

D R A F T

FOR DISCUSSION ONLY

**UNIFORM GUARDIANSHIP AND
PROTECTIVE PROCEEDINGS ACT (199__)**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

**UNIFORM GUARDIANSHIP AND
PROTECTIVE PROCEEDINGS ACT (199__)**

WITH COMMENTS

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ON UNIFORM STATE LAWS

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January 30, 1997

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January 30, 1997

UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT
(199__)

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January 30, 1997

UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT (199__)

ARTICLE 1

GENERAL PROVISIONS AND DEFINITIONS

SECTION 101. DEFINITIONS. In this [Act]:

(1) "Claim," with respect to a protected person, includes liability of an individual, whether arising in contract, tort, or otherwise, and liability of an estate which arises at or after the appointment of a conservator, including expenses of administration.

(2) "Court" means the [designate appropriate court].

(3) "Conservator" means a person who is appointed by a court to manage the estate of a protected person. The term includes a limited or special conservator.

(4) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to parental or spousal nomination or court appointment. The term includes a limited, emergency, or temporary guardian but not a guardian ad litem.

(5) "Incapacitated person" means an individual who, for reasons other than age, is unable to receive and evaluate information or make or communicate decisions to the extent the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with

appropriate technological assistance.

(6) "Legal representative" includes a representative payee, a guardian or conservator acting for a respondent in this State or elsewhere, a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary, and an agent designated under a power of attorney, whether for health care or property, of which the respondent is the principal.

(7) "Letters" includes letters of guardianship and letters of conservatorship.

(8) "Minor" means an unemancipated individual who has not attained [18] years of age.

(9) "Parent" means a parent whose parental rights have not been terminated.

(10) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(11) "Protected person" means a minor or other individual for whom a conservator has been appointed or other protective order has been made.

(12) "Respondent" means an individual for whom the appointment of a guardian or conservator or other protective order is sought.

(13) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

[(14) "Tribe" means a tribe, band, or village of Native Americans which is recognized by federal law or formally acknowledged by a State.]

(15) "Ward" means an individual for whom a guardian has been appointed.

Comment

The concepts of limited guardian and conservator, embraced in this Act, are reflected in the definitions of guardian and conservator. The revisions recognize that incapacity should be based on inability to receive and evaluate information or to make or communicate decisions to the point that the person's ability to care for his or her health, safety or self is compromised. Legal representative includes those who hold nominated positions, such as representative payee, trustee, custodian, and agent, as well as the traditional guardian and conservator.

Section 14 affords the States the ability to authorize a state court's certification of questions to a tribal court as well as to answer questions from a tribal court, but does not authorize tribal courts to certify or answer questions, which is determined by tribal law. If a Tribe wishes to adopt this Act, references to "this State" would be replaced by "this Tribe." The definition of "Tribe" is broad and is intended to include Native American Tribes in the technical sense of that term as well as other Native American Governmental units that perform functions similar to a tribe.

SECTION 102. FACILITY OF TRANSFER.

(a) A person required to transfer money or personal property to a minor may do so, as to an amount or value not exceeding [\$5,000] a year, by transferring it to:

(1) a person who has the care and custody of the minor and

with whom the minor resides;

(2) a guardian of the minor; or

(3) a custodian under the Uniform Transfers To Minors Act or custodial trustee under the Uniform Custodial Trust Act, or

(4) a financial institution as a deposit in a state or federally insured interest-bearing account or certificate in the sole name of the minor and giving notice of the deposit to the minor.

(b) This section does not apply if the person making payment or delivery knows that a conservator has been appointed or proceedings for appointment of a conservator of the estate of the minor are pending.

(c) A person who transfers money or property in compliance with this section is not responsible for its proper application.

(d) A person or guardian who receives money or property for a minor under subsection (a)(1) or (2) may only apply it to the support, care, education, health, and welfare of the minor, and not to reimbursement except for necessary expenses. Any excess must be preserved for the future support, care, education, health, and welfare of the minor and any balance must be transferred to the minor upon attaining majority or emancipation.

SECTION 103. DELEGATION OF POWERS BY PARENT OR GUARDIAN. A parent or guardian of a minor or incapacitated person, by a power of attorney, may delegate to another person, for a period not exceeding

six months, any power regarding care, custody, or property of the minor or ward, except the power to consent to marriage or adoption.

SECTION 104. SUBJECT-MATTER JURISDICTION. This [Act] applies to, and the court has jurisdiction over, guardianship and related proceedings for individuals domiciled or present in this State, protective proceedings for individuals domiciled in or having property located in this State, and property coming into the control of a guardian or conservator who is subject to the laws of this State.

SECTION 105. CONCURRENT JURISDICTION.

(a) If courts have concurrent jurisdiction over a guardianship or protective proceeding, the court in which later proceedings are brought shall notify the original court, in this or another State, and after consultation with that court, assume jurisdiction, retain jurisdiction, or transfer the proceedings to the other court, whichever is in the best interest of the ward or protected person.

(b) If the court in which later proceedings are brought assumes or retains jurisdiction, a guardian or conservator appointed in the original court may be appointed as a guardian or conservator in the subsequent court upon presentation of a petition therefor, proof of appointment, and a certified copy of such portion of the court record in the original court as the subsequent court may specify.

Notice of hearing on any such petition, together with a copy of the petition, shall

be mailed at least fourteen days prior to the hearing to the minor, if the minor has attained 14 years of age, to the incapacitated or protected person, and to the individuals and entities that 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 unless it concludes that the appointment would not be in the minor's or incapacitated or protected person's best interest. Upon the filing of an acceptance of office and any required bond, the appropriate letters of guardianship or conservatorship shall issue. Within fourteen days following an appointment, the guardian or conservator shall mail a copy of the order of appointment to the minor, if the minor has attained 14 years of age, to the incapacitated or protected person, and to all individuals and entities given notice of the petition.

Comment

When two courts have jurisdiction over a guardianship or conservatorship, the later court is required to notify the original court and consult with the court in deciding whether to assume, retain or transfer to the original court jurisdiction over the proceeding. This section is designed to prevent forum shopping that some guardians and conservators have engaged in and also to keep better track of guardianships and conservatorships. Some guardians and conservators have attempted to thwart jurisdiction by moving the ward or protected person to another state. This section, by putting the court on notice, can eliminate that practice. Once a court has begun a proceeding over which it has subject matter jurisdiction, the court does not lose jurisdiction by the guardian's or conservator's moving of the ward or protected person. The court in the [county] in which the ward or protected person currently resides has jurisdiction concurrent with the court in which the proceedings were first commenced or in which acceptance of a parental or spousal appointment of guardian or conservator is filed.

If the later court decides to assume or retain jurisdiction, subsection (b) sets out the process for the establishment of the guardianship or conservatorship

in that subsequent court. This provision is based on South Dakota statute § 29A-5-114.

Once the guardianship is established, the court does not lose jurisdiction because of a change in location of the guardian or the ward. See Sections 201 and 301.

SECTION 106. VENUE.

(a) Venue for guardianship proceedings for a minor is in the [county] of this State in which the minor resides or is present at the time the proceedings are commenced.

(b) Venue for guardianship proceedings for an incapacitated person is in the [county] of this State in which the respondent resides and, if the respondent has been admitted to an institution by order of a court of competent jurisdiction, in the [county] in which that court is located. Venue for the appointment of an emergency or a temporary guardian of an incapacitated person is also in the [county] in which the respondent is present.

(c) Venue for a protective proceeding is in the [county] of this State in which the respondent resides, whether or not a guardian has been appointed in another place or, if the respondent does not reside in this State, in any [county] of this State in which property of the respondent is located.

(d) If a proceeding under this [Act] is brought in more than one [county] in this State, the court of the [county] in which the proceeding is first brought has the exclusive right to proceed unless that court determines that venue is properly in another court or that the interests of justice otherwise require

that the proceeding be transferred.

Comment

The standard venue rules apply to guardianship and conservatorship. If there are two proceedings, the original court has the right to proceed unless the original court determines that venue lies elsewhere or that the interest of justice require the proceeding to be transferred to the later court. If the nominating instrument creating the guardianship is a will, then the proceeding should be filed in the [county] where the will would be subject to probate. For other nominating instruments, the proceeding should be filed where the minor resides or is present.

SECTION 107. PRACTICE IN COURT.

(a) Except as otherwise provided in this [Act], the rules of civil procedure, including the rules concerning appellate review and vacation of orders, govern proceedings under this [Act].

(b) If both guardianship and protective proceedings as to the same individual are commenced or pending in the same court, the proceedings may be consolidated.

SECTION 108. LETTERS OF OFFICE. The court shall issue appropriate letters of guardianship upon the filing by the guardian of an acceptance of office. The court shall issue appropriate letters of conservatorship upon the filing by the conservator of an acceptance of office and any required bond. Letters of guardianship must indicate whether the guardian was appointed by the court, parent, or spouse. Any limitation on the powers of a guardian or conservator must be endorsed on the guardian's or conservator's letters.

SECTION 109. EFFECT OF ACCEPTANCE OF APPOINTMENT.

By accepting appointment as guardian or conservator, a guardian or conservator submits personally to the jurisdiction of the court in any proceeding relating to the guardianship or conservatorship. The petitioner shall deliver or mail notice of any proceeding to the guardian or conservator at the guardian's or conservator's address shown in the court records and at any other address then known to the petitioner.

SECTION 110. TERMINATION OF OR CHANGE IN GUARDIAN'S OR CONSERVATOR'S APPOINTMENT.

(a) The appointment of a guardian or conservator terminates upon the death, resignation, or removal of the guardian or conservator or upon termination of the guardianship or conservatorship. Resignation of a guardian or conservator is not effective until the resignation has been approved by the court. [A parental or spousal appointment as guardian under an informally probated will terminates if the will is later denied probate in a formal proceeding.] Termination of a guardian's or conservator's appointment does not affect the guardian's or conservator's liability for previous acts or the obligation to account for money and other assets of the ward or protected person.

(b) A ward, protected person, or person interested in the welfare of a ward or protected person may petition for removal of a guardian or conservator on the ground that removal would be in the best interest of the ward

or protected person or for other good cause. A guardian or conservator may petition for permission to resign. A petition for removal or permission to resign may include a request for appointment of a successor guardian or conservator.

(c) The court may appoint a successor guardian or conservator before or after a vacancy occurs. A successor guardian or conservator appointed before a vacancy occurs may assume the duties of office immediately upon the termination of a predecessor's appointment and shall file an acceptance of office within 30 days after the appointment. A successor guardian or conservator succeeds to the predecessor's powers, and a conservator succeeds to the predecessor's title to the protected person's assets.

SECTION 111. NOTICE.

(a) Except as otherwise ordered by the court for good cause, if notice of a hearing on a petition is required, other than a notice for which specific requirements are otherwise provided, the petitioner shall give notice of the time and place of the hearing to the person to be notified or to the person's attorney. Notice must be given:

(1) by mail or personal delivery to the person to be notified at least 14 days before the hearing; or

(2) if the address or identity of the person is not known and cannot be ascertained with reasonable diligence, by publication of the notice in compliance with [the applicable rule of civil procedure].

(b) Proof of the giving of notice must be made prior to or at the hearing and filed in the proceeding.

(c) Notices under this [Act] must be given in plain language.

SECTION 112. WAIVER OF NOTICE. Except as otherwise provided in this section, a person may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding. A respondent, ward, or protected person may not waive notice.

SECTION 113. GUARDIAN AD LITEM. At any stage of a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor or other individual if the court determines that representation of the interest otherwise would be inadequate. If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several individuals or interests. The court shall state on the record the duties of the guardian ad litem and its reasons for the appointment.

COMMENT

If the respondent is currently represented, the attorney representing the respondent can not be appointed as the guardian ad litem because of the potential for a conflict of interest. The guardian ad litem's role is that of advisor to the court and not of counsel for the respondent. It is important that the court advise the guardian ad litem of his or her role.

SECTION 114. REQUEST FOR NOTICE; INTERESTED PERSONS. An interested person who desires to be notified before any order is

made in a guardianship proceeding, including a proceeding after the appointment of a guardian, or in a protective proceeding, may file a request for notice with the clerk of the court in which the proceeding is pending. The clerk shall mail a copy of the request to the guardian and to the conservator if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and the address of that person or an attorney to whom notice is to be given. The request is effective only as to proceedings conducted after its filing. A governmental agency paying or planning to pay benefits to the respondent or protected person is an interested person in a protective proceeding.

COMMENT

An interested person includes a creditor, secured or otherwise.

SECTION 115. MULTIPLE APPOINTMENTS OR

NOMINATIONS. If a respondent or other person makes more than one written appointment or nomination of a guardian or a conservator, the most recent controls.

ARTICLE 2

GUARDIANS OF MINORS

SECTION 201. APPOINTMENT AND STATUS OF GUARDIAN.

A person becomes a guardian of a minor upon appointment by a parent or by the court. The guardianship continues until terminated, without regard to the

location of the guardian or minor ward.

Comment

This article provides for the creation and administration of guardianship over minors. However, the Uniform Child Custody Jurisdiction Act, the Parental Kidnaping Prevention Act, and the Indian Child Welfare Act all concern the welfare of minor children. It is possible that proceedings could be instituted under this Act and one of those Acts. It is possible that a court which under this Act may have authority to appoint a guardian, may lose that authority after application of one of these other Acts. The drafters can not mandate that this Act supersede the other Acts. Instead, this Act must be read in conjunction with those laws.

SECTION 202. PARENTAL APPOINTMENT OF GUARDIAN.

(a) A parent may by will or other signed writing appoint a guardian for any minor children the parent has or may have in the future, and may revoke or amend an appointment. A parental appointment may specify the powers to be given to the guardian.

(b) Subject to the right to object of the minor, the other parent, or a person other than a parent having care and custody of the minor, the guardian's appointment becomes effective on the first to occur of the appointing parent's death, an adjudication that the parent is an incapacitated person, or a written determination by a physician who has examined the parent that the parent is no longer able to care for the child.

(c) Upon petition of the appointing parent, upon finding that the appointing parent will within [two] years or less likely become unable to care for the child, and following notice as provided in Section 205(b), the court, in advance of the appointment becoming effective, may confirm the parent's

selection of a guardian and terminate the rights of others to object.

(d) Not later than 30 days after the appointment becomes effective, the guardian must:

(1) file a notice of acceptance of appointment and a copy of the will or other nominating instrument with the court of the [county] in which the will was or could be probated or, in the case of another nominating instrument, with the court of the [county] in which the minor resides or is present; and

(2) give written notice of the acceptance of appointment to the appointing parent, if living, the minor, if 14 years of age or older, and to a person other than the parent having care and custody of the minor. The notice must include a statement of any right of those notified to terminate the appointment by filing a written objection in the court as provided in Section 203 and of the right of the appointing parent to revoke the appointment.

(e) Unless the appointment was previously confirmed by the court, within 45 days of filing the notice and nominating instrument the guardian must petition the court for confirmation of the appointment, giving notice as provided in Section 205(b).

(f) The appointment of a guardian does not supersede the parental rights of either parent. If both parents are dead or have been adjudged incapacitated persons, an appointment by the last parent who dies or was adjudged incapacitated has priority. A parental appointment effected by filing the guardian's acceptance under a will probated in the state of the testator's domicile

is effective in this State.

(g) The powers of a guardian who timely complies with the requirements of subsection (d) relate back in time to give acts by the guardian which are of benefit to the minor and which occurred on or after the date the guardian was eligible to file an acceptance of office the same effect as those which occurred after the filing.

(h) The authority of a guardian appointed under this section terminates upon the first to occur of (i) the appointment of a guardian by the court, (ii) the revocation of the appointment by the appointing parent, or (iii) the filing of an objection as provided in Section 203.

COMMENTS

This section has been revised by expanding the circumstances under which a parent can appoint a guardian to serve. The number of contingencies has been increased from death to death, adjudication of incapacity or written determination by a physician that the parent is no longer able to care for a minor child.

In the case of a parent who has disappeared, relief should be sought under the emergency guardianship section § 204(c), with preference to the nominated guardian absent a showing that it is not in the best interest of the minor child for that person to be appointed.

The section recognizes that the appointing parent may have additional children after making the appointment, so the language incorporates children that may be born, adopted or whose custody may be granted to the appointing parent, without the need to re-execute the nomination.

If a state does not have a definition of child similar to that in the UPC, then the state would need to insert such a definition in the definition section. In this section, child includes adopted and after-born children, in recognition of the fact that the parent may make the writing now for future contingencies to care

for all the parent's children at the time the contingency arises.

The parent's nomination of a person as guardian, is a rebuttable presumption that the nomination person should be appointed as guardian and the court should not disregard the nomination without good cause.

The appointing parent has the option of either making the appointment in a nomination or petitioning the court prior to the triggering event.

(g) Any acts performed before filing relate back to cover the time between the appointment becoming effective and the guardian's filing of the notice of acceptance to give those acts occurring in that time frame the same effect as those occurring after the filing of the notice of acceptance, as long as those prior acts are beneficial to the minor.

The petition for confirmation of appointment to be filed by a guardian should include the name and address of the minor, the identity and whereabouts of all persons having parental rights, the petitioner's name and address, relationship to the parent and child, interest in the appointment, information about any custody orders, and a statement of the petitioner's willingness to serve; any limitations placed by the appointing parent on the authority of the nominated guardian; information about the petition; and reasons why the appointment should be confirmed. The petition should be accompanied by a death certificate, an order of adjudication of incapacity or a written statement by the physician who has examined the appointing parent that the appointing parent is no longer able to care for the minor child. In this last case, the written statement should include the prognosis and diagnosis of the parent's condition. The petition should be accompanied by a copy of the nominating instrument.

In the hearing on the petition for confirmation, if the court finds that the appointing parent will not regain the ability to care for the minor child, the court should enter an order confirming the appointment, absent evidence rebutting the presumption of appointment. If the court finds that the parent may regain ability to care for the minor child, the court should enter an order confirming the appointment for a period of time deemed appropriate by the court.

Unless stated to the contrary in this section, other sections of this [Act] apply.

The guardian's appointment does not supersede the parental rights of either parent unless the parent has been adjudicated incapacitated. If a parent becomes incapacitated subsequent to the guardian's appointment becoming effective, at that time, the guardian's appointment supersedes the parental rights

of the incapacitated parent.

The purpose of the confirmation of appointment is to convert the nominated guardianship to a regular guardianship as soon as possible.

The minor, the other parent or an individual having care and custody of the minor, other than the parent, all have the right to file an objection within a specified time period. If an objection is filed, the nominated guardian has no authority to act and instead must petition the court for appointment as guardian under § 205. An objection that is not timely filed does not terminate the appointment.

SECTION 203. OBJECTION BY MINOR TO PARENTAL

APPOINTMENT. A minor who is the subject of a parental appointment and who has attained 14 years of age, the other parent or a person other than a parent having custody or care of the minor, may prevent or terminate the parental appointment by filing in the court in which the nominating instrument is filed a written objection to the appointment before it is accepted or within 30 days after receiving notice of its acceptance. An objection may be withdrawn. An objection does not preclude an appointment of the parental nominee by the court.

Comment

In the case of an objection, the parental nominee has no authority to act and instead must file a petition for appointment as guardian under § 205. Although the minor, the other parent, or the person who has care or custody of the minor has the right to object to the appointment, the court still can appoint the parental nominee over any objection. An objection that is not timely filed will not prevent the appointment.

SECTION 204. JUDICIAL APPOINTMENT OF GUARDIAN:

CONDITIONS FOR APPOINTMENT.

(a) The court may appoint a guardian for a minor if the parents consent, if all parental rights have been terminated, or if the parents are

unwilling or unable to exercise their parental rights. A guardian appointed pursuant to Section 202 whose appointment has not been prevented or terminated under Section 203 has priority over a guardian appointed by the court, but the court may proceed with another appointment upon a finding that the parental nominee has failed to accept the appointment within 30 days after notice of the guardianship proceeding.

(b) If necessary, and on petition or motion, the court may appoint a temporary guardian for a minor on a showing that an immediate need exists and that the appointment would be in the best interest of the minor. The appointment shall be made on such notice and conditions as the court may order, except that reasonable notice of the hearing shall be given to the minor, if the minor has attained 14 years of age, unless the petitioner makes a showing that such delay would not be in the best interest of the minor. Except as otherwise ordered by the court, the temporary guardian has the authority of an unlimited guardian, but the duration of the temporary guardianship may not exceed six months. Within five days of the appointment, the temporary guardian shall mail a copy of the order to all individuals who would be entitled to notice of hearing under Section 205

(c) If the court finds that following the procedures of this [article] will likely result in immediate and substantial harm to the minor's health or safety and that no other person appears to have authority to act in the circumstances, the court, on appropriate petition, may appoint an emergency

guardian for the minor, whose authority may not exceed [30] days and who may exercise only those powers specified in the order.

(d) Reasonable notice of the time and place of a hearing on the petition for appointment of an emergency guardian must be given to the minor and to the minor's living parent(s) or the person having care or custody of the minor, if other than a parent, unless the court finds as shown by affidavit or other sworn testimony that the minor will be immediately and substantially harmed before the hearing on the appointment of an emergency guardian. If the guardian is appointed without notice, notice of the appointment must be given within 48 hours after the appointment and a hearing on the appropriateness of the appointment must be held within five days after the appointment.

COMMENT

The court has to decide whether a parent is unwilling or unable to act. See David M. English, *Minor Guardianship in an Age of Multiple Marriage*, 1995 Institute on Estate Planning ¶¶ 500, 503 (Matthew Bender) for a discussion of criteria applied in determining unwillingness or unfitness of a parent to care for a minor child.

All individuals who would receive notice in § 205 are required to receive notice in a temporary guardianship proceeding under subsections (a) and (b). The six month limitation on the temporary guardianship does not prevent the renewal or extension of the guardianship by court order at the expiration of the six months. However, if the duration needs to be extended, the court should examine whether a regular guardianship of the minor would be more appropriate. The temporary guardianship provision, §202 (b), is based on South Dakota statute § 29A-5-210.

An emergency guardianship can be established for a minor when there is an immediate likelihood of danger to the minor. Since following normal procedures for establishment of a guardianship would result in delay which might cause harm to the minor, emergency procedures for hearing and notice are provided in (d).

SECTION 205. JUDICIAL APPOINTMENT OF GUARDIAN:

PROCEDURE.

(a) A minor or a person interested in the welfare of a minor may petition for appointment of a guardian.

(b) After a petition is filed, the court shall set a date for hearing, and the petitioner shall give notice of the time and place for hearing the petition, together with a copy of the petition, to:

(1) the minor, if the minor has attained 14 years of age and is not the petitioner;

(2) any person alleged to have had the principal care and custody of the minor during the 60 days preceding the filing of the petition;

(3) each living parent of the minor or, if there is none, the adult nearest in kinship that can be found;

(4) any person nominated as guardian by the minor if the minor has attained 14 years of age;

(5) any parental appointee whose appointment has not been prevented or terminated under Section 203; and

(6) any guardian or conservator currently acting for the minor in this State or elsewhere.

(c) The court, upon hearing, shall make the appointment if it finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the conditions of Section 204(a) have been met, and the best

interest of the minor will be served by the appointment. In other cases, the court may dismiss the proceedings or make any other disposition of the matter which will serve the best interest of the minor.

(d) If the court determines at any stage of the proceeding, before or after appointment, that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if the minor has attained 14 years of age. The court may confer the powers and impose the duties of a guardian ad litem upon an attorney appointed to represent a minor.

Comment

The court, in order to make the decision on a petition for appointment, must have as much information as possible. The requirements of this section seek to fulfill that by requiring specific information be contained in the petition. The court can, at any stage of the proceeding, appoint an attorney to represent the minor if the court determines that the minor's interests are not or might not be adequately represented. However, if the court confers upon an attorney appointed to represent the minor those powers and imposes those duties of a guardian ad litem, the attorney may find herself in a conflict of interest since the guardian ad litem may make a recommendation that is in conflict with the desires to the client. See, e.g., *Butland*, 1996 WL 362038 (Oh. App. 6/27/96).

SECTION 206. JUDICIAL APPOINTMENT OF GUARDIAN: QUALIFICATIONS, PRIORITY OF MINOR'S NOMINEE, LIMITED GUARDIANSHIP.

(a) The court shall appoint as guardian a person whose appointment will be in the best interest of the minor. The court shall appoint a person nominated by the minor, if the minor has attained 14 years of age, unless

the court finds the appointment contrary to the best interest of the minor.

(b) In the interest of developing self-reliance of a ward or for other good cause, the court, at the time of appointment or later, on its own motion or on motion of the minor ward or other interested person, may limit the powers of a guardian otherwise conferred by this [article] and thereby create a limited guardianship. Following the same procedure, additional powers may be conferred or existing powers may be withdrawn.

SECTION 207. DUTIES OF GUARDIAN.

(a) Except as otherwise limited by the court, a guardian of a minor ward has the duties of a parent regarding the ward's support, care, education, health, and welfare. A guardian shall act at all times in the ward's best interest and exercise reasonable care, diligence, and prudence.

(b) A guardian shall:

(1) become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

(2) take reasonable care of the ward's personal effects and bring protective proceedings if necessary to protect other property of the ward;

(3) apply for and expend money to which the ward is entitled to the ward's current needs for support, care, education, health, and welfare;

(4) conserve any excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the guardian shall pay at least quarterly to the conservator money of the ward to be conserved for the ward's future needs; and

(5) report the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control, as ordered by the court on application of any person interested in the ward's welfare or as required by court rule.

COMMENT

The guardian is authorized to apply for government benefits to which the ward is entitled and to use those benefits for the ward's support, care, education, health, and welfare.

SECTION 208. POWERS OF GUARDIAN.

(a) Except as otherwise limited by the court, a guardian of a minor ward has the powers and responsibilities of a parent regarding the ward's support, care, education, health, and welfare.

(b) A guardian may:

(1) if consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the person of the ward and establish the ward's place of custodial dwelling, but may only establish or move the ward's custodial dwelling outside the state on express authorization of the court. The guardian shall notify the court if the guardian moves or changes addresses.

(2) if a conservator for the estate of the ward has not been appointed, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay money for the benefit of the ward;

(3) consent to medical or other care, treatment, or service for the ward;

(4) consent to the marriage or adoption of the ward; and

(5) if reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

SECTION 209. RIGHTS AND IMMUNITIES OF GUARDIAN.

(a) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board, and clothing provided by the guardian to the ward, but only as approved by order of the court. If a conservator, other than the guardian or one who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court.

(b) A guardian has no duty to use the guardian's personal funds for the ward's expenses. A guardian is not liable to a third person for acts of the ward solely by reason of the relationship. A guardian is not liable for injury to the ward resulting from the negligence or act of a third person providing medical

or other care, treatment, or service for the ward except to the extent that the guardian was negligent in choosing the provider.

COMMENT

A guardian has no duty to use the guardian's personal funds for the ward. The guardian has no liability for a third person's negligent care, treatment or service to the ward except if the guardian was negligent in choosing the provider.

SECTION 210. TERMINATION OF GUARDIANSHIP; OTHER PROCEEDINGS AFTER APPOINTMENT.

(a) A guardianship of a minor terminates upon the minor's death, adoption, emancipation, or attaining majority, or as ordered by the court.

(b) A ward or a person interested in the welfare of a ward may petition for any order that is in the best interest of the ward. The petitioner shall give notice of the hearing on the petition to the ward, if the ward has attained 14 years of age and is not the petitioner, the guardian, and any other person as ordered by the court.

ARTICLE 3

GUARDIANS OF INCAPACITATED PERSONS

SECTION 301. APPOINTMENT AND STATUS OF GUARDIAN.

A person becomes a guardian of an incapacitated person upon appointment by a parent, a spouse, or the court. The guardianship continues until terminated, without regard to the location of the guardian or ward.

**SECTION 302. APPOINTMENT OF GUARDIAN BY WILL OR
OTHER WRITING.**

(a) A parent may by will or other signed writing, appoint a guardian for an unmarried child who the parent believes is an incapacitated person, revoke or amend the appointment, and specify any desired limitations on the powers to be given to the guardian.

(b) An individual may in a signed and writing, appoint a guardian for his or her spouse who the individual believes is an incapacitated person, revoke or amend the appointment, and specify the powers to be given to the guardian..

(c) Subject to the right of the incapacitated person, the person having custody or care of the incapacitated person if other than the appointing individual, or the adult nearest in kinship to object, the guardian's appointment becomes effective on the first to occur of the death of the appointing individual, the adjudication of incapacity of the appointing individual or a written determination by a physician who has examined the appointing individual that he or she is no longer able to care for the incapacitated person.

(d) Upon petition of the appointing individual, upon finding that the appointing individual will within [two] years or less likely become unable to care for the incapacitated person and following notice as provided in this section, the court, in advance of the appointment becoming effective, may confirm the appointing individual's selection of a guardian and terminate the rights of others

to object.

(e) Not later than 30 days after the appointment becomes effective, the guardian must:

(1) file a notice of acceptance of appointment and a copy of the will or other nominating instrument with the court of the [county] in which the will was or could be probated or, in the case of another nominating instrument, with the court in the [county] in which the incapacitated person resides or is present; and

(2) give written notice of the acceptance of appointment to the appointing individual if living, the incapacitated person, to the person having custody or care of the incapacitated person if other than the individual, and the adult nearest in kinship. The notice must include a statement of any right of those notified to terminate the appointment by filing a written objection as provided in this section and of the right of the appointing individual, if living, to revoke the appointment.

(f) An appointment effected by filing the guardian's acceptance under a will probated in the State of the decedent's domicile is effective in this State.

(g) The filing of a written objection to an appointment by the alleged incapacitated person or another person interested in the alleged incapacitated person's welfare in the court in which the guardian's written acceptance was filed terminates the appointment. An objection does not prevent

the court from appointing the parental or spousal nominee as guardian.

(h) Unless the appointment was previously confirmed by the court, within 45 days of filing the notice and the nominating instrument, a guardian, who was appointed by an instrument other than a will, shall file a petition in the court for confirmation of appointment as guardian of the incapacitated person, giving notice in the manner provided in Section 308, and, if necessary, for the appointment as conservator.

(i) The guardian's authority terminates when the appointing individual regains the ability to care for the incapacitated person and so notifies the court and the guardian, or a guardian is appointed for the incapacitated person.

(j) The appointment of a guardian under this section is not a determination of incapacity.

COMMENT

This section provides for a will or other nominative appointment. A parent of an adult unmarried child who the parent believes is incapacitated can make such appointment as can a spouse for the other spouse that the appointing spouse believes to be incapacitated. The nominated guardian's appointment becomes effective on the first to occur: the death of the nominating individual, adjudication of that person's incapacity or a written determination by a doctor who has examined the nominating individual that that person can no longer care for their adult disabled child or their incapacitated spouse. The adult disabled child or the incapacitated spouse as well as the person having custody or care of the child or spouse or the adult nearest in kinship have the right to object to the guardian's appointment. If an objection is filed the guardian's authority terminates, and the guardian must file a petition for appointment of guardian under § 303. Within 30 days of the contingency giving rise to the guardianship, the guardian has to file a notice of acceptance of appointment and the nominating instrument and give written notice to the appointing individual, if living, as well as to the incapacitated spouse or adult child and the person having custody or care of the incapacitated person and adult nearest in kinship of the appointment and the right to terminate it by filing a written objection.. If no objection is timely filed, then the guardian within a specified period of time has to file a petition for confirmation of the appointment. The guardian's authority terminates upon the timely filing of an objection or when the appointing individual regains the ability to care for the incapacitated person, or a guardian is appointed for the incapacitated person. The utilization of guardianship in this section provides for the appointing individual to designate another to care for the incapacitated spouse or child upon the occurrence of specified contingencies.

The standby guardianship is to be converted to a regular guardianship as soon as possible. Unless otherwise specified herein, the provisions of this [act] apply to a guardian appointed under a writing other than a will.

SECTION 303. JUDICIAL APPOINTMENT OF GUARDIAN:

PETITION.

(a) An individual or a person interested in the individual's welfare may petition for a finding of incapacity, in whole or in part, and the appointment of a limited or unlimited guardian for the individual.

(b) The petition must set forth the petitioner's name, residence,

current address, relationship to the respondent, and interest in the appointment and, to the extent known, set forth the following with respect to the respondent and the relief requested:

(1) the respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling where it is proposed that the respondent will reside if the appointment is made;

(2) the name and address of the respondent's spouse, domestic partner or companion and adult children or, if the respondent has none, the respondent's parents and adult brothers and sisters, or if the respondent has none, at least one of the adults nearest in kinship to the respondent who can be found;

(3) the name and address of the person responsible for care or custody of the respondent;

(4) the name and address of any legal representative for the respondent;

(5) the name and address of any person nominated as guardian by the respondent;

(6) the name and address of any proposed guardian, and the reason why the proposed guardian should be selected;

(7) the reason why guardianship is necessary, including a brief description of the nature and extent of the respondent's alleged incapacity;

(8) if an unlimited guardianship is requested, the reason

why limited guardianship is inappropriate, and if a limited guardianship is requested, the powers to be conferred upon the limited guardian; and

(9) a general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of any other anticipated income or receipts.

Comment

Although the individual can petition for appointment of a guardian for himself [or herself], in such a case, it would be better for the individual to execute a durable power of attorney. The petition has to contain the names and addresses of the spouse, domestic partner or companion and adult children. If there are several adults of equal degree of kinship to the respondent, notice to one is all that is required, not notice to the entire class.

SECTION 304. JUDICIAL APPOINTMENT OF GUARDIAN: PRELIMINARIES TO HEARING.

(a) Upon receipt of a petition for a guardianship, the court shall set a date for hearing and if the respondent is not represented by counsel, appoint an attorney, to represent the respondent or a [visitor]. If the respondent is represented by his or her own counsel, the court may appoint a [visitor]. The duties and reporting requirements of the [visitor] shall be limited to the relief requested in the petition. The visitor must be an individual having training or experience in the type of incapacity alleged.

(b) The duties and reporting requirements of the [visitor] shall be limited to the relief requested in the petition.] The [visitor] shall:

(1) interview the respondent in person and explain to the

respondent, in a manner which the respondent is likely to understand, the substance of the petition, the nature, purpose, and effect of the proceeding, the respondent's rights at the hearing, and the general powers and duties of a guardian;

(2) determine the respondent's views about the proposed guardian, the proposed guardian's powers and duties, and the scope and duration of the proposed guardianship;

(3) inform the respondent of the right to employ and consult with an attorney at the respondent's own expense and the right to request a court-appointed attorney;

(4) interview the petitioner and the proposed guardian;

(5) visit the respondent's present dwelling and the place where the respondent will dwell if the appointment is made;

(6) interview any physician or other person who is known to have treated, advised, or assessed the respondent;

(7) inform the respondent that all costs and expenses of the proceeding, including counsel's fees, will be paid from the respondent's estate; and

(8) make any other investigation as the court directs.

(c) The [visitor] shall promptly file a report in writing with the court, which must include:

(1) a recommendation whether an attorney should be

appointed to represent the respondent;

(2) a summary of daily functions the respondent can manage without assistance, could manage with the assistance of supportive services or benefits, including use of appropriate technological assistance, and cannot manage;

(3) recommendations regarding the appropriateness of guardianship, including whether less restrictive means of intervention are available, the type of guardianship, and, if a limited guardianship, the powers to be granted to the limited guardian;

(4) a statement of the qualifications of the proposed guardian, as well as a statement of whether the respondent approves or disapproves of the proposed guardian, and the powers and duties proposed or the scope of the guardianship;

(5) a statement as to whether the proposed dwelling meets the respondent's individual needs;

(6) a recommendation as to whether a professional evaluation or further evaluation is necessary; and

(7) such other matters as the court directs.

(d) The court shall appoint an attorney to represent the respondent in the proceeding if:

(1) requested by the respondent;

(2) recommended by the [visitor]; or

(3) the court determines that the respondent needs representation.

Comment

Appointment of a visitor is mandatory if the alleged incapacitated person is not represented by counsel or the court does not appoint counsel. The visitor serves as the information gathering arm of the court. The visitor can be a physician, psychologist, or other individual qualified to evaluate the alleged impairment. The visitor must individually meet with the respondent, the petitioner and the proposed guardian. The visitor's report contains information and recommendations to the court regarding the appropriateness of the guardianship, whether lesser restrictive alternatives might meet the respondent's needs, recommendations about further evaluations, powers to be given the guardian, and the appointment of counsel. Appointment of counsel is mandated when requested by the respondent, recommended by the visitor or when the court determines the respondent needs representation. If there is an estate, the visitor would be paid from it. If there is no estate, it is assumed that the visitor would be compensated from the general fund of the county. Payment is made pursuant to the procedures provided in § 416.

Courts seeking guidance as to those factors that may be considered in evaluating the alleged incapacitated person's abilities should refer to those contained in California Probate Code § 812. The [visitor] can be a physician, psychologist or other individual qualified to evaluate the alleged impairment.

The National Probate Court Standards, Standard 3.3.4 provides

The probate court should require a court appointee to visit with the respondent in a guardianship petition to (1) explain the rights of the respondent; (2) investigate the facts of the petition; and (3) explain the circumstances and consequences of the action; the visitor should investigate the need for additional court appointments and should file a written report with the court promptly after the visit.

SECTION 305. JUDICIAL APPOINTMENT OF GUARDIAN:

PROFESSIONAL EVALUATION. At or before the hearing, the court may order a professional evaluation of the respondent and shall order the evaluation if the respondent so demands. If the court orders an evaluation, the respondent

must be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the alleged impairment. The examiner shall promptly file a written report with the court. Unless otherwise directed by the court, the report must contain:

(1) a description of the nature, type, and extent of the respondent's specific cognitive and functional limitations;

(2) an evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;

(3) a prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and

(4) the date of any assessment or examination upon which the report is based.

COMMENT

The evaluation in (2) must include a summary of the consultation with the respondent's treating physician.

SECTION 306. CONFIDENTIALITY OF RECORDS. The written report of a [visitor] and any professional evaluation are confidential and must be sealed upon filing, but are available:

(1) to the court;

(2) to the respondent without limitation as to use;

(3) to the petitioner, the [visitor], and the petitioner's and

respondent's attorneys, for purposes of the proceeding; and
(4) to other persons for such purposes as the court may order for
good cause.

**SECTION 307. JUDICIAL APPOINTMENT OF GUARDIAN:
PRESENCE AND RIGHTS AT HEARING.**

(a) Unless excused by the court for good cause, the proposed guardian shall attend the hearing. The respondent shall be present in person and participate in the hearing, unless excused by the court. The respondent may present evidence and subpoena and cross-examine witnesses, including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the [visitor]. The hearing may be held in a location convenient to the respondent and may be closed if the respondent so requests upon a showing of good cause.

(b) Any person may request permission to participate in the proceeding. The court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation.

Comment

The proposed guardian must attend the hearing. The respondent may attend the hearing and take an active role, including presentation of evidence and witness testimony as well as cross-examination of witnesses. The respondent can request that the hearing be closed.

SECTION 308. NOTICE.

(a) A copy of the petition and the notice of the hearing on a

petition for guardianship shall be served on the respondent in person. A failure to serve the respondent is jurisdictional. The notice must include a statement that the respondent has a right to be physically present, inform the respondent of the respondent's rights at the hearing, and include a description of the nature, purpose, and consequences of an appointment.

(b) In a proceeding for a guardianship or for any other protective order, the petitioner shall give notice of the hearing to all other persons named in the petition. Failure to give notice under this subsection is not jurisdictional.

(c) A petitioner shall give notice of the hearing on a petition for an order after appointment of a guardian and notice of the filing of a guardian's report, together with a copy of the petition or other document to the ward, the guardian, and any other person as ordered by the court. Notice of the filing of a guardian's report must be mailed within 14 days after the filing.

SECTION 309. WHO MAY BE GUARDIAN: PRIORITIES.

(a) A qualified person must be considered for appointment as guardian in the following order of priority:

(1) a guardian, other than a temporary guardian, currently acting for the respondent in this State or elsewhere;

(2) a person nominated as guardian by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if at the time of the nomination the respondent had sufficient capacity to express a preference;

(3) an agent appointed by the respondent under [a durable power of attorney for health care] [the Uniform Health-Care Decisions Act];

(4) an agent appointed by the respondent under a durable power of attorney for property management;

(5) the spouse of the respondent or a person nominated by will or other signed writing of a deceased spouse;

(6) an adult child of the respondent;

(7) a parent of the respondent, or an individual nominated by will or other signed writing of a deceased parent; and

(8) an adult with whom the respondent has resided for more than six months before the filing of the petition.

(b) An owner, operator, or employee of [a long-term care institution] at which the respondent is receiving care may not be appointed as guardian unless related to the respondent by blood, marriage, or adoption.

(c) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, acting in the best interest of the respondent, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

Comment

A guardian or conservator, or individual nominated by the respondent or the respondent's agent in a health care power of attorney has priority over relatives. The nomination includes anyone nominated orally at the hearing. Anyone affiliated with a long-term care institution at which the respondent receives care is not eligible to be guardian absent a blood, marital or adoptive relationship. Each State adopting the Act needs to insert a list of those

facilities considered to be long-term care institutions.

The six month period in § 309(a)(8) is contained in the law of many states. The six month limitation does not have to be immediately preceding the filing of the petition. A temporary guardian was specifically excluded since a temporary guardian is contemplated for the short term, and thus should not be given preference for a long-term or even “permanent” appointment.

A professional guardian, including a public agency or nonprofit corporation, was specifically not given priority as those given priority are individuals with whom the ward has a close relationship. A professional guardian can still be appointed guardian if no one else with priority is available and willing to serve, but is not given a statutory preference, unless coming under (a)(1)-(6). A public agency or nonprofit corporation is eligible to be appointed guardian as long as it can provide an active and suitable guardianship program and is not otherwise providing substantial services or assistance to the protected person, but is not entitled to statutory priority in appointment as guardian.

SECTION 310. FINDINGS; ORDER OF APPOINTMENT.

(a) The court may appoint a limited or unlimited guardian for a respondent only if it finds by clear and convincing evidence that:

(1) the respondent is an incapacitated person; and

(2) the respondent's identified needs cannot be met by any less restrictive means, including use of appropriate technological assistance.

(b) Alternatively, the court, with appropriate findings, may treat the petition as one for a protective order under Section 401, enter any other appropriate order, or dismiss the proceeding.

(c) The court, whenever feasible, shall confer upon a guardian only those powers necessitated by the ward's limitations and demonstrated needs, and shall make appointive and other orders that will encourage the development of the ward's maximum self-reliance and independence.

(d) Within 14 days after an appointment, a guardian shall mail to the ward and to all other persons given notice of the hearing on the petition a copy of the order of appointment, together with a notice of the right to request termination or modification.

Comment

A guardian is to be appointed only when no lesser restrictive alternative will meet the respondent's identified needs. If a guardian is to be appointed, the guardian shall be give only those powers needed to meet the ward's needs and limitations. The court must specify the powers granted to the guardian and the limits on the incapacitated person's rights.

SECTION 311. EMERGENCY GUARDIANS.

(a) If the court finds that following the procedures of this [article] will likely result in immediate and substantial harm to the respondent's health, safety, or welfare, and that no other person appears to have authority to act in the circumstances, the court, on appropriate petition, may appoint an emergency guardian whose authority may not exceed [30] days and who may exercise only those powers specified in the order. Immediately upon receipt of the petition for an emergency guardianship, the court shall appoint an attorney to represent the respondent in the proceeding. Reasonable notice of the time and place of a hearing on the petition must be given to the respondent and any other persons as ordered by the court.

(b) An emergency guardian may be appointed without notice to the respondent and the respondent's attorney only if the court finds as shown by affidavit or other sworn testimony, that the respondent will be immediately and

substantially harmed before the hearing on the appointment of an emergency guardian can be held. If an emergency guardian is appointed without notice to the respondent, the respondent must be given notice of the appointment within 48 hours after the appointment and a hearing on the appropriateness of the appointment must be held within five days after the appointment.

(c) Appointment of an emergency guardian, with or without notice, is not a determination of the respondent's incapacity.

(d) The court may remove an emergency guardian at any time.

An emergency guardian shall make any report the court requires. In other respects the provisions of this [Act] concerning guardians apply to an emergency guardian.

Comment

There may be occasions where there is an emergency and if the procedures in this article were followed, the respondent might be harmed by the delay. An emergency guardian can only be appointed without notice when there is sworn testimony that the respondent would be immediately and substantially harmed before the hearing on the appointment. In such case, notice must be given within 48 hours and a hearing held within 5 days. States adopting this Act should look at the time frames for the ex parte hearing and determine whether to adopt the time frames contained in this section or whether to impose their own time frames.

SECTION 312. TEMPORARY GUARDIANS.

(a) If the court finds that a guardian is not effectively performing duties and that the welfare of the ward requires immediate action, it may appoint, with or without previous notice, a temporary guardian for the ward for a specified period not exceeding six months. If an appointment is made without

previous notice, the court shall promptly notify the ward of the appointment.

Except as otherwise ordered by the court, a temporary guardian so appointed has the powers set forth in the previous order of appointment. The authority of any unlimited or limited guardian previously appointed by the court is suspended as long as a temporary guardian has authority.

(b) The court may remove a temporary guardian at any time. A temporary guardian shall make any report the court requires. In other respects the provisions of this [Act] concerning guardians apply to a temporary guardian.

Comment

A temporary guardian may be appointed under this section. However, a temporary guardian does not automatically have preference to be appointed the guardian. States adopting this Act should look at the time period set out in this section and determine whether to adopt it as contained in this section or to modify it.

SECTION 313. DUTIES OF GUARDIAN.

(a) Except as otherwise limited by the court, a guardian shall make decisions regarding the ward's support, care, education, health, and welfare. A guardian shall exercise authority only as necessitated by the ward's limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on his [or her] own behalf, and develop or regain the capacity to manage his [or her] personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known. A guardian shall act at all times in the ward's best interest and exercise reasonable care, diligence, and prudence.

(b) A guardian shall:

(1) become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;

(2) take reasonable care of the ward's personal effects and bring protective proceedings if necessary to protect the property of the ward;

(3) expend money to which the ward is entitled to the ward's current needs for support, care, education, health and welfare; and

(4) conserve excess money of the ward for the ward's future needs, but if a conservator has been appointed for the estate of the ward, the guardian shall pay to the conservator, at least quarterly, money of the ward to be conserved for the ward's future needs.

(5) immediately notify the court if the ward's condition has changed so that the ward is capable of exercising rights previously removed.

SECTION 314. POWERS OF GUARDIAN.

A guardian may:

(1) apply for and receive money payable to the ward's guardian or custodian for the support of the ward under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;

(2) if consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the person

of the ward and establish the ward's place of dwelling within or without this State;

(3) if a conservator for the estate of the ward has not been appointed with existing authority, bring a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay money for the benefit of the ward;

(4) consent to medical or other care, treatment, or service for the ward;

(5) consent ~~to~~ or refuse to consent to the marriage, [divorce or] adoption of the ward; and

(6) if reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

COMMENT

There is a split amongst the jurisdictions as to whether a guardian has the power to initiate a divorce for the ward. Those jurisdictions that do not allow the guardian to do so, generally hold such because of the personal nature of marriage.

Subsection (5) regarding adoptions should be read in conjunction with Article V of the Uniform Adoption Act.

SECTION 315. RIGHTS AND IMMUNITIES OF GUARDIAN; LIMITATIONS.

(a) A guardian is not personally liable for the ward's expenses and is not liable to third persons for acts of the ward solely by reason of the relationship nor is the guardian liable for injury to the ward resulting from the

negligence or acts of third persons providing medical or other care, treatment, or service for the ward except to the extent that the guardian was negligent in choosing the provider.

(b) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board, and clothing provided to the ward, but only as approved by order of the court. If a conservator, other than the guardian or one who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court.

(c) A guardian, without prior authorization of the court, may not revoke a power of attorney for health care [made pursuant to the Uniform Health-Care Decisions Act] of which the ward is the principal. If a power of attorney for health care [made pursuant to the Uniform Health-Care Decisions Act] is in effect, absent a court order to the contrary, a health-care decision by the agent takes precedence over that of a guardian.

(d) A guardian may not commit a ward to a [mental health-care] institution without following the applicable state's procedures for involuntary civil commitment..

(e) The guardian may establish or move the ward's place of dwelling outside of the State on express authorization of the court. The guardian shall notify the court if the guardian moves or changes address.

Comment

If the ward had made a power of attorney for health care, the guardian can not revoke it without court order. Further, the agent's decision takes priority over that of the guardian unless the power of attorney has been revoked by court order. A mental health-care institution includes those institutions or treatment facilities defined in the health care decisions act as adopted by the state. Commitment can not occur without following the state's procedures for involuntary civil commitment. Although a guardian can not commit a ward to a mental health-care institution, the guardian may petition under the state's applicable health care act for voluntary or involuntary, commitment, outpatient treatment, or involuntary medication for mental health treatment.

SECTION 316. REPORTS; MONITORING OF GUARDIANSHIP.

(a) Within 30 days after appointment, a guardian shall report to the court in writing on the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control. A guardian shall report at least annually thereafter and otherwise when ordered by the court. A report must contain:

(1) the current mental, physical, and social condition of the ward;

(2) the living arrangements for all addresses of the ward during the reporting period;

(3) the medical, educational, vocational, and other services provided to the ward and the guardian's opinion as to the adequacy of the ward's care;

(4) a summary of the guardian's visits with the ward and activities on the ward's behalf and the extent to which the ward has participated

in decision-making;

(5) if the ward is institutionalized, whether the guardian considers the current plan for care, treatment, or habilitation to be in the ward's best interest;

(6) plans for future care; and

(7) a recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship.

(b) The court may appoint a [visitor] to review a report, to interview the ward or guardian, and to make such other investigation as the court directs.

(c) The court shall establish a system for monitoring guardianships, including the filing and review of annual reports.

COMMENT

The report has to contain the current mental, physical and social condition of the ward. It is contemplated that letters from the treating physician will accompany the report.

SECTION 317. TERMINATION OR MODIFICATION OF GUARDIANSHIP.

(a) A guardianship terminates upon the death of the ward or order of the court.

(b) On petition of a ward, a guardian, or another person interested in the ward's welfare, the court may terminate a guardianship if the ward no longer needs the assistance or protection of a guardian. The court may modify

the type of appointment or powers conferred upon the guardian if the extent of protection or assistance previously granted is currently excessive or insufficient or the ward's capacity to provide for support, care, education, health, or welfare has so changed as to warrant that action.

(c) Except as otherwise ordered by the court for good cause, the court before terminating a guardianship shall follow the same procedures to safeguard the rights of the ward which apply to a petition for guardianship. Upon presentation by the petitioner of evidence establishing a prima facie case for termination, the court must order the termination unless the guardian proves that continuation of the guardianship is in the best interest of the ward.

COMMENT

If the ward's condition changes so that the guardian believes that the ward is capable of exercising some or all of the rights that were previously removed, the guardian should immediately notify the court and not wait until the due date of the next report.

ARTICLE 4

PROTECTION OF PROPERTY OF PERSONS UNDER DISABILITY AND MINORS

SECTION 401. PROTECTIVE PROCEEDINGS. Upon petition and after notice and hearing, the court may appoint a limited or unlimited conservator or make any other protective order provided in this section:

(1) In relation to the estate and affairs of a minor, if the court determines that the minor owns money or property requiring management or protection that cannot otherwise be provided or has or may have business affairs

that may be jeopardized or prevented because of the minor's age, or that money is needed for support and education and that protection is necessary or desirable to obtain or provide money.

(2) In relation to the estate and affairs of any other individual, if the court determines that, for reasons other than age:

(i) by clear and convincing evidence, the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions, even with the use of appropriate technological assistance, or because the individual is missing, detained, or unable to return to the United States; and

(ii) by a preponderance of evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the individual or of those individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money.

COMMENT

The concept of conservatorship contemplates both limited and unlimited conservatorships.

SECTION 402. JURISDICTION OVER BUSINESS AFFAIRS OF PROTECTED PERSONS. After the service of notice in a proceeding seeking a conservatorship or other protective order and until termination of the proceeding, the court in which the petition is filed has:

(1) exclusive jurisdiction to determine the need for a conservatorship or other protective order;

(2) exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this State must be managed, expended, or distributed to or for the use of the protected person, individuals who are in fact dependent upon the protected person, or other claimants; and

(3) concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and questions of title concerning assets of the estate.

SECTION 403. ORIGINAL PETITION FOR APPOINTMENT OR PROTECTIVE ORDER.

(a) The person to be protected or an individual interested in the estate, affairs, or welfare of the person to be protected, including a parent, guardian, custodian, or a person who would be adversely affected by lack of effective management of the property and business affairs of the person to be protected, may petition for the appointment of a conservator or for any other appropriate protective order.

(b) The petition must set forth the petitioner's name, residence, current address if different, relationship to the respondent, and interest in the appointment or other protective order, and, to the extent known, state the following with respect to the respondent and the relief requested:

(1) the respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling where it is proposed that the respondent will reside if the appointment is made;

(2) if the petition alleges impairment in the respondent's ability to receive and evaluate information, a brief description of the nature and extent of the respondent's alleged impairment;

(3) if the petition alleges that the respondent is missing, detained, or unable to return to the United States, a statement of the relevant circumstances, including the time and nature of the disappearance or detention and a description of any search or inquiry concerning the respondent's whereabouts;

(4) the name and address of the respondent's spouse, domestic partner or companion, and adult children or, if the respondent has none, the respondent's parents and adult brothers and sisters or, if the respondent has none, at least one of the adults nearest in kinship to the respondent who can be found;

(5) the name and address of the person responsible for care or custody of the respondent;

(6) the name and address of any legal representative for the respondent;

(7) a general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and

amount of other anticipated income or receipts; and

(8) the reason why a conservatorship or other protective order is in the best interest of the respondent.

(c) If a conservatorship is requested, the petition must also set forth to the extent known:

(1) the name and address of any proposed conservator and the reason why the proposed conservator should be selected;

(2) the name and address of any person nominated as conservator by the respondent if the respondent has attained the age of 14 years; and

(3) the type of conservatorship requested and, if an unlimited conservatorship, the reason why limited conservatorship is inappropriate or, if a limited conservatorship, the property to be placed under the conservator's control and any limitation on the conservator's powers and duties.

Comment

Although the person to be protected can petition for the appointment of a conservator, the person should investigate the use of a durable power of attorney. The petition has to list names and addresses of the spouse, domestic partner or companion and adult siblings or if none, then at least one of the adult relatives nearest in kinship who can be found.

SECTION 404. NOTICE.

(a) A copy of the petition and the notice of hearing on a petition for a conservatorship or other protective order shall be served on the respondent in person, but if the respondent's whereabouts is unknown or personal service is

otherwise impossible, service on the respondent must be by [substituted service] [or] [by publication]. A failure to serve the respondent is jurisdictional. The notice must include a statement that the respondent has the right to be physically present, inform the respondent of the respondent's rights at the hearing, and, if the appointment of a conservator is requested, include a description of the nature, purpose, and consequences of an appointment.

(b) In a proceeding for a conservatorship or other protective order, the petitioner shall give notice of the hearing to all other persons listed in the petition. Failure to give notice under this subsection is not jurisdictional.

(c) A petitioner shall give notice of the hearing on a petition for an order after appointment of a conservator or entry of other protective order and notice of the filing of an inventory, accounting, or plan of conservatorship, together with a copy of the petition or other document to the protected person, if the protected person has attained 14 years of age and is not missing, detained, or unable to return to the United States, any conservator of the protected person's estate, and any other person as ordered by the court. Notice of the filing of an inventory, accounting, or plan of conservatorship must be mailed within 14 days after the filing.

SECTION 405. ORIGINAL PETITION: PRELIMINARIES TO HEARING.

(a) Upon receipt of a petition for a conservatorship or protective order

for the reason that the respondent is a minor, the court shall set a date for hearing. If the court determines at any stage of the proceeding, before or after appointment, that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if the minor has attained 14 years of age. The court may confer the powers and impose the duties of a guardian ad litem upon an attorney appointed to represent a minor.

(b) Upon receipt of a petition for a conservatorship or other protective order for a respondent for reasons other than age, the court shall set a date for hearing and, if the respondent is not represented by counsel, appoint either an attorney, to represent the respondent or a [visitor]. If the respondent is represented by his or her own counsel, the court may appoint a [visitor].

(c) The duties and reporting requirements of the [visitor] limited to the relief requested in the petition. The [visitor] shall:

(1) interview the respondent in person and explain to the respondent in a manner which the respondent can understand, the substance of the petition, the nature, purpose, and effect of the proceeding;

(2) if the appointment of a conservator is requested, inform the respondent of the general powers and duties of a conservator and determine the respondent's views regarding the proposed conservator, the proposed conservator's powers and duties, and the scope and duration of the proposed conservatorship;

(3) advise the respondent of the respondent's rights, including the right to retain and consult with an attorney at the respondent's own expense, and the right to request a court-appointed attorney;

(4) interview the petitioner and the proposed conservator, if any; and

(5) make any other investigations the court directs.

(d) The [visitor] shall promptly file a report with the court which must include:

(1) a recommendation as to whether an attorney should be appointed to represent the respondent;

(2) recommendations regarding the appropriateness of a conservatorship, including whether less restrictive means of intervention are available, the type of conservatorship, and, any limitations on the conservator's powers and duties and the assets involved.

(3) a statement of the qualifications of the proposed conservator, as well as a statement of whether the respondent approves or disapproves of the proposed conservator, and the powers and duties proposed or the scope of the conservatorship;

(4) a recommendation as to whether a professional evaluation or further evaluation is necessary; and

(5) such other matters as the court directs.

(e) The court may also appoint a physician, psychologist, or other

individual qualified to evaluate the alleged impairment to conduct an examination of the respondent.

(f) The court shall appoint an attorney to represent the respondent in the proceeding if:

(1) requested by the respondent;

(2) recommended by the [visitor]; or

(3) the court determines that the respondent needs representation.

(g) While a petition for a conservatorship or other protective order is pending, after preliminary hearing and without notice to others, the court may make orders to preserve and apply the property of the respondent as may be required for the support of the respondent or individuals who are in fact dependent upon the respondent, and may appoint a special conservator to assist in that task.

Comment

Appointment of a visitor is mandatory when the respondent is not represented by counsel. Although an attorney can be appointed as a visitor, the attorney's role is that of a visitor and not as the attorney for the respondent. The visitor serves as the information gathering arm of the court. If the relief sought is a protective order, the visitor's powers and duties should be limited to that of the relief sought in the protective order. When the relief sought is a conservatorship, the visitor has an expanded list of duties. The visitor's report contains information and recommendations to the court regarding the appropriateness of the conservatorship, whether lesser restrictive alternatives might meet the respondent's needs, recommendations about further evaluations, powers to be given the conservator and the appointment of counsel.

Appointment of counsel is mandated when requested by the respondent, recommended by the visitor or when the court determines the respondent needs

representation. This is in keeping with the Probate Judges Standards

The National Probate Court Standards, Standard 3.3.4 provides

The probate court should require a court appointee to visit with the respondent in a guardianship petition to (1) explain the rights of the respondent; (2) investigate the facts of the petition; and (3) explain the circumstances and consequences of the action; the visitor should investigate the need for additional court appointments and should file a written report with the court promptly after the visit.

The court may order a professional evaluation of the respondent.

SECTION 406. CONFIDENTIALITY OF RECORDS. The written report of a [visitor], [guardian ad litem], and any professional evaluation are confidential and must be sealed upon filing, but are available:

- (1) to the court;
- (2) to the respondent without limitation as to use;
- (3) to the petitioner, the [visitor], and the petitioner's and respondent's attorneys, for purposes of the proceeding; and
- (4) to other persons for such purposes as the court may order for good cause.

SECTION 407. ORIGINAL PETITION: PROCEDURE AT HEARING.

(a) Unless excused by the court for good cause, the proposed conservator shall attend the hearing. The respondent shall be present in person and participate in the hearing, unless excused by the court for good cause. The respondent may present evidence and subpoena and cross-examine witnesses,

including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the [visitor]. The hearing may be held in a location convenient to the respondent and may be closed if the respondent so requests ~~and~~ on a showing of good cause.

(b) Any person may apply for permission to participate in the proceeding and the court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation.

SECTION 408. ORIGINAL PETITION: ORDERS.

(a) If a proceeding is brought for the reason that the respondent is a minor, after a hearing on the petition, upon finding that the appointment of a conservator or other protective order is in the best interest of the minor, the court shall make an appointment or other appropriate protective order.

(b) If a proceeding is brought for reasons other than age, after a hearing on the petition, upon finding that a basis exists for a conservatorship or other protective order, the court shall make the least restrictive order consistent with its findings. The court, shall make orders necessitated by the protected person's limitations and demonstrated needs, including appointive and other orders that will encourage the development of maximum self-reliance and independence of the protected person.

(c) Within 14 days after an appointment, the conservator shall mail a copy of the order of appointment, together with a statement of the right to

seek termination or modification, to the protected person, if the protected person has attained 14 years of age and is not missing, detained, or unable to return to the United States, and to all other persons given notice of the petition.

(d) The appointment of a conservator or the entry of other protective order is not a determination of incapacity of the protected person.

Comment

The court, in granting the conservatorship, shall give the conservator only those powers needed and ensure in its order that the protected person's self-reliance and independence are maximized.

SECTION 409. POWERS OF COURT. After hearing and upon determining that a basis for a conservatorship or other protective order exists, the court has the following powers, which may be exercised directly or through a conservator:

(1) With respect to a minor for reasons of age, the court has all the powers over the estate and business affairs of the minor which may be necessary for the best interest of the minor and members of the minor's immediate family;

(2) With respect to an adult, or to a minor for reasons other than age, the court, for the benefit of the protected person and individuals who are in fact dependent on the protected person for support, has all the powers over the estate and business affairs of the protected person which the protected person could exercise if an adult, present, and not under conservatorship or other protective order.

SECTION 410. REQUIRED COURT APPROVAL.

(a) Express authorization of the court is required for a conservator to:

(1) make gifts, except as provided in Section 425(b);

(2) convey or release contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entireties;

(3) exercise or release a power of appointment;

(4) create a revocable or irrevocable trust of property of the estate which may extend beyond the duration of the conservatorship or to revoke or amend a trust revocable by the protected person;

(5) exercise rights to elect options and change beneficiaries under insurance policies and annuities or surrender the policies and annuities for their cash value;

(6) exercise any right to an elective share in the estate of the protected person's deceased spouse and to renounce or disclaim any interest by testate or intestate succession or by transfer inter vivos; and

(7) make, amend, or revoke the protected person's will.

(b) The court, in exercising or in approving a conservator's exercise of the powers listed in subsection (a), shall consider primarily the decision that the protected person would have made, to the extent that the decision can be ascertained. The court shall also consider the financial needs of

the protected person, the needs of individuals who are in fact dependent on the protected person for support and the interest of creditors; possible reduction of income, estate, inheritance or other tax liabilities; eligibility for governmental assistance; the protected person's previous pattern of giving or level of support; the existing estate plan; the protected person's life expectancy; the probability that the conservatorship will terminate before the protected person's death; and any other factors the court considers relevant.

(c) Without prior authorization of court, a conservator may not revoke or amend a durable power of attorney of which the protected person is the principal. If a durable power of attorney is in effect, absent a court order to the contrary, a decision by the agent takes precedence over that of a conservator.

SECTION 411. PROTECTIVE ARRANGEMENTS AND SINGLE TRANSACTIONS.

(a) If it is established that a basis exists for a protective order with respect to an individual, the court, without appointing a conservator, may:

(1) authorize, direct, or ratify any transaction necessary or desirable to achieve any arrangement for security, service, or care meeting the foreseeable needs of the protected person, including sale, mortgage, lease, or other transfer of property; purchase of an annuity; contracting for life care, a deposit contract, or a contract for training and education; or addition to or establishment of a suitable trust[, including a trust created under the Uniform

Custodial Trust Act]; and

(2) authorize, direct, or ratify any other contract, trust, will, or transaction relating to the protected person's property and business affairs, including a settlement of a cause of action, upon determining that it is in the best interest of the protected person.

(b) Before approving a protective arrangement or other transaction under this section, the court shall consider the factors listed in Section 410(b).

(c) The court may appoint a surrogate to assist in the accomplishment of any protective arrangement or other transaction authorized under this section. The surrogate has the authority conferred by the order and shall serve until discharged by order after report to the court.

COMMENT

The settlement of a cause of action includes the settlement of a personal injury lawsuit brought on behalf of the minor.

SECTION 412. WHO MAY BE CONSERVATOR: PRIORITIES.

(a) a qualified person must be considered for appointment as conservator in the following order of priority:

(1) a conservator, guardian of the estate, or other like fiduciary appointed or recognized by an appropriate court of any other jurisdiction in which the protected person resides;

(2) a person nominated by the respondent if the respondent

has attained 14 years of age and at the time of the nomination had sufficient capacity to express a preference;

(3) an agent appointed by the respondent under a durable power of attorney;

(4) the spouse of the respondent;

(5) an adult child of the respondent;

(6) a parent of the respondent; and

(7) an adult with whom the respondent has resided for more than six months before the filing of the petition.

(b) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, acting in the best interest of the protected person, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

(c) An owner, operator, or employee of [a long-term care institution] at which the respondent is receiving care may not be appointed as conservator unless related to the respondent by blood, marriage, or adoption.

(d) a person having priority under (a)(1), (4), (5), or (6) may designate in writing a substitute to serve instead and thereby transfer the priority to the substitute.

Comment

Priority for consideration of appointment as conservator is given first to a fiduciary such as a conservator or guardian, then to the respondent's nominee or respondent's agent under a durable power of attorney before preference is given to spouse or relatives. Anyone affiliated with a long-term

care facility at which the respondent is receiving care is ineligible to be conservator absent a blood, marital or adoptive arrangement. Sections (a)(4) and (6) allow someone who has been nominated as conservator to have a statutory preference when the court determines who should be appointed as conservator of the respondent. However, the person so designated has no authority to act without a court order and must follow the procedures for the establishment of a conservatorship. The process for nominating a guardian is much more detailed because it is more important to protect the person in such circumstances. There are many mechanisms available to the nominating individual to protect the property besides a conservatorship. However, in some circumstances, conservatorship may be necessary, so it is incumbent on the appointed guardian to determine whether there is a need for a conservatorship, and if so, petition for appointment. A person named in a writing, will or otherwise, should be appointed unless not qualified.

SECTION 413. PETITIONS FOR ORDERS SUBSEQUENT TO APPOINTMENT.

(a) The protected person or a person interested in the welfare of a protected person may file a petition in the appointing court for an order:

(1) requiring bond or collateral or additional bond or collateral, or reducing bond;

(2) requiring an accounting for the administration of the protected person's estate;

(3) directing distribution;

(4) removing the conservator and appointing a temporary or successor conservator;

(5) modifying the type of appointment or powers conferred upon the conservator if the extent of protection or management previously granted is currently excessive or insufficient or the protected person's ability to

manage the estate and business affairs has so changed as to warrant the action; or

(6) granting other appropriate relief.

(b) A conservator may petition the appointing court for instructions concerning fiduciary responsibility.

(c) On notice and hearing of the petition the court may give appropriate instructions and make any appropriate order.

SECTION 414. BOND. The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it may specify. Unless otherwise directed by the court, the bond must be in the amount of the aggregate capital value of the property of the estate in the conservator's control, plus one year's estimated income, and minus the value of assets deposited under arrangements requiring an order of the court for their removal and the value of any real property that the fiduciary, by express limitation of power, lacks power to sell or convey without court authorization. The court, in lieu of sureties on a bond, may accept other collateral for the performance of the bond, including a pledge of securities or a mortgage of real property.

COMMENT

The bond may be set pursuant to an order entered on the court's own motion or a petition by the protected person or an individual interested in the protected person's welfare.

SECTION 415. TERMS AND REQUIREMENTS OF BONDS.

(a) The following requirements and provisions apply to any bond

required:

(1) Except as otherwise provided by the terms of the bond, sureties are jointly and severally liable with the conservator and with each other.

(2) By executing the bond of a conservator, the surety submits to the jurisdiction of the court that issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator and naming the surety as a party respondent. Notice of any proceeding must be delivered to the surety or mailed by registered or certified mail to the address shown in the court records at the place where the bond is filed and to any other address then known to the petitioner.

(3) On petition of a successor conservator or any interested person, a proceeding may be brought against a surety for breach of the obligation of the bond of the conservator.

(4) The bond of the conservator is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(b) a proceeding may not be brought against a surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or a statute of limitations.

SECTION 416. COMPENSATION AND EXPENSES. If not otherwise compensated for services rendered, a guardian, conservator, attorney

for the respondent, attorney whose services resulted in a protective order or in an order beneficial to a protected person's estate and any other person appointed by the court is entitled to reasonable compensation from the estate. Compensation may be paid and expenses reimbursed without court order, but if the court later determines the compensation to be excessive or the expenses to be inappropriate, the amount determined to be excessive or inappropriate must be repaid to the estate.

COMMENT

Compensation for services rendered or expenses incurred by those serving the respondent or representing the respondent or anyone else appointed by the court are paid from the estate without court order. Excessive or inappropriate payments must be repaid to the estate. If the estate is limited or inadequate, the estate would be divided amongst those entitled to compensation or reimbursement. The reasonableness of the compensation or expenses would be determined by looking at the size of the estate. It is contemplated that if the respondent is found to be indigent, compensation and expenses will be paid from the general fund of the county, probably at a fixed rate.

SECTION 417. GENERAL DUTIES OF CONSERVATOR; PLAN.

(a) A conservator, in relation to powers conferred by this [article], or implicit in the title acquired by virtue of the proceeding, shall act as a fiduciary and observe the standards of care applicable to a trustee.

(b) The conservator shall exercise authority only as necessitated by the limitations of the protected person, and to the extent possible, encourage the protected person to participate in decisions, to act in his [or her] own behalf, and to develop or regain the ability to manage his [or her] estate and business affairs.

(c) Within 60 days after appointment, a conservator shall file with the appointing court the plan for the managing, expending and distributing the assets of the protected person's estate. The plan must be based on the actual needs of the protected person and take into consideration the best interest of the protected person. The conservator shall include in the plan steps to develop or restore the protected person's ability to manage his [or her] property, the an estimate of the duration of the conservatorship, and projections for expenses and resources. At least annually thereafter, the conservator shall review the plan and report to the court.

(d) In investing an estate, selecting assets of the estate for distribution, and invoking powers of revocation or withdrawal available for the use and benefit of the protected person and exercisable by the conservator, a conservator shall take into account any estate plan of the protected person known to the conservator and may examine the will and any other donative, nominative, or other appointive instrument of the protected person.

SECTION 418. INVENTORY; RECORDS.

(a) Within 60 days after appointment, a conservator shall prepare and file with the appointing court an inventory of the estate subject to the conservatorship, together with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits.

(b) The conservator shall keep records of the administration of the

estate, and exhibit them on reasonable request of any interested person.

Comment

The conservator has the authority that the protected person would have.

**SECTION 419. ACCOUNTS; APPOINTMENT OF [VISITOR];
MONITORING.**

(a) A conservator shall account to the court for administration of the estate annually unless the court otherwise directs, upon resignation or removal, upon termination of the conservatorship, and at other times as the court directs. An order, after notice and hearing, allowing an intermediate account of a conservator adjudicates as to liabilities concerning the matters reflected in the accounting. An order, after notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities relating to the conservatorship.

(b) An accounting must contain:

(1) a listing of the assets of the estate under the conservator's control and a listing of the receipts, disbursements, and distributions during the reporting period;

(2) a listing of the services provided to the protected person; and

(3) any recommended changes in the conservatorship plan as well as a recommendation as to the continued need for conservatorship and any recommended changes in the scope of the conservatorship.

(c) The court may appoint a [visitor] to review an accounting or plan, interview the protected person or conservator, and make such other investigation as the court directs. In connection with an account, the court may order a conservator to submit the estate to an appropriate examination to be made in a manner the court directs.

(d) The court shall establish a system for monitoring of conservatorships, including the filing and review of conservators' accounts and plans.

COMMENT

Subsection (b) does not foreclose any creditors from following the claims procedures in this act. Many states do not have such provision in their statutes.

SECTION 420. TITLE BY APPOINTMENT.

(a) The appointment of a conservator vests title in the conservator as trustee to all property of the protected person, or to the part thereof specified in the order, held at the time of appointment or thereafter acquired. An order vesting title to only a part of the property of the protected person creates a conservatorship limited to assets specified in the order.

(b) Letters of conservatorship are evidence of vesting title of the protected person's assets in the conservator. An order terminating a conservatorship transfers title to assets remaining subject to the conservatorship, including any described in the order, to the formerly protected person or the successors of the formerly protected person.

(c) Subject to the requirements of general statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship and orders terminating conservatorships may be filed or recorded to give record notice of title as between the conservator and the protected person.

SECTION 421. PROTECTED PERSON'S INTEREST NON-ALIENABLE.

(a) Except as provided in subsections (c) and (d), the interest of the protected person in property vested in a conservator is not transferrable or assignable by the protected person. An attempted transfer or assignment by the protected person, although ineffective to affect property rights, may give rise to a claim against the protected person for restitution or damages which, subject to presentation and allowance, may be satisfied as provided in Section 428.

(b) Property vested in a conservator by appointment and the interest of the protected person in that property are not subject to levy, garnishment, or similar process for claims against the protected person unless allowed pursuant to Section 428.

(c) A person without knowledge of the conservatorship who in good faith and for security or substantially equivalent value acquires from a protected person or transferee of the protected person property or an interest in property, title to which is vested in the conservator, is protected as if the

protected person or transferee had valid title.

(d) A third party who deals with the protected person with respect to property vested in a conservator is entitled to any protection provided in other law.

SECTION 422. SALE, ENCUMBRANCE, OR OTHER TRANSACTION INVOLVING CONFLICT OF INTEREST.

Any transaction involving the conservatorship estate which is affected by a substantial conflict between the conservator's fiduciary and personal interests is voidable unless the transaction is approved by the court after notice to such persons as the court directs. A transaction affected by a substantial conflict between personal and fiduciary interests includes any sale, encumbrance, or other transaction involving the conservatorship estate entered into by the conservator, the spouse, descendant, agent, or attorney of a conservator, or corporation or other enterprise in which the conservator has a substantial beneficial interest.

SECTION 423. PROTECTION OF PERSONS DEALING WITH CONSERVATORS.

(a) A person who assists or deals with a conservator in good faith and for value in any transaction other than those requiring a court order as provided in Section 409 or 410 is protected as though the conservator properly

exercised the power. The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, but restrictions on powers of conservators which are endorsed on letters as provided in Section 108 are effective as to third persons. A person is not bound to see to the proper application of assets of the estate paid or delivered to a conservator.

(b) The protection provided by this section extends to any procedural irregularity or jurisdictional defect which occurred in proceedings leading to the issuance of letters and is not a substitute for protection provided to persons assisting or dealing with a conservator by comparable provisions in other law relating to commercial transactions or to simplifying transfers of securities by fiduciaries.

COMMENT

The reference to other law in subsection (b) includes the UCC and the Uniform Simplification of Fiduciary Security Transfers Act.

SECTION 424. POWERS OF CONSERVATOR IN ADMINISTRATION.

(a) Except as qualified or limited by the court in its order of appointment and endorsed on the letters, a conservator has all of the powers conferred in this section and any additional powers conferred by law on trustees in this State.

(b) A conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may:

(1) collect, hold, and retain assets of the estate including real property in another State, until the conservator considers that disposition of an asset should be made, and the assets may be retained, even if they include an asset in which the conservator is personally interested;

(2) receive additions to the estate;

(3) continue or participate in the operation of any business or other enterprise;

(4) acquire an undivided interest in an asset of the estate in which the conservator, in any fiduciary capacity, holds an undivided interest;

(5) invest and reinvest funds and assets of the estate as may a trustee;

(6) deposit money of the estate in a state or federally insured financial institution, including one operated by the conservator;

(7) acquire or dispose of an asset of the estate, including real property in another State, for cash or on credit, at public or private sale, and manage, develop, improve, exchange, partition, change the character of, or abandon an asset of the estate;

(8) make ordinary or extraordinary repairs or alterations in buildings or other structure, demolish any improvements, and raze existing or

erect new party walls or buildings;

(9) subdivide, develop, or dedicate land to public use, make or obtain the vacation of plats and adjust boundaries, adjust differences in valuation or exchange or partition by giving or receiving considerations, and dedicate easements to public use without consideration;

(10) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the term of the conservatorship;

(11) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) grant an option involving disposition of an asset of the estate and take an option for the acquisition of any asset;

(13) vote a security, in person or by general or limited proxy;

(14) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) sell or exercise stock subscription or conversion rights;

(16) consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(17) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery;

(18) insure the assets of the estate against damage or loss and the conservator against liability with respect to a third person;

(19) borrow money, with or without security, to be repaid from the estate or otherwise and advance money for the protection of the estate or the protected person and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any assets, for which the conservator has a lien on the estate as against the protected person for advances so made;

(20) pay or contest any claim; settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and release, in whole or in part, any claim belonging to the estate to the extent the claim is uncollectible;

(21) pay taxes, assessments, compensation of the conservator and any guardian, and other expenses incurred in the collection, care, administration, and protection of the estate;

(22) allocate items of income or expense to income or principal of the estate, as provided by other law, including creation of reserves out of income for depreciation, obsolescence, or amortization or for depletion of minerals or timber;

(23) pay any sum distributable to a protected person or individual who is in fact dependent on the protected person by paying the sum to the distributee or by paying the sum for the use of the distributee to the guardian of the distributee, or to a distributee's custodian under the Uniform Transfers to Minors Act or custodial trustee under the Uniform Custodial Trust Act, or, if there is no guardian, to a relative or other person having custody of the distributee;

(24) prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of assets of the estate and of the conservator in the performance of fiduciary duties; and

(25) execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the conservator.

SECTION 425. DELEGATION

(a) A conservator may not delegate to an agent or another conservator the entire administration of the estate, but a conservator may otherwise delegate the performance of functions that a prudent conservator of comparable skills might delegate under similar circumstances.

(b) The conservator shall exercise reasonable care, skill, and caution in:

- (1) selecting an agent;
- (2) establishing the scope and terms of a delegation, consistent with the purposes and terms of the conservatorship;
- (3) periodically reviewing an agent's overall performance and

compliance with the terms of the delegation; and

(4) redressing an action or decision of an agent which would constitute a breach of trust if performed by the conservator.

(c) A conservator who complies with the requirements of subsections (a)-(b) is not liable to the protected person or to the estate for the decisions or actions of the agent to whom a function was delegated.

(d) In performing a delegated function, an agent shall exercise reasonable care to comply with the terms of the delegation.

(e) By accepting a delegation from a conservator subject to the law of this state, an agent submits to the jurisdiction of the courts of this State.

COMMENT

This section is based on the Uniform Prudent Investors Act and refers to the Restatement 3d, Trusts.

SECTION 426. PRINCIPLES OF DISTRIBUTION BY CONSERVATOR.

(a) Unless otherwise specified in the order of appointment and endorsed on the letters of appointment or contrary to the conservatorship plan, a conservator may expend or distribute income or principal of the estate without further court authorization or confirmation for the support, care, education, health, and welfare of the protected person and individuals who are in fact dependent on the protected person, including the payment of child support, in accordance with the following principles:

(1) The conservator shall consider recommendations relating to the appropriate standard of support, care, education, health, and welfare for the protected person or the individual who is in fact dependent on the protected person made by a guardian, if any, and, if the protected person is a minor, the conservator shall consider recommendations made by a parent.

(2) The conservator may not be surcharged for money paid to persons furnishing support, education, care, or benefit to the protected person or an individual who is in fact dependent on the protected person pursuant to the recommendations of a parent or guardian of the protected person unless the conservator knows that the parent or guardian derives personal financial benefit therefrom, including relief from any personal duty of support, or the recommendations are not in the best interest of the protected person.

(3) In making distributions under this subsection, the conservator shall consider:

(i) the size of the estate, the estimated duration of the conservatorship, and the likelihood that the protected person, at some future time, may be fully self-sufficient and able to manage business affairs and the estate;

(ii) the accustomed standard of living of the protected person and individuals who are in fact dependent on the protected person; and

(iii) other money or sources used for the support of

the protected person.

(4) Money expended under this subsection may be paid by the conservator to any person, including the protected person, to reimburse for expenditures that the conservator might have made, or in advance for services to be rendered to the protected person if it is reasonable to expect the services will be performed and advance payments are customary or reasonably necessary under the circumstances.

(b) If an estate is ample to provide for the distributions authorized by subsection (a), a conservator for a protected person other than a minor may make gifts to charity and other objects which the protected person might have been expected to make, in amounts that do not exceed in total for any year 20 percent of the income from the estate

SECTION 427. DEATH OF PROTECTED PERSON.

(a) If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into the conservator's possession, inform the personal representative or beneficiary named in the will of the delivery, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto.

(b) If a personal representative has not been appointed within 40 days after the death of a protected person and an application or petition for

appointment is not before the court, the conservator may apply to exercise the powers and duties of a personal representative in order to administer and distribute the decedent's estate. Upon application for an order conferring upon the conservator the powers of a personal representative, after notice given by the conservator to any person nominated personal representative by any will of which the applicant is aware, the court may grant the application upon determining that there is no objection and endorse the letters of conservatorship to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative.

(c) The making and entry of an order under this section has the effect of an order of appointment of a personal representative [as provided in Section 3-308 and Parts 6 through 10 of Article III of the Uniform Probate Code], but the estate in the name of the conservator, after administration, may be distributed to the decedent's successors without retransfer to the conservator as personal representative.

Comment

There may be circumstances where the conservator will need to seek court approval to act as the personal representative for the purpose of distributing the assets of the decedent's estate. If the application is granted, the conservatorship letters would be endorsed to note the conservator's acquisition of powers of a personal representative.

SECTION 428. CLAIMS AGAINST PROTECTED PERSON.

(a) A conservator may pay or secure from the estate claims against the estate or against the protected person arising before or after the

conservatorship upon their presentation and allowance in accordance with the priorities stated in subsection (d). A claim may be presented by either of the following methods:

(1) the claimant may deliver or mail to the conservator a written statement of the claim indicating its basis, the name and mailing address of the claimant, and the amount claimed; or

(2) the claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of court and deliver or mail a copy of the statement to the conservator.

(b) A claim is deemed presented on receipt of the written statement of claim by the conservator or the filing of the claim with the court, whichever first occurs. A presented claim is allowed if it is not disallowed by written statement mailed by the conservator to the claimant within 60 days after its presentation. The conservator before payment may change an allowance to a disallowance in whole or in part, but not after allowance by a court order or judgment or an order directing payment of the claim. The presentation of a claim tolls any statute of limitation relating to the claim until 30 days after its disallowance.

(c) A claimant whose claim has not been paid may petition the court for determination of the claim at any time before it is barred by a statute of limitations and, upon due proof, procure an order for its allowance, payment, or security from the estate. If a proceeding is pending against a protected person at

the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party shall give notice of the proceeding to the conservator if the proceeding could result in creating a claim against the estate.

(d) If it appears that the conservatorship estate is likely to be exhausted before all existing claims are paid, the conservator shall distribute the estate in money or in kind in payment of claims in the following order:

(1) costs and expenses of administration;

(2) claims of the federal or state government having priority under other law;

(3) claims incurred by the conservator for support, care, education, health, and welfare previously provided to the protected person or individuals who are in fact dependent on the protected person;

(4) claims arising before the conservatorship; and

(5) all other claims.

(e) Preference may not be given in the payment of a claim over any other claim of the same class, and a claim due and payable may not be preferred over claims not due.

(f) If assets of the conservatorship are adequate to meet all existing claims, the court, acting in the best interest of the protected person, may order the conservator to give a mortgage or other security on the conservatorship estate to secure payment at some future date of any or all claims.

SECTION 429. PERSONAL LIABILITY OF CONSERVATOR.

(a) Except as otherwise provided in the contract, a conservator is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate unless the conservator fails to reveal the representative capacity and identify the estate in the contract.

(b) A conservator is personally liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if personally at fault.

(c) Claims based on contracts entered into by a conservator in a fiduciary capacity, obligations arising from ownership or control of the estate, and claims based on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable therefor.

(d) A question of liability between the estate and the conservator personally may be determined in a proceeding for accounting, surcharge, or indemnification, or in another appropriate proceeding or action.

SECTION 430. TERMINATION OF PROCEEDINGS.

(a) A conservatorship terminates upon the death of the protected person or upon order of the court. When the protected person dies, the conservator has the duty to conclude the administration of the estate. Unless the conservatorship was created for reasons other than age, a conservatorship created

for a minor also terminates upon the protected person's attaining of majority or emancipation. If the conservatorship terminates by reason of the death of the protected person, the conservator must file a petition for a final accounting and discharge within [30] days of distribution.

(b) On petition of the protected person, the conservator, or another person interested in the protected person's welfare, the court may terminate the conservatorship if the protected person no longer needs the assistance or protection of a conservator. Termination of the conservatorship does not affect a conservator's liability for previous acts or the obligation to account for funds and assets of the protected person.

(c) Except as otherwise ordered by the court for good cause, before terminating a conservatorship the court shall follow the same procedures which apply to a petition for a conservatorship. Upon presentation by the petitioner of evidence establishing a prima facie case for termination, the court shall order termination unless the conservator proves that continuation of the conservatorship is in the best interest of the protected person.

(d) Upon termination, title to assets of the estate passes to the formerly protected person or to the formerly protected person's successors. The order of termination must provide for expenses of administration and direct the conservator to execute appropriate instruments to evidence the transfer of title, to file a final accounting and a petition for discharge upon approval of the final accounting.

(e) The court shall enter a final order of discharge upon the approval of the final accounting and satisfaction by the conservator of any other conditions placed by the court on the conservator's discharge.

SECTION 431. PAYMENT OF DEBT AND DELIVERY OF PROPERTY TO FOREIGN CONSERVATOR WITHOUT LOCAL PROCEEDINGS.

(a) A person who is indebted to or has the possession of tangible or intangible property of a protected person may pay the debt or deliver the property to a foreign conservator, guardian of the estate, or other court-appointed fiduciary of the State of residence of the protected person. Payment or delivery may be made upon proof of appointment and presentation of an affidavit made by or on behalf of the fiduciary stating that a protective proceeding relating to the protected person is not pending in this State and the foreign fiduciary is entitled to payment or to receive delivery.

(b) Payment or delivery in response to the demand and affidavit discharges the debtor or possessor, absent knowledge of any protective proceeding pending in this State.

SECTION 432. FOREIGN CONSERVATOR: PROOF OF AUTHORITY, BOND, POWERS. If a conservator has not been appointed in this State and a petition in a protective proceeding is not pending in this State, a conservator appointed in the State in which the protected person resides may file

in a court of this State, in a [county] in which property belonging to the protected person is located, authenticated copies of letters of appointment and of any bond. Thereafter, the conservator may exercise all powers of a conservator appointed in this State as to property in this State and may maintain actions and proceedings in this State subject to any conditions otherwise imposed upon nonresident parties.

ARTICLE 5

MISCELLANEOUS PROVISIONS

SECTION 501. SHORT TITLE. This [Act] may be cited as the Uniform Guardianship and Protective Proceedings Act.

SECTION 502. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among States enacting it.

SECTION 503. SUPPLEMENTARY GENERAL PRINCIPLES OF LAW APPLICABLE. Unless displaced by the particular provisions of this [Act], the principles of law and equity supplement its provisions.

SECTION 504. SEVERABILITY. If any provision of this [Act] or its

application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 505. CONSTRUCTION AGAINST IMPLIED REPEAL.

This [Act] is a general act intended as a unified coverage of its subject matter and subsequent legislation may not be construed to repeal by implication any part of this [Act] if that construction reasonably can be avoided.

SECTION 506. EFFECTIVE DATE. This [Act] takes effect

_____ .

SECTION 507. REPEAL. The following acts and parts of acts are repealed:

- (1) _____
- (2) _____
- (3) _____

SECTION 508. SAVING AND TRANSITIONAL PROVISIONS.

SECTION 509. APPLICATION TO EXISTING RELATIONSHIPS.

