

2019
SPRING CONFERENCE
OF THE
NATIONAL COLLEGE OF PROBATE JUDGES

Omni Royal Orleans
New Orleans, Louisiana
May 14 -17, 2019

Association Management:
NATIONAL CENTER FOR STATE COURTS
300 Newport Avenue
Williamsburg, VA 23185-4147

NATIONAL COLLEGE OF PROBATE JUDGES – 2018-2019 EXECUTIVE COMMITTEE

<u>PRESIDENT</u>	<u>EXPIRATION OF TERM</u>	<u>ELIGIBLE FOR RE-ELECTION?</u>
Ms. Anne Meister ('12 – 2) Register of Wills (ret.) 3613 Prince William Drive Fairfax, VA 22031 (202) 809-8274	November 2019	NO
<u>PRESIDENT-ELECT</u> Hon. Christine Butts ('13—2) Riddle & Butts, LLP 8777 West Rayford Road The Woodlands, TX 77389 (281) 537-7110	November 2019	NO
<u>SECRETARY/TREASURER</u> Hon. Brenda Hull Thompson ('14 – 2) Probate Court of Dallas County Renaissance Tower 1201 Elm Street Ste. 2400-A Dallas, TX 75270 (214) 653-7236	November 2019	YES
<u>IMMEDIATE PAST PRESIDENT</u> Hon. Tamara C. Curry ('10 – 1) Charleston County Probate Court 100 Broad Street, Suite 469 Charleston, SC 29401 (843) 958-5030	November 2019	NO
<u>EXECUTIVE COMMITTEE</u> Hon. James P. Dunleavy ('14 – 2) Aroostook County Probate Court P.O. Box 33 Presque Isle, ME 04769 (207) 764-4491	November 2020	NO
Ho. Amy W. McCulloch ('16-2) Richland County Probate Court P.O. Box 192 Columbia, SC 29202 (803) 576-1997	November 2020	YES
Hon. Timothy J. Grendell ('18-2) Judge Geauga Co. Probate/Juvenile Court 231 Main Street, Ste. 200 Courthouse Annex, 2nd Floor Chardon, OH 44024 (440) 279-1830	November 2020	YES
Hon. O. James Purnell, III (-17 – 1) Probate Judge (ret.) Ellington Probate Court P.O. Box 268 Vernon, CT 06066-0268	November 2019	YES
Hon. James T. Walther ('15 – 2) Judge Lorain County Probate Court 225 Court Street, 6th Floor Elyria, OH 44035 (440) 329-5443	November 2019	YES
Hon. Dianne Yamin ('15 – 2) Danbury Probate Court 155 Deer Hill Avenue Danbury, CT 06810 (203) 797-4521	November 2019	YES

Figures in parentheses indicate the year first elected and the length of the first term.

NATIONAL COLLEGE OF PROBATE JUDGES

2019 Spring Conference

May 14-17, 2019 ***** New Orleans, Louisiana

Tuesday, May 14

2:00 PM - 6:00 PM	Registration	Petit Salon B
5:30 PM – 6:00 PM	Reception for New Members and First Time Attendees	Royal Garden Terrace Complex
6:00 PM - 7:00 PM	Welcome Reception (light hors d'oeuvres, host bar) <i>(Sponsored by Equivant)</i>	Royal Garden Terrace Complex

Wednesday, May 15

8:00 AM – 12:15 PM	Registration	Petit Salon B
8:00 AM – 12:15 PM	Vendor Exhibits and Coffee Service	Promenade Room
8:45 AM – 9:00 AM	Welcome Remarks Anne Meister, NCPJ President Justice Sandra Jenkins, Fourth Circuit Court of Appeals, New Orleans	Esplanade Room
9:00 AM – 9:30 AM	Presentation by Equivant Topic: Using Technology to Monitor “Red Flags” in Probate Cases Speaker: Gary Egner	Esplanade Room
9:30 AM – 10:30 AM	Educational Session Speaker: Dr. Gerry W. Beyer, Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law Topic: <i>Digital Assets</i>	Esplanade Room
10:30 AM – 10:45 AM	Vendor Exhibits and Coffee Break	Promenade Room
10:45 AM – 12:15 AM	Educational Session Speakers: Ben Orzeske, Chief Counsel, Uniform Law Commission Diana Noel, Senior Legislative Representative, AARP Topic: <i>Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act</i>	Esplanade Room
Beginning at 12:50 PM	Golf at South Course of Bayou Oaks at City Park	

Thursday, May 16

8:30 AM – 12:15 PM	Vendor Exhibits and Coffee Service	Promenade Room
9:00 AM – 9:10 AM	Presentation by Argent Trust Topic: Overview of Argent Service Offerings Speakers: James Breaux, Senior Vice President and National Sales Executive Jill Knight Nalty, Business Development Officer	Esplanade Room
9:15 AM – 9:25 AM	Presentation by TurboCourt Topic: TurboCourt Intelligent Filing: increased access for filers, improved efficiency for Probate Courts Speaker: Scott Crampton	Esplanade Room

9:30 AM – 10:30 AM	Educational Session: Speaker: Kathryn Holt, Senior Court Research Analyst at the National Center for State Courts Topic: <i>Finding the Right Fit – Decision-Making Supports and Guardianship: A New Resource from the National Center for State Courts</i>	Esplanade Room
10:30 AM – 10:45 AM	Vendor Exhibits and Coffee Break	Promenade Room
10:45 AM – 12:15 PM	Educational Session Speaker: Hon. Gerald Fisher, Associate Judge, D.C. Superior Court Topic: <i>Hearsay Exceptions in Probate & Estate Proceedings</i>	Esplanade Room
12:30 PM - 5:00 PM	Executive Committee Meeting	St. Louis/Chartres Room
6:00 PM – 7:00 PM	Reception (host bar) (Sponsored by Oppenheimer)	Royal Garden Terrace Complex
7:00 PM - 9:00 PM	Banquet Dinner, <i>Business Casual*</i>	Royal Garden Terrace Terrace
<u>Friday, May 17</u>		
8:30 AM – 9:00 AM	Coffee Service	Promenade Room
9:15 AM – 10:15 AM	Educational Session Speaker: Mark R. Caldwell, Burdett & Rice PLLC Topic: <i>A Road Increasingly Traveled: Multistate Probate Issues</i>	Esplanade Room
10:15 AM – 11:15 AM	Educational Session Speaker: Prof. Ronald Scalise, Tulane School of Law Topic: <i>Asset Protection Trusts</i>	Esplanade Room
11:15 AM – 11:30 AM	Break	Promenade Room
11:30 AM - 12:30 PM	Educational Session Speakers: Peter C. Palumbo, AIF®, Director – Investments, The Palumbo Group of Oppenheimer & Co. Inc. Darryl Lynch, AIF®, Executive Director – Investments Topic: <i>Fiduciary Ethics and the Use of Special Needs Trusts in Combination with Able Trusts</i>	Esplanade Room

* No jacket or tie required; no jeans.

NCPJ gratefully acknowledges the support of conference sponsors AARP, Argent Trust, Equivant, Oppenheimer and TurboCourt.

NCPJ 2019 Spring Conference
Omni Royal Orleans
May 11, 2019 - May 18, 2019

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R.R. Denny Clunk	Ohio	1997-1998
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*Marion Guess	Georgia	1995-1996
*Evelyn Shelley	South Carolina	1993-1995
*Field Benton	Colorado	1991-1993
*Evans Brewster	New York	1989-1991
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Floyd Probst	Georgia	1983-1985
*Alfred Podolski	Massachusetts	1981-1983
*Pat Gregory	Texas	1979-1981
George Berry	Missouri	1977-1979
*William Treat	New Hampshire	1974-1977

*Deceased

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1981	Prof. Edward Halbach	Berkeley, CA
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1983	Justice Sandra Day O'Connor	Washington, DC
1984	Dean William Schwartz	Boston, MA
1985	Edward B. Winn	Dallas, TX
1986	Judge Kenneth Pat Gregory	Houston, TX
1987	Prof. A. James Casner	Cambridge, MA
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1989	Judge Alfred Podolski	Dedham, MA
	Judge Glenn E. Knierim	Simsbury, CT
1990	Melvin J. Peterson, Sr.	Minneapolis, MN
1991	Judge George C. Berry	Kansas City, MO
1992	John J. Lombard, Jr.	Philadelphia, PA
1993	Prof. Richard V. Wellman	Athens, GA
1994	James R. Wade	Denver, CO
1995	Judge Floyd Propst	Atlanta, GA
1996	Professor Eugene F. Scoles	Eugene, OR
1997	Professor Stanley M. Johanson	Austin, TX
1998	Judge Joseph S. Mattina	Buffalo, NY
1999	Judge Marion Guess	Decatur, GA
2000	Judge Isabella Horton Grant	San Francisco, CA
2001	Professor John H. Langbein	New Haven, CT
2002	Professor Mary Radford	Atlanta, GA
2003	Judge R.R. Denny Clunk	Alliance, OH
2004	Professor S. Alan Medlin	Columbia, SC
	Mr. Malcolm A. Moore	Seattle, WA
2005	Professor Amy Morris Hess	Knoxville, TN
2006	Judge Arnold H. Gold	Studio City, CA
2007	Judge John Maher	Portsmouth, NH
2008	Sally Balch Hurme	Washington, DC
2009	Prof. Rebecca Morgan	Gulfport, FL
2010	Judge Milton L. Mack, Jr.	Detroit, MI
2011	Prof. David M. English	Columbia, MO
2012	Judge Ann A. Scott Timmer	Phoenix, AZ
2013	Judge Susan M. Bazis	Omaha, NE
2014	Mary Joy Quinn	San Francisco, CA
2015	Judge Andrew Klein	Phoenix, AZ
2016	Shale D. Stiller	Baltimore, MD
2017	Dana C. Hanley, Esq.	South Paris, ME
2018	Judge Thomas A. Swift	Vienna, OH

Judge Isabella Horton Grant Guardianship Award

2012	Phillip Marshall Annette de la Renta
2013	Erica Wood
2014	Hon. Patrick Connaghan
2015	Michael Mackniak
2016	Brenda K. Uekert
2017	Carleton Coleman
2018	Pamela Teaster
2019	Christopher Bieter

May 2019

NATIONAL COLLEGE OF PROBATE JUDGES

Meeting Schedule

2019 Fall Conference

November 13-16, Loews Philadelphia, Philadelphia, Pennsylvania

2020 Spring Conference

May 13-16, Cheyenne Mountain Resort, Colorado Springs, Colorado

Dr. Gerry W. Beyer joined the faculty of the Texas Tech University School of Law in June 2005 as the first holder of the Governor Preston E. Smith Regents Professorship. Previously, Prof. Beyer taught as a professor or visiting professor at several other law schools including Boston College, Boston University, The Ohio State University, Southern Methodist University, the University of New Mexico, Santa Clara University, St. Mary's University, and La Trobe University (Australia). He is the recipient of dozens of outstanding and distinguished faculty awards including the Chancellor's Distinguished Teaching Award, the most prestigious university-wide teaching award at Texas Tech, and the 2013 and 2017 Outstanding Law Researcher Awards. Professor Beyer received his J.D. from The Ohio State University and his LL.M. and J.S.D. degrees from the University of Illinois. He is a member of the Order of the Coif, an Academic Fellow of the American College of Trust and Estate Counsel, a member of the American Law Institute, and was inducted into the Estate Planning Hall of Fame by The National Association of Estate Planners & Councils.



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CYBER ESTATE PLANNING AND ADMINISTRATION

Dr. Gerry W. Beyer

Governor Preston E. Smith Regents Professor of Law
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Cheap Funerals

- In which state are funerals the cheapest?
 - A. Arkansas
 - B. Mississippi
 - C. Nevada
 - D. Arizona

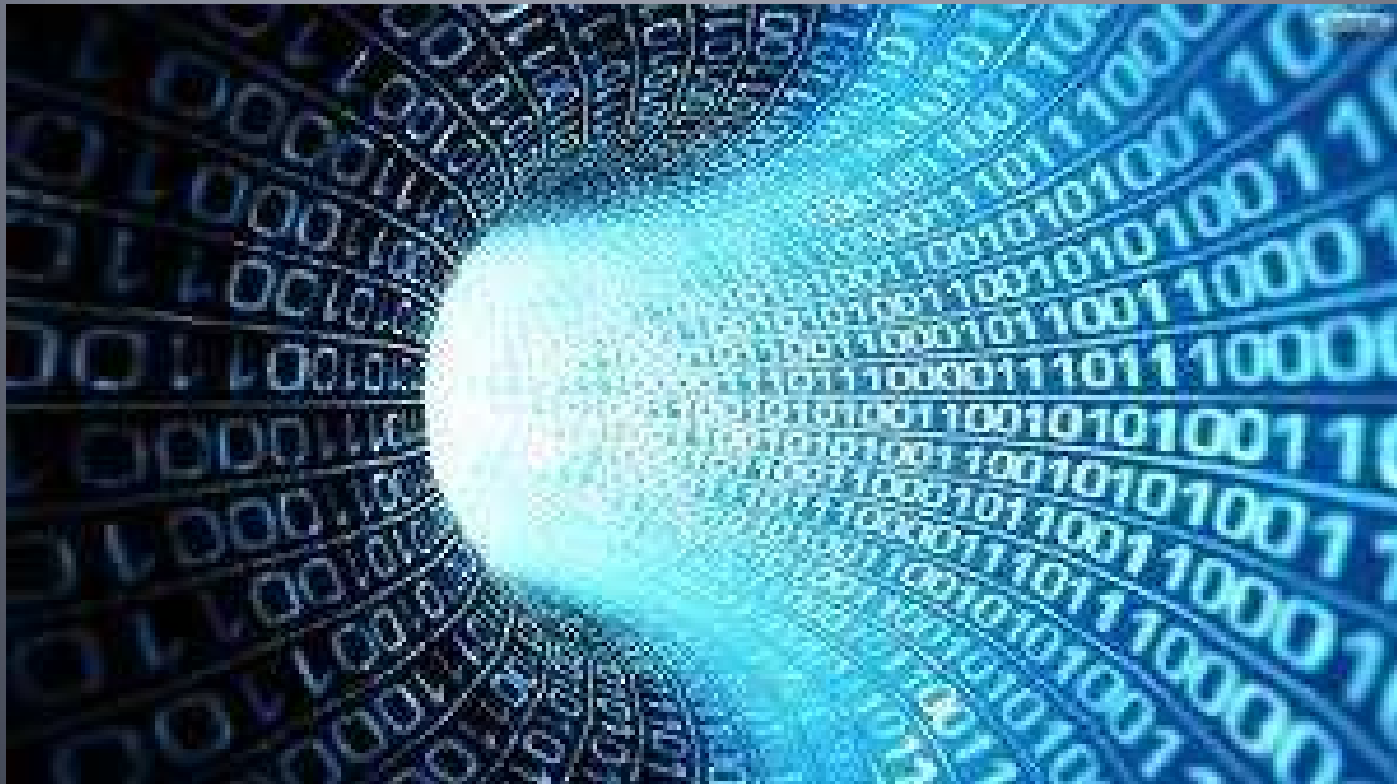
Most Complex Probate

- In which state is probate the most complex?
 - A. California
 - B. Texas
 - C. Arkansas
 - D. Alaska

Longest Life Expectancy

- Which state has the longest life expectancy at over 81 years?
 - A. Arkansas
 - B. Hawaii
 - C. Nevada
 - D. Florida

Digital Assets

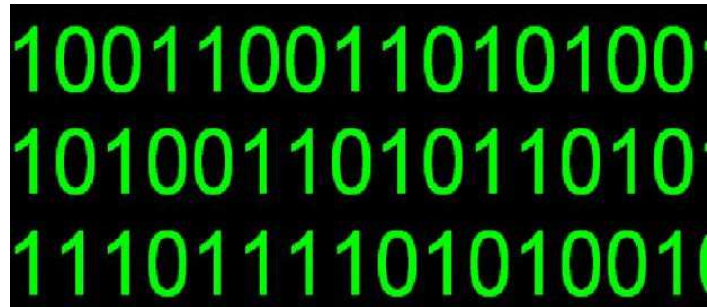


Overview

- What are “digital assets”?
- The importance of planning for these assets.
- The impact of user policies and Federal law.
- Obstacles to planning for these assets.
- Fiduciary access to digital assets – generally.
- The Revised Uniform Fiduciary Access to Digital Assets Act.
- How a probate judge may be asked to deal with digital assets under RUFADAA.

Definition of Digital Assets

- Electronic record in which an individual has a right or interest.
 - May be electrical, digital, magnetic, wireless, optical, electromagnetic, etc.



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- Does *not* include any underlying asset or liability unless it is itself an electronic record.

Digital Assets -- Personal

- **Types of Files:**
 - e-mail and text messages
 - Photos
 - Music (mp3)
 - Videos
 - Documents – word processing, pdf, etc.
 - Spreadsheets
 - Tax records and returns
 - PowerPoint presentations
 - e-books (Kindle, Nook, etc.)

Digital Assets -- Personal

- **Location of files:**
 - Computer
 - Smart phone
 - Tablet
 - e-reader
 - Camera
 - Memory cards or USB flash drives
 - CDs and DVDs
 - Online in the cloud

Digital Assets -- Personal

- **Gaining access:**
 - Password or equivalent to start device.
 - Password to access operating system.
 - Password to open document.
 - Password to access website where material stored.

Digital Assets – Social Media

The Facebook logo, consisting of the word "facebook" in white lowercase letters on a blue rectangular background.

facebook

The LinkedIn logo, featuring the word "Linked" in black and "in" in white inside a blue square, with a registered trademark symbol.

Linked in

The Twitter logo, featuring the word "twitter" in blue lowercase letters followed by a blue bird icon.

twitter

The Instagram logo, featuring a camera icon with a rainbow flash and the word "Instagram" in a white script font on a blue rectangular background.

Instagram

Digital Assets – Financial Accounts

- **Examples:**
 - Bank accounts
 - PayPal
 - Cryptocurrency (e.g., Bitcoin)
 - Investment and brokerage accounts
 - Utility bill payment (water, gas, telephone, cell phone, cable, and trash disposal)
 - Loan payments (mortgage, car, credit cards, etc.)
 - IRS e-filing

Digital Assets – Business Accounts

- **Examples:**
 - Client records (attorney, CPA, etc.).
 - Patient records (physicians, dentists, etc.).
 - Customer information databases (names, addresses, credit card numbers, order history, pending orders, etc.).
 - Inventory.
 - eBay accounts.

Digital Assets – Internet Sites

- **Domain Names**
- **Blogs**

Digital Assets – Loyalty Program Benefits

- **Examples:**
 - Frequent flyer points.
 - Credit card “cash back” or “reward points”
 - Business “points,” discounts, or vouchers.

Digital Assets -- Others

- Gaming “money,” avatars, and virtual property



Importance of Planning

- 1. Make things easier for your family and executor when you die or become disabled.

Life
100% fatal

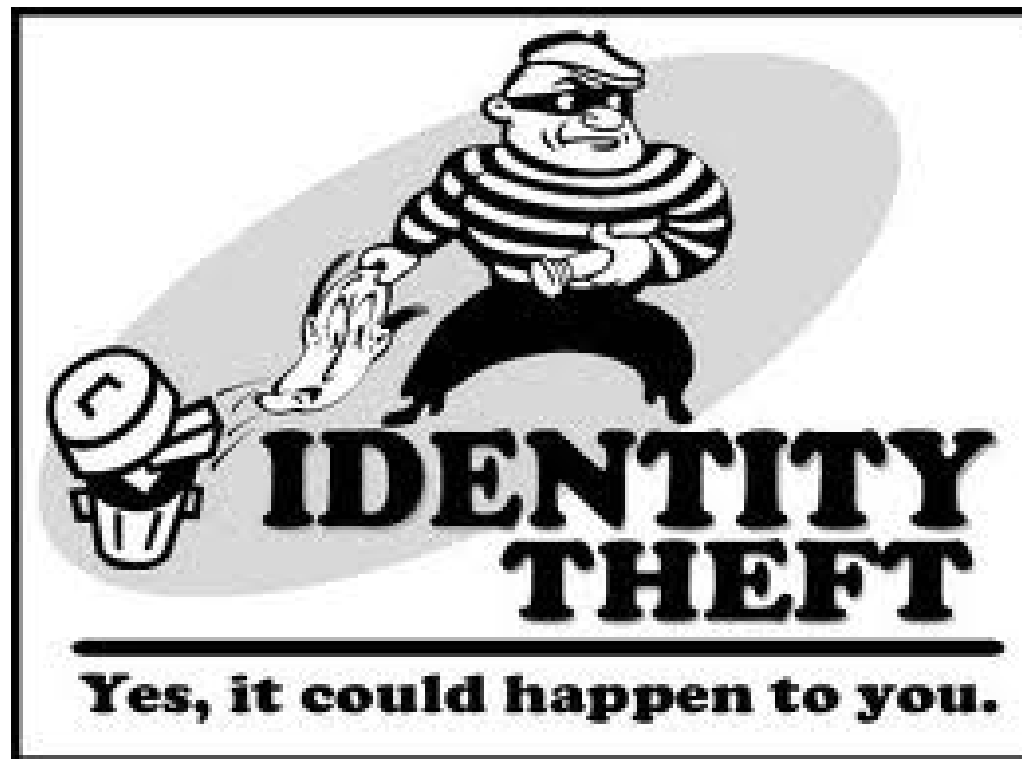


Disability > 90 days
60% chance



Importance of Planning

- 2. Prevent identify theft.



Importance of Planning

- 3. Prevent Financial Losses to Estate



???.com



Importance of Planning

- 4. Avoid Losing the Deceased's Story



Importance of Planning

- 5. Protect Secrets from Being Revealed



Obstacles to Planning

1. Terms of Service Agreements [TOSA]

- May govern what happens upon death.
- Did decedent *really* know or agree?

I Agree

I Have No Idea
What This Says



Obstacles to Planning

1. Terms of Service Agreements [TOSA]



Obstacles to Planning

2. Federal Law

- **Stored Communications Act**
- **Computer Fraud and Abuse Act**

Obstacles to Planning

2. Federal Law -- Interface with User Agreements

- Agreements usually prohibit user from granting others access to account.
- Thus, revealing user name and password to a non-user and allowing that person to access the account may be in violation of federal statutes prohibiting access without lawful consent.

Obstacles to Planning

- **2. Federal Law -- Potential Federal Law Limitations**
 - Can provider turn over without violating Stored Communications Act?
 - Daftary case (2012).
 - Ajemian case (2017).



Sahar Daftary

Obstacles to Planning

- 3. Safety
 - Computer or papers can be stolen.
 - Encryption can be broken.
 - Internet storage can be hacked.



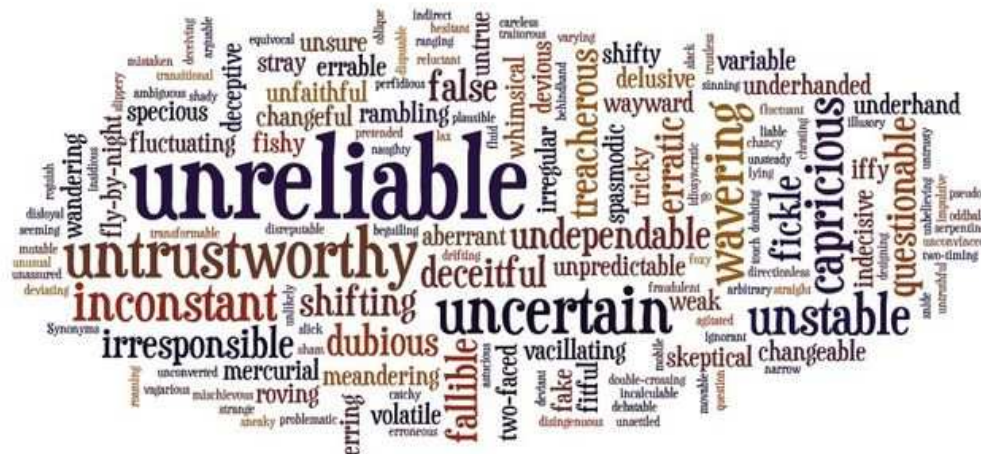
Obstacles to Planning

- 4. Hassle -- Information changes rapidly:
 - Accounts opened.
 - Accounts closed.
 - Passwords change.
 - Equipment is bought and sold.



Obstacles to Planning

- **5. Uncertain Reliability of Afterlife Companies and Ability to do What Promised**



Summary: Why does PR want access?

- **Complete estate inventory**
 - Contents of estate
 - Value of assets
- **Administer estate assets**
- **Give notices to creditors**
- **Pay creditors**
- **Distribute to beneficiaries**

History of Fiduciary Access to Digital Assets

- **1. Primitive state statutes**
 - Remain only in Louisiana, Oklahoma, and Rhode Island
- **2. Uniform Fiduciary Access to Digital Assets Act (2014)**
 - Fiduciaries have default access unless person provided otherwise in will, power of attorney, trust, etc.
 - Defeated in 26 states; only enacted in Delaware
- **3. Privacy Expectation Afterlife & Choices Act**
 - No access unless express permission plus court order.
 - Enacted in Virginia but later repealed

Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)

- Substantial rewrite approved July 2015.
- Fiduciaries do not have default access to e-mail contents.
- Instead, access to contents only if the user consented to disclosure.

RUFADAA -- Endorsements

- Association of American Retired Persons
- Center for Democracy and Technology
- Facebook
- Google
- National Academy of Elder Law Attorneys

RUFADAA – Enactment Status

Green = enacted Blue = introduced Gray = partial adoption

Alabama
Alaska
Arizona
Arkansas
California
Colorado
Connecticut
Delaware
DC
Florida
Georgia
Hawaii
Idaho

Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Missouri

Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania

Rhode Island
South Carolina
South Dakota
Tennessee
Texas
Utah
Vermont
Virginia
Virgin Islands
Washington
West Virginia
Wisconsin
Wyoming

(as of 04/15/2019)

RUFADAA – Fiduciaries Covered

- **Personal representatives of a decedent's estate**
 - Executors
 - Administrators
- **Agents under a power of attorney**
- **Trustees**
- **Guardians appointed by a court**

RUFADAA – Access to Contents

- Access to contents of electronic communications (e.g., e-mail, text messages, social media accounts).
 - Priority order for consent to access:
 1. On-line tool directions.
 2. Directions in will, trust, power of attorney, court order appointing guardian.
 3. Terms of service (they may prohibit access to fiduciaries).

RUFADAA – Access to Contents

- Statute appears to say the court may order contents access *regardless* of consent but providers balk.
- Thus, very hard for PR to get access to contents if the decedent died intestate or died testate with no authorization.

RUFADAA – Access to Catalogue

- Access to catalogue of electronic communications and other digital assets is allowed even without express permission.
 - Catalogue information includes:
 - Name of sender
 - E-mail address of sender
 - Date and time the message was sent
 - Does *not* include the subject line

RUFADAA – PR to Contents

- Method for deceased user's PR to gain access to contents:
 - PR sends request to custodian including:
 - Certified copy of death certificate.
 - Copy of will showing express consent (unless on-line tool used).
 - Certified copy of document granting authority (letters).

RUFADAA – PR to Contents

- Method for deceased user's PR to gain access to contents:
 - Custodian may ask for the following before disclosing:
 - Information identifying the account and linking the deceased user to the account.
 - Court order finding that:
 - Account belonged to decedent.
 - Disclosure would not violate Stored Communications Act, etc.
 - Deceased user consented.
 - Disclosure reasonably necessary for estate administration

RUFADAA – PR to Catalogue, etc.

- Method for deceased user's PR to gain access to catalogue and other digital assets:
 - Send request to custodian including:
 - Certified copy of death certificate.
 - Certified copy of document granting authority (letters).

RUFADAA – PR to Catalogue, etc.

- Method for deceased user's PR to gain access to catalogue and other digital assets:
 - Custodian may ask for the following before disclosing:
 - Information identifying the account and linking the deceased user to the account.
 - Court order finding that:
 - Account belonged to decedent.
 - Disclosure reasonably necessary for estate administration

RUFADAA – Important Advice



- Several custodians have indicated that they will *always* require a court order prior to disclosure.
- Thus, prudent attorneys will request the court to make the necessary findings as early in the estate administration process as is possible.

RUFADAA – Guardians

- Method for Guardians of the Person (Conservators) to gain access
 - Guardians have no automatic access by virtue of being a guardian.
 - With a court hearing, the court may grant compete access.
 - Without a hearing, the court may grant access to the catalogue and other assets (but not contents).

RUFADAA – Agents & Trustees

- The procedures for agents and trustees to gain access to contents and catalogue do *not* normally have a court component.
- However, if the custodian does not comply with a proper request, the agent or trustee may come to court to seek a court order forcing the custodian to permit access.

RUFADAA – Custodian's Response

- **14. Custodian's Response to Proper Request**
 - **Must comply within 60 days.**
 - May charge reasonable fee.
 - May disclose on paper or digitally.
 - May object claiming request causes undue burden.

RUFADAA – Custodian's Response

- **Custodian's Response to Proper Request**
 - **If custodian does not comply:**
 - Custodian incurs no penalty.
 - Fiduciary may obtain court order directing disclosure.
 - Fiduciary's estate bears all costs such as attorney fees and court costs.
 - However, custodian may be liable if it does not comply with a valid court order.

Cryptocurrency



Cryptocurrency

Must have the private key or seed phrase.

- If lost, cryptocurrency gone forever.
- No court order can help.



Cryptocurrency

■ Advice

- Protect and transfer private key
 - Be sure someone knows you own cryptocurrency.
 - Make back-up copies of the private keys and passwords to access digital wallets.
- Keep records of where purchased and price
 - Cryptocurrency is property, not money, so capital gains tax may be owed.

Questions?



CYBER ESTATE PLANNING AND ADMINISTRATION



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**2019 SPRING CONFERENCE
NATIONAL COLLEGE OF PROBATE JUDGES**

New Orleans, Louisiana

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166422

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"*Estate Planning for Digital Assets*," Midland Memorial Foundation and Midland College Estate Planning Update 2013, Midland, Texas, May 2, 2013.

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. TYPES OF DIGITAL ASSETS.....	1
A. Personal.....	1
B. Social Media	2
C. Financial Accounts	2
D. Business Accounts.....	2
E. Domain Names or Blogs	2
F. Loyalty Program Benefits	2
III. IMPORTANCE OF PLANNING FOR DIGITAL ASSETS.....	3
A. To Make Things Easier on Executors and Family Members.....	3
B. To Prevent Identity Theft	3
C. To Prevent Financial Losses to the Estate	3
D. To Avoid Losing the Deceased’s Personal Story	4
E. To Prevent Unwanted Secrets from Being Discovered	5
F. To Prepare for an Increasingly Information-Drenched Culture	5
IV. OBSTACLES TO PLANNING FOR DIGITAL ASSETS.....	5
A. User Agreements.....	5
B. Federal Law.....	6
C. Safety Concerns	8
D. Hassle.....	8
E. Uncertain Reliability of Online Afterlife Management Companies	8
F. Overstatement of the Abilities of Online Afterlife Management Companies	8
V. BRIEF HISTORY OF FIDUCIARY ACCESS TO DIGITAL ASSETS	8
A. Early State Law	9
B. First Attempt at a Uniform Act	10
C. Privacy Expectation Afterlife and Choices Act.....	10
VI. REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT	11
A. Definitions	11
B. Applicability	13
C. Priority of Instructions.....	13
D. Disclosure Procedures	13
E. Custodian’s Response to Request to Disclose Digital Assets	16
F. Duty and Authority.....	16

VII. PLANNING SUGGESTIONS.....	17
A. Take Advantage of Online Tools.....	17
B. Back-Up to Tangible Media	17
C. Prepare Comprehensive Inventory of Digital Estate.....	18
D. Provide Immediate Access to Digital Assets.....	18
E. Authorize Agent to Access Digital Assets	18
F. Address Digital Assets in a Will.....	19
G. Place Digital Assets in a Trust.....	20
H. Use Online Afterlife Company	20
VIII. CRYPTOCURRENCY	21
A. The Basics of Cryptocurrency	21
B. Benefits of Cryptocurrency	23
C. Risks of Cryptocurrency	23
D. Prudent Investment Concerns	24
E. Taxation of Cryptocurrency	24
F. Recommendations	24
IX. FUTURE REFORM AREAS	25
A. Providers Gather User’s Actual Preferences	25
B. Congress Amends Federal Law	26
C. States Enact RUFADAA	26
X. CONCLUSION.....	26
APPENDIX A – DIGITAL ESTATE INFORMATION SAMPLE FORM.....	27
APPENDIX B –SAMPLE DOCUMENT LANGUAGE.....	37
A. Wills	37
B. Power of Attorney.....	39
C. Authorization and Consent for Release of Electronically Stored Information	39
D. Non-Authorization.....	40
E. Pleading	40
F. Court Order.....	40
APPENDIX C – SAMPLE REQUEST LETTER TO DIGITAL ASSET CUSTODIAN.....	41
APPENDIX D – A PRIMER FOR PROBATE JUDGES.....	42
APPENDIX E – SUMMARY OF STATE STATUTES.....	45
A. RUFADAA Enacted	45
B. RUFADAA Pending.....	46
C. Non-RUFADAA.....	46

POWERPOINT SLIDES.....	47
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CYBER ESTATE PLANNING AND ADMINISTRATION

I. INTRODUCTION

For hundreds of years, we have viewed personal property as falling into two major categories – tangible (items you can see or hold) and intangible (items that lack physicality). Recently, a new subdivision of personal property has emerged that many label as “digital assets.” There is no real consensus about the property category in which digital assets belong. Some experts say they are intellectual property, some say they are intangible property, and others say they can easily be transformed from one form of personal property to another with the click of a “print” button. See Scott Zucker, [*Digital Assets: Estate Planning for Online Accounts Becoming Essential \(Part II\)*](#), The Zucker Law Firm PLLC (Dec. 16, 2010). In actuality, some accounts that we consider “assets” are simply licenses to use a website’s service that generally expire upon death. See Steven Maimes, [*Understand and Manage Digital Property*](#), The Trust Advisor Blog (Nov. 20, 2009).

Digital assets may represent a sizeable portion of a client’s estate. A survey conducted by McAfee, Inc. revealed that the average perceived value of digital assets for a person living in the United States is \$54,722. [*McAfee Reveals Average Internet User Has More Than \\$37,000 in Underprotected ‘Digital Assets’*](#), McAfee.com, (Sept. 27, 2011) (the \$37,000 figure is the global average).

This article aims to educate estate planning professionals on the importance of planning for the disposition and administration of digital assets so that fiduciaries can locate, access, protect, and properly dispose of them. The operation of the Revised Uniform Fiduciary Access to Digital Assets Act now enacted in at least thirty-six states is explained in detail. Several planning techniques that may be employed are discussed and the appendices include sample forms clients may use to organize their digital assets and sample language that can be used in estate planning documents, court

orders, and in request letters to digital asset custodians.

II. TYPES OF DIGITAL ASSETS

The [*Revised Uniform Fiduciary Access to Digital Assets Act*](#) (hereinafter “RUFADAA”) defines “digital asset” as “an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.” For purposes of this definition, “electronic” means “relating to technology having electrical, digital, magnetic, wireless, optical, electro-magnetic, or similar capabilities,” and “record” means “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” [*RUFADAA § 2*](#).

Digital assets can be classified in numerous different ways, and the types of property and accounts are constantly changing. (A decade ago, who could have imagined the ubiquity of Facebook? Who can imagine what will replace it in the next few decades?) People may accumulate different categories of digital assets: personal, social media, financial, and business. Although there is some overlap, of course, clients may need to make different plans for each type of digital asset.

A. Personal

The first category includes personal assets stored on a computer, tablet, smart phone, or other digital device, as well as uploaded onto a web site or on a cloud storage account. These can include treasured photographs or videos stored on an individual’s hard drive or photo sharing site, such as tinybeans or Flickr. Other examples include emails, texts, documents, music playlists, medical records, tax documents, personal blogs, digital books, gaming assets, avatars, and recordings from home security systems. The list of what a client could potentially own or control is, almost literally, infinite.

B. Social Media

Social media assets involve interactions with other people with accounts through providers such as Facebook, LinkedIn, Twitter, YouTube, Instagram, Reddit, Tumblr, and Pinterest. These sites are used not only for messaging and social interaction, but they also can serve as storage for documents, photos, videos, and other electronic files.

C. Financial Accounts

The most obvious example of financial digital assets are virtual currencies, which are becoming more prevalent and are addressed in more detail in section VIII below.

Though some bank and investment accounts have no connection to brick-and-mortar buildings, most retain some connection to a physical space. They are, however, increasingly designed to be accessed via the Internet with few, if any, paper records or monthly statements. For example, an individual can maintain an Amazon.com account, have an e-Bay account, be registered with PayPal, and subscribe to online magazines and other media providers.

Many people make extensive arrangements to pay bills online such as income taxes, mortgages, car loans, credit cards, water, gas, telephone, cell phone, cable, and trash disposal. These individuals may not receive traditional paper statements via the U.S. mail with regard to these accounts.

D. Business Accounts

An individual engaged in any type of commercial practice is likely to store some information on computers. Businesses collect data such as customer orders and preferences, home and shipping addresses, credit card data, bank account numbers, and even personal information such as birthdates and the names of family members and friends. Physicians store patient information. eBay sellers have an established presence and reputation. Lawyers might store client files or use a Dropbox.com-type service that allows a legal team spread across the United

States to access litigation documents through shared folders.

E. Domain Names or Blogs

A domain name or blog can be valuable, yet access and renewal may only be possible through a password or e-mail.

F. Loyalty Program Benefits

In today's highly competitive business environment, there are numerous options for customers to make the most of their travel and spending habits, especially if they are loyal to particular providers. Airlines have created programs in which frequent flyers accumulate "miles" or "points" they may use towards free or discounted trips. Some credit card companies offer users an opportunity to earn "cash back" on their purchases or accumulate "points" which the cardholder may then use for discounted merchandise, travel, or services. Retail stores often allow shoppers to accumulate benefits including discounts and credit vouchers. Some members of these programs accumulate a staggering amount of points or miles and then die without having "spent" them. For example, there are reports that "members of frequent-flyer programs are holding at least 3.5 trillion in unused miles." [*Managing Your Frequent-Flyer Miles*](#) (last visited Aug. 6, 2017). See also Becky Yerak, [*Online Accounts After Death: Remember Digital Property When Listing Assets*](#), CHICAGO TRIB., Aug. 26, 2012.

The rules of the loyalty program to which the client belongs plays the key role in determining whether the accrued points may be transferred. Many customer loyalty programs do not allow transfer of accrued points upon death, but as long as the beneficiary knows the online login information of the member, it may be possible for the remaining benefits to be transferred or redeemed. However, some loyalty programs may view this redemption method as fraudulent or require that certain paperwork be filed before authorizing the redemption of remaining benefits.

III. IMPORTANCE OF PLANNING FOR DIGITAL ASSETS

A. To Make Things Easier on Executors and Family Members

When individuals are prudent about their online lives, they have many different usernames and passwords for their digital assets. Each digital asset may require a different means of access—simply logging onto someone’s computer generally requires a password, perhaps a different password for operating system access, and then each of the different files on the computer may require its own password. Each online account is likely to have a username, password, and security questions and answers. Some devices and apps have biometric verification, such as fingerprint scanning, iris recognition, or face recognition. This is the only way to secure identities, but this devotion to protecting sensitive personal information can wreak havoc on families and fiduciaries upon incapacity or death.

Consider the well-publicized “Ellsworth case.” After Lance Cpl. Justin Ellsworth was killed in 2004 while serving with the United States Marine Corps in Afghanistan, his parents began a legal battle with Yahoo! to gain access to messages stored in his e-mail account. [*Yahoo Will Give Family Slain Marine’s E-mail Account*](#), USA TODAY (April 21, 2005). Yahoo! initially refused the family’s request, but ultimately did not fight a probate court order to hand over more than 10,000 pages of e-mails. *Id.* However, the family remained disappointed when the data CD provided by Yahoo! contained only received e-mails and none their late son had written. *Id.* Had Justin provided guidance to his family members regarding his digital assets, his family may have been able to avoid the expense and trouble of going to court, and they also might have gained access to all the emails they desired to have, rather than just some.

In addition, many individuals no longer receive paper statements or bills and instead receive everything via email or by logging on to a service provider’s online account. Without instructions

from a client, locating, collecting, and monitoring these assets will be a very burdensome task for the client’s family members and fiduciaries.

Despite legislation addressing fiduciaries’ ability to access and manage digital assets (discussed below), the rights of executors, agents, guardians, and beneficiaries with regard to digital assets are still unclear. The more a client plans in advance for digital assets, the better chance his or her fiduciaries will have to be able to efficiently access and administer such assets.

B. To Prevent Identity Theft

In addition to needing access to online accounts for personal reasons and closing probate, family members need this information quickly so that a deceased’s identity is not stolen. Until authorities update their databases regarding a new death, criminals can open credit cards, apply for jobs under a dead person’s name, and get state identification cards. A fraud prevention firm by the name of ID Analytics conducted a study in 2012 and found that approximately 2.5 million deceased Americans have their identity stolen each year. See [Identity Theft and Tax Fraud: Hearing Before the H. Comm. on Ways and Means, 112th Cong. \(2012\) \(statement of Rep. Sam Johnson, Chairman, Subcomm. on Social Security\)](#). Criminals know that they have a window of opportunity when someone passes away, so they search through obituaries and other death databases to locate new victims.

C. To Prevent Financial Losses to the Estate

1. Bill Payment and Online Sales

Electronic bills for utilities, loans, insurance, and other expenses need to be discovered quickly and paid to prevent cancellations. This concern is augmented further if the deceased or incapacitated conducted an online business and is the only person with access to incoming orders, the servers, corporate bank accounts, and employee payroll accounts. See Tamara Schweitzer, [Passing on Your Digital Data](#), INC., Mar. 1, 2010. Bids for items advertised on eBay may go unanswered and lost forever.

2. Domain Names

The decedent may have registered one or more domain names that have commercial value. If registration of these domain names is not kept current, they can easily be lost to someone waiting to snag the name upon a lapsed registration.

Here is list of some of the most expensive domain names that have been sold in recent years:

1. Carinsurance.com \$49.7 million in 2010
2. Insurance.com \$35.6 million in 2010
3. VacationRentals.com \$35 million in 2007
4. PrivateJet.com \$30.18 million in 2012
5. Internet.com \$18 million in 2009
6. 360.com \$17 million in 2015
7. Insure.com \$16 million in 2009
8. Fund.com £9.99 million in 2008
9. Sex.com \$14 million in 2010
10. Hotels.com \$11 million in 2001
11. Porn.com \$9.5 million in 2007
12. Porno.com \$8,888,888 in 2015
13. Fb.com by Facebook \$8.5 million in 2010
14. Business.com \$7.5 million in 1999
15. Diamond.com \$7.5 million in 2006
16. Beer.com \$7 million in 2004
17. Z.com 6.8 million in 2014
18. iCloud.com by Apple Inc. \$6 million in 2011
19. Israel.com \$5.88 million in 2008
20. Casino.com \$5.5 million in 2003

[List of most expensive domain names](#), Wikipedia (updated May 21, 2018).

3. Encrypted Files

Some digital assets of value may be lost if they cannot be decrypted. Consider the case of Leonard Bernstein who died in 1990 leaving the manuscript for his memoir entitled *Blue Ink* on his computer in a password-protected file. To this day as far as these authors can ascertain, no one has been able to break the password and access what may be a very interesting and valuable document. See Helen W. Gunnarsson, *Plan for Administering Your Digital Estate*, 99 ILL. B.J. 71 (2011).

4. Virtual Property

The decedent may have accumulated valuable virtual property for use in on-line games. For example, a planet for the *Entropia Universe* sold for \$6 million in 2011 and an asteroid space resort for the same game sold for \$635,000 in 2010. Andrea Divirgilio, [Most Expensive Virtual Real Estate Sales](#), Bornrich.com (Apr. 23, 2011) (also discussing other high priced sales of virtual property); Oliver Chiang, [Meet The Man Who Just Made a Half Million From the Sale of Virtual Property](#), Forbes.com (Nov. 13, 2010). There are also reports of more “reasonable” prices for virtual items such as a virtual sword for use in *Age of Wulin*, a video game, which was sold for \$16,000. Katy Steinmetz, [Your Digital Legacy: States Grapple with Protecting Our Data After We Die](#), Time Tech (Nov. 29, 2012). If monthly usage or subscription fees apply and are not paid, this virtual property could be lost.

Your client may also have the potential of winning large prizes in videogame tournaments. In 2017, reports indicate that over \$100 million in gaming prizes were awarded. *Big Bucks for Pro Gamers*, WIRED, Dec. 2017, at 34.

D. To Avoid Losing the Deceased’s Personal Story

Many digital assets are not inherently valuable, but are valuable to family members who extract meaning from what the deceased leaves behind. Historically, people kept special pictures, letters, and journals in shoeboxes or albums for future heirs. Today, this material is stored on computers or online and is often never printed. Personal

blogs and Twitter feeds have replaced physical diaries, and e-mails and texts have replaced letters. Without alerting family members that these assets exist, and without telling them how to get access to them, the story of the life of the deceased may be lost forever. This is not only a tragedy for family members, but also possibly for future historians who are losing pieces of history in the digital abyss. Rob Walker, [*Cyberspace When You're Dead*](#), N.Y. TIMES, Jan. 5, 2011.

For more active online lives, this concern may also involve preventing spam from infiltrating a loved one's website or blog site. Comments from friends and family are normally welcomed, but it is jarring to discover the comment thread gradually infiltrated with links for "cheap Ugg boots." *Id.* "It's like finding a flier for a dry cleaner stuck among flowers on a grave, except that it is much harder to remove." *Id.* In the alternative, family members may decide to delete the deceased's website against the deceased's wishes simply because those wishes were not expressed to the family.

E. To Prevent Unwanted Secrets from Being Discovered

Sometimes people do not want their loved ones discovering private emails, documents, or other electronic material. They may contain hurtful secrets, non-politically correct jokes and stories, or personal rantings. The decedent may have a collection of adult recreational material (porn) which he or she would not want others to know had been accumulated. A professional such as an attorney or physician is likely to have files containing confidential client information. Without designating appropriate people to take care of electronically stored materials, the wrong person may come across this type of information and use it in an inappropriate or embarrassing manner.

F. To Prepare for an Increasingly Information-Drenched Culture

Although the principal concern today appears to be the disposition of social media and e-mail contents, the importance of planning for digital assets will increase each day. Online information

will continue to spread out across a growing array of flash drives, iPhones, and cloud accounts, and it will be more difficult to locate and accumulate. As people invest more information about their activities, health, and collective experiences into digital media, the legacies of digital lives grow increasingly important. If a foundation for planning for these assets isn't set today, we may re-learn the lesson the Rosetta Stone once taught us: "there is no present tense that can long survive the fall and rise of languages and modes of recordkeeping." Ken Strutin, [*What Happens to Your Digital Life When You Die?*](#), N.Y. L.J., Jan. 27, 2011 (For fifteen centuries, the meaning of the hieroglyphs on the Rosetta Stone detailing the accomplishments of Ptolemy V were lost when society neglected to safeguard the path to deciphering the writings. A Napoleonic soldier eventually discovered the triptych, enabling society to recover its writings.).

IV. OBSTACLES TO PLANNING FOR DIGITAL ASSETS

Including digital assets in estate plans is a relatively new phenomenon, and there are several obstacles that make it difficult to plan for them. Some of the problem areas include user agreements, federal law, safety issues involved with passwords, the hassle of updating this information, the uncertainty surrounding online afterlife management companies, and the fact that some online afterlife management companies overstate their abilities.

A. User Agreements

1. Terms of Service Agreements ("TOSA")

When an individual signs up for a new online account or service, the process typically requires an agreement to the provider's terms of service. Service providers may have policies on what will happen on the death of an account holder but individuals rarely read the terms of service carefully, if at all. Nonetheless, the user is at least theoretically made aware of these policies before being able to access any service. Anyone who has signed up for an online service has probably clicked

on a box next to an “I agree” statement near the bottom of a web page or pop-up window signifying consent to the provider’s TOSA. The terms of these “clickwrap” agreements are typically upheld by the courts.

For example, at the end of its TOSA, Yahoo! explicitly states that an account cannot be transferred: “You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.” [Yahoo! Terms of Service](#), Yahoo! (last visited Aug. 6, 2017).

2. Ownership

A problem may also arise if the client does not actually own the digital asset but merely has a license to use that asset while alive. It is unlikely a person can transfer to heirs or beneficiaries music, movies, and books they have purchased in electronic form although they may transfer “old school” physical records (vinyl), CDs, DVDs, books, etc. without difficulty. It has been reported that actor Bruce Willis wants to leave his large iTunes music collection to his children but that Apple’s user agreement prohibits him from doing so. See Brandon Griggs, [Can Bruce Willis Leave His iTunes Music to His Kids?](#), CNN.com (Sept. 4, 2012) and Claudine Wong, [Can Bruce Willis Leave His iTunes Collection to His Children?: Inheritability of Digital Media in the Face of EULAS](#), 29 SANTA CLARA COMPUTER & TECH. L.J. 703 (2013). Apple’s Terms and Conditions grant the user a license to use their services but expressly prohibit transfers, making it clear that services “are licensed, not sold, to you,” and that Apple “grants to you a nontransferable license.” [Apple Media Services Terms and Conditions](#) (last visited Aug. 6, 2017).

B. Federal Law

There are two primary federal laws that are relevant in the discussion regarding a fiduciary’s access to digital assets: (1) the Stored Communications Act (“SCA”), a federal privacy law, and (2) the Computer Fraud and Abuse Act (“CFAA”), a federal criminal law.

1. Stored Communications Act

The Stored Communications Act, 18 USC § 2701 et seq. was enacted in 1986 as part of the Electronic Communications Privacy Act (“ECPA”), 18 USC § 2510 et seq. It regulates access to and disclosure of stored electronic communications and was an effort by Congress to deal with the consequences of online communications upon Fourth Amendment privacy protections. The SCA provides for criminal penalties to be imposed on anyone who “intentionally accesses without authorization a facility through which an electronic communication service is provided” or “intentionally exceeds an authorization to access that facility” and “thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system.” 18 USC § 2701(a).

In addition, the SCA prohibits an electronic communication service provider or a remote computing service provider from knowingly divulging the contents of a communication that is stored by, carried, or maintained on that service, unless disclosure is made “with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.” 18 USC § 2702(b)(3).

a. *In re Facebook, Inc.* (“Daftary case”)

The Federal District Court for the Northern District of California applied the SCA in the Daftary case where the personal representative of a decedent’s estate attempted to compel Facebook to turn over contents of the decedent’s account under the belief that the account held evidence that the decedent did not commit suicide and was instead murdered. See [In re Facebook, Inc.](#), 923 F. Supp. 2d 1204 (N.D. Cal. 2012). See also James Lamm, [Facebook Blocks Demand for Contents of Deceased User’s Account](#), Oct. 11, 2012. The court noted that under the SCA, lawful consent to disclosure may *permit* a custodian to disclose electronic communications, but it does not *require* such disclosure, and therefore Facebook

could not be compelled to turn over the contents. The court specifically declined to decide whether the personal representatives could provide sufficient “lawful consent” under the SCA, but it also noted that Facebook could determine on its own that the personal representative had standing to consent to disclosure and provide the requested materials voluntarily.

b. Ajemian v. Yahoo!

On October 16, 2017, the Supreme Judicial Court of Massachusetts became the first court to answer the question of whether a personal representative of a deceased individual may grant “lawful consent” on behalf of the deceased individual for purposes of the SCA. See [*Ajemian v. Yahoo!, Inc.*](#) In a tremendous win for fiduciaries, the court answered the question in the affirmative, firmly repudiating the position of service providers that the SCA prohibits such disclosure. However, the court’s decision echoed the Daftary court’s sentiment that even with lawful consent from a personal representative, the SCA does not *require* Yahoo! to disclose the decedent’s email account content to the personal representatives; it merely holds that the SCA *permits* the disclosure. The court remanded one portion of the case to the probate court to determine whether the Yahoo! TOSA prevents disclosure. It is anticipated that the probate court, on remand, will issue an order mandating that Yahoo! disclose the contents of the account, now that the Supreme Judicial Court has confirmed that the personal representatives may provide Yahoo! with lawful consent under the SCA.

The United States Supreme Court denied Yahoo!’s petition for a writ of certiorari on March 26, 2018.

2. Computer Fraud and Abuse Act

The Computer Fraud and Abuse Act, 18 U.S.C. § 1030 was also enacted by Congress in 1986. It states that anyone who “intentionally accesses a computer without authorization or exceeds authorized access” has committed a crime. 18 USC § 1030(a)(2). A basic violation of the CFAA is a misdemeanor but can become a felony

if done for profit or in furtherance of another crime or tort.

The United States Department of Justice asserts that the CFAA allows the government to charge an individual with a crime for violating the CFAA if such individual violates the access rules of a service provider’s TOSA. “This position was stated by Richard Downing, Deputy Chief of the DOJ’s Computer Crime and Intellectual Property Section, Criminal Division, in testimony presented on November 15, 2011, before the U.S. House Committee on Judiciary, Subcommittee on Crime, Terrorism, and National Security.” James Lamm, “*Planning for Digital Property: ‘The Future Ain’t What it Used to Be’ (A Yogi Berra Quote)*,” HECKERLING INSTITUTE ON ESTATE PLANNING (2017). However, Mr. Downing also made it clear that the DOJ is not interested in prosecuting minor violations.

3. Interface with User Agreements

Note that both federal statutes described above provide an exception—if an individual has lawful consent or authorization to access an electronic communication (SCA) or a computer (CFAA), that individual is not committing a crime. However, the issue is that most service providers’ TOSAs prohibit users from granting anyone else access to their accounts. If the user does not have the ability to give lawful consent, then the person accessing the account is by default exceeding authorized access. Compounding the issue, many providers retain the right to change their TOSAs at any time and without notice to the user. Therefore, a fiduciary’s access to an account may be a permitted act one day but become a criminal act the next, just because a service provider makes a change to its TOSA.

Neither the SCA nor the CFAA was intended to address fiduciaries’ access to digital assets, but it is easy to see why the statutes have a significant chilling effect on fiduciaries attempting to access certain digital assets. These statutes are complicated, and their application to emails and social networking sites has sparked additional confusion. There have been infinite technological advances since 1986, yet Congress has not

updated the statutes to conform to modern technology.

The American College of Trust and Estate Counsel (ACTEC) has drafted language that would fix both of these statutes for estate planning purposes (see [Letter from Kathleen R. Sherby, ACTEC President 2014-2015, to Jeff Flake, Chairman, Sen. Subcomm. on Privacy, Tech. and the Law, and Darrell Issa, Chairman, H. Subcomm. on Courts, Intellectual Prop. and the Internet](#) (January 28, 2015)). The revisions are simple and include adding a definition to both the SCA and the CFAA, and adding one additional sentence to the SCA.

The problem of fiduciary access possibly being in violation of the law is also an issue in other nations such as the United Kingdom where using a deceased's username and password could result in the person who gains access violating the Computer Misuse Act of 1990. See Aileen Entwistle, [Safeguarding Your Online Legacy After You've Gone](#), Scotsman.com, March 30, 2013.

C. Safety Concerns

Clients may be hesitant to place all of their usernames, passwords, and other information in one place. We have all been warned, "Never write down your passwords." This document could fall into the hands of the wrong person, leaving your client exposed. With an online afterlife management company or an online password vault, clients may worry that the security system could be breached, leaving them completely exposed. See Deborah L. Jacobs, [Six Ways to Store Securely the Keys to Your Online Financial Life](#), FORBES, Feb. 15, 2011.

D. Hassle

Planning for digital assets is an unwanted burden. Digital asset information is constantly changing and may be stored on a variety of devices (e.g., desktop computers, laptop computers, smart phones, cameras, iPads, CDs, DVDs, and flashdrives). A client may routinely open new email accounts, new social networking or gaming accounts, or change passwords. Documents with this information must be revised and accounts at

online afterlife management companies must be frequently updated. For clients who wish to keep this information in a document, advise them to update the document quarterly and save it to a USB flash drive or in the cloud, making sure that a family member, friend, or attorney knows where to locate it. See Tamara Schweitzer, [Passing on Your Digital Data](#), INC., Mar. 1, 2010.

E. Uncertain Reliability of Online Afterlife Management Companies

Afterlife management companies come and go; their life is dependent upon the whims and attention spans of their creators and creditors. Lack of sustained existence of all of these companies make it hard, if not impossible, to determine whether this market will remain viable. Clients may not want to spend money to save digital asset information when they are unsure about the reliability of the companies.

F. Overstatement of the Abilities of Online Afterlife Management Companies

Some of these companies claim they can distribute digital assets to beneficiaries upon your client's death. Clients need to understand that these companies cannot do this legally, and that they need a will to transfer assets, no matter what kind. Using these companies to store information to make the probate process easier could be an effective technique but they cannot be used to avoid probate altogether. David Shulman, an estate planner in Florida, stated that he "would relish the opportunity to represent the surviving spouse of a decedent whose eBay business was 'given away' by Legacy Locker to an online friend in Timbuktu." David Shulman, [Estate Planning for Your Digital Life, or, Why Legacy Locker Is a Big Fat Lawsuit Waiting to Happen](#), SOUTH FLORIDA ESTATE PLANNING LAW (Mar. 21, 2009).

V. BRIEF HISTORY OF FIDUCIARY ACCESS TO DIGITAL ASSETS

The rights of executors, administrators, agents, trustees, and guardians to access digital assets of

the decedent, principal, beneficiary, or ward has seen rapid development since California first touched on the issue in 2002. This section briefly discusses prior legislation to help place the current majority law, the Revised Uniform Fiduciary Access to Digital Assets Act, into perspective.

A. Early State Law

States began to recognize the need to plan for digital assets and to provide clarity in this area of the law as early as 2002. This legislation took a variety of forms, and can be divided into different “generations.”

1. First Generation

The first generation statutes only covered e-mail accounts. They did not contain provisions enabling or permitting access to any other type of digital asset.

California. The first and most primitive first generation statute was enacted by California in 2002, which simply provided, “Unless otherwise permitted by law or contract, any provider of electronic mail service shall provide each customer with notice at least 30 days before permanently terminating the customer’s electronic mail address.” [CAL. BUS. & PROF. CODE § 17538.35](#) (West 2010). In 2016, California enacted the decedent’s estates and trusts provisions of RUFADAA.

Connecticut. Connecticut was one of the first states to address executors’ rights to digital assets in 2005 in S.B. 262, requiring “electronic mail providers” to allow executors and administrators “access to or copies of the contents of the electronic mail account” of the deceased, upon showing of the death certificate and a certified copy of the certificate of appointment as executor or administrator, or by court order. S.B. 262, 2005 Leg., Reg. Sess. (Conn. 2005) (codified at CONN. GEN. STAT. ANN § 45a-334a (West 2012)). The bill specifically defined “electronic mail service providers” as “sending or receiving electronic mail” on behalf of end-users. *Id.* In 2016, Connecticut enacted RUFADAA.

Rhode Island. In 2007, Rhode Island passed the Access to Decedents’ Electronic Mail Accounts Act, requiring “electronic mail service providers” to provide executors and administrators “access to or copies of the contents of the electronic mail account” of the deceased, upon showing of the death certificate and certificate of appointment as executor or administrator, or by court order. H.B. 5647, 2007 Leg., Jan. Sess. (R.I. 2007) (codified at [R.I. GEN. LAWS § 33-27-3](#) (2012)). RUFADAA is pending as of December 29, 2018.

2. Second Generation

Indiana. Perhaps in acknowledgement of changing technological times and the need to address more than just email accounts, Indiana enacted a second generation statute in 2007 which required custodians of records “stored electronically” regarding or for an Indiana-domiciled decedent, to release such records upon request to the personal decedent’s personal representative. [IND. CODE § 29-1-13-1.1 \(2007\)](#). This statute has been repealed in Indiana, where RUFADAA took effect on July 1, 2016.

3. Third Generation

Third generation legislation (enacted in Oklahoma, Idaho, Nevada, and Louisiana) acknowledged the changes to the digital asset landscape and expressly recognized social networking and microblogging as digital assets.

Oklahoma. In 2010, Oklahoma enacted legislation with a fairly broad scope, giving executors and administrators “the power . . . to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites.” H.B. 2800, 52nd Leg., 1st Sess. (Okla. 2010) (codified at [OKLA. STAT. tit. 58, § 269](#) (2012)). This law is still in effect in Oklahoma.

Idaho. On March 26, 2012, Idaho amended its Uniform Probate Code to enable personal representatives and conservators to “[t]ake control of, conduct, continue or terminate any accounts of the decedent on any social networking website, any microblogging or short message service website or any e-mail service

website.” S.B. 1044, 61st Leg., Reg. Sess. (Idaho 2011). Idaho adopted RUFADAA in 2016.

Nevada. In 2013, Nevada enacted [Nev. 2013 Sess. Laws ch. 325](#) authorizing a personal representative to direct the termination of, but not access to, e-mail, social networking, and similar accounts. Nevada adopted RUFADAA in 2017.

Louisiana. In 2014, Louisiana granted succession representatives the right to obtain access or possession of a decedent’s digital accounts within thirty days after receipt of letters. The statute attempts to trump contrary provisions of service agreements by deeming the succession representative to be an authorized user who has the decedent’s lawful consent to access and possess the accounts. [La. Rev. Stat. § 3191](#).

B. First Attempt at a Uniform Act

As the years passed, state legislation became increasingly comprehensive, but the laws also became more and more different from one another. The conflicting laws were compounding the issues as questions arose regarding which state’s law should apply. The National Conference of Commissioners on Uniform State Laws (“NCCUSL” or “ULC”) recognized the need for a uniform act to address fiduciary access to digital assets and to provide uniformity among the states. Many states that were considering legislation stopped in their tracks when the NCCUSL announced it would be drafting a uniform act in 2012.

In the beginning, the NCCUSL was working with representatives of Facebook and industry trade associations to develop the model act, but they parted ways and each started working on a separate model act. The NCCUSL was the first to introduce its act, which it approved as the Uniform Fiduciary Access to Digital Assets Act (UFADAA) on July 29, 2014. The goal of UFADAA was to resolve as many of the impediments to fiduciary access to digital assets to and management of digital assets as possible by reinforcing the notion that the fiduciary steps into the shoes of the accountholder and should be able to do everything with the account that the accountholder could have done.

Delaware was the only state to enact a version of UFADAA. [50 Del Code §§ 5001-5007](#). Delaware’s version of the law was based off of a draft version of the model act prior to it being finalized, but the NCCUSL considered it “close enough” and designated it as an enactment of the model act. After Delaware’s enactment, twenty-six other states introduced the act, but it froze in all states due to massive opposition from the technology industry and privacy advocates.

Various online service providers, civil liberties organizations, and state bar sections voiced their concerns about UFADAA to state legislators and governors. Their primary concerns were that UFADAA resulted in an invasion of privacy, it conflicted with the SCA, and it included an improper override of their TOSAs. *See e.g., Joint Letter: Civil Liberty Organizations Respond to the Uniform Fiduciary Access to Digital Assets Act,* Jan. 12, 2015.

C. Privacy Expectation Afterlife and Choices Act

In response to UFADAA, NetChoice, an association of Internet companies that includes Google and Facebook, released its model act entitled the [Privacy Expectation Afterlife and Choices Act \(“PEAC”\)](#). PEAC required “companies to disclose contents only when a court finds that the user is deceased, and that the account in question has been clearly linked to the deceased. Additionally, the request for disclosure must be ‘narrowly tailored to effect the purpose of the administration of the estate,’ and the executor demonstrates that the information is necessary to resolve the fiscal administration of the estate. And even then, the amount of information is further restricted to the year preceding the date of death. This is stringent guidance meant to protect the privacy of those who communicated with the user while also ensuring that their loved ones can access important financial statements that may be delivered to the account.” Alethea Lange, [Everybody Dies: What is Your Digital Legacy?](#), Center for Democracy & Technology (Jan. 23, 2015).

A modified version of PEAC was enacted in Virginia effective as of July 1, 2015 ([Va. Code Ann. § 64.2-109 et. seq.](#)). It was introduced in California and Oregon, and New York introduced a bill that incorporated some provisions from PEAC. None of these bills were enacted, and PEAC flat lined as well, primarily due to its inadequacies (it only addressed personal representatives of estates and did not address other fiduciaries) and the fact that it was unworkable for fiduciaries (e.g., requiring personal representatives to get a court order if access was needed). Virginia's version of PEAC was later repealed and replaced by RUFADAA. See Karin Prangley, *War and PEAC in Digital Assets*, PROB. & PROP., July/Aug. 2015, at 40.

VI. REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

In response to the overwhelming failure of both model acts, service providers and the NCCUSL entered into negotiations to discuss a compromise. The result was the NCCUSL approving the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) at its July 2015 Annual Conference. This revision is a substantial rewrite with significant changes in presumptions and procedures. "Unlike the original UFADAA, which granted fiduciaries *presumptive* authority to access digital assets, RUFADAA places great emphasis upon whether the deceased or incapacitated user *expressly* consented to the disclosure of the content of the digital assets, either through what RUFADAA refers to as an "online tool" or an express grant of authority in the user's estate planning documents or power of attorney. Hence, RUFADAA respects the concept of "lawful consent" under the SCA, and, unlike UFADAA, does not attempt to impute such lawful consent to the fiduciary." Michael D. Walker, [The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age](#), REAL PROP., TR. & EST. L.J., Spring 2017, at 59.

See also Jeffrey R. Gottlieb, [ULC Rewrites "Uniform Fiduciary Access to Digital Assets Act,"](#) Plan for the Road Ahead (July 20, 2015).

As of April 15, 2019, RUFADAA has already been enacted in forty-one states and the U.S. Virgin Islands: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. In addition, RUFADAA is pending in four states (Massachusetts, New Hampshire, Pennsylvania, and Rhode Island) and the District of Columbia. See [Uniform Law Commission Enactment Status Map](#) and Appendix D.

California enacted the decedent's estates and trusts provisions of RUFADAA in 2016. NCCUSL, however, does not treat this legislation as sufficiently complete to be treated as a RUFADAA enactment as it did not cover powers of attorney, trusts, or conservatorships where the principal, settlor, or conservatee is still alive.

A. Definitions

Section 2 of RUFADAA defines the key terms, the most important of which include:

1. Catalogue of electronic communications.

The "catalogue" includes "information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person." [RUFADAA § 2\(4\)](#). For emails, this would include a list of when emails were sent or received and the email addresses involved, but it would not include any of the text of the email or the subject line.

2. Content of an electronic communication.

The "content" includes "information concerning the substance or meaning of the communication which: (A) has been sent or received by a user; (B) is in electronic storage by a custodian . . .; and (C) is not readily accessible to the public." [RUFADAA § 2\(6\)](#). This would include the actual substance or text of an electronic message that is

not accessible to the public. If the electronic message was accessible by the public, it would not be subject to the federal privacy protections under the SCA and would not be defined as “content” pursuant to RUFADAA. An example of an electronic communication that would not fall under this definition is a “tweet” by a Twitter user that is accessible to the general public. Michael D. Walker, *The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age*, REAL PROP., TR. & EST. L.J., Spring 2017, at 60.

3. Digital Asset

A “digital asset” is defined in RUFADAA as “an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.” RUFADAA §2(10). “Electronic” means “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities,” and “record” means “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” RUFADAA § 2(11) and § 2(22).

The term “digital asset” is a very broad term which encompasses all electronically-stored information, including (a) information stored on a user’s computer and other digital devices, (b) content uploaded onto websites, (c) rights in digital property, and (d) records that are either the catalogue or the content of an electronic communication. RUFADAA § 2 cmt.

4. Online Tool

An “online tool” is “an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.” RUFADAA § 2(16). This “third person” is referred to as the “designated recipient” in RUFADAA to clarify that such a named person is not required to be the fiduciary and is not to be held to the same legal

standard of conduct as a fiduciary. See RUFADAA § 2 cmt.

As of April 2019, not many service providers offer an online tool. The only two major providers with online tools are Facebook and Google.

Google created its Inactive Account Manager in April 2013 long before any other service provider and long before the promulgation of RUFADAA. The Inactive Account Manager allows users to control what happens to emails, photos, and other documents stored on Google sites such as +1s, Blogger, Contacts and Circles, Drive, Gmail, Google+ Profiles, Pages and Streams, Picasa Web Albums, Google Voice, and YouTube. The user sets a period of time after which the user’s account is deemed inactive. Once the period of time runs, Google will notify the individuals the user specified and, if the user so indicated, share data with these users. Alternatively, the user can request that Google delete all contents of the account. See [About Inactive Account Manager](#), Google (last visited Aug. 10, 2015).

Facebook, the world’s most popular online social network, recognized a need to allow a deceased person’s wall to provide a source of comfort in 2009. In its earliest stages, Facebook’s deceased user policy allowed for two solutions upon the death of a user: (1) memorialize the account or (2) delete the account. [How Do I Report a Deceased Person or an Account on Facebook That Needs to be Memorialized or Deleted?](#), Facebook Help Center?, [Memorialization Request](#) (last visited Aug. 6, 2017). When Facebook receives proof of death, the decedent’s page can be “memorialized,” so that only confirmed friends will continue to have access. Because the “wall” remains, friends can still post on the memorialized page. Once an account is memorialized, Facebook keeps it secure by preventing anyone from logging into it. The second option is the removal of the account if requested by verified immediate family members.

The most recent addition to Facebook’s deceased user policy is a true online tool to designate a “Legacy Contact,” that is, a person designated by a user to delete the account or look after the user’s account if it is memorialized. To designate

a Legacy Contact, the user must be at least eighteen years of age. The Legacy Contact may (1) write a pinned post for the profile, (2) respond to new friend requests, (3) update the profile picture and cover photo, and (4) download a copy of what the user has shared on Facebook in the past. A Legacy Contact may not (1) log into the user's account, (2) remove or change photos or things shared on the timeline, (3) read the user's messages, or (4) remove friends. If a user fails to designate a Legacy Contact, the user's account may still be memorialized or deleted as discussed above.

More companies will likely soon provide online tool options for users to maintain control over the access to and disposition of their users' accounts.

B. Applicability

Section 3 of RUFADAA addresses access to digital assets for four different types of fiduciaries: (1) a personal representative of a decedent's estate, (2) an agent appointed pursuant to a power of attorney, (3) a conservator or guardian, and (4) a trustee of a trust. Once enacted by a state, RUFADAA applies to these fiduciaries, regardless of whether they were appointed before, on, or after the effective date of the act. However, RUFADAA "does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business." For example, a law firm with an internal email communication system is not subject to the act and would not be required to turn over a deceased attorney's emails to the executor of such attorney's estate. [RUFADAA § 3](#).

C. Priority of Instructions

Section 4 of RUFADAA clarifies the priority given to conflicting instructions from a user. First priority is given to online tools. If the online tool allows the user to modify the instructions specified using the online tool at any given time, the instructions provided using the online tool will take first priority.

Second priority is given to the user's instructions in the user's power of attorney, will, trust, or other record.

If the user has not provided instructions through an online tool or written record, then the service provider's TOSA will govern the rights of the user's fiduciaries. If the TOSA does not address fiduciaries' rights (as is often the case), then RUFADAA's default rules will be the only remaining option for the fiduciary. See Michael D. Walker, [The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age](#), REAL PROP., TR. & EST. L.J., Spring 2017, at 61.

D. Disclosure Procedures

1. Personal Representatives of Estates

Section 7 and 8 of RUFADAA address disclosure of digital assets to a personal representative of a deceased user's estate, with Section 7 focusing on the disclosure of content of electronic communications and Section 8 focusing on the disclosure of all other digital assets.

a. Contents

If a deceased user consented in the user's will or a court issues a disclosure order, a custodian must disclose the content of an electronic communication to the personal representative of a deceased user's estate if the representative provides:

- a written request for disclosure,
- a certified copy of the deceased user's death certificate,
- a certified copy of letters testamentary or letters of appointment proving the representative's authority, and
- a copy of the documentation (typically, the will) in which the user consented to the disclosure of the content of electronic communications specifically (if not so provided pursuant to an online tool).

In addition, the custodian may request additional information such as:

- information necessary to identify the user's account,
- evidence linking such account to the user, and

- a finding by the court that the account actually belonged to the decedent, the disclosure of the contents would not violate the SCA and other federal laws, the user consented to disclosure, disclosure is permitted by RUFADAA, and disclosure is reasonably necessary for estate administration. RUFADAA § 7.

A sample letter to the custodian of a decedent's digital asset is include in Appendix C.

b. Catalogue and Other Digital Assets

The requirements for a personal representative to gain access to the catalogue and digital assets other than the content of electronic communications are less stringent. Unless prohibited by the user or court order, the personal representative is granted access to the catalogue and digital assets other than the content by default (upon providing the custodian with the specified required documentation, which is basically the same as is required to access contents under 7, except there is no requirement that the decedent's will be produced or that the decedent specifically consented to disclosure).

While § 8 also includes a custodian's ability to request a court order, it does not include a reference "to compliance with the SCA because such non-content disclosures are not prohibited by the SCA." Michael D. Walker, [*The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age*](#), REAL PROP., TR. & EST. L.J., Spring 2017, at 63.

c. Practical Problems

The ability of a custodian to request a court order under any circumstance makes access very burdensome for personal representatives as well as the courts. One of the authors has heard from representatives of Google and Facebook that they will *always* require a court order. They want the security of a court order before releasing any information for fear of liability for improper disclosure.

The case of In the [*Matter of Serrano*](#), 2017 NY Slip Op 27200 (June 14, 2017) is instructive. A

husband requested authority to access his deceased spouse's Google email, contacts, and calendar in order to "be able to inform friends of his passing" and "close any unfinished business, etc." *Id.* New York recently enacted its own version of RUFADAA, so Google, presumably pursuant to such law, requested a finding by the court before making any disclosures to the surviving spouse. *Id.* The court ordered Google to disclose the contacts and calendar information (finding that such items were not contents of electronic communications pursuant to the SCA). *Id.* However, the court stated, "Authority to request from Google disclosure of the content of the decedent's email communications—to the extent petitioner requests such authority—is denied without prejudice to an application by the voluntary administrator . . . establishing that disclosure of that electronic information is reasonably necessary for the administration of the estate." *Id.* While this is not necessarily an unfavorable result for the surviving spouse, it does indicate that custodians may exercise their rights pursuant to RUFADAA to request court orders on a regular basis, which (in this author's opinion) goes against the spirit of RUFADAA.

Another problem is evident from the *Daftary* case discussed above. Courts are likely to be hesitant to make the determination that personal representatives, by sole virtue of having been appointed as fiduciary, can offer "lawful consent" pursuant to the SCA to receive the content of electronic communications.

d. Advice

These concerns emphasize the need for a user to expressly consent to disclosure in the user's estate planning documents or through an online tool. Sample will language is provided in Appendix B.

Because of the likelihood that a custodian will require a court order before granting access, include the appropriate language in the earliest possible pleading in the administration of the estate of a deceased user. Sample language is provided in Appendix B.

2. Agents Under Powers of Attorney

a. Contents

The rules for agents under powers of attorney are similar to those for personal representatives of decedents' estates. Upon receiving the specified required documentation (a request in written or electronic form, the original or a copy of the power of attorney containing the express consent to disclose, and a certification under perjury that the power of attorney remains in effect) a custodian must disclose to the agent under a power of attorney the contents of electronic communications of the principal user if the user's power of attorney expressly grants the agent authority over such content (unless a court or the user direct otherwise). [RUFADAA § 9](#). Sample power of attorney language is provided in Appendix B.

b. Catalogue and Other Digital Assets

Upon receiving the specified required documentation (basically the same as discussed above for access to contents), a custodian must disclose to the agent under a power of attorney (who has been granted specific authority over digital assets or general authority to act on behalf of the user) the catalogue and digital assets other than the content of the principal user unless otherwise ordered by the court, provided in the power of attorney, or directed by the principal. [RUFADAA § 10](#).

3. Trustees

Sections 11, 12, and 13 of RUFADAA address a trustees' ability to access digital assets, and there are two separate rules depending upon the origination of the digital asset.

a. Trustee is Original User

If the trustee is the original user, meaning that the trustee, in his or her capacity as the trustee, opened an online account or procured a digital asset, the custodian must provide the trustee with all content, catalogues, and digital assets of the trust. [RUFADAA § 11](#).

b. Trustee is Not Original User

If the trustee is not the original user (for example, a settlor has a digital asset and then transfers it to a trust, either during life or at death), then different rules apply whether the trustee is requesting the content or non-content material.

A custodian (upon receiving the specified required documentation, including a certified copy of the trust agreement that grants disclosure of the content specifically and a certification by the trustee under penalty of perjury that the trust exists and the trustee is currently serving as the trustee) must disclose to a trustee the content of electronic communications unless otherwise directed by the user, provided for in the trust agreement, or ordered by the court. [RUFADAA § 12](#).

When the trustee is not the original user, a custodian (upon receiving the specified required documentation) must disclose to a trustee the catalogue and all digital assets other than the content unless otherwise directed by the user, provided for in the trust agreement, or ordered by the court. [RUFADAA § 13](#).

In both cases, the custodian may request additional information such as a number, user name, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account or evidence which links the account to the trust.

4. Guardians (Conservators)

The last type of fiduciary covered by RUFADAA is a guardian (conservator) of a protected person. Because a protected person is likely to retain a right to privacy in personal communications, access to digital assets is not automatically granted to a guardian by virtue of the fact that the person is appointed as a guardian. [RUFADAA § 14 cmt.](#)

If there is a hearing on the matter, a court may grant a guardian complete access to the ward's digital assets, that is, the contents of electronic communications, the catalogue of electronic communications, and other digital assets in which the ward has a right or interest. [RUFADAA § 14\(a\)](#).

Without a hearing, a guardian may obtain access to the catalogue and digital assets other than the content of electronic communications but a court order is still required along with other specified required documentation including a certified copy of the court order that granted the guardian authority over the ward's digital assets. [RUFADAA § 14\(b\)](#).

In addition, a guardian may also request that an account be terminated or suspended for good cause upon providing the custodian with a copy of the court order giving the guardian general authority over the protected person's property. [RUFADAA § 14\(c\)](#).

E. Custodian's Response to Request to Disclose Digital Assets

1. Timing

The custodian must comply with a request to disclose not later than sixty days after receipt of a proper request along with the required documentation. [RUFADAA § 16\(a\)](#).

2. Notice to User of Request

The custodian may, but is not required to, notify the user, e.g., the principal or ward, that a fiduciary made a disclosure request. [RUFADAA § 16\(c\)](#). The custodian may properly deny a disclosure request if the custodian is aware of any lawful access to the account following the receipt of the request. [RUFADAA § 16\(d\)](#).

3. Method of Custodian's Disclosure

When a custodian discloses digital assets pursuant to the terms of RUFADAA, the custodian may at its sole discretion:

- grant the fiduciary full access to the user's account,
- limit access to the access that is sufficient for the fiduciary's performance of designated tasks,
- provide the fiduciary with a paper or digital copy of a digital asset,
- assess a reasonable administrative charge for disclosing digital assets,

- withhold an asset deleted by a user, and/or
- make the determination that a request imposes an undue burden on the custodian, and if necessary, petition the court for an order.

[RUFADAA § 6](#)

The NCCUSL acknowledges that each custodian has a different business model, and some may prefer one method for disclosure over another. [RUFADAA § 6\(a\) cmt](#).

An example of the type of situation NCCUSL is preemptively addressing by allowing the custodian to claim that a request imposes an undue burden is where a fiduciary requests disclosure of "any email pertaining to financial matters," which would require the custodian to sift through all emails and determine which ones were relevant or irrelevant. In such event, the custodian may decline the fiduciary's request, and either the fiduciary or the custodian may request guidance from a court. [RUFADAA § 6 cmt](#).

4. Failure to Disclose

A custodian incurs no penalty for failing to disclose within sixty days of a proper request.

If the custodian does not disclose, the fiduciary may apply to the court for an order directing compliance. [RUFADAA § 16\(a\)](#). The order must state that compliance is not in violation of 18 U.S.C. § 2702. [RUFADAA § 16\(b\)](#). The decedent's estate, principal, ward, or trust bears all the expenses of seeking and obtaining the court order such as attorney fees and court costs.

5. Custodian Protection

A custodian is immune from liability for disclosing or failing to disclose if done in good faith. [RUFADAA § 16\(f\)](#). However, a custodian is likely to be liable if it fails to comply with a valid court order. [RUFADAA § 16 cmt](#).

F. Duty and Authority

Section 15 specifies the nature, extent, and limitation of the fiduciary's authority over digital

assets. RUFADAA § 15 cmt. Among other things, it specifically states that fiduciaries managing digital assets are subject to the fiduciary duties of care, loyalty, and confidentiality. It also specifies that a fiduciary acting within the scope of the fiduciary's duties is an authorized user for purposes of applicable computer fraud and unauthorized computer access laws. [RUFADAA § 15](#).

VII. PLANNING SUGGESTIONS

Legal uncertainty reinforces the importance of planning to increase the likelihood that an individual's wishes concerning the disposition of digital assets will be actually carried out. Even individuals who believe it is important to plan for digital assets are not taking steps to plan for them. See Becky Yerak, [Online Accounts After Death: Remember Digital Property When Listing Assets](#), CHICAGO TRIB., Aug. 26, 2012. (reporting that a survey by BMO Retirement Institute revealed that 57% of respondents who believed it was very or somewhat important to plan for digital assets had not made such plans).

Despite the fact that states are addressing the issues surrounding fiduciary access to digital assets for over a decade, many attorneys opted to wait and see what would happen in their states before attempting to help their clients plan for digital assets. If the desire to help clients is not enough to motivate attorneys to begin addressing these issues, perhaps the fear of violating the rules of professional conduct will. [ABA Model Rule 1.1](#) states, "A lawyer shall provide competent representation to a client." The ABA added a new comment 8 to Model Rule 1.1 that states, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology" Attorneys should be aware of the challenges digital assets impose on clients and their appointed fiduciaries, and these challenges need to be discussed with clients as part of competent representation. "We all know the old adage that, 'ignorance of the law is no excuse.' The ABA is telling us that 'ignorance of technology is no excuse.'" James Lamm, *"Planning for Digital*

Property: 'The Future Ain't What it Used to Be' (A Yogi Berra Quote)," HECKERLING INSTITUTE ON ESTATE PLANNING (2017).

With almost all states enacting RUFADAA, and with RUFADAA's emphasis on respecting an accountholder's intent as evidenced through online tools and planning documents, the best advice we can give to clients is to be proactive, make their wishes known, and stop dismissing digital assets as something inconsequential.

A. Take Advantage of Online Tools

As previously mentioned, most service providers do not currently provide an online tool option to their users such as Google's Inactive Account Manager and Facebook's Legacy Contact. However, because so many states are enacting RUFADAA, combined with the fact that RUFADAA allows the service providers to maintain control over fiduciary access to and management of their users' accounts by creating an online tool option, we will most likely start to see more service providers creating online tools.

Clients should utilize the online tool option whenever it is available. In a state that has enacted RUFADAA, if the client has the ability to change his or her directions pursuant to the online tool at any time, the client's instructions using the online tool will trump any other document or agreement and will be the controlling instructions for that account.

B. Back-Up to Tangible Media

Clients should consider making copies of materials stored on Internet sites or "inside" of devices on to tangible media of some type such as a CD, DVD, portable hard drive, or flash drive. The client can store these materials in a safe place, such as a safe deposit box, and then leave them directly to named beneficiaries in the user's will. Of course, this plan requires constant updating and may remove a level of security if the files on these media are unencrypted. However, for some files such as many years of vacation and family photos, this technique may be effective.

C. Prepare Comprehensive Inventory of Digital Estate

1. Creation

Each client should prepare a comprehensive audit of his or her digital world, including a list of how and where digital assets are held, along with usernames, passwords, answers to “secret” questions, and what he or she would want to happen to each account in the event of disability or death. Sample forms are included in Appendix A. Such an inventory will help fiduciaries locate and collect digital assets. Once this inventory is created, it is just as important for clients to make sure they keep it updated when they change passwords, open new accounts, etc. Lawyers can motivate clients to create such a digital inventory by informing them what happens in the absence of planning, the default system of patchwork laws and patchy service provider policies, as well as the choices for opting out of the default systems.

2. Storage

As addressed earlier, there is a safety concern involved with this approach to planning. Careful storage of the inventory document is essential. Giving a family member or friend this information while alive and well can backfire on your clients. For example, if a client gives his daughter his online banking information to pay his bills while he is sick, siblings may accuse her of misusing the funds. Further, a dishonest family member would be able to steal your client’s money undetected.

If you decide that a separate document with digital asset information is the best route for your client, this document could be kept with your client’s will and durable power of attorney in a safe place. The document can be delivered to the client’s executor upon the client’s death or agent upon the client’s incapacity. Clients can take extra steps to protect this information, such as by encrypting this document and keeping the passcode in a separate location as a further safeguard. Another option is to create two documents; one with part of the needed information, such as usernames, and one with the rest of the information, such as passwords. The

documents can be stored in different locations or given to different individuals.

A newer option is to use an online password storage service such as 1Password, KeePass, or my-iWallet. Your client would then need to pass along only one password to a personal representative or agent. See Nancy Anderson, [*You Just Locked Out Your Executor and Made Your Estate Planning a Monumental Hassle*](#), FORBES, Oct. 18, 2012. However, this makes this one password extremely powerful as now just one “key” unlocks the door to your client’s entire digital world.

Warning: Giving someone else the client’s user name and password may be against the TOSA. Accordingly, if someone uses your client’s access information, it may be deemed a state or federal crime because it exceeds the access to that information that is stated in the user agreement.

D. Provide Immediate Access to Digital Assets

Your client may be willing to provide family members and friends immediate access to some digital assets while still alive. Your client may store family photographs and videos on websites such as Flickr, GoogleDocs, DropBox, Shutterfly, and DropShot which permit multiple individuals to have access. Your client could create a family YouTube channel by using a password to privately protect the videos. See Nancy Anderson, [*You Just Locked Out Your Executor and Made Your Estate Planning a Monumental Hassle*](#), FORBES, Oct. 18, 2012.

E. Authorize Agent to Access Digital Assets

If your state has adopted RUFADAA, a broadly drafted power of attorney should provide the agent with power over the catalogue and digital assets other than the content of electronic communications, but it will not provide power over the content unless the power of attorney specifically provides that the agent should have access to the content. The power of attorney document must specifically reference access to the content of electronic communications. Sample language is included in Appendix B that

should give the agent access all digital assets and their contents.

Some statutory power of attorney forms have been amended to make it easy for a principal to authorize the agent to access digital assets and their contents. TEX. EST. CODE § 752.051.

Also note that if you have a very private client who does not want his agent to have access to any digital assets, this should be specifically stated in his power of attorney. Otherwise, the agent might be granted access.

F. Address Digital Assets in a Will

Keep in mind that a will becomes public record once admitted to probate, so placing security codes and passwords within it is not recommended. Further, amending a will each time a testator changes a password would be cumbersome and expensive. While a will is not an appropriate place for passwords and security codes, there are several places within a will where it might make sense to address digital assets.

1. Disposition of Digital Assets

Many of the digital assets that we “buy” and think we “own” are not transferable upon death or are simply licenses to use the digital asset during life. However, some digital assets may be transferable, so wishes with regard to disposition should be made clear, just in case those wishes can be followed. If a transferable digital asset is not specifically gifted, it will pass via the residuary clause which could cause the asset to pass in undivided shares to multiple beneficiaries causing considerable difficulty with management and division.

Furthermore, at least one commentator has focused “on the troubling implications of contracts limiting the right to devise digital assets” and “argues that users of digital assets, in light of our theories and methodologies used to define property, have property interests that allow a user to determine how an account should be treated upon his or her death.” Natalie M. Banta, *Property Interests in Digital Assets: The Rise of Digital Feudalism*, CARDOZO L. REV.,

2017, at 1102. It is possible that users may one day have more control over the disposition of their digital assets than they do today.

It is also important to note that if the ownership of the digital asset upon death is governed by the TOSA, the asset may actually be of the non-probate variety. Thus, like a multiple-party bank account or life insurance policy, the digital asset may pass outside of the probate process.

2. Personal Representative Access to Digital Assets

Digital assets should also be addressed in a will in the personal representative’s powers section, which is where RUFADAA comes into play. If your state has enacted RUFADAA, the fiduciary should be able to get access to the catalogue and digital assets other than the content of electronic communications without any special language in the will, but the fiduciary will only be able to access the content if the will (or other record) specifically grants the fiduciary access to such content. All wills should now include provisions making it clear whether the testator intends for the fiduciary to have access to some or all digital assets.

Appendix B includes sample provisions that may be used in a will (or adapted for use in a revocable trust). Appendix B also includes a sample “Authorization and Consent for Release of Electronically Stored Information” that should qualify as an “other record” under RUFADAA. *See* RUFADAA § 7.

3. Other Digital Asset Concerns

It may be prudent to address digital assets in the definitions section of a will. A broad definition of digital assets is preferable, such as the compilation of RUFADAA definitions provided at the beginning of this outline. *See* RUFADAA § 2(10), (11), and (22).

There are other things clients can do in their wills. For example, you could specifically reference within the will that there is a digital asset inventory that lists usernames and passwords and provides the fiduciary with the testator’s desires for each account. This would

alert the fiduciary that such a resource is available and needs to be located.

If a client has substantial digital assets or thinks that someone with special skills needs to be appointed to manage the digital assets, the client may consider appointing a separate fiduciary to handle just the digital assets or request that the personal representative hire a digital asset manager to help.

G. Place Digital Assets in a Trust

One of the most innovative solutions for dealing with digital assets is to create a revocable trust to hold the assets. *See* Joseph M. Mentrek, *Estate Planning in a Digital World*, 19 Ohio Prob. L.J. 195 (May/June 2009). A trust may be a more desirable place for account information than a will because it would not become part of the public record and is easier to amend than a will.

Recall that under RUFADAA, if the user originates an account within a trust, the trustee should have complete access to the catalogue and all digital assets, including the content of electronic communications. *See* RUFADAA § 11. If the account is not originated within a trust, and assuming the asset is transferable, the user could transfer it into a trust, and then RUFADAA §§ 12 and 13 would be applicable to the trustee's management authority. The trust agreement could provide the trustee with detailed instructions regarding management and disposition. *See* Jessica Bozarth, *Copyrights & Creditors: What Will Be Left of the King of Pop's Legacy?*, 29 CARDOZO ARTS & ENT. L.J. 85, 104-07 (2011).

Furthermore, it is possible that by placing the assets in a trust, a user might enable licenses to survive beyond the death of the user if the trust owns these accounts and assets instead of an individual, defeating a TOSA that specifies otherwise. When a person accumulates more digital assets, designating these assets as trust assets may be as simple as adding the word "trustee" after the owner's last name. *See* John Conner, *Digital Life After Death: The Issue of Planning for a Person's Digital Assets After Death*, 4 EST. PLAN. & COMM. PROP. L.J. 301 (2011).

However, creating a separate revocable trust for digital assets may be overkill for many individuals and only be practical for those with digital assets of substantial value.

H. Use Online Afterlife Company

Entrepreneurs recognizing the need for digital estate planning have created companies that offer services to assist in planning for digital assets. These companies offer a variety of services to assist clients in storing information about digital assets as well as notes and emails that clients wish to send post-mortem. As an estate planning attorney, you may find this additional service to be valuable and recommend one to your clients.

A non-exclusive list of the different companies and the services they offer is set forth below in alphabetical order. The author is not recommending any of these companies and no endorsement should be implied because of a company's inclusion or exclusion from this list. You must use due diligence in investigating and selecting a digital afterlife company. For example, in the six years the authors have been maintaining this list, over one-third of the companies have gone out of business or merged with another similar firm.

Name	Services Offered
AfterSteps	Provides users with a step-by-step guide in planning their estate, financial, funeral, and legacy plans, which will be transferred to the users' designated beneficiaries upon passing.
Dead Man's Switch	Enables users to write emails and designate recipients. Once user fails to respond to three emails, Dead Man's Switch releases the emails to the recipients.
DeadSocial	Helps users organize online lives, download data from social media sites, and prepare for death on social media sites.
Estate Map	Moves an estate planning attorney's intake and enables clients to securely store and pass on important estate information.
E-Z-Safe	Enables users to securely store, update, retrieve, and pass their growing digital assets.

Name	Services Offered
If I Die	Enables users to write notes that will be sent to pre-designated recipients at death.
My Wonderful Life	Enables users to plan their funeral, leave letters, instructions, information, and photographs for pre-designated recipients.
Parting Wishes	Enables users to draft online estate planning documents, design online memorials, create web pages about their lives, prepare final messages, document funeral wishes, and designate Keyholders to distribute this information.
Secured Safe [formerly DataInherit, Entrustet, and others]	Provides users with online storage for passwords and digital documents.
SlightlyMorbid	Enables users to leave behind emails, instructions, and personal online contacts.
True Key	Auto-saves and enters passwords. Is accessible as an app and on a computer.
Vital Lock	Posthumously delivers text, videos, images, audio recordings, and links to pre-designated recipients.
YouDeparted [formerly AssetLock]	Enables users to upload documents, final letters, final wishes, instructions, important locations, and secret information to an online safe deposit box. Once the user dies, YouDeparted will release pre-designated information to the pre-designated recipients.

VIII. CRYPTOCURRENCY

Less than a decade ago, if an estate planner asked clients whether they owned any cryptocurrency, the most likely response would be, “You mean, money to buy a crypt?” Now, due to the widespread media coverage of Bitcoin, the most famous of all cryptocurrencies, most clients will have some basic idea about what the estate planner is inquiring.

The use of cryptocurrency is increasing at a rapid pace. As of December 31, 2018, there were approximately 17.5 million Bitcoins in circulation worth over \$67 billion. See Blockchain, [Bitcoins in Circulation](#). Although

only a few cryptocurrencies in addition to Bitcoin are well-known outside the cryptocurrency community (e.g., XRP, Ethereum, EOS, and Stellar), over 2,000 different virtual currencies are actively traded. See CoinMarketCap, [Top 100 Cryptocurrencies by Market Capitalization](#). These other cryptocurrencies are sometimes referred to as *altcoins*, meaning that they are an alternative to Bitcoin.

A recent survey revealed that 25% of individuals between the ages of 24 and 38 who either had \$50,000 of investable assets or earned \$100,000 or more per year own cryptocurrency. See Megan Henney, [More Rich Millennials are Investing in Cryptocurrencies](#), Foxbusiness.com (Nov. 1, 2018). A growing number of mainstream businesses already accept Bitcoin such as Microsoft, Subway, KFC Canada, many Etsy vendors, Whole Foods, Dish Network, and Expedia. See Jonas Chokun, [Who Accepts Bitcoins](#) (listing approximately 100 vendors who accept Bitcoins). In addition, some law firms are already accepting Bitcoin in payment of legal services.

This section starts by building a basic foundation about virtual currencies and how they operate. The section then reviews the estate planning and administration issues that arise with owning cryptocurrency and concludes with recommendations for how to address virtual currency in your practice.

A. The Basics of Cryptocurrency

Before looking at cryptocurrency in detail, it is helpful to place this specialized asset into proper context. The overarching category under discussion is called *digital currency*. Digital currency refers to all monetary assets in digital form whether the money it represents is actually a nation’s currency (e.g., dollars, euros, or yen) or whether it is privately issued. *Virtual currency* is “digital currency that is only available in electronic form and not in physical form.” Jake Frankenfield, [Virtual Currency](#), Investoidiacom (May 3, 2018). In other words, you cannot hold virtual currency in your hand like you can with hard currency. Virtual currency is nothing more than ones and zeros stored on computer media.

Virtual currency is not connected to a nation's actual currency but is instead "issued, managed and controlled by private issuers, developers, or the founding organization." *Id.* Cryptocurrency is virtual currency which uses sophisticated cryptography to make certain that transactions are secure and authentic. *Id.*

The discussion below is admittedly simple and omits sophisticated high-level computer discussion. Nonetheless, the discussion should provide the estate planner with a basic understanding of the workings of cryptocurrency.

A cryptocurrency is "born" through a computer process called *mining*. The "parent" of the virtual currency creates complex mathematical equations which the parent expects other people (the *miners*) to solve using high-powered computers. As a reward for solving these equations, the miners receive a virtual coin which they may then use to purchase real-world assets assuming they can find someone willing to accept it. As more coins are mined, it becomes harder (that is, more processing power is needed over a longer period of time) to mine each subsequent coin until a cap is reached either because one was provided by the parent or mining is no longer a cost-effective way of obtaining a coin.

These virtual coins rely on *blockchain* technology for security and validity. A blockchain is a distributed database often referred to as the *ledger*, that is, a list of transactions and their details such as the number of coins added or subtracted along with the date and time of the transaction, which is held by individuals who agree to share the database with all other users of the same database (virtual currency). The database is then continuously updated and synchronized. This results in all users having the complete record of the virtual currency instead of having only one central computer or entity that processes all transactions. Each transaction or *block* is added to the chain along with a timestamp and link to the previous block. These transactions immediately revise all of the other copies of the database.

The owner of cryptocurrency has a very long and complex "password" called a *private key* to access the portion of the blockchain containing

the owner's coins. This private key is mandatory to access the owner's virtual currency. To transfer virtual currency from one person to another person as payment for goods or services (or perhaps as a gift), the owner uses the owner's private key to authorize the transaction and then sends a message to the recipient containing a *public key* which is mathematically related to the location of the owner's virtual currency so that the recipient can receive the transfer. Complex software running on many different computers then verify the transaction. If the transaction is determined to be valid by enough computers, it becomes the next block in the chain. "To prevent people from generating counterfeit currency, the math required to verify a transaction takes so much computing power that no one user or group could do it." Alexander George, *Did You Miss the Cryptocurrency Boat?*, POPULAR MECHANICS, April 2018, at 16, 17. In fact, one writer claims it would take the world's most powerful supercomputer over a trillion years to determine the owner's private key from the public key. See Prypto, [Bitcoin Public and Private Keys—Dummies](#).

Most cryptocurrency owners do not need to concern themselves with these details. Businesses called *cryptocurrency exchanges* have sprung up which handle the complex details making it easy for a person to buy, sell, and transfer their virtual coins such as Coinbase and Uphold. See Finder, [Cryptocurrency Exchange Finder](#) (Sept. 13, 2018), (indicating that over 200 cryptocurrency exchanges exist). For example, these exchanges hold the private keys and public keys and generate the messages necessary to effectuate transfers.

Cryptocurrency resides in "wallets" that can be stored in many different ways such as on an exchange accessed over the Internet, software on a computer, tablet, or cell phone, or on a dedicated flash drive. To be able to retrieve cryptocurrency and transfer it, you must have the private key or the *seed phrase*, that is, a list of random words which allows the person to recover the wallet containing the virtual currency. A seed phrase would look something like this "warlock implode lawyer drink love close cactus

river street double water most.” These words are tied to the private key through a complex computation process. The seed phrase needs to be kept secure at all times. Otherwise, anyone finding the phrase could access the currency. See [Seed Phrase](#) Bitcoin Wiki. If the wallet resides on an commercial exchange, the cryptocurrency may be accessible by a person who knows the user name, password, answers to security questions, and the ability to satisfy other verification steps.

B. Benefits of Cryptocurrency

1. Security

Because of the high-level of encryption, cryptocurrency is extremely safe from being used by an unauthorized person unless the owner is careless in protecting the owner’s private key or seed phrase. In addition, because the ledger is stored on many computers all over the world, it is very safe against hacking and other cyber attacks.

2. Privacy

Cryptocurrency is virtually untraceable and sometimes gets a “bad rap” as being used by people involved in illegal activities such as drugs, gun-running, murder for hire, and prostitution. Of course, the same could be said of traditional hold-in-your-hand cash which is also normally untraceable absent the recording of serial numbers, being marked with invisible ink, or containing traceable electronic devices.

Many individuals do not wish for their financial transactions to be public for reasons that do not involve covering up unseemly activities. Instead, they believe that it is no one’s business how much they own, what they buy, and what they sell. Perhaps they merely want to avoid the endless advertisements that appear after making a purchase on a traditional website which collects a considerable amount of private data.

3. Shorter Transfer Delay and Lower Cost

Transferring hard currencies takes time (often many days or up to a week or more), involves many intermediary steps (e.g., customer, customer’s bank, intermediary banks, business’s

bank, and business), and incurs transfer fees. On the other hand, transfers of cryptocurrencies may occur immediately or within a few minutes and, unless an exchange is used, without a transfer cost. Even if an exchange is involved, the cost is often considerably less than traditional banking fees.

C. Risks of Cryptocurrency

1. No Recovery Without Private Key or Seed Phrase

If the owner of cryptocurrency forgets, misplaces, or loses the private key and seed phrase, there is no way the owner can recover it. There is no “forgot password” link that the owner can use to recover the private key or seed phrase. If the cryptocurrency is stored on an exchange, there will be a greater chance of being able to regain a lost password because the owner is gaining access to the exchange rather than the cryptocurrency directly.

James Howells of Newport, Wales learned this lesson the hard way. He chose to store his 7,500 Bitcoins on a hard drive in 2009 when they were nearly worthless. Several years later, he discarded the hard drive in the trash which ended up in a landfill the size of a football field. He searched the landfill to no avail even after funding a more extensive search with an Indiegogo account. See Stephen Shankland, *UK Man Tries to Retrieve \$7.5 Million in Bitcoins from Dump*, CNET, Nov. 29, 2013. If he had those Bitcoins on of January 3, 2019, they would have been worth approximately \$28 million.

2. Value Fluctuation

Cryptocurrency is not backed by any government and thus its value is subject to tremendous fluctuation. Even the most popular virtual currency, Bitcoin, has seen huge value shifts. For example, in 2010, one Bitcoin was worth \$.01 and had increased to \$1,000 by January 1, 2017. At the end of 2017, one Bitcoin was worth almost \$20,000. On January 1, 2019, the value of one Bitcoin was approximately \$3,800 with value changing by several dollars every second.

3. No Regulation

Cryptocurrencies are not subject to any central authority, such as a government or governmental entity, which can provide a type of security or insurance from the value fluctuations discussed above, cheaters, scammers, and other evil conduct. If something “happens” to cryptocurrency, the owner is out-of-luck without any recourse. For example, “[in] February 2014, the then-largest bitcoin exchange, Mt. Gox, went bankrupt after hackers stole some 850,000 bitcoins that at the time were worth roughly \$450 million.” Rebecca Patterson, *The Hype and Hope of Bitcoin and Blockchain*, Bessemer Trusts, Second Quarter 2018, at 1, 3.

D. Prudent Investment Concerns

Cryptocurrency is risky. As one commentator stated, it is more risky than gambling. “In roulette, if you put \$1 on every number, you’ll spend \$38 and be guaranteed to get exactly \$36 in return. You could buy \$1 of every cryptocurrency and they might all end up worthless.” Alexander George, *Did You Miss the Cryptocurrency Boat?*, POPULAR MECHANICS, April 2018, at 16, 17.

Under the prior prudent person rule, a trustee could not invest in cryptocurrency absent express permission in the trust because of this risk. However, under the Uniform Prudent Investor Act effective in most states, trustees must make investment decisions “in the context of the trust portfolio as a whole and as part of an overall investment strategy having *risk* and return objectives reasonably suited to the trust.” Accordingly, the trustee needs to determine with respect to each trust, after considering all of the circumstances whether investment in cryptocurrency is allowed or perhaps even required. The author’s anecdotal conversations with corporate trustees reveal a tremendous hesitancy to invest in cryptocurrency without express permission in the trust instrument from the settlor, a release by the beneficiaries, or authorization in a court order. *See also* Suzanne Walsh, *Every Day is Bitcoin Pizza Day: What Clients and Estate Planners Need to Know about Cryptocurrency*, Lexology.com, Sept. 6, 2017.

E. Taxation of Cryptocurrency

In 2014, the IRS indicated that cryptocurrency is “property” rather than currency. IRS Notice 2014-21. Accordingly, cryptocurrency is subject to capital gains tax rules. The fair market value of cryptocurrency is to be calculated “by converting the virtual currency into U.S. dollars . . . at the exchange rate, in a reasonable manner that is consistently applied.” *Id.* There are sources that keep historical records of the value of a cryptocurrency as of a certain date, such as Poloniex and Coinmarketcap.com. *See* Michael Goldberg, *Estate Planning for Cryptocurrency*, 106 ILL. B.J. 38 (2018). These resources enable users to access cryptocurrency records much like they can access historical records of stock.

F. Recommendations

As time marches by, an increasing number of your clients will own cryptocurrency. Only with proper planning, however, will the value of this property be available to the client’s successors in interest. Here is a summary of the key steps an estate planner should take.

- Early in the estate planning process via client intake forms, questionnaires, or interview questions, ascertain whether your client owns (or plans to acquire) cryptocurrency.
- A cryptocurrency owning client needs to keep detailed records of the date of each virtual currency purchase and the amount so that capital gains income tax planning can be effectively accomplished such as (1) selling and paying the tax (or taking a loss) now, (2) gifting with a carry over basis, or (3) allowing it to pass at death to give the beneficiary a stepped up basis.
- If the client owns cryptocurrency stored in a software wallet not connected to an exchange, it is essential to make arrangements to protect and then transfer the private key or seed phrase to the person whom the client wishes to own the virtual currency after the client’s death. Storing the key or phrase in a safe deposit box is a frequently used technique.

- If the client owns cryptocurrency stored on an exchange, then protection, storage, and transfer of the user name, password, and security question information is needed. In addition, some exchanges use two-factor authentication. For example, after entering the user name and password on the exchange's website log-in page, the exchange sends a numerical code to the owner's cell phone which the user must then enter to access the owner's account. If this is the case, the cell phone itself and how to access it must also be protected. *See* Michael J. Kearney & Joseph B. Doll, *Considerations in Estate Planning for Bitcoin, Ethereum, and Other Cryptocurrencies*, www.estaxtrustsestatesblog.com (Apr. 26, 2018).
- If the client owns cryptocurrency stored on a hardware wallet (flash drive), arrangements to reveal to the intended beneficiary both the drive's location and the keys, phrases, or codes needed to access it must be made. As with software wallets, keeping the device and phrase in a safe deposit box is often an effective protection method.
- The estate planner needs to ascertain whether the client wishes to make a specific gift of any cryptocurrency upon death (either to a person or to a trust) or whether it is merely to become part of the decedent's general estate. If a specific gift is intended, the gift provision needs to be carefully drafted to transfer the cryptocurrency but *not* contain the private key, seed phrase, passwords, or other access information. Instead, the will should describe how the beneficiary (or trustee, if the transfer is to a trust) may obtain this information such as on a flash drive in a safe deposit box or from a trusted individual.
- After a person has died, search diligently for the existence of digital currency. If the decedent used an exchange to purchase the cryptocurrency, the exchange account will typically be linked to a bank account or credit card, so the decedent's bank records or emails may provide a clue that the account exists. Signs of cryptocurrency can also be spotted on the decedent's phone, tablet, or computer if a mobile wallet or offline wallet was used. Another, albeit much rarer sign, would be a room filled with high-end computers which could indicate the decedent was a miner.
- If cryptocurrency is located, the executor or administrator will need to deal with it appropriately. The property is just like any other estate asset. It needs to be preserved as much as possible if it is subject to a specific bequest in the decedent's will. If it is not, the personal representative will need to decide whether to retain the cryptocurrency or liquidate it for United States currency. As discussed above, this will require the executor or administrator to act as a reasonably prudent investor.
- For inventory and transfer tax purposes, the value of the cryptocurrency is the fair market value at the date of death. Several websites maintain historical exchange rate records such as Poloniex, Bittrex, and Coinmarketcap. *See* Michael Alan Goldberg, *Estate Planning for Cryptocurrency*, ILL. B.J., Feb. 2018, at 38, 49.
- A trustee should not invest in or retain cryptocurrency without settlor, beneficiary, or court authorization.

IX. FUTURE REFORM AREAS

A. Providers Gather User's Actual Preferences

Although most service providers have a policy on what happens to the accounts of deceased users, these policies are not prominently posted and many consumers may not be aware of them. If they are part of the standard terms of service, they may not appear on the initial screens, as users quickly click past them.

Rather than forcing these unread terms upon users, the service providers should follow the lead of Google and Facebook in developing online tools, allowing users to indicate their desires for what should happen upon the user's death. To ensure that more people make provisions, providers should offer an easy method at the time a person signs up for a new service so the person can designate the disposition of the account upon the owner's incapacity or death. For accounts already in existence, service providers should make the effort to reach out to users about their new online tool, stressing the importance of entering the required data and making it easy for them to do so.

B. Congress Amends Federal Law

Congress should amend the Stored Communications Act and the Computer Fraud and Abuse Act to make certain that fiduciary access, even if contrary to TOSAs, is not potentially subject to federal criminal sanctions. Federal law could require service providers to respect state laws on fiduciary powers, or even to ensure that all users click through an "informed consent" provision when they sign up for new services.

C. States Enact RUFADAA

As previously mentioned, as of April 15, 2019, forty-one states and the U.S. Virgin Islands have enacted RUFADAA, and the legislation has been introduced in an additional four states plus the District of Columbia. These jurisdictions acted expediently to put into place legislation that is a tremendous step in the right direction when it comes to fiduciaries' access to digital assets.

However, there are still four states that have not enacted RUFADAA in total and where it was not pending as of April 15 2019:

1. *California*. As previously mentioned, California enacted the decedent's estates and trusts provisions of RUFADAA in 2016, but has not yet enacted the act in its entirety. See [AB-691, adding Part 20 to Division 2 of the Probate Code](#).

2. *Delaware*. Delaware still has the original "enactment" of UFADAA as its current law but has not enacted RUFADAA. See [Decedents' Estates and Fiduciary Relations, Title 12, Chapter 50 \(2014\)](#).

3. *Kentucky*. No legislation.

4. *Louisiana*. Louisiana considered RUFADAA in 2016, but it was not enacted. Louisiana HB 1118 (2016). Louisiana still has its "third generation" legislation in place as summarized earlier. [La. Rev. Stat. § 3191](#).

5. *Oklahoma*. No legislation.

X. CONCLUSION

Complications surround planning for digital assets, but all clients need to understand the ramifications of failing to do so. Estate planning attorneys need to comprehend fully that this is not a trivial consideration and that it is a developing area of law. More cases will arise regarding TOSAs, rights of beneficiaries, and the ramifications of applicable state and federal laws. The best thing clients can do at this time is to use the methods available to them to make clear their desires with regard to digital assets.

APPENDIX A – DIGITAL ESTATE INFORMATION SAMPLE FORM¹

DIGITAL ESTATE INFORMATION FOR:

I. LOCATIONS OF HARD COPY FILES AND MEDIA BACKUP

Personal records =

Financial =

Home/apartment records =

Media backups =

The location of traditional paper records as well as where back ups of digital information are stored is very helpful.

DEFAULT INFORMATION

User names =

Passwords =

Secret questions:

Mother's maiden name =

Grade school =

Street where grew up =

Many clients have default information which they use for many accounts. If no specific access information is provided, this at least provides a starting point.

Some clients may also have a method of assigning passwords. If so, the client should provide this information.

¹ For another sample form, see James D. Lamm, [*Digital Audit: Passwords & Digital Property*](#) (2015).

ELECTRONIC DEVICE ACCESS

<u>Device</u>	<u>Website</u>	<u>Username</u>	<u>PIN</u>	<u>Password</u>
Computer – home				
Computer – office				
Operating System				
Voice mail – home				
Voice mail – work				
Voice mail – cell phone				
Security system				
Tablet				
e-Reader				
GPS				
Router				
DVR/TiVo				
Television				

E-MAIL ACCOUNTS

<u>Description</u>	<u>E-mail address</u>	<u>Username</u>	<u>PIN</u>	<u>Password</u>	<u>Disposition Desires</u>
Work					
Home					
School					

DOMAIN NAMES

<u>Website/Domain Name</u>	<u>Webhost</u>	<u>Username</u>	<u>PIN</u>	<u>Password</u>
Personal				
Business				

ON-LINE STORAGE

<u>Name</u>	<u>Website</u>	<u>Username</u>	<u>PIN</u>	<u>Password</u>
Dropbox				
Google Drive				

FINANCIAL SOFTWARE

<u>Item</u>	<u>Website</u>	<u>User Name</u>	<u>PIN</u>	<u>Password</u>
Quicken				
TurboTax				

BANKING

<u>Institution</u>	<u>Website</u>	<u>User Name</u>	<u>Password</u>	<u>ATM PIN</u>	<u>Security Image</u>
Checking					
Savings					
PayPal					

STOCKS, BONDS, SECURITIES

<u>Institution</u>	<u>Website</u>	<u>User Name</u>	<u>Password</u>	<u>Other Information</u>

INCOME TAXES

<u>Item</u>	<u>Website</u>	<u>User Name</u>	<u>PIN</u>	<u>Password</u>
Federal Income tax payment	https://www.eftps.com/eftps/			
State Income tax payment				
Prior computerized tax returns				

RETIREMENT

<u>Institution</u>	<u>Website</u>	<u>User Name</u>	<u>Password</u>	<u>Other Information</u>

INSURANCE

<u>Institution</u>	<u>Website</u>	<u>User Name</u>	<u>Password</u>	<u>Other Information</u>
Health				
Life				
Property				

CREDIT CARDS

<u>Institution</u>	<u>Website</u>	<u>User Name</u>	<u>Password</u>	<u>PIN</u>
American Express				
Visa				

DEBTS

<u>Institution</u>	<u>Website</u>	<u>User Name</u>	<u>Password</u>	<u>Other Information</u>
Mortgage				
Cars				
Student Loan				

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UTILITIES

<u>Institution</u>	<u>Website</u>	<u>User Name</u>	<u>Password</u>	<u>Other Information</u>
Electric				
Gas				
Internet				
Phone(landline)				
Phone (cell)				
TV				
Trash				
Water				

BUSINESSES

<u>Institution</u>	<u>Website</u>	<u>User Name</u>	<u>Password</u>	<u>Other Information</u>
Amazon.com				
e-Bay.com				

SOCIAL NETWORKS

<u>Institution</u>	<u>Website</u>	<u>User Name</u>	<u>Password</u>	<u>Disposition Desires</u>
Facebook				
LinkedIn				
Twitter				
Instagram				

DIGITAL MEDIA ACCOUNTS

<u>Institution</u>	<u>Website</u>	<u>User Name</u>	<u>Password</u>	<u>Other Information</u>
Netflix				
iTunes				
YouTube				
Hulu				

Nook				
Kindle				

LOYALTY PROGRAMS

<u>Name</u>	<u>Website</u>	<u>User Name</u>	<u>Password</u>
Airlines			
Grocery stores			
Appliance stores			
Starbucks			

OTHER ACCOUNTS

<u>Name</u>	<u>Website</u>	<u>User Name</u>	<u>Password</u>
Skype			
LoJack			
WoW			
HalfLife			

CYBER ESTATE PLANNING AND ADMINISTRATION

<u>Name</u>	<u>Website</u>	<u>User Name</u>	<u>Password</u>
Flickr			
Medical records			

APPENDIX B –SAMPLE DOCUMENT LANGUAGE

A. Wills

1. Short Form Samples

Digital Assets Other than Electronic Communications

I grant my executor full access to my digital assets other than electronic communications to the fullest extent allowed under state and federal law.

Electronic Communications

[full access]

I grant my executor full access to both the catalogue and the content of electronic communications sent or received by me to the fullest extent allowed under state and federal law.

[partial access]

I grant my executor the right to receive and access the catalogue of electronic communications sent or received by me to the fullest extent allowed under state and federal law. However, my executor has no right to receive access to the content of any electronic communication sent or received by me.

[no access]

My executor does not have any right to receive the catalogue or content of any electronic communications sent or received by me.

2. Long Form Sample 1

[Adapted from a provision supplied by James Lamm and reproduced in Michael Froomkin, [*Estate Planning for Your Digital Afterlife*](#), Discourse.net (Feb. 18, 2013).]

The personal representative may exercise all powers that an absolute owner would have and any other powers appropriate to achieve the proper investment, management, and distribution of: (1) any kind of computing device of mine; (2) any kind of data storage device or medium of mine; (3) any electronically stored information of mine; (4) any user account of mine; and (5) any domain name of mine. The personal representative may obtain copies of any electronically stored information of mine from any person or entity that possesses, custodies, or controls that information. I hereby authorize any person or entity that possesses, custodies, or controls any electronically stored information of mine or that provides to me an electronic communication service or remote computing service, whether public or private, to divulge to the personal representative: (1) any electronically stored information of mine; (2) the contents of any communication that is in electronic storage by that service or that is carried or maintained on that service; (3) any record or other information pertaining to me with respect to that service. This authorization is to be construed to be my lawful consent under the Electronic Communications Privacy Act of 1986, as amended; the Computer Fraud and Abuse Act of 1986, as amended; and any other applicable federal or state data privacy law or criminal law. The personal representative may employ any consultants or agents to advise or assist the personal representative in decrypting any encrypted electronically stored information of mine or in bypassing, resetting, or recovering any password or other kind of authentication or authorization, and I hereby authorize the personal representative to take any of these actions to access: (1) any kind of computing device of mine; (2) any kind of data storage device or medium of mine; (3) any electronically stored information of mine; and (4) any user account of mine. The terms used in this paragraph are to be construed as broadly as possible, and the term “user account” includes without

limitation an established relationship between a user and a computing device or between a user and a provider of Internet or other network access, electronic communication services, or remote computing services, whether public or private.

3. Long Form Sample 2

[Adapted from Michael D. Walker, [*The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age*](#), 52 REAL PROP, TR., & EST. L.J. 51, 75 (2017).]

(a) My Personal Representative may take any action (including, without limitation, assuming or amending a terms-of-service agreement or other governing instrument) with respect to my Digital Assets, Digital Devices, or Digital Accounts as my Personal Representative shall deem appropriate, and as shall be permitted under applicable state and Federal law. My Personal Representative may engage experts or consultants or any other third party, and may delegate authority to such experts, consultants or third party, as necessary or appropriate to effectuate such actions with respect to my Digital Assets, Digital Devices, or Digital Accounts, including, but not limited to, such authority as may be necessary or appropriate to decrypt electronically stored information, or to bypass, reset or recover any password or other kind of authentication or authorization. This authority is intended to constitute “lawful consent” to any service provider to divulge the contents of any communication or record under The Stored Communications Act (currently codified as 18 U.S.C. §§ 2701 et seq.), the Computer Fraud and Abuse Act (currently codified as 18 U.S.C. § 1030), and any other state or federal law relating to Digital Assets, data privacy, or computer fraud, to the extent such lawful consent may be required. My Personal Representative shall be an authorized user for purposes of applicable computer-fraud and unauthorized-computer-access laws. The authority granted under this paragraph is intended to provide my Personal Representative with full authority to access and manage my Digital Assets, Digital Devices, or Digital Accounts, to the maximum extent permitted under applicable state and Federal law and shall not limit any authority granted to my Personal Representative under such laws.

(b) The following definitions and descriptions shall apply under this will to the authority of the Personal Representative with respect to my Digital Assets and Accounts:

(1) “Digital Assets” shall be any electronic record that is defined as a “Digital Asset” under the [applicable state law], together with any and all files created, generated, sent, communicated, shared, received, or stored on the Internet or on a Digital Device, regardless of the ownership of the physical device upon which the digital item was created, generated, sent, communicated, shared, received or stored (which underlying physical device shall not be a “Digital Asset” for purposes of this will).

(2) A “Digital Device” is an electronic device that can create, generate, send, share, communicate, receive, store, display, or process information, including, without limitation, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smart phones, cameras, electronic reading devices, and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops.

(3) “Digital Account” means an electronic system for creating, generating, sending, sharing, communicating, receiving, storing, displaying, or processing information which provides access to a Digital Asset stored on a Digital Device, regardless of the ownership of such Digital Device.

(4) For the purpose of illustration, and without limitation, Digital Assets and Digital Accounts shall include email and email accounts, social network content and accounts, social media content and accounts, text, documents, digital photographs, digital videos, software, software licenses, computer programs, computer source codes, databases, file sharing accounts, financial accounts, health insurance records and accounts, health care records and accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online store accounts and affiliate programs and other

online accounts which currently exist or may exist as technology develops, or such comparable items and accounts as technology develops, including any words, characters, codes, or contractual rights necessary to access such items and accounts.

B. Power of Attorney

[Adapted from Keith P. Huffman, [*Law Tips: Estate Planning for Digital Assets*](#), Indiana Continuing Legal Education Forum (Dec. 4, 2012)]

Digital Assets. My agent has (i) the power to access, use, and control my digital device, including, but not limited to, desktops, laptops, peripherals, storage devices, mobile telephones, smart phones, and any similar device which currently exists or exists in the future as technology develops for the purpose of accessing, modifying, deleting, controlling or transferring my digital assets, (ii) the power to access, modify, delete, control, and transfer my digital assets, including, but not limited to, any emails, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, domain registrations, web hosting accounts, tax preparation service accounts, on-line stores, affiliate programs, other on line programs, including frequent flyer and other bonus programs, and similar digital items which currently exist or exist in the future as technology develops, and (iii) the power to access the content of all electronic communications as defined by [citation to state statute].

C. Authorization and Consent for Release of Electronically Stored Information

[Adapted from Wealthaven, LLC, [*Sample Digital Language*](#) (2014).]

By this document, I hereby authorize and consent for any person or entity that has possession, custody or control over any electronically stored information or digital assets wherein I have a property right or interest, or that provides an electronic communication service, a remote communication service, a storage service, whether public or private, to release and disclose to my personal representatives (a) any electronically stored information, (b) the contents of any communication that is in electronic storage by that service or that is carried or maintained on that service, (c) any record or other information pertaining to me with respect to that service.

It is my intention that this authorization and consent is to be construed as broadly as possible to allow my personal representative under this document to have the access and use of information described above. I intend for my personal representative to include a trustee of my revocable trust, a trustee of a trust appointed under my will, an attorney in fact (agent) acting under a power of attorney document, a guardian or conservator appointed for me, the personal representative or executor of my estate or other representative created by operation of law.

This authorization and consent is to be construed to be my lawful consent under the Electronic Communications Privacy Act of 1986, as Amended; the Computer Fraud and Abuse Act of 1986 as amended; and any other applicable federal or state data privacy or criminal law.

This authorization is effective immediately. Unless I revoke this authorization in writing while I am competent, this authorization continues to be effective during any period that I am incapacitated and continues to be effective after my death.

Unless a person or entity has received actual notice that this authorization has been validly revoked by me, that person or entity receiving this authorization may act in reliance on the presumption that it is valid and unrevoked and that person or entity is released and held harmless by me, my heirs, legal representatives, successors, assigns from any loss suffered or liability incurred for acting according to this authorization. A person or entity may accept a copy or facsimile of this original authorization as though it were an original document.

D. Non-Authorization

[Adapted from Jennifer J. Wioncek & Michael D. Melrose, *Executive Summary* (May 10, 2016).]

My [type of fiduciary such as executor or agent] does not have any right to receive the catalogue or content of any electronic communications sent or received by me.

[or]

My [type of fiduciary such as executor or agent] has the right to receive and access the catalogue of electronic communications sent or received by me. However, my [type of fiduciary such as executor or agent] shall have no right to receive access to the content of any electronic communication sent or received by me.

E. Pleading

Applicant, the personal representative of the Estate of [name of deceased], respectfully requests the court to make the following findings:

1. [Name of deceased] had the following account with [name of custodian] identified as follows:
 - Account number: _____.
 - User name: _____.
 - Address: _____.
 - Unique subscriber or account identifier: _____.
2. Disclosure of the content of this account would not violate 18 U.S.C. § 2701 et seq., 47 U.S.C. § 222, or other applicable law.
3. [Name of deceased] expressly consented to the disclosure of the content of an electronic communication in [his/her] will.
4. Disclosure of the content of [name of deceased] electronic communication is reasonably necessary for the administration of [name of deceased]'s estate.

F. Court Order

The court finds the following:

1. Applicant is the personal representative of the Estate of [name of deceased].
2. [Name of deceased] had the following account with [name of custodian] identified as follows:
 - Account number: _____.
 - User name: _____.
 - Address: _____.
 - Unique subscriber or account identifier: _____.
3. Disclosure of the content of this account would not violate 18 U.S.C. § 2701 et seq., 47 U.S.C. § 222, or other applicable law.
4. [Name of deceased] expressly consented to the disclosure of the content of an electronic communication in [his/her] will.
5. Disclosure of the content of [name of deceased] electronic communication is reasonably necessary for the administration of [name of deceased]'s estate.

APPENDIX C – SAMPLE REQUEST LETTER TO DIGITAL ASSET CUSTODIAN

[Adapted from Michael D. Walker, [*The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age*](#), 52 REAL PROP, TR., & EST. L.J. 51,77 (2017).]

Via Certified Mail _____
Return Receipt Requested

Cyberdyne Systems
1701 Enterprise Drive
Skynet, CA 90210

Re: Email Account of Sarah Connor, Deceased (iwantolive@cyberdyne.com)

Dear Custodian:

I am the duly appointed personal representative of Sarah Connor (the “Decedent”). The Decedent died on _____.

Pursuant to the [citation to state’s version of RUFADAA] (hereafter, “RUFADAA”), I hereby request full access to the Decedent’s email account maintained by Cyberdyne Systems. In connection with this request, I am enclosing the following:

1. A certified copy of the death certificate of the Decedent.
2. A certified copy of the Letters Testamentary issued by [court] on [date] which appoints me as the Personal Representative of the Decedent’s estate.
3. A copy of the Will of Decedent dated [date]. Please note that pursuant to [citation to enabling will provision] of the Decedent’s Will, the Decedent expressly provided her full consent to the disclosure of all her digital assets, including the content of electronic communications, to her personal representative, and further authorized her personal representative to take any and all actions relating to her digital assets as her personal representative shall deem appropriate.
4. A copy of an email dated [date] which was sent to me by the Decedent. This email contains the Decedent’s cyberdyne.com email address referenced above, together with other information identifying the Decedent’s account with Cyberdyne Systems.

I look forward to your prompt response in accordance with RUFADAA. Please contact me if you have any questions.

Very truly yours,

Kyle Reese
Personal Representative
Estate of Sarah Connor, Deceased

APPENDIX D – A PRIMER FOR PROBATE JUDGES

Originally published in NAT'L COLLEGE OF PROB. JUDGES J., Fall 2017, at 1
(slightly edited to update)

A new type of motion is going to start hitting your bench with increased frequency – a request for an order allowing the personal representative to access a decedent's or ward's digital assets. What is this all about? What do I need to know? Should I grant or deny the motion? This article aims to answer these and other questions so that probate judges are well-informed about the cyberspace-estate administration interface.

What is a digital asset?

Digital assets are electronic records (think binary 1s and 0s) in which a person has a right or interest. Examples include e-mails, text messages, photos, digital music and video, word processing documents, social media accounts (e.g., Facebook, LinkedIn, Twitter), and gaming avatars.

Why does a personal representative care about the digital assets of a decedent?

There are many reasons why a personal representative would want access to the decedent's digital assets. (1) Many people forego paper statements for financial accounts such as bank accounts, retirement accounts, and brokerage accounts. The personal representative may seek access to the contents of the decedent's e-mail messages to ascertain where these accounts are located and to gain the information necessary to complete the estate inventory, pay creditors, and distribute the funds appropriately. (2) Likewise, many people forego paper statements for utilities, credit cards, car loans, and home mortgages. The personal representative may need to give notice to and pay these creditors and thus needs access to e-mail messages to determine the names of the creditors and the amounts owed. (3) Some digital assets like domain names, customer lists, manuscripts, and compositions may have significant economic value. The personal representative needs access to these assets for both inventory and distribution purposes. (4) Some digital assets like family photos and videos do not have monetary value but they have great sentimental value and need to be transferred to the proper heirs or will beneficiaries.

What law governs a personal representative's access to digital assets?

See Appendix E, page 45.

Does it matter when the decedent died?

No. RUFADAA applies to a personal representative acting for a decedent who died before, on, or after the effective date.

How is priority for access to a decedent's digital assets determined?

Section 4 of RUFADAA provides the priority order. First priority is given to the decedent's instructions using the custodian's online tools. Examples include Google's Inactive Account Manager and Facebook's Legacy Contact. Second priority is given to the decedent's instructions in the decedent's will. If the decedent has not provided instructions through an online tool or will, then the service provider's terms of service agreement (the "I agree" button) will govern the rights of the decedent's personal representative.

Is there anything special about “access” that I need to know?

Yes! There is a major difference between two types of access. The first type is access to the contents of electronic communications which refers to the substance or meaning of the communication such as the actual subject line and text of e-mail messages.

The second type of access encompasses both the catalogue of electronic communications (e.g., the name of sender, the e-mail address of the sender, and the date and time of the message but *not* the subject line or the content) and other digital assets (e.g., photos, videos, material stored on the decedent’s computer, etc.).

Why is the personal representative bothering me for a court order?

RUFADAA §§ 7 & 8 provide procedures for the personal representative to seek access to digital assets directly from the custodian without the need for a court order. However, the custodian is authorized to ask for a court order before granting access. Many custodians ask for a court order as a matter of standard practice.

What must a court order granting access to contents of electronic communications contain?

You must make the following findings in your court order to grant the executor access to the contents of electronic communications:

- The decedent had the specific account with the custodian including the account’s number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the decedent’s account.
- The disclosure of the contents would not violate 18 U.S.C. § 2701 et seq., 47 U.S.C. § 221, or other applicable law.
- The decedent expressly consented in the decedent’s will to the disclosure of the contents.

May I issue a court order granting access to contents of electronic communications if the decedent died intestate or did not authorize access in the decedent’s will?

From a practical point of view, no. You should issue a court order granting access to contents only if the decedent had a will which expressly authorized the executor to have access to contents. From the exact terms of the statute, however, you have the power to issue the order even without permission but evidence shows the custodian will balk at such an order.

What must a court order granting access to the catalogue of electronic communications and other digital assets contain?

You must make the following findings in your court order to grant the executor of a will or the administrator of an intestate estate access to the catalogue of electronic communications and other digital assets:

- The decedent had the specific account with the custodian including the account’s number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the decedent’s account.
- The disclosure is reasonably necessary for the administration of the estate.

How long does the custodian have to comply with my court order?

The custodian should comply with the request not later than 60 days after your order under RUFADAA § 16. However, a custodian incurs no penalty for failing to disclose within sixty days of a proper request. If the custodian does not disclose, the personal representative may apply to your court for an order

directing compliance. This order must state that compliance is not in violation of 18 U.S.C. § 2702. The decedent's estate bears all the expenses of seeking and obtaining the court order such as attorney fees and court costs. If the custodian does not comply with the court order, you may be able to make an award against the custodian for non-compliance expenses or contempt of court.

Might I need to deal with digital assets in a guardianship or conservatorship?

Yes. Because a protected person is likely to retain a right to privacy in personal communications, access to digital assets is not automatically granted to a guardian or conservator by virtue of the fact that the person is appointed as a guardian or conservator.

If there is a hearing on the matter, you may grant a guardian complete access to the ward's digital assets, that is, the contents of electronic communications, the catalogue of electronic communications, and other digital assets in which the ward has a right or interest. RUFADAA § 14(a).

Without a hearing, a guardian may obtain access to the catalogue and digital assets other than the content of electronic communications but a court order is still required along with other specified required documentation including a certified copy of the court order that granted the guardian authority over the ward's digital assets. RUFADAA § 14(b).

A guardian may also request that an account be terminated or suspended for good cause upon providing the custodian with a copy of the court order giving the guardian general authority over the protected person's property. RUFADAA § 14(c).

Might I need to deal with digital assets when a power of attorney or trust is involved?

Yes. A custodian has no right to ask for court findings as is the case when a personal representative of a decedent's estate is involved. However, if the custodian does not comply with an agent or trustee's valid request, the agent or trustee may seek a court order requiring the custodian to comply with the disclosure request.

Where can I get more information about RUFADAA?

RUFADAA has extensive Comments which are very helpful. You may access them on the website of the Uniform Law Commission at <http://www.uniformlaws.org/>.

You may also access a comprehensive article on the planning for and administration of digital assets at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166422.

APPENDIX E – SUMMARY OF STATE STATUTES

A. RUFADAA Enacted

1. Alabama. [Chapter 1A of Title 19, Code of Alabama 1975](#)
2. Alaska. [HB 108](#). Will be Alaska Stat. § 13.26.645
3. Arizona. [Ariz. Rev. Stat. §§ 14-13101 et seq.](#)
4. Arkansas. [28 Ark. Stat. Ch. 75](#)
5. Colorado. [Colo. Rev. Stat. §§ 15-1-1501 et seq.](#)
6. Connecticut. [Conn. Gen. Stat. § 45a-334b et seq.](#)
7. Florida. [Fla. Stat. §§ 740.001 et seq.](#)
8. Georgia. [SB 301](#).
9. Hawaii. [Hawaii Rev. Stat. §§ 556A-1 et seq.](#)
10. Idaho. [Idaho Code §§ 15-14-101 et seq.](#)
11. Illinois. [755 ILCS 70/1 et seq.](#)
12. Indiana. [Ind. Code Ann. § 32-39-1-1 et seq.](#)
13. Iowa. [2017 S.B. 333](#)
14. Kansas. [2017 S.B. 63](#)
15. Maine. [LD 846](#)
16. Maryland. [Md. Estates & Trust Code §§ 15-601 et seq.](#)
17. Michigan. [Mich. Comp. Laws §§ 700.1001 et seq.](#)
18. Minnesota. [Minn. Stat. §§ 521A.01 et seq.](#)
19. Mississippi. [2017 H.B. 849](#).
20. Missouri. [Mo. Stat. 472.400-472.490](#).
21. Montana. [2017 S.B. 118](#)
22. Nebraska. [Rev. Stat. Neb. §§ 30-501 to -518](#)
23. Nevada. [AB 239](#). Title 59 Nev. Rev. Stat. (new chapter).
24. New Jersey. [A3433](#). Title 3B C.3B:14-61.
25. New Mexico. [2017 S.B. 60](#).
26. New York. [McKinney's EPTL §§ 13-A-1 to 13-A-5.2](#)
27. North Carolina. [N.C. Gen. Stat. §§ 36F-1 et seq.](#)
28. North Dakota. [Chapter 47-36 of the North Dakota Century Code](#)
29. Ohio. [Ohio Rev. Code §§ 2137.01 et seq.](#)
30. Oregon. [2016 S.B. 1554](#)
31. South Carolina. [S.C. Code Ann. §§ 62-2-1010 et seq.](#)


32. South Dakota. [2017 H.B. 1080](#)
33. Tennessee. [Tenn. Code §§ 35-8-101 et seq.](#)
34. Texas. [Tex. Est. Code Chapter 2001](#)
35. Utah. [2017 H.B. 13](#).
36. Vermont. [2017 H.B. 192, Act 13](#).
37. Virginia. [2017 H.B. 1608, Chap. 33](#) / [2017 S.B. 903, Chap. 80](#)
38. Virgin Islands. [15 V.I. Code ch. 65](#)
39. Washington. [Rev. Code Wash. §§ 11.120.010 et seq.](#)
40. West Virginia. [W. Va. Code § 44-5B-1 et seq.](#)
41. Wisconsin. [Wisc. Stat. § 711.01 et seq.](#)
42. Wyoming. [Wyo. Stat. § 2-3-1001 et seq.](#)

B. RUFADAA Pending

1. District of Columbia.
2. Massachusetts
3. New Hampshire.
4. Pennsylvania
5. Rhode Island

C. Non-RUFADAA

1. California. [Calif. Prob. Code §§ 870 et seq.](#) (partial RUFADAA)
2. Delaware. [Del. Code tit. 12 § 5001 to 5007](#) (UFADAA)
3. Kentucky. No legislation.
4. Louisiana. [La. Code of Civ. Proc., Art. 3191](#)
5. Massachusetts. No legislation.
6. Oklahoma. [OKLA. STAT. tit. 58, § 269](#)
7. Rhode Island: [R.I. GEN. LAWS § 33-27-3](#)



NATIONAL COLLEGE OF PROBATE JUDGES
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CYBER ESTATE PLANNING AND ADMINISTRATION

Dr. Gerry W. Beyer
Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law

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1

Cheap Funerals

- In which state are funerals the cheapest?
 - A. Arkansas
 - B. Mississippi
 - C. Nevada
 - D. Arizona

2

2

Most Complex Probate

- In which state is probate the most complex?
 - A. California
 - B. Texas
 - C. Arkansas
 - D. Alaska

3

3

Longest Life Expectancy

- Which state has the longest life expectancy at over 81 years?
 - A. Arkansas
 - B. Hawaii
 - C. Nevada
 - D. Florida

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Digital Assets



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Overview

- What are “digital assets”?
- The importance of planning for these assets.
- The impact of user policies and Federal law.
- Obstacles to planning for these assets.
- Fiduciary access to digital assets – generally.
- The Revised Uniform Fiduciary Access to Digital Assets Act.
- How a probate judge may be asked to deal with digital assets under RUFADAA.

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Definition of Digital Assets

- Electronic record in which an individual has a right or interest.
 - May be electrical, digital, magnetic, wireless, optical, electromagnetic, etc.

```
100110011010100
101001101011010
111011110101001
```

- Does *not* include any underlying asset or liability unless it is itself an electronic record.

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Digital Assets -- Personal

- Types of Files:
 - e-mail and text messages
 - Photos
 - Music (mp3)
 - Videos
 - Documents – word processing, pdf, etc.
 - Spreadsheets
 - Tax records and returns
 - PowerPoint presentations
 - e-books (Kindle, Nook, etc.)

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Digital Assets -- Personal

- Location of files:
 - Computer
 - Smart phone
 - Tablet
 - e-reader
 - Camera
 - Memory cards or USB flash drives
 - CDs and DVDs
 - Online in the cloud

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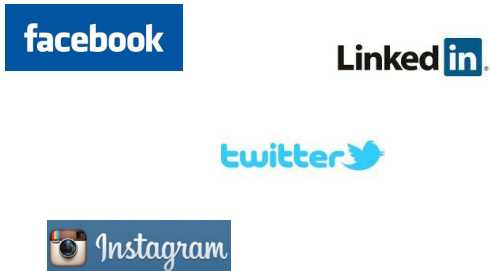
Digital Assets -- Personal

- Gaining access:
 - Password or equivalent to start device.
 - Password to access operating system.
 - Password to open document.
 - Password to access website where material stored.

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Digital Assets – Social Media



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Digital Assets – Financial Accounts

- Examples:
 - Bank accounts
 - PayPal
 - Cryptocurrency (e.g., Bitcoin)
 - Investment and brokerage accounts
 - Utility bill payment (water, gas, telephone, cell phone, cable, and trash disposal)
 - Loan payments (mortgage, car, credit cards, etc.)
 - IRS e-filing

12

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Digital Assets – Business Accounts

- Examples:
 - Client records (attorney, CPA, etc.).
 - Patient records (physicians, dentists, etc.).
 - Customer information databases (names, addresses, credit card numbers, order history, pending orders, etc.).
 - Inventory.
 - eBay accounts.

13

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Digital Assets – Internet Sites

- Domain Names
- Blogs

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Digital Assets – Loyalty Program Benefits

- Examples:
 - Frequent flyer points.
 - Credit card “cash back” or “reward points”
 - Business “points,” discounts, or vouchers.

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Digital Assets -- Others

- Gaming "money," avatars, and virtual property



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Importance of Planning

- 1. Make things easier for your family and executor when you die or become disabled.

Life
100% fatal



Disability > 90 days
60% chance

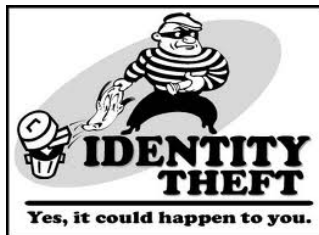


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Importance of Planning

- 2. Prevent identify theft.



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Importance of Planning

■ 3. Prevent Financial Losses to Estate



???.com



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Importance of Planning

■ 4. Avoid Losing the Deceased's Story



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Importance of Planning

■ 5. Protect Secrets from Being Revealed



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Obstacles to Planning

1. Terms of Service Agreements [TOSA]

- May govern what happens upon death.
- Did decedent *really* know or agree?

I Agree

I Have No Idea
What This Says



22

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Obstacles to Planning

1. Terms of Service Agreements [TOSA]

Apple iTunes

amazonkindle

amazonMP3

nook

23

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Obstacles to Planning

2. Federal Law

- Stored Communications Act
- Computer Fraud and Abuse Act

24

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Obstacles to Planning

2. Federal Law -- Interface with User Agreements

- Agreements usually prohibit user from granting others access to account.
- Thus, revealing user name and password to a non-user and allowing that person to access the account may be in violation of federal statutes prohibiting access without lawful consent.

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Obstacles to Planning

■ 2. Federal Law -- Potential Federal Law Limitations

- Can provider turn over without violating Stored Communications Act?
 - Daftary case (2012).
 - Ajemian case (2017).



Sahar Daftary

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Obstacles to Planning

■ 3. Safety

- Computer or papers can be stolen.
- Encryption can be broken.
- Internet storage can be hacked.



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Obstacles to Planning

- 4. Hassle -- Information changes rapidly:
 - Accounts opened.
 - Accounts closed.
 - Passwords change.
 - Equipment is bought and sold.



28

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Obstacles to Planning

- 5. Uncertain Reliability of Afterlife Companies and Ability to do What Promised



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Summary: Why does PR want access?

- Complete estate inventory
 - Contents of estate
 - Value of assets
- Administer estate assets
- Give notices to creditors
- Pay creditors
- Distribute to beneficiaries

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History of Fiduciary Access to Digital Assets

- 1. Primitive state statutes
 - Remain only in Louisiana, Oklahoma, and Rhode Island
- 2. Uniform Fiduciary Access to Digital Assets Act (2014)
 - Fiduciaries have default access unless person provided otherwise in will, power of attorney, trust, etc.
 - Defeated in 26 states; only enacted in Delaware
- 3. Privacy Expectation Afterlife & Choices Act
 - No access unless express permission plus court order.
 - Enacted in Virginia but later repealed

31

31

Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)

- Substantial rewrite approved July 2015.
- Fiduciaries do not have default access to e-mail contents.
- Instead, access to contents only if the user consented to disclosure.

32

32

RUFADAA -- Endorsements

- Association of American Retired Persons
- Center for Democracy and Technology
- Facebook
- Google
- National Academy of Elder Law Attorneys

33

33

RUFADAA – Enactment Status

Green = enacted Blue = introduced Gray = partial adoption

Alabama	Illinois	Montana	Rhode Island
Alaska	Indiana	Nebraska	South Carolina
Arizona	Iowa	Nevada	South Dakota
Arkansas	Kansas	New Hampshire	Tennessee
California	Kentucky	New Jersey	Texas
Colorado	Louisiana	New Mexico	Utah
Connecticut	Maine	New York	Vermont
Delaware	Maryland	North Carolina	Virginia
DC	Massachusetts	North Dakota	Virgin Islands
Florida	Michigan	Ohio	Washington
Georgia	Minnesota	Oklahoma	West Virginia
Hawaii	Mississippi	Oregon	Wisconsin
Idaho	Missouri	Pennsylvania	Wyoming

(as of 04/15/2019)

34

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RUFADAA – Fiduciaries Covered

- Personal representatives of a decedent's estate
 - Executors
 - Administrators
- Agents under a power of attorney
- Trustees
- Guardians appointed by a court

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RUFADAA – Access to Contents

- Access to contents of electronic communications (e.g., e-mail, text messages, social media accounts).
 - Priority order for consent to access:
 1. On-line tool directions.
 2. Directions in will, trust, power of attorney, court order appointing guardian.
 3. Terms of service (they may prohibit access to fiduciaries).

36

36

RUFADAA – Access to Contents

- Statute appears to say the court may order contents access *regardless* of consent but providers balk.
- Thus, very hard for PR to get access to contents if the decedent died intestate or died testate with no authorization.

37

37

RUFADAA – Access to Catalogue

- Access to catalogue of electronic communications and other digital assets is allowed even without express permission.
- Catalogue information includes:
 - Name of sender
 - E-mail address of sender
 - Date and time the message was sent
 - Does *not* include the subject line

38

38

RUFADAA – PR to Contents

- Method for deceased user's PR to gain access to contents:
 - PR sends request to custodian including:
 - Certified copy of death certificate.
 - Copy of will showing express consent (unless on-line tool used).
 - Certified copy of document granting authority (letters).

39

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RUFADAA – PR to Contents

- Method for deceased user's PR to gain access to contents:
 - Custodian may ask for the following before disclosing:
 - Information identifying the account and linking the deceased user to the account.
 - Court order finding that:
 - Account belonged to decedent.
 - Disclosure would not violate Stored Communications Act, etc.
 - Deceased user consented.
 - Disclosure reasonably necessary for estate administration

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RUFADAA – PR to Catalogue, etc.

- Method for deceased user's PR to gain access to catalogue and other digital assets:
 - Send request to custodian including:
 - Certified copy of death certificate.
 - Certified copy of document granting authority (letters).

41

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RUFADAA – PR to Catalogue, etc.

- Method for deceased user's PR to gain access to catalogue and other digital assets:
 - Custodian may ask for the following before disclosing:
 - Information identifying the account and linking the deceased user to the account.
 - Court order finding that:
 - Account belonged to decedent.
 - Disclosure reasonably necessary for estate administration

42

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RUFADAA – Important Advice



- Several custodians have indicated that they will *always* require a court order prior to disclosure.
- Thus, prudent attorneys will request the court to make the necessary findings as early in the estate administration process as is possible.

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43

RUFADAA – Guardians

- Method for Guardians of the Person (Conservators) to gain access
 - Guardians have no automatic access by virtue of being a guardian.
 - With a court hearing, the court may grant compete access.
 - Without a hearing, the court may grant access to the catalogue and other assets (but not contents).

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RUFADAA – Agents & Trustees

- The procedures for agents and trustees to gain access to contents and catalogue do *not* normally have a court component.
- However, if the custodian does not comply with a proper request, the agent or trustee may come to court to seek a court order forcing the custodian to permit access.

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RUFADAA – Custodian’s Response

- 14. Custodian’s Response to Proper Request
 - Must comply within 60 days.
 - May charge reasonable fee.
 - May disclose on paper or digitally.
 - May object claiming request causes undue burden.

46

46

RUFADAA – Custodian’s Response

- Custodian’s Response to Proper Request
 - If custodian does not comply:
 - Custodian incurs no penalty.
 - Fiduciary may obtain court order directing disclosure.
 - Fiduciary’s estate bears all costs such as attorney fees and court costs.
 - However, custodian may be liable if it does not comply with a valid court order.

47

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Cryptocurrency



48

48

Cryptocurrency

Must have the private key or seed phrase.

- If lost, cryptocurrency gone forever.
- No court order can help.



49

49

Cryptocurrency

Advice

- Protect and transfer private key
 - Be sure someone knows you own cryptocurrency.
 - Make back-up copies of the private keys and passwords to access digital wallets.
- Keep records of where purchased and price
 - Cryptocurrency is property, not money, so capital gains tax may be owed.

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Questions?



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Benjamin Orzeske is Chief Counsel at the Uniform Law Commission. He supervises a staff of legislative attorneys who work to enact uniform laws in all fifty United States, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Ben personally provides legislative support for the Uniform Commercial Code and for uniform laws in the areas of real property, trusts and estates, investment management, and elder law. He also serves as the ULC's internal Legal Counsel.

The ULC is a non-profit law reform organization comprised of volunteer attorney/commissioners appointed by the states and supported by the staff at its Chicago headquarters. Founded in 1892, the ULC drafts model legislation in areas of state statutory law for which uniformity is feasible and appropriate.

Ben is a member of the American Bar Association Section of Real Property, Trust and Estate Law where he serves as Co-Chair of the Legal Education and Uniform Laws Group, and also a member of the ABA Business Law Section. He is the Chair of the Chicago Bar Association's Legislative Committee. He also serves as the ULC's staff liaison to the Joint Editorial Boards for Uniform Real Property Acts and Uniform Trust and Estate Acts.

Diana Noel is a Senior Legislative Representative with AARP's Department of Government Affairs. Since joining AARP in 2011, Diana has served as an issue expert primarily in the areas of elder abuse, financial exploitation, adult guardianship, power of attorney, and asset protection. In her position, she provides technical assistance to AARP's 53 state offices to further their strategic engagements in state and local level legislative and regulatory advocacy.

Prior to joining AARP, Diana served as the Director of the Labor and Economic Development Committee with the National Conference of State Legislatures. She lobbied Congress on behalf of the nation's state legislators on a host of issues including international trade, disability and employment, arts and culture, and economic development.

Diana graduated from the University of Maryland College Park with a Bachelor of Arts degree in Government and Politics and received her Master of Public Administration degree from Bowie State University. In her spare time, Diana is a 5k coach and enjoys running half marathons.

Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act

National College of Probate Judges
2019 Spring Conference
New Orleans, Louisiana

Presented by
Benjamin Orzeske, Chief Counsel, Uniform Law Commission &
Diana Noel, Senior Legislative Representative, AARP



1



What is the ULC?

- Uniform Law Commission (ULC)
 - Non-profit organization formed in 1892
 - Commissioners are volunteer attorneys appointed by the states
 - ULC drafts model state legislation on topics where uniformity among the states is desirable
 - Legislative staff based in Chicago headquarters
 - www.uniformlaws.org

2



49-Year History of Law Reform

- 1969:** Uniform Probate Code (Article V on Protection of Persons Under Disability and their Property)
- 1979:** Uniform Durable Power of Attorney Act
- 1982:** Uniform Guardianship & Protective Proceedings Act (Introduces limited guardianships)
- 1997:** Revised UGPPA (More protective of an individual's legal rights; least restrictive alternative; court visitor; must take person's views into account)
- 2006:** Uniform Power of Attorney Act (Greater protection against financial abuse; encourages wider acceptance)

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The Road to UGCOPAA

October 2011: National Guardianship Network Third National Guardianship Summit







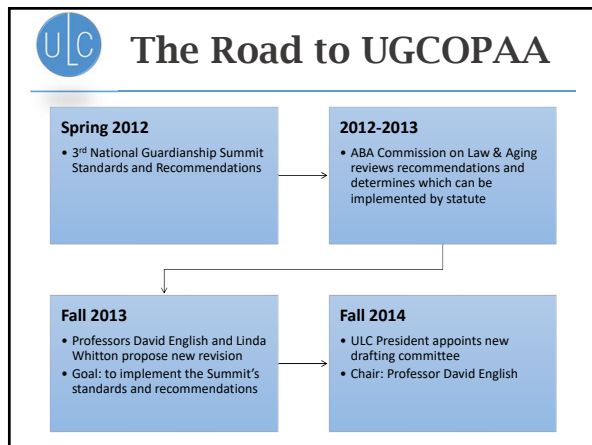








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UGCOPAA Drafting Committee

- ✓ Prof. David English, Chair
- ✓ Prof. Nina Kohn, Reporter
- ✓ Uniform Law Commissioners from 10 States
















6



New Law, New Name


1997

Uniform Guardianship and Protective Proceedings Act ("UGPPA")

2017

Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act ("UGCOPAA")

7




UGCOPAA Terminology

"Guardian" means a person appointed by the court to make decisions with respect to the personal affairs of an individual.

"Conservator" means a person appointed by a court to make decisions with respect to the property or financial affairs of an individual.

"Less restrictive alternative" means an approach to meeting an individual's needs which restricts fewer rights of the individual than would the appointment of a guardian or conservator. The term includes supported decision making, appropriate technological assistance, appointment of a representative payee, and appointment of an agent by the individual, including appointment under a [power of attorney].


8



Why Guardianship Reform

- Recent articles have spotlighted many holes in state systems that failed vulnerable adults and exposed them to abuse and exploitation
- People are living longer and there will be more people in a system that it's not prepared to handle
- Most states haven't had a major revision of guardianship laws in over 20 years

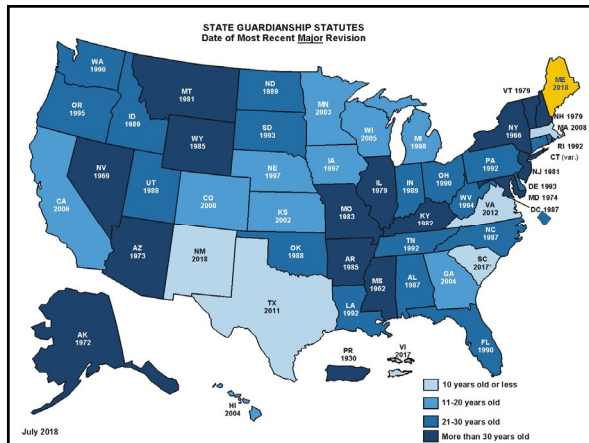
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Political Landscape

- Typically a bi-partisan issue
- Issue isn't "hot"...UNLESS there's a crisis or tragedy
- Broad issue and could be a very long process
- No one-size-fits-all solution
- Lack of data
- Policy wonks aren't necessarily on-the-ground/frontline, workers and vice versa

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Common Issues Across States

- Caregiving
- Shortage of Guardians
- Public Guardianship
- Abuse/Financial Exploitation
- Accountability and Court Monitoring
- Individual Rights
- Alternatives to Guardianship
- Lack of Good and Consistent Data



12

AARP
Real Possibilities

Reform Trends

- Individuals, their family and friends are speaking up!
- Person-centered approach
- Alternatives to guardianship
- Standards and training for ALL guardians
- Increase in education and outreach
- Monitoring reforms to prevent abuse/exploitation
- More collaboration/taskforces/multidisciplinary teams (ex. WINGS)
- State courts are taking on a more active role



13

AARP
Real Possibilities


Person-Centered Terminology

Old:

- Ward
- Alleged incapacitated person
- Incapacitated person

New:

- Adult/Minor
- Respondent
- Adult/Minor subject to guardianship/conservatorship



14

AARP
Real Possibilities

UGCOPAA: A Basic Overview

Focus on the Courts	<ul style="list-style-type: none"> · Encourages individualized planning · Requires least restrictive environment · Increases court oversight and monitoring
Focus on the Guardian	<ul style="list-style-type: none"> · Outlines clear duties and responsibilities · Prevents isolation · Gets rid of bad actors
Focus on the Individual	<ul style="list-style-type: none"> · Protects legal rights · Updates terminology · Promotes independence

15



Seven Key Reforms

1. Expanded Procedural Rights
2. Least-Restrictive Alternative
3. Individual Guardianship Plans
4. Enhanced Monitoring
5. Informal Grievance Procedure
6. Clear Decision-Making Standards
7. Right to Social Interaction

16



Expanded Procedural Rights

- Strengthens the requirement for the respondent to be present at the hearing (audio/video hearings permitted).
- Requires findings *before* removal of fundamental rights (e.g. vote, marry).
- Attorney must advocate for the client's wishes.
- Plain-language notice of key rights.
- Limits guardian's ability to charge fees to oppose the individual's efforts to change terms of the appointment.
- Automatic triggers for reconsideration.

17



Least-Restrictive Alternative

- Petitioners seeking guardianship or conservatorship must explain why a less restrictive alternative is not sufficient.
- Courts may treat a petition for guardianship or conservatorship as a petition for a less-restrictive alternative.
- Courts ordering guardianship or conservatorship must include findings explaining why a less-restrictive alternative is not sufficient.

18

AARP
Real Possibilities

Individual Guardianship & Conservatorship Plans

- Guardian or conservator must file a plan within 60 days of appointment, with copies to whomever the court directs.
- Plan must include:
 - Living arrangements, services, and supports;
 - Social and educational activities;
 - Persons with whom the adult has personal relationships and plans for facilitating visits with those persons;
 - Nature and frequency of guardian's communication with the adult;
 - Goals, including future restoration of rights;
 - Statement of proposed charges & expenses.
- Plan must be updated at least annually.

19

U|C

Enhanced Monitoring

- Guardians must submit an annual report. Court can compare the report to the individual's plan to determine whether the guardian/conservator is in compliance.
- Court can appoint respondent's loved ones to receive notice of all hearings, copies of plans, and notice of certain major events (e.g. change of residence, health, etc.).
- A no-cost alternative to court monitoring of guardianship/conservatorship.

20

U|C

Informal Grievance Procedure

- Any interested person who reasonably believes the guardian/conservator is out of compliance may submit a grievance to the court in writing.
- No formal petition necessary.
- Court required to review and respond as appropriate, unless a similar grievance was filed in the previous six months.

21



Clear Decision-Making Standards

Guardians are required to:

- make the decision they “reasonably believe the adult would make if the adult were able unless doing so would unreasonably harm or endanger the welfare or personal or financial interests of the adult.”
- “consider the adult’s previous or current directions, preferences, opinions, values, and actions, to the extent actually known or reasonably ascertainable” to determine the decision the adult would make.
- make the decision that is in the best interest of the adult if the guardian cannot determine what decision the person would make or the decision would unreasonably harm the welfare or interests of the adult.

22



Clear Decision-Making Standards

Conservators are required to:

- “make the decision the conservator reasonably believes the individual would make if the individual were able unless doing so would unless doing so would **fail to preserve the resources needed to maintain the individual’s well-being and lifestyle or otherwise** unreasonably harm or endanger the welfare or personal or financial interests of the individual.”
- use a best interest approach if – and only if – the conservator cannot determine what decision the individual would make or the individual’s decision would **fail to preserve resources needed to maintain the individual’s well-being and lifestyle or otherwise** would unreasonably harm or endanger the individual or the individual’s interests.”

23



Right to Social Interaction

- Details about social interaction (who, where, how often, etc.) go into the plan.
- Without court approval, a guardian for an adult may not indefinitely restrict interaction with another person unless the guardian has good cause to believe interaction poses a risk of significant physical, psychological, or financial harm.
- Restriction limited to 7 days if the person has a family or pre-existing social relationship with the adult, otherwise 60 days.

24

**AARP**
Real Possibilities


Potential Players

- Courts
- Court Administration
- Guardians & Conservators
- State Bar Association (elder law/family law/probate/trust)
- Senior Advocates
- Child Advocates
- Advocates for the Developmentally Disabled
- Uniform Law Commissioners



25

Thank you!



26

UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SIXTH YEAR
SAN DIEGO, CALIFORNIA
JULY 14 - JULY 20, 2017

WITH PREFATORY NOTE AND COMMENTS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

July 9, 2018

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UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

Prefatory Note.....	1
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[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE.....	5
SECTION 102. DEFINITIONS.....	5
SECTION 103. SUPPLEMENTAL PRINCIPLES OF LAW AND EQUITY APPLICABLE. .	10
SECTION 104. SUBJECT-MATTER JURISDICTION.....	10
SECTION 105. TRANSFER OF PROCEEDING.....	12
SECTION 106. VENUE.....	14
SECTION 107. PRACTICE IN COURT.	15
SECTION 108. LETTERS OF OFFICE.....	16
SECTION 109. EFFECT OF ACCEPTANCE OF APPOINTMENT.....	17
SECTION 110. CO-GUARDIAN; CO-CONSERVATOR.....	17
SECTION 111. JUDICIAL APPOINTMENT OF SUCCESSOR GUARDIAN OR SUCCESSOR CONSERVATOR.....	19
SECTION 112. EFFECT OF DEATH, REMOVAL, OR RESIGNATION OF GUARDIAN OR CONSERVATOR.....	20
SECTION 113. NOTICE OF HEARING GENERALLY.....	21
SECTION 114. WAIVER OF NOTICE.....	22
SECTION 115. GUARDIAN AD LITEM.....	23
SECTION 116. REQUEST FOR NOTICE.....	24
SECTION 117. DISCLOSURE OF BANKRUPTCY OR CRIMINAL HISTORY.....	25
SECTION 118. MULTIPLE NOMINATIONS.....	26
SECTION 119. COMPENSATION AND EXPENSES; IN GENERAL.....	27
SECTION 120. COMPENSATION OF GUARDIAN OR CONSERVATOR.....	28
SECTION 121. LIABILITY OF GUARDIAN OR CONSERVATOR FOR ACT OF INDIVIDUAL SUBJECT TO GUARDIANSHIP OR CONSERVATORSHIP.....	30
SECTION 122. PETITION AFTER APPOINTMENT FOR INSTRUCTION OR RATIFICATION.....	31
SECTION 123. THIRD-PARTY ACCEPTANCE OF AUTHORITY OF GUARDIAN OR CONSERVATOR.....	31
SECTION 124. USE OF AGENT BY GUARDIAN OR CONSERVATOR.....	33
SECTION 125. TEMPORARY SUBSTITUTE GUARDIAN OR CONSERVATOR.....	35
SECTION 126. REGISTRATION OF ORDER; EFFECT	37
SECTION 127. GRIEVANCE AGAINST GUARDIAN OR CONSERVATOR.....	39
[SECTION 128. DELEGATION BY PARENT.]	41

[ARTICLE] 2

GUARDIANSHIP OF MINOR

SECTION 201. BASIS FOR APPOINTMENT OF GUARDIAN FOR MINOR.....	43
SECTION 202. PETITION FOR APPOINTMENT OF GUARDIAN FOR MINOR.	44
SECTION 203. NOTICE OF HEARING FOR APPOINTMENT OF GUARDIAN FOR MINOR.	46
SECTION 204. ATTORNEY FOR MINOR OR PARENT.....	48
SECTION 205. ATTENDANCE AND PARTICIPATION AT HEARING FOR APPOINTMENT OF GUARDIAN FOR MINOR.....	50
SECTION 206. ORDER OF APPOINTMENT; PRIORITY OF NOMINEE; LIMITED GUARDIANSHIP FOR MINOR.	52
SECTION 207. STANDBY GUARDIAN FOR MINOR.	54
SECTION 208. EMERGENCY GUARDIAN FOR MINOR.	59
SECTION 209. DUTIES OF GUARDIAN FOR MINOR.....	62
SECTION 210. POWERS OF GUARDIAN FOR MINOR.....	64
SECTION 211. REMOVAL OF GUARDIAN FOR MINOR; TERMINATION OF GUARDIANSHIP; APPOINTMENT OF SUCCESSOR.	67

[ARTICLE] 3

GUARDIANSHIP OF ADULT

SECTION 301. BASIS FOR APPOINTMENT OF GUARDIAN FOR ADULT.....	69
SECTION 302. PETITION FOR APPOINTMENT OF GUARDIAN FOR ADULT.....	71
SECTION 303. NOTICE OF HEARING FOR APPOINTMENT OF GUARDIAN FOR ADULT.	76
SECTION 304. APPOINTMENT AND ROLE OF [VISITOR].....	78
SECTION 305. APPOINTMENT AND ROLE OF ATTORNEY FOR ADULT.	82
SECTION 306. PROFESSIONAL EVALUATION.	83
SECTION 307. ATTENDANCE AND RIGHTS AT HEARING.	85
SECTION 308. CONFIDENTIALITY OF RECORDS.	88
SECTION 309. WHO MAY BE GUARDIAN FOR ADULT; ORDER OF PRIORITY.....	91
SECTION 310. ORDER OF APPOINTMENT FOR GUARDIAN.....	94
SECTION 311. NOTICE OF ORDER OF APPOINTMENT; RIGHTS.	98
SECTION 312. EMERGENCY GUARDIAN FOR ADULT.	100
SECTION 313. DUTIES OF GUARDIAN FOR ADULT.....	103
SECTION 314. POWERS OF GUARDIAN FOR ADULT.....	106
SECTION 315. SPECIAL LIMITATIONS ON GUARDIAN'S POWER.	112
SECTION 316. GUARDIAN'S PLAN.	113
SECTION 317. GUARDIAN'S REPORT; MONITORING OF GUARDIANSHIP.	117
SECTION 318. REMOVAL OF GUARDIAN FOR ADULT; APPOINTMENT OF SUCCESSOR.....	122
SECTION 319. TERMINATION OR MODIFICATION OF GUARDIANSHIP FOR ADULT.	125

[ARTICLE] 4

CONSERVATORSHIP

SECTION 401. BASIS FOR APPOINTMENT OF CONSERVATOR.....	129
SECTION 402. PETITION FOR APPOINTMENT OF CONSERVATOR.	131
SECTION 403. NOTICE AND HEARING FOR APPOINTMENT OF CONSERVATOR....	137
SECTION 404. ORDER TO PRESERVE OR APPLY PROPERTY WHILE PROCEEDING PENDING.	139
SECTION 405. APPOINTMENT AND ROLE OF [VISITOR].....	139
SECTION 406. APPOINTMENT AND ROLE OF ATTORNEY.....	142
SECTION 407. PROFESSIONAL EVALUATION.	146
SECTION 408. ATTENDENCE AND RIGHTS AT HEARING.....	148
SECTION 409. CONFIDENTIALITY OF RECORDS.	151
SECTION 410. WHO MAY BE CONSERVATOR; ORDER OF PRIORITY.....	153
SECTION 411. ORDER OF APPOINTMENT OF CONSERVATOR.	157
SECTION 412. NOTICE OF ORDER OF APPOINTMENT; RIGHTS.	160
SECTION 413. EMERGENCY CONSERVATOR.	162
SECTION 414. POWERS OF CONSERVATOR REQUIRING COURT APPROVAL.	164
SECTION 415. PETITION FOR ORDER AFTER APPOINTMENT.	168
SECTION 416. BOND; ALTERNATIVE ASSET-PROTECTION ARRANGEMENT.	169
SECTION 417. TERMS AND REQUIREMENTS OF BOND.	171
SECTION 418. DUTIES OF CONSERVATOR.....	172
SECTION 419. CONSERVATOR’S PLAN.	178
SECTION 420. INVENTORY; RECORDS.....	180
SECTION 421. ADMINISTRATIVE POWERS OF CONSERVATOR NOT REQUIRING COURT APPROVAL.....	181
SECTION 422. DISTRIBUTION FROM CONSERVATORSHIP ESTATE.	185
SECTION 423. CONSERVATOR’S REPORT AND ACCOUNTING; MONITORING.	188
SECTION 424. ATTEMPTED TRANSFER OF PROPERTY BY INDIVIDUAL SUBJECT TO CONSERVATORSHIP.	193
SECTION 425. TRANSACTION INVOLVING CONFLICT OF INTEREST.	193
SECTION 426. PROTECTION OF PERSON DEALING WITH CONSERVATOR.....	195
SECTION 427. DEATH OF INDIVIDUAL SUBJECT TO CONSERVATORSHIP.....	196
SECTION 428. PRESENTATION AND ALLOWANCE OF CLAIM.....	198
SECTION 429. PERSONAL LIABILITY OF CONSERVATOR.....	200
SECTION 430. REMOVAL OF CONSERVATOR; APPOINTMENT OF SUCCESSOR....	202
SECTION 431. TERMINATION OR MODIFICATION OF CONSERVATORSHIP.....	205
SECTION 432. TRANSFER FOR BENEFIT OF MINOR WITHOUT APPOINTMENT OF CONSERVATOR.....	210

[ARTICLE] 5

OTHER PROTECTIVE ARRANGEMENTS

SECTION 501. AUTHORITY FOR PROTECTIVE ARRANGEMENT.	213
SECTION 502. BASIS FOR PROTECTIVE ARRANGEMENT INSTEAD OF GUARDIANSHIP FOR ADULT.	214
SECTION 503. BASIS FOR PROTECTIVE ARRANGEMENT INSTEAD OF CONSERVATORSHIP FOR ADULT OR MINOR.	216
SECTION 504. PETITION FOR PROTECTIVE ARRANGEMENT.	221
SECTION 505. NOTICE AND HEARING.	225
SECTION 506. APPOINTMENT AND ROLE OF [VISITOR].	226
SECTION 507. APPOINTMENT AND ROLE OF ATTORNEY.	230
SECTION 508. PROFESSIONAL EVALUATION.	232
SECTION 509. ATTENDANCE AND RIGHTS AT HEARING.	234
SECTION 510. NOTICE OF ORDER.	237
SECTION 511. CONFIDENTIALITY OF RECORDS.	237
SECTION 512. APPOINTMENT OF [MASTER].	240

[[ARTICLE] 6

FORMS

SECTION 601. USE OF FORMS.	240
SECTION 602. PETITION FOR GUARDIANSHIP FOR MINOR.	241
SECTION 603. PETITION FOR GUARDIANSHIP, CONSERVATORSHIP, OR PROTECTIVE ARRANGEMENT.	247
SECTION 604. NOTIFICATION OF RIGHTS FOR ADULT SUBJECT TO GUARDIANSHIP OR CONSERVATORSHIP.	247

[ARTICLE] 7

MISCELLANEOUS PROVISIONS

SECTION 701. UNIFORMITY OF APPLICATION AND CONSTRUCTION.	249
SECTION 702. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.	249
SECTION 703. APPLICABILITY.	249
[SECTION 704. SEVERABILITY.]	250
SECTION 705. REPEALS; CONFORMING AMENDMENTS.	250
SECTION 706. EFFECTIVE DATE.	250

UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

Prefatory Note

This act replaces the Uniform Guardianship and Protective Proceedings Act (UGPPA) which was last comprehensively revised in 1997. It may be enacted either as a free-standing act or as part of the Uniform Probate Code (UPC). States enacting the act as part of the UPC should consult Article V of the UPC for the official text of the act as conformed to the UPC's definitions and general provisions.

The act covers guardianships and conservatorships for both minors and adults, as well as protective arrangements instead of guardianship for adults and protective arrangements instead of conservatorship for both adults and minors. It consists of seven articles. Article 1 contains definitions and general provisions applicable to guardianships, conservatorships, and protective arrangements instead of guardianship and conservatorship. Article 2 governs guardianships for minors. Article 3 governs guardianships for adults. Article 4 covers conservatorships for both minors and adults. Article 5 governs protective arrangements instead of guardianship or conservatorship. Article 6 contains optional forms that can be used by persons petitioning for guardianship, conservatorship, or a protective arrangement under Article 5. It also contains a form that can be used to notify adults subject to guardianship or conservatorship of their rights. Article 7 contains an effective date provision and boilerplate provisions common to Uniform acts.

The act is the result of the work of the drafting committee, which was charged with revising the UGPPA to implement recommendations of the Third National Guardianship Summit (NGS) held in 2011. The drafting committee's work built upon two earlier versions of the act: the 1982 UGPPA which significantly advanced guardianship law by recognizing limited guardianship, and the 1997 UGPPA which further advanced the law by, among other things, adopting a functional definition of capacity and emphasizing that guardianship and conservatorship should be options of last resort. The 1982 UGPPA in turn built upon the provisions of Article V of the UPC as originally approved in 1969.

The drafting committee worked in close consultation with a broad range of participants representing numerous constituencies. In addition to the American Bar Association advisors listed above, national organizations providing significant input included AARP, The ARC, the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys, the National Association to Stop Guardianship Abuse, the National College of Probate Judges, the National Center for State Courts, the National Disability Rights Network, and the National Guardianship Association.

The act has three overarching aims.

First, it aims to reflect the person-centered philosophy endorsed by the NGS. The person-centered approach is evidenced in the act's updated terminology. The terms "ward" and "incapacitated person," which were rejected by the NGS as demeaning and even offensive, are

eliminated and the more precise terms “adult subject to guardianship,” “minor subject to guardianship,” and “individual subject to conservatorship” are used instead. The person-centered approach is also evident in new provisions requiring that individuals subject to guardianship or conservatorship be given meaningful notice of their rights and how to assert them; provisions that require involving individuals subject to guardianship and conservatorship in decisions about their lives; requirements that guardians and conservators create person-centered plans; and provisions to facilitate court monitoring of compliance with those plans.

Second, the act aims to create legal rules that advance key objectives embraced by the NGS, including respecting and protecting the rights and interests of both individuals alleged to need a guardian or conservator and individuals subject to guardianship or conservatorship. These include provisions designed to ensure that the least restrictive means are used to protect an individual alleged to need a guardianship or conservatorship, to provide better guidance to guardians and conservators, and to help courts monitor guardians and conservators.

Third, the act aims to advance rules and systems that make it easier for all persons involved in the process—whether they be petitioners, individuals subject to guardianship or conservatorship, guardians or conservators, or judges—to achieve these objectives. It does this in a number of ways. These include creating new petition requirements to ensure that judges have the information needed to make appropriate decisions; creating an option for courts to enter orders instead of guardianship or conservatorship where such less restrictive alternatives would meet a respondent’s need; and offering model forms to make it easier for petitioners to seek limited appointments instead of full ones.

With these overarching objectives in mind, a number of more specific changes are likely to be particularly noteworthy to those considering the act.

First, the act includes clearer guidance to guardians and conservators, many of whom are lay people. Specifically, the act clarifies how appointees are to make decisions, including decisions about particularly fraught issues such as medical treatment and residential placement. These clarifications are consistent with the person-centered approach embraced by the act in that appointees are given specific guidance on involving the individual in decisions.

Second, the act recognizes the role of, and encourages the use of, less restrictive alternatives, including supported decision-making and single-issue court orders instead of guardianship and conservatorship. To this end, the act provides that neither guardianship nor conservatorship is appropriate where an adult’s needs can be met with technological assistance or supported decision-making. It also provides for protective arrangements instead of guardianship or conservatorship; the 1997 version, by contrast, only provided for such an arrangement as an alternative to conservatorship. These alternative arrangements have the potential to reduce the extent to which individuals in need of protection are deprived of liberties. They can also reduce the time and cost associated with meeting individuals’ needs. Unlike a guardianship or conservatorship, long-term monitoring and reporting will generally be unnecessary.

Third, the act expands the procedural rights for respondents with the aim of ensuring that respondents’ rights are fully respected and that guardianships and conservatorships are only

imposed when less restrictive alternatives are not feasible. In expanding these protections, the act strikes a balance between the need to provide meaningful procedural rights for individuals alleged to need a guardian or conservator, and the need to avoid making the appointment process overly complex or expensive. Key revisions include narrowing the exception to the general rule that the respondent must be present at the hearing, a requirement that explicit findings be made before certain fundamental rights are removed, and the elimination of provisions that would have allowed appointment of a guardian for an adult by will or other writing without prior judicial approval.

Fourth, the act provides for enhanced monitoring of guardians and conservators to ensure that such appointees are complying with their fiduciary duties and that individuals subject to guardianship and conservatorship are protected against exploitation. One innovation in the act is to allow the court to identify people who are to be given notice of certain key changes or suspect actions, and who can therefore serve as an extra set of eyes and ears for the court. Other revisions include a provision that makes bond a default option for conservators and the addition of provisions that clarify factors relevant in determining the reasonableness of fees for guardians and conservators.

Fifth, the act provides enhanced procedural rights for individuals subject to guardianship and conservatorship. Key changes from the 1997 act include a provision that the court provide such individuals with plain-language notice of key rights, the addition of provisions for attorney representation of individuals subject to guardianship and conservatorship, greater scrutiny of the guardian or conservator's ability to charge fees to oppose the individual's efforts to alter the appointment, and additional triggers for reconsideration of an appointment.

Sixth, recognizing that individuals subject to guardianship and conservatorship benefit from visitation and communication with third parties, the act sets forth specific rights to such interactions. In recent years, some family members of individuals subject to guardianship have raised concerns that guardians have unreasonably restricted the ability of individuals subject to guardianship to receive visitors and communicate with others, and family advocates have encouraged legislative responses to address this concern. The act includes a variety of provisions addressing this concern. These include a limitation on a guardian's ability to curtail communications, visits, or interactions between an adult subject to guardianship and third parties and a requirement that a guardian prioritize residential settings that allow the individual subject to guardianship to interact with those important to the individual. In a similar vein, it establishes a default that the adult children and spouse of an adult subject to guardianship or conservatorship are entitled to notice of key events, including a change in the adult's primary residence, the adult's death, or a significant change in the adult's condition.

Seventh, the act creates a new mechanism for protecting individuals from exploitation. Section 503 of the act allows a court, without imposing a guardianship or conservatorship or ruling on the individual's abilities, to restrict access to the respondent or the respondent's property by a specified person that the court finds by clear-and-convincing evidence: (1) through fraud, coercion, duress, or the use of deception and control, caused, or attempted to cause, an action that would have resulted in financial harm to the respondent or the respondent's property; and (2) poses a serious risk of substantial financial harm to the respondent or the respondent's property.

This allows courts to create tailored orders to protect vulnerable individuals at risk of substantial exploitation even though the individual might not have the level of limitation in abilities necessary to impose a conservatorship or guardianship. At the same time, it discourages courts from imposing a guardianship or conservatorship if a limited order would meet an individual's needs.

Eighth, the act contains a variety of provisions designed to improve compliance with the act's prohibition on courts establishing a full guardianship or conservatorship if a limited guardianship or conservatorship would meet the respondent's needs. The drafting committee recognized that, despite the best efforts of previous committees, there is a lack of compliance with the prohibition even though it was included in the 1997 act. In order to facilitate compliance, the act includes a sample petition which makes it easier for a petitioner to seek a limited order. In addition, the act requires petitioners seeking a full guardianship or conservatorship to do more to justify that approach, and courts imposing a full guardianship to provide findings to support that imposition.

Ninth, the act modernizes and clarifies provisions related to minors subject to guardianship. For example, consistent with modern trends in the law, the act provides for greater involvement of minors in decisions involving them. The age of involvement for a minor has been lowered from 14 to 12, the decision-making standard for guardians now calls on them to consider the minor's views, and an attorney must be appointed for a minor in certain situations. The act also provides greater guidance to those petitioning for guardianship of a minor, to courts determining whether they have jurisdiction over guardianship for minors, and to guardians making decisions on behalf of minors. In addition, in consideration of the U.S. Supreme Court's ruling in *Troxel v. Granville*, 530 U.S. 57 (2000), the act provides greater due process protections for parents of minors

Tenth, the act contains updated provisions to govern property management for individuals subject to conservatorship. In updating property management protections, the drafting committee looked to the Uniform Prudent Investor Act and the Uniform Trust Code, among other sources of guidance.

Finally, the act has been reorganized with the aim of making it easier to understand. Ease of use is important as many of those who need to comply with its directives are not attorneys, but are family members or friends responding to urgent or unstable circumstances, or are individuals with limited resources and significant functional challenges.

UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act.

Comment

The title has been changed from the predecessor “Uniform Guardianship and Protective Proceedings Act” to better reflect the act’s content.

Including the word “conservatorship” in the title helps clarify that the 2017 act, like prior versions, covers both guardianship, which involves making decisions about the personal affairs of another person, and conservatorship, which involves management of another person’s property and financial affairs. Including the term “protective arrangement” in the title reflects the fact that the 2017 act, unlike prior versions, emphasizes the use of protective arrangements as a less restrictive alternative to guardianship or conservatorship.

By avoiding the broad term “protective proceeding,” the new title signals that the 2017 act does not cover all “protective proceedings” as that phrase is often understood (e.g., it does not cover common orders used for protection from domestic violence). The predecessor act’s use of the term “protective proceeding” to refer to conservatorship proceedings and proceedings for a court order authorizing a transaction only with respect to property was confusing to many.

SECTION 102. DEFINITIONS. In this [act]:

(1) “Adult” means an individual at least [18] years of age or an emancipated individual under [18] years of age.

(2) “Adult subject to conservatorship” means an adult for whom a conservator has been appointed under this [act].

(3) “Adult subject to guardianship” means an adult for whom a guardian has been appointed under this [act].

(4) “Claim” includes a claim against an individual or conservatorship estate, whether arising in contract, tort, or otherwise.

(5) “Conservator” means a person appointed by a court to make decisions with respect to the property or financial affairs of an individual subject to conservatorship. The term includes a co-conservator.

(6) “Conservatorship estate” means the property subject to conservatorship under this [act].

(7) “Full conservatorship” means a conservatorship that grants the conservator all powers available under this [act].

(8) “Full guardianship” means a guardianship that grants the guardian all powers available under this [act].

(9) “Guardian” means a person appointed by the court to make decisions with respect to the personal affairs of an individual. The term includes a co-guardian but does not include a guardian ad litem.

(10) “Guardian ad litem” means a person appointed to inform the court about, and to represent, the needs and best interest of an individual.

(11) “Individual subject to conservatorship” means an adult or minor for whom a conservator has been appointed under this [act].

(12) “Individual subject to guardianship” means an adult or minor for whom a guardian has been appointed under this [act].

(13) “Less restrictive alternative” means an approach to meeting an individual’s needs which restricts fewer rights of the individual than would the appointment of a guardian or conservator. The term includes supported decision making, appropriate technological assistance, appointment of a representative payee, and appointment of an agent by the individual, including appointment under a [power of attorney for health care] or power of attorney for finances.

(14) “Letters of office” means a record issued by a court certifying a guardian’s or conservator’s authority to act.

(15) “Limited conservatorship” means a conservatorship that grants the conservator less than all powers available under this [act], grants powers over only certain property, or otherwise restricts the powers of the conservator.

(16) “Limited guardianship” means a guardianship that grants the guardian less than all powers available under this [act] or otherwise restricts the powers of the guardian.

(17) “Minor” means an unemancipated individual under [18] years of age.

(18) “Minor subject to conservatorship” means a minor for whom a conservator has been appointed under this [act].

(19) “Minor subject to guardianship” means a minor for whom a guardian has been appointed under this [act].

(20) “Parent” does not include an individual whose parental rights have been terminated.

(21) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(22) “Property” includes tangible and intangible property.

(23) “Protective arrangement instead of conservatorship” means a court order entered under Section 503.

(24) “Protective arrangement instead of guardianship” means a court order entered under Section 502.

(25) “Protective arrangement under [Article] 5” means a court order entered under Section 502 or 503.

(26) “Record”, used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(27) “Respondent” means an individual for whom appointment of a guardian or conservator or a protective arrangement instead of guardianship or conservatorship is sought.

(28) “Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(29) “Standby guardian” means a person appointed by the court under Section 207.

(30) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

(31) “Supported decision making” means assistance from one or more persons of an individual’s choosing in understanding the nature and consequences of potential personal and financial decisions, which enables the individual to make the decisions, and in communicating a decision once made if consistent with the individual’s wishes.

Legislative Note: *Unlike the 1997 act, this act does not use the term “incapacitated person.” Because this term may be used elsewhere in an enacting state’s statutory code, the state should review its other laws to determine whether conforming amendments are necessary.*

Comment

In addition to clarifying the definition of terms used in the 1997 act, the 2017 act adds several new defined terms.

The 2017 act replaces the term “ward,” which was used in prior versions of the act, with the terms “minor subject to guardianship” (paragraph (19)), “adult subject to guardianship” (paragraph (3)), and “individual subject to guardianship” (paragraph (12)). This change reflects a modern understanding that the word “ward” has pejorative implications, and implements Recommendation 1.7 of the Third National Guardianship Summit that the term be avoided in

favor of person-first language. *See Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191, 1199 (2012). Additionally, the 2017 act replaces the term “protected person” with “adult subject to conservatorship” (paragraph (2)), “individual subject to conservatorship” (paragraph (11)), and “minor subject to conservatorship” (paragraph (18)). Similar to the replacement of the term “ward,” replacing the term “protected person” implements a person-first philosophy.

The act adds a definition of “less restrictive alternative” (paragraph (13)). The term is used to describe a variety of arrangements that might meet an individual’s needs without the loss of rights intrinsic to guardianship and conservatorship. Whether a particular alternative will meet the person’s needs, as well as whether a particular alternative is in fact “less restrictive,” will vary on a case-by-case basis.

The act also adds the term “supported decision making” (paragraph (31)). The act uses the term to apply to a variety of arrangements in which an individual is assisted by one or more persons of the individual’s choosing in making and communicating decisions. These arrangements may be purely informal, or may be formalized by an agreement between the individual and the person or persons providing assistance.

Although the term “supported decision making” has received much attention in recent years, the underlying concept is not new. In other contexts, the fact that an individual may need help to make decisions, or communicate decisions, is well-recognized. Indeed, entire professions (e.g., investment advisors, admissions counselors, etc.) have developed to provide others with support in making decisions. The act thus puts assistance with decision-making in the same category as other forms of assistance individuals may require (e.g., technological assistance or the use of an interpreter) to meet their needs.

Notably, consistent with Recommendation 1.7 of the Third National Guardianship Summit, the act no longer uses the term “incapacitated person,” a term used in all prior versions of the act. The term is unnecessary because the key concept from the definition in the 1997 act—the inability to meet essential requirements and to receive and evaluate information or communicate decisions—is built directly into the preconditions for the appointment of a guardian in Section 301 or a conservator in Section 401, which also spell out that a guardianship or conservatorship may be established for an adult only if the adult’s needs cannot be met using less restrictive alternatives. Compare Section 301 (2017 act) with Section 102(5) (1997 act). There is no need to use the potentially offensive term as a general label for an adult subject to guardianship or conservatorship.

As under the 1997 act, the term “parent” (paragraph (20)) is defined only to the extent of excluding an individual whose parental rights have been terminated. Remaining aspects of the meaning of “parent” are left to other laws of the enacting state. A parent whose parental rights have been terminated, however, is not a parent as so defined even if the parent is allowed to inherit from the child under the enacting state’s probate code.

SECTION 103. SUPPLEMENTAL PRINCIPLES OF LAW AND EQUITY

APPLICABLE. Unless displaced by a particular provision of this [act], the principles of law and equity supplement its provisions.

***Legislative Note:** If codified as part of a state's version of the UPC, the enacting state should place the section number in brackets to preserve the numbering system: [SECTION 103. RESERVED].*

Comment

This section will be needed if the act is enacted as a stand-alone act and not codified as part of a state's version of the UPC.

SECTION 104. SUBJECT-MATTER JURISDICTION.

(a) Except to the extent jurisdiction is precluded by [insert citation to Uniform Child Custody Jurisdiction and Enforcement Act], the [designate appropriate court] has jurisdiction over a guardianship for a minor domiciled or present in this state. The court has jurisdiction over a conservatorship or protective arrangement instead of conservatorship for a minor domiciled or having property in this state.

(b) The [designate appropriate court] has jurisdiction over a guardianship, conservatorship, or protective arrangement under [Article] 5 for an adult as provided in the [insert citation to Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act].

(c) After notice is given in a proceeding for a guardianship, conservatorship, or protective arrangement under [Article] 5 and until termination of the proceeding, the court in which the petition is filed has:

(1) exclusive jurisdiction to determine the need for the guardianship, conservatorship, or protective arrangement;

(2) exclusive jurisdiction to determine how property of the respondent must be managed, expended, or distributed to or for the use of the respondent, an individual who is

dependent in fact on the respondent, or other claimant;

(3) nonexclusive jurisdiction to determine the validity of a claim against the respondent or property of the respondent or a question of title concerning the property; and

(4) if a guardian or conservator is appointed, exclusive jurisdiction over issues related to administration of the guardianship or conservatorship.

(d) A court that appoints a guardian or conservator, or authorizes a protective arrangement under [Article] 5, has exclusive and continuing jurisdiction over the proceeding until the court terminates the proceeding or the appointment or protective arrangement expires by its terms.

Comment

Subsection (a) recognizes that the Uniform Child Custody Jurisdiction and Enforcement Act (1997) (UCCJEA) largely controls jurisdiction over guardianship for minors. However, the UCCJEA does not apply to proceedings involving a minor's property. Therefore, subsection (a) does grant the court jurisdiction over a conservatorship or protective arrangement for a minor domiciled or having property in the state.

Subsection (b) aligns subject matter jurisdiction for proceedings for adults with provisions found in the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), which was approved in 2007 and which is codified as Article 5A of the Uniform Probate Code. As of June 2018, the UAGPPJA has been enacted in all but four states.

Subsection (c) addresses jurisdiction after the filing of a petition seeking a guardianship, conservatorship, or protective arrangement instead of guardianship or conservatorship under Article 5. Subsection (c)(1) provides that the court in which the petition is filed has exclusive jurisdiction to determine whether to order a guardianship, conservatorship, or protective arrangement under this act. Thus, if a petition seeks a guardianship, the court has exclusive jurisdiction to determine not only the need for guardianship, but also for conservatorship or a protective arrangement instead of guardianship or conservatorship. This provision gives the court the jurisdiction needed to treat a petition for a more restrictive arrangement as one for a less restrictive arrangement where that less restrictive arrangement would meet the individual's needs as set forth in Sections 301, 401, and 501.

Subsection (c)(2) likewise gives the court exclusive jurisdiction to determine how property of the respondent subject to the law of the state is to be managed, expended, or distributed to or for the use of the respondent, an individual who is dependent in fact on the respondent, or other claimant. This provision recognizes that such matters are an integral part of the legal issue

before a court in a proceeding under this act.

Pursuant to subsection (c)(3), the court has concurrent, nonexclusive jurisdiction to determine the validity of a claim against the respondent or the respondent's property, or a question of title concerning that property. Such questions are often very closely related to proceedings brought under this act, but are not so inherently bound to the proceedings as to warrant exclusive jurisdiction.

Subsection (c)(4) simply states that a court that appoints a guardian or conservator has exclusive jurisdiction over issues related to administration of the guardianship or conservatorship.

Subsection (d) clarifies that a court does not lose jurisdiction over a guardianship or conservatorship because of a change in location of the guardian or conservator, or of the individual subject to guardianship or conservatorship.

SECTION 105. TRANSFER OF PROCEEDING.

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

(b) After appointment of a guardian or conservator, the court that made the appointment may transfer the proceeding to a court in another [county] in this state or another state if transfer is in the best interest of the individual subject to the guardianship or conservatorship.

(c) If a proceeding for a guardianship or conservatorship is pending in another state or a foreign country and a petition for guardianship or conservatorship for the same individual is filed in a court in this state, the court shall notify the court in the other state or foreign country and, after consultation with that court, assume or decline jurisdiction, whichever is in the best interest of the respondent.

(d) A guardian or conservator appointed in another state or country may petition the court for appointment as a guardian or conservator in this state for the same individual if jurisdiction in this state is or will be established. The appointment may be made on proof of appointment in the other state or foreign country and presentation of a certified copy of the part of the court record

in the other state or country specified by the court in this state.

(e) Notice of hearing on a petition under subsection (d), together with a copy of the petition, must be given to the respondent, if the respondent is at least 12 years of age at the time of the hearing, and to the persons that would be entitled to notice if the procedures for appointment of a guardian or conservator under this [act] were applicable. The court shall make the appointment unless it determines the appointment would not be in the best interest of the respondent.

(f) Not later than 14 days after appointment under subsection (e), the guardian or conservator shall give a copy of the order of appointment to the individual subject to guardianship or conservatorship, if the individual is at least 12 years of age, and to all persons given notice of the hearing on the petition.

Comment

This section, which is similar to Section 107 of the 1997 act, will have limited application. Transfer of proceedings for adults from one state to another are governed by the widely enacted Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), approved in 2007, which contains a detailed procedure for transferring an adult proceeding to another state. The specific provisions in this section are therefore limited to transfer of an adult proceeding to another county within the same state, and to transfers of a minor's proceeding, whether to another state or county. In the case of a guardianship for a minor under Article 2, however, the relevant states' versions of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) should be consulted for additional rules on when a case may be transferred and the procedures to be used when more than one court is involved in making these determinations.

This section, and Section 106, which addresses the appropriate venue within a state for appointment of a guardian or conservator, are designed to limit forum shopping and to assist the courts in keeping track of guardianships and conservatorships. Some guardians and conservators have attempted to thwart a court's authority by moving the individual subject to guardianship or conservatorship to another county, state, or foreign country.

The standard for transferring a guardianship or protective proceeding under this section is always the best interest of the individual, and courts should use care to avoid transfers to secure a more favorable venue for other reasons. In considering whether transfer is in the best interest of an adult, the court should consider the adult's preferences, opinions, values, and actions consistent with the decision-making standards set forth in Section 313 and Section 418. In considering

whether transfer is in the best interest of a minor, the court should consider the minor's preferences consistent with the decision-making standards in Section 209 and Section 210.

Under subsection (d), a guardian or conservator appointed in another state or country may petition the court for appointment as a guardian or conservator in this state if jurisdiction is already established or will be established upon the transfer. Pursuant to Section 113, unless the court otherwise orders, notice of the hearing on the petition must be given at least 14 days before the hearing. Under subsection (e), notice to a respondent or individual subject to guardianship who is under 12 years of age is permissive.

SECTION 106. VENUE.

(a) Venue for a guardianship proceeding for a minor is in:

(1) the [county] in which the minor resides or is present at the time the proceeding commences; or

(2) the [county] in which another proceeding concerning the custody or parental rights of the minor is pending.

(b) Venue for a guardianship proceeding or protective arrangement instead of guardianship for an adult is in:

(1) the [county] in which the respondent resides;

(2) if the respondent has been admitted to an institution by court order, the [county] in which the court is located; or

(3) if the proceeding is for appointment of an emergency guardian for an adult, the [county] in which the respondent is present.

(c) Venue for a conservatorship proceeding or protective arrangement instead of conservatorship is in:

(1) the [county] in which the respondent resides, whether or not a guardian has been appointed in another [county] or other jurisdiction; or

(2) if the respondent does not reside in this state, in any [county] in which

property of the respondent is located.

(d) If proceedings under this [act] are brought in more than one [county], the court of the [county] in which the first proceeding is brought has the exclusive right to proceed unless the court determines venue is properly in another court or the interest of justice otherwise requires transfer of the proceeding.

Legislative Note: Under this section, the reference to “county” is placed in brackets to accommodate enacting jurisdictions that use a different term for the relevant unit of local government.

Comment

This section modifies the venue provisions for a proceeding for a minor that were found in Section 108 of the 1997 act but largely follows the provisions of the 1997 act for adult proceedings.

Under Section 108 of the 1997 act, venue for a proceeding for a minor was in the county in which the minor resides or is present at the time the proceeding commences. Subsection (a)(2), recognizing that such cases can arise out of a proceeding concerning child custody or adjudication of parental rights, provides that venue is also in the county in which that other proceeding is pending.

As set forth in Section 108 of the 1997 act, appointment of a guardian or conservator (other than an emergency guardian or conservator) for an adult may be made only by a court in the county where the individual subject to guardianship or conservatorship resides. A court in the county where the individual is currently located but is not a resident is not prohibited from acting, but such action is limited to the appointment of an emergency guardian or an emergency conservator.

The requirement that only a court in the county where the respondent resides may appoint a guardian or conservator (except in an emergency) applies when proceedings are brought in different states, and also when multiple proceedings are brought in different counties of the same state. Subsection (d) provides that when more than one proceeding is brought within a state, the first court decides where venue is appropriate. The first court should not automatically proceed; it should first decide where proper venue lies and enter an order accordingly.

SECTION 107. PRACTICE IN COURT.

(a) Except as otherwise provided in this [act], the rules of evidence and civil procedure, including rules concerning appellate review, govern a proceeding under this [act].

(b) If proceedings for a guardianship, conservatorship, or protective arrangement under [Article] 5 for the same individual are commenced or pending in the same court, the proceedings may be consolidated.

[(c) A respondent may demand a jury trial in a proceeding under this [act] on the issue whether a basis exists for appointment of a guardian or conservator.]

Legislative Note: *State laws vary with respect to whether a jury trial may be demanded in a guardianship or conservator case. States in which a jury trial may be demanded should include subsection (c).*

Comment

Subsection (a) incorporates the enacting state's rules of procedure. Subsection (b) authorizes the consolidation of multiple proceedings that are pending in the same court. It is critical that the separate proceedings be consolidated when separate petitions for guardianship and conservatorship or for a protective arrangement instead of guardianship or conservatorship are filed. Consolidation serves to protect the respondent's rights and to provide continuity and consistency.

Subsection (c) is new to this act but the section is otherwise similar to Section 109 of the 1997 act. Subsection (c) creates an option for states to give respondents the right to demand a jury trial to determine whether the basis for appointment of a guardian or conservator exists.

SECTION 108. LETTERS OF OFFICE.

(a) The court shall issue letters of office to a guardian on filing by the guardian of an acceptance of appointment.

(b) The court shall issue letters of office to a conservator on filing by the conservator of an acceptance of appointment and filing of any required bond or compliance with any other asset-protection arrangement required by the court.

(c) Limitations on the powers of a guardian or conservator or on the property subject to conservatorship must be stated on the letters of office.

(d) The court at any time may limit the powers conferred on a guardian or conservator. The court shall issue new letters of office to reflect the limitation. The court shall give notice of

the limitation to the guardian or conservator, individual subject to guardianship or conservatorship, each parent of a minor subject to guardianship or conservatorship, and any other person the court determines.

Comment

Subsection (a) requires a guardian to file an acceptance of office. Subsection (b) requires a conservator to file an acceptance of office as well as any required bond. Subsection (c) requires the court to state any limitations on the powers of the guardian or conservator in the letters of office so the limitations may be recognized and honored. Pursuant to subsection (d), a separate court order, not merely an amendment to the letters of office, is required to modify the powers of the guardian or conservator. The specific procedure for modifying the powers of a guardian or conservator is addressed elsewhere in the act. *See* Section 319 (for guardians of adults), and Section 431 (for conservatorships). Language in Section 110 of the 1997 act that required the letters of office to state whether a guardian was appointed by a court, a parent, or a spouse has been omitted because this act provides for appointment by a court only. Provisions in Sections 301 through 303 of the 1997 act that allowed for a guardianship to be established for an adult without full due process in a court of law were rejected by the drafting committee as inconsistent with adults' fundamental rights. Likewise, under the 2017 act, a guardianship for a minor may be established only pursuant to a court order. The provisions of Section 202 of the 1997 act allowing for parental appointment of a guardian without prior court review were not carried over into the 2017 act.

SECTION 109. EFFECT OF ACCEPTANCE OF APPOINTMENT. On acceptance of appointment, a guardian or conservator submits to personal jurisdiction of the court in this state in any proceeding relating to the guardianship or conservatorship.

Comment

Once the guardian or conservator accepts the appointment, the court has jurisdiction over the guardian or conservator in any proceeding relating to the guardianship or conservatorship. Regardless of where the guardian or conservator may move, jurisdiction over the guardian or conservator continues. *See* Section 104(d).

Unlike Section 111 of the 1997 act, this section does not prescribe the procedure for giving notice to a guardian or conservator, instead leaving this issue to the enacting state's rules of civil procedure.

SECTION 110. CO-GUARDIAN; CO-CONSERVATOR.

(a) The court at any time may appoint a co-guardian or co-conservator to serve

immediately or when a designated event occurs.

(b) A co-guardian or co-conservator appointed to serve immediately may act when that co-guardian or co-conservator complies with Section 108.

(c) A co-guardian or co-conservator appointed to serve when a designated event occurs may act when:

(1) the event occurs; and

(2) that co-guardian or co-conservator complies with Section 108.

(d) Unless an order of appointment under subsection (a) or subsequent order states otherwise, co-guardians or co-conservators shall make decisions jointly.

Comment

This section, new to the act, clarifies the procedure for appointing co-guardians and co-conservators and the role of such appointees. Co-appointment may be useful when the court determines that appointment of a particular person is desirable but recognizes that the person may need help in carrying out fiduciary duties, either currently or in the future. For example, the court might appoint co-conservators in a situation where an elderly parent seeks to become conservator for a developmentally disabled son (whose needs cannot be met by less restrictive alternatives), and the court determines that the parent is the person most knowledgeable about the son's needs and preferences but would benefit from help in making financial decisions, or the parent has significant health issues that may intermittently hinder the parent's ability to perform needed functions. In this situation, appointing another person as co-conservator (such as a sibling of the son) may better meet the son's needs.

Under this section, the court's appointment of a co-guardian or co-conservator need not be immediate. Rather, under subsection (c) the appointment may be made effective upon a designated future event such as a death or resignation of another co-guardian or co-conservator. However, the appointment does not take effect until the co-guardian or co-conservator meets the requirements of Section 108 by filing an acceptance of office and, if applicable, a bond.

Subsection (d) confirms that co-guardians and co-conservators must act jointly unless the court orders otherwise either at the time of original appointment or later. However, a co-guardian or co-conservator need not obtain court approval to delegate to another co-conservator as provided in Section 124.

SECTION 111. JUDICIAL APPOINTMENT OF SUCCESSOR GUARDIAN OR SUCCESSOR CONSERVATOR.

(a) The court at any time may appoint a successor guardian or successor conservator to serve immediately or when a designated event occurs.

(b) A person entitled under Section 202 or 302 to petition the court to appoint a guardian may petition the court to appoint a successor guardian. A person entitled under Section 402 to petition the court to appoint a conservator may petition the court to appoint a successor conservator.

(c) A successor guardian or successor conservator appointed to serve when a designated event occurs may act as guardian or conservator when:

- (1) the event occurs; and
- (2) the successor complies with Section 108.

(d) A successor guardian or successor conservator has the predecessor's powers unless otherwise provided by the court.

Comment

This section is designed to create a comprehensive and clear set of rules to govern appointment of successor guardians and conservators. It includes language previously found in Section 112 of the 1997 act.

Subsection (a) authorizes a court to appoint a successor guardian or conservator, effective either upon appointment of the original guardian or conservator or upon a future contingency. A court can also appoint a successor guardian or conservator to fill an existing or potential vacancy. However, under subsection (c) the appointment of the successor, whether immediate or upon a future event, does not take effect until the successor guardian or conservator meets the requirements of Section 108 by filing an acceptance of office and, if applicable, a bond.

The ability to appoint a guardian or conservator to act upon some specified future event can be particularly useful in situations involving adults with developmental disabilities. The initial guardian or conservator appointed will usually be a parent of the individual subject to guardianship or conservatorship. The ability to appoint a successor guardian or conservator at the time of the initial appointment can provide both the parent and the individual with assurance

that upon the parent's death someone will be available to step in and provide continuity of assistance.

The ability to appoint a successor or additional guardian to take office in the future is different from appointing a standby guardian for a minor under Article 2. Standby guardians for minors can be appointed to take office in the future even though no guardian is currently in office – usually because a parent is providing care but expects to be unable to fulfill parental duties in the foreseeable future. Under this section, only the appointment of a successor or additional guardian or conservator is allowed.

Subsection (d) clarifies that a successor guardian or conservator has all of the predecessor's powers unless otherwise provided by the court. Although the successor typically will have the same powers as the predecessor, the court may use the change of guardian or conservator to grant the successor less or more powers. Any modification of powers, particularly an expansion of powers, must comply with the procedures under Section 319 (for guardians of adults) or Section 431 (for conservatorships).

SECTION 112. EFFECT OF DEATH, REMOVAL, OR RESIGNATION OF GUARDIAN OR CONSERVATOR.

(a) Appointment of a guardian or conservator terminates on the death or removal of the guardian or conservator, or when the court under subsection (b) approves a resignation of the guardian or conservator.

(b) A guardian or conservator must petition the court to resign. The petition may include a request that the court appoint a successor. Resignation of a guardian or conservator is effective on the date the resignation is approved by the court.

(c) Death, removal, or resignation of a guardian or conservator does not affect liability for a previous act or the obligation to account for:

- (1) an action taken on behalf of the individual subject to guardianship or conservatorship; or
- (2) the individual's funds or other property.

Comment

A guardian or conservator may submit a resignation at any time, but pursuant to subsection (a)

the resignation is not effective until approved by the court. Subsection (b), which requires that a guardian or conservator must petition the court for permission to resign, assures that all affected parties will receive notice of the resignation.

Regardless of how the appointment ended, subsection (c) clarifies that a guardian or conservator whose appointment has ended is still liable for previous breaches of the guardian's or conservator's fiduciary duty, and still has a duty to account for property of the individual subject to guardianship or conservatorship that was within the guardian's or conservator's control. In the event of a termination of appointment due to the death of the guardian or conservator, the duty to account is normally performed by the personal representative of the estate of the deceased guardian or conservator. In the event of the removal of a guardian or conservator due to the guardian's or conservator's own limitations, the duty to account may be performed by an agent acting under a power of attorney executed by the guardian or conservator or by a guardian or conservator appointed for the former guardian or conservator.

Section 112 of the 1997 act, which included provisions paralleling those in this section, also included provisions governing the process for removing a guardian or conservator and provisions governing appointment of co-appointees and successor appointees. Provisions governing removal are now located in Section 211 (for guardians of minors), Section 318 (for guardians of adults), and Section 430 (for conservators). Provisions governing co-appointees are now in Section 110. Provisions governing successor guardians and successor conservators are now in Section 111.

SECTION 113. NOTICE OF HEARING GENERALLY.

(a) Except as otherwise provided in Sections 203, 207, 303, 403, and 505, if notice of a hearing under this [act] is required, the movant shall give notice of the date, time, and place of the hearing to the person to be notified unless otherwise ordered by the court for good cause. Except as otherwise provided in this [act], notice must be given in compliance with [insert citation to this state's rule of civil procedure] at least 14 days before the hearing.

(b) Proof of notice of a hearing under this [act] must be made before or at the hearing and filed in the proceeding.

(c) Notice of a hearing under this [act] must be in at least 16-point font, in plain language, and, to the extent feasible, in a language in which the person to be notified is proficient.

Comment

This section does not supersede specific notice requirements provided elsewhere in the act. *See*

also Sections 105(e), 114, 116, 125(d), 203, 207, 208, 211(c), 303, 311, 312(c) & (d), 314(e), 316(b), 317(d), 318(c), 319(c), 403, 412, 413(c)&(d), 414(a), 417(a)&(c), 418(m), 419(b), 420(b), 423(d), 427(b), 428(c), 430(c), 431(e), 505, and 510 for additional notice procedures that apply in specific situations. The requirement of at least 14 days' prior notice is copied from the 1982 and 1997 acts. A 14-day prior notice provision has also been part of the Uniform Probate Code, including its provisions on guardianships, conservatorships, and protective arrangements, since its inception in 1969.

Under subsection (a), notice must be given using the method of notice provided in the enacting jurisdiction's applicable rule of civil procedure. This will typically mean that notice may be provided by mail as well as by private courier, delivery service, or other methods provided in the enacting state's rules of civil procedure. However, the time limit for notice contained in subsection (a) applies, even if different from that in the state's otherwise applicable rule.

Subsection (c) requires that the notice be in plain language. Plain language is language that is easy to read and understand and that where possible uses everyday words and short sentences. Subsection (c) also adds two additional requirements. First, it specifies that the notice be in at least 16-point font. This is to increase the likelihood that individuals receiving the notice will be visually able to read it. Second, it specifies that to the extent feasible the notice be in a language in which the recipient is proficient. Although it is sufficient under this section to provide notice in a language in which the recipient is proficient and not necessarily expert, and then only to the extent feasible, best practice is to provide notice in the recipient's primary language.

The requirements in this section reflect the importance of notice of hearings under this act. Such notices play a vital role in protecting the fundamental legal rights of some of the most vulnerable members of society, by guarding against individuals being stripped of their rights when less restrictive alternatives would suffice.

Articles 2, 3, and 4 specify in detail the persons who are to receive notice of a guardianship or conservatorship proceeding. Not mentioned in these articles is federal law on consular notification, which supplements the provisions of this act. If the subject of the proceeding is a foreign national, Section 37(b) of the Vienna Convention on Consular Relations, which was ratified by the US in 1969, requires that notice of the proceeding be given promptly to the nearest consular official for the subject's country. The failure to give such notice does not invalidate the proceeding, however. Although the Vienna Convention does not expressly mention conservators, it does not appear that the Convention is intended to apply only to guardians of the person. The Convention is applicable to proceedings for the appointment of "a guardian or trustee" for a person. If not covered by the reference to "guardian," a conservator might well be covered within the term "trustee." Because the convention applies only to appointments, it does not appear that the Convention would ordinarily apply to a protective arrangement under Article 5.

SECTION 114. WAIVER OF NOTICE.

(a) Except as otherwise provided in subsection (b), a person may waive notice under this [act] in a record signed by the person or person's attorney and filed in the proceeding.

(b) A respondent, individual subject to guardianship, individual subject to conservatorship, or individual subject to a protective arrangement under [Article] 5 may not waive notice under this [act].

Comment

This section parallels Section 114 of the 1997 act by permitting both specific and general waivers. As specified in subsection (b), under no circumstances may the respondent, individual subject to guardianship or conservatorship, or individual for whom a protective arrangement instead of guardianship or conservatorship has been ordered, waive notice. In consequence, except as ordered by the court under Section 113 for good cause, a period of at least 14 days must elapse between the date of the notice and the hearing on the relevant petition. The interval allows a respondent or individual subject to guardianship, conservatorship, or other protective arrangement enough time to arrange for legal representation at the hearing if desired. If necessary for protection of a vulnerable individual in the interim, the court can issue an emergency order under Section 208 (for an emergency guardianship for a minor), Section 312 (for an emergency guardianship for an adult), or Section 413 (for an emergency conservatorship).

SECTION 115. GUARDIAN AD LITEM. The court at any time may appoint a guardian ad litem for an individual if the court determines the individual's interest otherwise would not be adequately represented. If no conflict of interest exists, a guardian ad litem may be appointed to represent multiple individuals or interests. The guardian ad litem may not be the same individual as the attorney representing the respondent. The court shall state the duties of the guardian ad litem and the reasons for the appointment.

Comment

This section authorizes the court to appoint a guardian ad litem for an individual whose interests would not otherwise be adequately represented or adequately known to the court. Such an appointment is distinct from the appointment of an attorney for a respondent (*see* Sections 204, 305, 406, and 507) and the appointment of a visitor in a proceeding for an adult respondent (*see* Sections 304, 405, and 506). The appointment of a guardian ad litem for an adult respondent is therefore not typical and is not required for any proceeding under the act.

It is important that the court, when appointing a guardian ad litem, advise the guardian ad litem of his or her role. This section encourages such advice by requiring the court to state the duties of the guardian ad litem and its reasons for the appointment.

The section adds language not present in Section 115 of the 1997 act and the counterpart provision of even earlier versions of the act clarifying that the guardian ad litem may not be the same individual as the attorney representing a respondent. A similar statement was included in the comments to, but not text of Section 115 of the 1997 act. The role of the guardian ad litem is distinct from that of the attorney for a respondent, and the two often may be in conflict. The guardian ad litem typically is tasked with identifying and representing an individual's best interest. By contrast, an attorney for a respondent is tasked with advocating for the individual's wishes to the extent ascertainable (*see* Sections 204, 305, 406, and 507). Appointing the same person to take on both roles is thus incompatible with due process and does not advance the court's interest in fact-finding.

When appointing a guardian ad litem who is an attorney, the court should avoid appointing an attorney who is associated with a firm in which another attorney represents a party to the proceeding (e.g. the respondent or the petitioner). Such appointments can create a conflict of interest and may be proscribed by the jurisdiction's rules of professional responsibility.

This act does not address payment for a guardian ad litem because that topic is ordinarily addressed elsewhere in state law.

SECTION 116. REQUEST FOR NOTICE.

(a) A person may file with the court a request for notice under this [act] if the person is:

(1) not otherwise entitled to notice; and

(2) interested in the welfare of a respondent, individual subject to guardianship or

conservatorship, or individual subject to a protective arrangement under [Article] 5.

(b) A request under subsection (a) must include a statement showing the interest of the person making the request and the address of the person or an attorney for the person to whom notice is to be given.

(c) If the court approves a request under subsection (a), the court shall give notice of the approval to the guardian or conservator, if one has been appointed, or the respondent if no guardian or conservator has been appointed.

Comment

Subsection (a) authorizes a person not otherwise entitled to notice to file a request for notice if the person has an interest in the welfare of the respondent, or individual subject to guardianship, conservatorship, or a protective arrangement instead of guardianship or conservatorship. For a

request for notice under this section to be effective, subsection (b) requires that the request include a statement of the person's interest. Section 116 of the 1997 act had provided that an "interested person" could file a request for notice and that a government agency paying or planning to pay benefits is an interested person. The revision changes "interested person" to "person interested in the welfare" of the relevant person and deletes the reference to a government agency. This change is because a government agency should only be considered an interested person as to certain issues (e.g., financial exploitation by a third party that involves benefits paid by the agency) and should not be considered an interested person in all proceedings under this act.

Subsection (c) requires that the court give notice of the court's approval of a request for notice to the guardian or conservator. Unlike Section 116 of the 1997 act, subsection (c) then continues by requiring that notice of the approval be given to the respondent if no guardian or conservator has been appointed. Whether a particular person is considered a person interested in the welfare of the subject of a proceeding must be determined in light of the issues involved in the proceeding. In a proceeding regarding management of property, for example, the category might include a creditor, secured or otherwise, or a government agency paying benefits to the individual who is the subject of the proceeding. Under certain circumstances, it could also include a member of the media or a "watch-dog" agency.

SECTION 117. DISCLOSURE OF BANKRUPTCY OR CRIMINAL HISTORY.

(a) Before accepting appointment as a guardian or conservator, a person shall disclose to the court whether the person:

(1) is or has been a debtor in a bankruptcy, insolvency, or receivership proceeding; or

(2) been convicted of:

(A) a felony;

(B) a crime involving dishonesty, neglect, violence, or use of physical force; or

(C) other crime relevant to the functions the individual would assume as guardian or conservator.

(b) A guardian or conservator that engages or anticipates engaging an agent the guardian or conservator knows has been convicted of a felony, a crime involving dishonesty, neglect,

violence, or use of physical force, or other crime relevant to the functions the agent is being engaged to perform promptly shall disclose that knowledge to the court.

(c) If a conservator engages or anticipates engaging an agent to manage finances of the individual subject to conservatorship and knows the agent is or has been a debtor in a bankruptcy, insolvency, or receivership proceeding, the conservator promptly shall disclose that knowledge to the court.

Comment

This section, which is new to this act, creates an affirmative duty for a person to disclose to the court whether the person has been the subject of a bankruptcy, insolvency, or receivership proceeding, convicted of a felony, or convicted of a crime involving dishonesty, neglect, violence, or use of physical force prior to being appointed as a guardian or conservator. Such disclosures help ensure that the court has adequate information to determine whom to appoint, what bond or alternative asset protection arrangement to impose, and what other monitoring provisions may be appropriate. In states that require background checks for potential appointees, such disclosures may be redundant in many cases. Even in those states, however, compliance with these provisions may provide the court with relevant information that otherwise would not come to the court's attention.

The disclosure of a bankruptcy or criminal conviction is not disqualifying. A close relative may be the most qualified candidate to serve as a guardian or conservator despite such a disclosure. When considering appointment of a person who made a disclosure under this section, the court should take into account the period of time elapsed since the bankruptcy or conviction, the severity of the offense, subsequent behavior, and any other relevant factor.

Subsections (b) and (c) also create an affirmative duty for a guardian or conservator to disclose the use of, or plans to use, an agent whom the guardian or conservator knows has been the subject of a bankruptcy proceeding, convicted of a felony, or convicted of a crime involving dishonesty. Such disclosures can help the court monitor and guide the guardian or conservator.

SECTION 118. MULTIPLE NOMINATIONS. If a respondent or other person makes more than one nomination of a guardian or conservator, the latest in time governs.

Comment

The most recent appointment or nomination of a guardian or conservator is the one with the most recent date during the period when the respondent had the ability to make the appointment or nomination. If the most recent appointment is determined invalid, the prior appointment would control. This section is identical to Section 117 of the 1997 act.

SECTION 119. COMPENSATION AND EXPENSES; IN GENERAL.

(a) Unless otherwise compensated or reimbursed, an attorney for a respondent in a proceeding under this [act] is entitled to reasonable compensation for services and reimbursement of reasonable expenses from the property of the respondent.

(b) Unless otherwise compensated or reimbursed, an attorney or other person whose services resulted in an order beneficial to an individual subject to guardianship or conservatorship or for whom a protective arrangement under [Article] 5 was ordered is entitled to reasonable compensation for services and reimbursement of reasonable expenses from the property of the individual.

(c) The court must approve compensation and expenses payable under this section before payment. Approval is not required before a service is provided or an expense is incurred.

(d) If the court dismisses a petition under this [act] and determines the petition was filed in bad faith, the court may assess the cost of any court-ordered professional evaluation or [visitor] against the petitioner.

Comment

Subsection (a) provides that an attorney for a respondent is entitled to reasonable compensation and reimbursement of reasonable expenses. Thus, reasonable compensation is due to an attorney who defends against an appointment even if the court ultimately determines that the appointment is proper.

Subsections (b) and (c) provide for compensation and reimbursement of expenses for an attorney or other person whose services resulted in an order beneficial to an individual subject to guardianship, conservatorship, or a protective arrangement instead of guardianship or conservatorship. The compensation must be approved by the court, but no approval is required before the services are provided. Such compensation, especially of attorneys, is important to ensure access to counsel for those seeking to restore rights. *See* Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Ethics and Legality of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581, 603 (2016) (“having the right to directly challenge the continued necessity or terms of the guardianship, including who serves as guardian, is virtually meaningless without the accompanying right to legal representation.”). Attorneys’ concerns about payment for their services are a significant barrier to attorneys accepting representation of

individuals subject to guardianship or conservatorship. *See Jenica Cassidy, Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L. J. 83, 102 (2015).

Subsection (d) allows the court to assess certain costs against a person who, in bad faith, unsuccessfully petitions for appointment of a guardian or conservator. This provision aims to reduce the cost, including the cost to the state, caused by those who might abuse the system.

Section 417 of the 1997 act provided for reasonable compensation of guardians, conservators, and attorneys, but did not address many of the issues addressed in Sections 119 and 120 of this act.

SECTION 120. COMPENSATION OF GUARDIAN OR CONSERVATOR.

(a) Subject to court approval, a guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board, clothing, and other appropriate expenses advanced for the benefit of the individual subject to guardianship. If a conservator, other than the guardian or a person affiliated with the guardian, is appointed for the individual, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without court approval.

(b) Subject to court approval, a conservator is entitled to reasonable compensation for services and reimbursement for appropriate expenses from the property of the individual subject to conservatorship.

(c) In determining reasonable compensation for a guardian or conservator, the court, or a conservator in determining reasonable compensation for a guardian as provided in subsection (a), shall consider:

- (1) the necessity and quality of the services provided;
- (2) the experience, training, professional standing, and skills of the guardian or conservator;
- (3) the difficulty of the services performed, including the degree of skill and care required;

(4) the conditions and circumstances under which a service was performed, including whether the service was provided outside regular business hours or under dangerous or extraordinary conditions;

(5) the effect of the services on the individual subject to guardianship or conservatorship;

(6) the extent to which the services provided were or were not consistent with the guardian's plan under Section 316 or conservator's plan under Section 419; and

(7) the fees customarily paid to a person that performs a like service in the community.

(d) A guardian or conservator need not use personal funds of the guardian or conservator for the expenses of the individual subject to guardianship or conservatorship.

(e) If an individual subject to guardianship or conservatorship seeks to modify or terminate the guardianship or conservatorship or remove the guardian or conservator, the court may order compensation to the guardian or conservator for time spent opposing modification, termination, or removal only to the extent the court determines the opposition was reasonably necessary to protect the interest of the individual subject to guardianship or conservatorship.

Comment

Subsections (a) and (b) provide that guardians and conservators are entitled to reasonable compensation, subject to court approval or, in the case of a guardian who is not also the conservator, with the approval of the conservator. Although compensation may come from the funds of the individual subject to guardianship or conservatorship, it need not be so. For example, public funds may be used to pay guardians or conservators if the individual subject to guardianship or conservatorship does not have sufficient resources.

Subsection (c) sets forth factors for the court to consider in determining reasonable compensation. This subsection reflects recommendations made by the Third National Guardianship Summit. *See Third National Guardianship Summit Standards and Recommendations*, 2012 UTAH L. REV. 1191, 1201-1202 (2012) (especially Recommendation 3.2). It also reflects Standard 22 of the 2013 National Guardianship Association Standards of

Practice.

The factor listed in subsection (c)(7)—the fees customarily paid to persons who perform like services in the community—is responsive to concerns about attorneys serving as guardian or conservator unreasonably charging their standard hourly rates as attorney for all services performed as guardian. Pursuant to subsection (c)(7), when an attorney who serves as guardian or conservator performs a function that does not require or benefit from legal expertise, the hourly fee generally should be lower. For example, attorneys generally should not receive their standard hourly rate to accompany an individual subject to guardianship on a routine personal care appointment or to grocery shop for the individual.

Subsection (d) states that guardians and conservators are not required to use their personal funds to cover expenses of those for whom they are appointed.

Subsection (e) provides that if a minor or adult subject to guardianship or conservatorship seeks court intervention to modify or terminate the guardianship or conservatorship (under Section 319 or 431) or to remove the guardian or conservator, the guardian or conservator may be compensated only for time spent opposing such effort to the extent that the court has determined that the involvement or opposition is or was reasonably necessary to protect the interest of the individual subject to guardianship or conservatorship. Subsection (e) is designed to address concerns about guardians and conservators inappropriately opposing an individual who is seeking to restore rights. In such situations, the guardian or conservator may have a conflict of interest as successful opposition will preserve the guardian's or conservator's control and continuation of fees. In formulating this approach, the drafting committee considered Colorado Revised Statutes §15-14-318, which prohibits a guardian or conservator from taking any action to oppose or interfere in the termination proceeding initiated by the individual subject to guardianship or conservatorship with the exception that the guardian or conservator may file a written report with the court or seek instruction from the court on any matter relevant to the termination proceeding. The drafting committee declined to adopt the Colorado approach in part because of concerns that it would limit the ability of guardians and conservators to provide useful information to the court, and could prevent the guardian or conservator from assisting with restoration of rights in situations where such assistance would be consistent with the guardian or conservator's fiduciary duty.

Section 417 of the 1997 act provided for reasonable compensation of guardians, conservators, and attorneys, but did not address many of the issues addressed in Sections 119 and 120 of this act.

SECTION 121. LIABILITY OF GUARDIAN OR CONSERVATOR FOR ACT OF INDIVIDUAL SUBJECT TO GUARDIANSHIP OR CONSERVATORSHIP. A guardian or conservator is not personally liable to another person solely because of the guardianship or conservatorship for an act or omission of the individual subject to guardianship or

conservatorship.

Comment

As this new section indicates, appointment as a guardian or conservator does not itself cause the appointee to assume personal liability for acts of the individual subject to guardianship or conservatorship. However, the section does not preclude a guardian or conservator from being held personally liable for acts of the individual subject to guardianship or conservatorship if those acts are caused by the appointee's negligence or breach of fiduciary duty.

SECTION 122. PETITION AFTER APPOINTMENT FOR INSTRUCTION OR RATIFICATION.

(a) A guardian or conservator may petition the court for instruction concerning fiduciary responsibility or ratification of a particular act related to the guardianship or conservatorship.

(b) On notice and hearing on a petition under subsection (a), the court may give an instruction and issue an appropriate order.

Comment

This section expands the authority to petition for instructions, which under Section 414(b)-(c) of the 1997 act applied only to conservators. This section provides an opportunity for both guardians and conservators to obtain guidance from the court before acting, and to have an act ratified by the court after it is done. While petitions for instructions are common in many jurisdictions even absent statutory authorization, the enactment of this section will leave no doubt about the availability of the procedure.

Petitioning for an instruction may be useful when guardians or conservators are uncertain as to whether a particular act falls within their existing authority. Petitioning for an instruction or for ratification may be useful when guardians or conservators are concerned about another person subsequently challenging the propriety of a particular action and seek an instruction or ratification to clarify that the action falls within their authority.

SECTION 123. THIRD-PARTY ACCEPTANCE OF AUTHORITY OF GUARDIAN OR CONSERVATOR.

(a) A person must not recognize the authority of a guardian or conservator to act on behalf of an individual subject to guardianship or conservatorship if:

(1) the person has actual knowledge or a reasonable belief that the letters of office

of the guardian or conservator are invalid or the conservator or guardian is exceeding or improperly exercising authority granted by the court; or

(2) the person has actual knowledge that the individual subject to guardianship or conservatorship is subject to physical or financial abuse, neglect, exploitation, or abandonment by the guardian or conservator or a person acting for or with the guardian or conservator.

(b) A person may refuse to recognize the authority of a guardian or conservator to act on behalf of an individual subject to guardianship or conservatorship if:

(1) the guardian's or conservator's proposed action would be inconsistent with this [act]; or

(2) the person makes, or has actual knowledge that another person has made, a report to the [government agency providing protective services to adults or children] stating a good-faith belief that the individual subject to guardianship or conservatorship is subject to physical or financial abuse, neglect, exploitation, or abandonment by the guardian or conservator or a person acting for or with the guardian or conservator.

(c) A person that refuses to accept the authority of a guardian or conservator in accordance with subsection (b) may report the refusal and the reason for refusal to the court. The court on receiving the report shall consider whether removal of the guardian or conservator or other action is appropriate.

(d) A guardian or conservator may petition the court to require a third party to accept a decision made by the guardian or conservator on behalf of the individual subject to guardianship or conservatorship.

Comment

This section is new to the act. Subsection (a) specifies when a third party *must* refuse to accept the authority of a guardian or conservator. The exception is deliberately narrow. Refusal is

mandatory only when there is knowledge or a reasonable belief that the appointee lacks authority to act in the particular way the appointee is attempting to act, or the person has actual knowledge that the appointee or someone acting with or for the appointee has abused, neglected, exploited, or abandoned the individual subject to guardianship or conservatorship.

Subsection (b) states the circumstances under which a third party *may* refuse to accept the authority of a guardian or conservator. It permits refusal if the appointee's action would be inconsistent with the act itself, or in certain situations in which a report of mistreatment has been made to the appropriate governmental agency. In the case of minors this will typically be a child protective services agency; in the case of adults, it will typically be an adult protective services agency.

Subsection (c) provides a mechanism for a person who has refused to accept the authority of a guardian or conservator to report the refusal and the underlying concern to the court. On receiving such a report, the court must consider whether removal of the appointee or other corrective action is appropriate.

Subsection (d) provides an appointee with a mechanism for requiring a third party to recognize the appointee's lawful authority. Subsection (d) is responsive to concerns about third parties refusing to accept the authority of a duly appointed guardian or conservator, thus frustrating the underlying purpose of the appointment and preventing the guardian or conservator from acting in the interest of the individual subject to guardianship or conservatorship.

SECTION 124. USE OF AGENT BY GUARDIAN OR CONSERVATOR.

(a) Except as otherwise provided in subsection (c), a guardian or conservator may delegate a power to an agent which a prudent guardian or conservator of comparable skills could delegate prudently under the circumstances if the delegation is consistent with the guardian's or conservator's fiduciary duties and the guardian's plan under Section 316 or conservator's plan under Section 419.

(b) In delegating a power under subsection (a), the guardian or conservator shall exercise reasonable care, skill, and caution in:

- (1) selecting the agent;
- (2) establishing the scope and terms of the agent's work in accordance with the guardian's plan under Section 316 or conservator's plan under Section 419;
- (3) monitoring the agent's performance and compliance with the

delegation; and

(4) redressing an act or omission of the agent which would constitute a breach of the guardian's or conservator's duties if done by the guardian or conservator.

(c) A guardian or conservator may not delegate all powers to an agent.

(d) In performing a power delegated under this section, an agent shall:

(1) exercise reasonable care to comply with the terms of the delegation and use reasonable care in the performance of the power; and

(2) if the guardian or conservator has delegated to the agent the power to make a decision on behalf of the individual subject to guardianship or conservatorship, use the same decision-making standard the guardian or conservator would be required to use.

(e) By accepting a delegation of a power under subsection (a) from a guardian or conservator, an agent submits to the personal jurisdiction of the courts of this state in an action involving the agent's performance as agent.

(f) A guardian or conservator that delegates and monitors a power in compliance with this section is not liable for the decision, act, or omission of the agent.

Comment

This section is new to the act. Subsection (a) sets forth general parameters for when a guardian or conservator may delegate a power to an agent. Agents include, but are not limited to, professionals such as attorneys and accountants who assist the appointee in the performance of duties. As a general matter, delegation may be proper and even desirable in situations where the agent's abilities or expertise will allow the guardian or conservator to better meet the needs of the individual subject to guardianship or conservatorship. This may be for a variety of reasons, including because the use of agents will be more economical (e.g., a guardian employs a third-party with a lower hourly rate than the guardian to do grocery shopping for the individual) or the agent has expertise or skills that will help the appointee act or make decisions on behalf of the individual (e.g., a guardian employs an attorney to represent the individual in a claim against a third party or a conservator employs an investment advisor to assist in the management of a large conservatorship estate).

As provided in subsection (c), a guardian or conservator may not delegate all powers to an agent.

As noted in subsection (a), the powers a guardian or conservator may delegate will depend on the circumstances. A prudent guardian or conservator may reasonably decide to delegate certain tasks to an agent where those tasks require a level or type of expertise the agent has, but the guardian or conservator does not have. For example, a conservator might delegate certain investment decisions to a professional money manager. Similarly, delegation may be prudent where it will reduce the cost of services to the individual subject to guardianship or conservatorship. For example, a prudent attorney appointed as a guardian must prudently delegate responsibility for performing grocery shopping to someone with a much lower hourly fee.

At a minimum, and as subsections (b) and (f) indicate, the guardian or conservator may not delegate the duty to monitor the agent to ensure the agent meets the needs of the individual subject to guardianship or conservatorship in a matter that is consistent with this act and with the guardian or conservator's underlying fiduciary duty. Failure to properly monitor the agent may result in the guardian's or conservator's liability for the agent's wrongful conduct. Thus, as a general matter, a prudent guardian or conservator should not delegate visitation with the individual subject to guardianship or conservatorship.

Delegation does not mean the guardian or conservator may abdicate all responsibility with respect to the agent's actions. In addition to the obligation to monitor the agent, subsection (b) requires that a guardian or conservator must exercise reasonable care, skill and caution in selecting the agent and in establishing the scope and terms of the agent's work in accordance with the guardian's plan under Section 316 or conservator's plan under Section 419.

Subsection (d) is designed to make it clear not only that agents must use reasonable care, but also that agents to whom are delegated any decision-making powers must use the same decision-making standard that applies to the guardian or conservator.

Much of this section is derived from Section 9 of the Uniform Prudent Investor Act (identical to Section 807 of the Uniform Trust Code) and Section 80 of the Restatement (Third) of Trusts (2007) but clarifying language has been added and the section has otherwise been adapted to better match the fiduciary responsibilities of guardians and conservators. Differences between this section and Section 9 of the Uniform Prudent Investor Act include: (1) subsection (a) of this section clarifies that the delegation must be consistent with both fiduciary duties and the guardianship or conservatorship plan; (2) subsection (b)(4) adds that a guardian or conservator must redress an act or omission of an agent that would constitute a breach of fiduciary duty if done by the guardian or conservator; (3) subsection (c) provides that a guardian or conservator may not delegate all powers, and (4) subsection (d)(2) adds that an agent who makes a decision on behalf of an individual subject to guardianship and conservatorship must use the same decision-making standard that the guardian or conservator would be required to use.

SECTION 125. TEMPORARY SUBSTITUTE GUARDIAN OR CONSERVATOR.

(a) The court may appoint a temporary substitute guardian for an individual subject to guardianship for a period not exceeding six months if:

(1) a proceeding to remove a guardian for the individual is pending; or

(2) the court finds a guardian is not effectively performing the guardian's duties and the welfare of the individual requires immediate action.

(b) The court may appoint a temporary substitute conservator for an individual subject to conservatorship for a period not exceeding six months if:

(1) a proceeding to remove a conservator for the individual is pending; or

(2) the court finds that a conservator for the individual is not effectively performing the conservator's duties and the welfare of the individual or the conservatorship estate requires immediate action.

(c) Except as otherwise ordered by the court, a temporary substitute guardian or temporary substitute conservator appointed under this section has the powers stated in the order of appointment of the guardian or conservator. The authority of the existing guardian or conservator is suspended for as long as the temporary substitute guardian or conservator has authority.

(d) The court shall give notice of appointment of a temporary substitute guardian or temporary substitute conservator, not later than [five] days after the appointment, to:

(1) the individual subject to guardianship or conservatorship;

(2) the affected guardian or conservator; and

(3) in the case of a minor, each parent of the minor and any person currently having care or custody of the minor.

(e) The court may remove a temporary substitute guardian or temporary substitute conservator at any time. The temporary substitute guardian or temporary substitute conservator shall make any report the court requires.

Comment

The procedure in this section can be used when a guardian or conservator has been appointed, but a proceeding to remove that appointee is pending or the appointee is not effectively discharging the functions of the office. The role of the temporary substitute guardian or conservator, as the name implies, is to fill in for the regular guardian, whose powers are suspended for the duration of the appointment. As provided in subsection (a)(2), an appointment under this section is limited to situations in which the individual's welfare requires immediate action.

A temporary substitute guardian or conservator differs from an emergency guardian or conservator. An emergency guardian or conservator is appointed in an urgent situation in which there is no guardian or conservator but the needs of the individual demand action be taken. A temporary substitute guardian also differs from a standby guardian. A standby guardian is appointed under Section 207 to serve at some point in the future, most commonly upon the death of the parent of a minor. A temporary substitute guardian, by contrast, is granted immediate authority. Likewise, a temporary substitute guardian or conservator differs from a successor guardian or successor conservator appointed under Section 111 in that the authority of the previously appointed guardian or conservator is merely suspended, not terminated, and the authority of the temporary substitute guardian or temporary substitute conservator is immediate.

This section builds on language in Section 313 of the 1997 act, which also allowed for appointment of a temporary substitute guardian. The 2017 act extends the general approach of former Section 313 to guardianships over minors as well as to conservatorships – hence the relocation into Article 1. This extension reflects a recognition that the need for someone to fill-in can arise in the context of both guardianships and conservatorships, whether the individual subject to guardianship or conservatorship is an adult or a minor. Moreover, creating a mechanism for another person to assume responsibilities reduces the barriers to removing a guardian or conservator when doing so is appropriate.

If, at the end of the six months, the individual still needs a guardian or conservator, the court should appoint a regular guardian or conservator. A temporary substitute guardian does not automatically have preference to be appointed as guardian or conservator in such cases.

In some cases, circumstances may dictate the appointment of the temporary substitute guardian without prior notice being given to the guardian or conservator, or the individual subject to guardianship or conservatorship. If that occurs, subsection (d) requires the court to inform both expeditiously. In addition, where the individual subject to guardianship or conservatorship is a minor, the minor's parents must be provided with notice. Notice to the regularly-appointed guardians and conservators is essential to ensure they know their authority has been suspended. Enacting states are free to enact a notice period of less than five days but are encouraged to not enact a notice period of more than five days.

SECTION 126. REGISTRATION OF ORDER; EFFECT

(a) If a guardian has been appointed in another state for an individual, and a petition for

guardianship for the individual is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court, may register the guardianship order in this state by filing as a foreign judgment, in a court of an appropriate [county] of this state, certified copies of the order and letters of office.

(b) If a conservator has been appointed in another state for an individual, and a petition for conservatorship for the individual is not pending in this state, the conservator appointed for the individual in the other state, after giving notice to the appointing court, may register the conservatorship in this state by filing as a foreign judgment, in a court of a [county] in which property belonging to the individual subject to conservatorship is located, certified copies of the order of conservatorship, letters of office, and any bond or other asset-protection arrangement required by the court.

(c) On registration under this section of a guardianship or conservatorship order from another state, the guardian or conservator may exercise in this state all powers authorized in the order except as prohibited by this [act] and law of this state other than this [act]. If the guardian or conservator is not a resident of this state, the guardian or conservator may maintain an action or proceeding in this state subject to any condition imposed by this state on an action or proceeding by a nonresident party.

(d) The court may grant any relief available under this [act] and law of this state other than this [act] to enforce an order registered under this section.

Comment

Subsections (a) and (b) parallel Sections 432 and 433 of the 1997 act as revised in 2010 to incorporate Section 401 and Section 402 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007) (UAGPPJA). However, unlike the UAGPPJA, which applies only to adult proceedings, this section also applies to minors. As stated in the General Comment to UAGPPJA Article 4, these provisions are designed to facilitate the enforcement of guardianship and protective orders in other states. Influenced by the early case of Hoyt v.

Sprague, 103 U.S. 613 (1881), which refused to give a guardianship order effect beyond the state of appointment, the courts have generally held that guardianship and conservatorship orders are not entitled to full faith and credit in other states. *See, e.g., Morrissey v. Rogers*, 21 P.2d 359 (1993), and *Mack v. Mack*, 618 A.2d 744 (Md. 1993). However, there have been cases where the order has been given full faith and credit in other states. *See In re Guardianship of Enos*, 670 N.E.2d 967 (Mass Ct. App. 1966); *In re Prye*, 169 S.W. 3d 116 (Mo. Ct. App. 2005). The widespread enactment of the UAGPPJA, which has been enacted in all but four states as of June, 2018, eliminates the doubts. The UAGPPJA recognizes that many problems could be avoided if guardianships and conservatorships established in one state were entitled to recognition in other states. Registration of guardianship and conservatorship orders is a key concept under UAGPPJA.

Subsections (c) and (d) parallel Section 434 of the 1997 act as revised in 2010 to incorporate Section 403 of the UAGPPJA. These provisions state that following registration of the order in the appropriate county of the other state, and after giving notice to the appointing court of the intent to register the order in the other state, a guardian or conservator, without the need for a new court proceeding, may exercise all powers authorized in the order of appointment except as prohibited under the laws of the registering state.

SECTION 127. GRIEVANCE AGAINST GUARDIAN OR CONSERVATOR.

(a) An individual who is subject to guardianship or conservatorship, or person interested in the welfare of an individual subject to guardianship or conservatorship, that reasonably believes the guardian or conservator is breaching the guardian's or conservator's fiduciary duty or otherwise acting in a manner inconsistent with this [act] may file a grievance in a record with the court.

(b) Subject to subsection (c), after receiving a grievance under subsection (a), the court:

(1) shall review the grievance and, if necessary to determine the appropriate response, court records related to the guardianship or conservatorship;

(2) shall schedule a hearing if the individual subject to guardianship or conservatorship is an adult and the grievance supports a reasonable belief that:

(A) removal of the guardian and appointment of a successor may be appropriate under Section 318;

(B) termination or modification of the guardianship may be appropriate

under Section 319;

(C) removal of the conservator and appointment of a successor may be appropriate under Section 430; or

(D) termination or modification of the conservatorship may be appropriate under Section 431; and

(3) may take any action supported by the evidence, including:

(A) ordering the guardian or conservator to provide the court a report, accounting, inventory, updated plan, or other information;

(B) appointing a guardian ad litem;

(C) appointing an attorney for the individual subject to guardianship or conservatorship; or

(D) holding a hearing.

(c) The court may decline to act under subsection (b) if a similar grievance was filed within the six months preceding the filing of the current grievance and the court followed the procedures of subsection (b) in considering the earlier grievance.

Comment

This section, which is new to the act, creates an accessible mechanism for bringing concerns about improper conduct by guardians or conservators to the attention of the court. The section has precedent in complaint processes enabled by statutes or court rules in a number of jurisdictions, including Idaho, Ohio, Washington, and Wyoming. It is also consistent with National Probate Court Standard 3.3.18 (2013), which calls on probate courts to “establish a clear and easy-to-use process for communicating concerns about guardianships and conservatorships and the performance of guardians/conservators.”

The use of the term “grievance” instead of “complaint” or “petition” reflects the fact that the person filing the grievance need not request or seek any particular relief; the person needs only to present the court with information. Upon receipt of a grievance under this section, the court is required to consider the grievance unless both of the following are true: (1) a similar grievance has been filed in the past six months, and (2) the court followed the procedures under this section in considering the earlier grievance. The provision thus precludes the court from declining to

consider information about potential improper conduct simply because it is not formalized as a motion or petition.

Upon receipt of a grievance, under subsection (b) the court is not required to do anything more than simply consider the grievance unless the grievance supports a reasonable belief that termination of a guardianship or conservatorship, or removal of a guardian or conservator, is appropriate. In that case, the grievance serves as a “communication” within the meaning of Section 318, Section 319, Section 430, or Section 431 that triggers the processes outlined in those sections. It could likewise trigger the court to appoint a temporary substitute guardian under Section 125. Thus, upon receipt of a grievance the court itself determines whether further action is proper.

In drafting this section, the drafting committee sought to strike a balance between facilitating access to the court by non-attorneys, including individuals subject to guardianship or conservatorship, and minimizing the burden on the court’s resources. By allowing a person to get the attention of the court without a formal petition or motion, the provision increases access. By requiring the grievance be in a record, as recommended by National Probate Standard 3.3.18 (2013), and allowing the court to decline consideration of a grievance if a similar grievance was made in the prior six months, the provision discourages frivolous complaints and inefficient uses of the court’s time. In addition, the grievance mechanism has the potential to reduce the administrative burden on courts by allowing courts to promptly address issues that would otherwise fester unattended and create larger problems.

The inclusion of this provision reflects a recognition that improper and abusive conduct by guardians and conservators, while not the norm, is a significant and ongoing problem. Although there is no reliable estimate of the extent of such behavior, reports of abuse are not uncommon. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-33, ELDER ABUSE: THE EXTENT OF ABUSE BY GUARDIANS IS UNKNOWN, BUT SOME MEASURES EXIST TO HELP PROTECT OLDER ADULTS, 6–11 (2016) (describing the state of knowledge); U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT AND ABUSE OF SENIORS (2010) (concluding that the GAO could not determine whether guardianship abuse is widespread, but identifying hundreds of allegations during a 20-year period).

In some situations, a court might reasonably respond to a grievance filed under this section by encouraging the individual filing the grievance to engage in voluntary mediation with the guardian or conservator. For example, this might include mediation of disputes between a family member who wishes to visit with an individual subject to guardianship and the guardian who wishes to limit that visitation. Voluntary mediation would generally not be appropriate where the individual filing the grievance is the individual subject to guardianship or conservatorship as the power differential would be too great, and the voluntariness may be suspect.

[SECTION 128. DELEGATION BY PARENT. A parent of a minor, by a power of attorney, may delegate to another person for a period not exceeding [nine months] any of the

parent's powers regarding care, custody, or property of the minor, other than power to consent to marriage or adoption.]

Legislative Note: *A version of Section 128 has appeared in the Uniform Probate Code since 1969 and has been enacted in some form by more than 40 states. However, the subject matter of this section is more appropriately included in a state's general family law statutes. An enacting state should review its existing law to determine whether to include this section, and where it could be codified most appropriately.*

Comment

This section provides for a temporary delegation of powers by the parent. When a parent requires assistance for a finite period of time, such temporary delegations may serve to avoid imposition of guardianship and thus allow parents to retain the right to make decisions for their children. For example, a single parent in the military called to a tour of duty could use this provision to grant a power of attorney to allow a friend or relative to make decisions while the parent is away. Should the tour of duty exceed the statutory maximum period for such authorizations, the parent would need to renew the power. Thus, Section 128 can be seen as creating a less restrictive alternative to guardianship.

Unlike Section 105 of the 1997 act, this section only applies to parents of minors. It does not allow a parent to delegate powers over an adult nor does it allow for delegation by a guardian. The first change reflects a recognition that all adults, even those with very significant disabilities, have the right to make decisions for themselves to the extent able and that the right to do so should only be removed after full consideration and due process. The second change reflects a recognition that guardians have some non-delegable duties as set forth in Section 124. A guardian may employ agents to assist with the performance of the guardian's duties, but the guardian retains a fiduciary duty that requires the guardian, at a minimum, to use care in selecting and monitoring the agent.

This section does not create a guardianship nor does it allow a parent to grant powers the parent does not possess. Thus, the ability to make a delegation under this section may be quite limited for a parent who does not have all parental rights (e.g., a parent who does not have custody over the child).

Although this section refers to a delegation of power over property, the application of this section to property management is limited as parents' powers over the property of a minor are themselves limited. When it is necessary to secure powers over a minor's property, a petition for conservatorship will likely be appropriate.

The Uniform Deployed Parents Custody and Visitation Act (UDPCVA) may provide alternative provisions for delegation in certain situations. The UDPCVA allows the court, at the request of a deploying parent, to temporarily grant the service member's portion of custodial responsibility to an adult nonparent who is either a family member or with whom the child has a close and substantial relationship when it serves the child's best interest. In the event that a deploying

parent is the only parent with custodial responsibility of the child, the UDPCVA allows custody arrangements during the service member's deployment to be made unilaterally by power of attorney.

[ARTICLE] 2

GUARDIANSHIP OF MINOR

SECTION 201. BASIS FOR APPOINTMENT OF GUARDIAN FOR MINOR.

(a) A person becomes a guardian for a minor only on appointment by the court.

(b) The court may appoint a guardian for a minor who does not have a guardian if the court finds the appointment is in the minor's best interest and:

(1) each parent of the minor, after being fully informed of the nature and consequences of guardianship, consents;

(2) all parental rights have been terminated; or

(3) there is clear-and-convincing evidence that no parent of the minor is willing or able to exercise the powers the court is granting the guardian.

Comment

A guardian for a minor may be appointed only by a court. This is a change from the 1997 act, which allowed appointment by a parent of the minor. *See* Section 202 of the 1997 act. This change is designed to better protect the rights and welfare of the minor, as well as to better respect the rights of non-appointing parents. The parent's preferences still, however, play a substantial role in the appointment process. Under Section 206(b), the court must appoint a person nominated by the parent in a will or other record unless the court finds that the appointment would be contrary to the best interest of the minor.

Unless all parental rights have been terminated, the court may only appoint a guardian for a minor under this act if each parent of the minor provides informed consent or the court finds by clear-and-convincing evidence that no parent of the minor is able or willing to exercise the powers to be granted to the guardian. The drafters of this act could not anticipate all of the conflicts that can arise in some states between the jurisdiction of the probate court to appoint a guardian for a minor and the jurisdiction of other courts within the state to award custody or adjudicate juvenile dependency for the same child. For a discussion of the standards for the appointment of a guardian of a minor and the jurisdictional conflicts that can arise, at least in one state, see Deirdre M. Smith, *From Orphans to Families in Crisis: Parental Rights Matters in Maine Probate Courts*, 68 ME. L. REV. 45 (2016).

The court's ability to appoint a guardian for a minor under this part is in certain cases partially or wholly superseded by special legislation relating to custody of minors. Reference should be made to the Uniform Child Custody Jurisdiction and Enforcement Act (1997), the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, and the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq. For a discussion of the jurisdictional limitations, see David M. English, *Minors' Guardianship in an Age of Multiple Marriage*, 29 INST. ON EST. PLAN. ¶¶ 500, 502 (1995). For more recent analyses of the Indian Child Welfare Act in relation to probate guardianships, see Amina McCoy, *The Battle of Wills: The Impact of the Indian Child Welfare Act on Parents Who Make Testamentary Appointments of Guardianship for Their Indian Children*, 28 J. JUV. L. 148 (2007); Richard B. Maltby, *The Indian Child Welfare Act of 1978 and the Missed Opportunity to Apply the Act in Guardianships*, 46 St. LOUIS U.L.J. 213 (2002).

This section, like the rest of Article 2, governs guardianship of an unemancipated minor. If an individual is below the age of majority, but has been emancipated, any guardianship over the individual would be governed by Article 3. The definition of "adult" (Section 102(1)) includes an emancipated minor.

SECTION 202. PETITION FOR APPOINTMENT OF GUARDIAN FOR MINOR.

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

(b) A petition under subsection (a) must state the petitioner's name, principal residence, current street address, if different, relationship to the minor, interest in the appointment, the name and address of any attorney representing the petitioner, and, to the extent known, the following:

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

(2) the name and current street address of the minor's parents;

(3) the name and address, if known, of each person that had primary care or custody of the minor for at least 60 days during the two years immediately before the filing of the petition or for at least 730 days during the five years immediately before the filing of the petition;

(4) the name and address of any attorney for the minor and any attorney for each

parent of the minor;

(5) the reason guardianship is sought and would be in the best interest of the minor;

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

(7) if the minor has property other than personal effects, a general statement of the minor's property with an estimate of its value;

(8) whether the minor needs an interpreter, translator, or other form of support to communicate effectively with the court or understand court proceedings;

(9) whether any parent of the minor needs an interpreter, translator, or other form of support to communicate effectively with the court or understand court proceedings; and

(10) whether any other proceeding concerning the care or custody of the minor is pending in any court in this state or another jurisdiction.

Comment

This section, which is new to the act, brings together the 1997 provisions governing who may petition the court for appointment of a guardian for a minor with new provisions setting forth what must be included in the petition. The requirements in subsection (b) are designed to ensure that the court has the information necessary to adequately understand the needs and interests of the minor. For example, subsection (b)(3) requires the petitioner to include the name of each person who had primary custody of the minor for at least 60 days during the two years immediately before the petition was filed, or for at least 730 days (i.e., two years' worth of days) during the five years immediately before the filing. This provision recognizes that the minor may have bounced among caregivers or parental figures, and may have been cared for by persons other than their parents or persons with whom they currently reside. Those persons may be in a position to best inform the court as to the child's needs and interests, and may, in some cases, be qualified to serve as a guardian for the minor.

**SECTION 203. NOTICE OF HEARING FOR APPOINTMENT OF GUARDIAN
FOR MINOR.**

(a) If a petition is filed under Section 202, the court shall schedule a hearing and the petitioner shall:

(1) serve notice of the date, time, and place of the hearing, together with a copy of the petition, personally on each of the following that is not the petitioner:

(A) the minor, if the minor will be 12 years of age or older at the time of the hearing;

(B) each parent of the minor or, if there is none, the adult nearest in kinship who can be found with reasonable diligence;

(C) any adult with whom the minor resides;

(D) each person that had primary care or custody of the minor for at least 60 days during the two years immediately before the filing of the petition or for at least 730 days during the five years immediately before the filing of the petition; and

(E) any other person the court determines should receive personal service of notice; and

(2) give notice under Section 113 of the date, time, and place of the hearing, together with a copy of the petition, to:

(A) any person nominated as guardian by the minor, if the minor is 12 years of age or older;

(B) any nominee of a parent;

(C) each grandparent and adult sibling of the minor;

(D) any guardian or conservator acting for the minor in any jurisdiction;

and

(E) any other person the court determines.

(b) Notice required by subsection (a) must include a statement of the right to request appointment of an attorney for the minor or object to appointment of a guardian and a description of the nature, purpose, and consequences of appointment of a guardian.

(c) The court may not grant a petition for guardianship of a minor if notice substantially complying with subsection (a)(1) is not served on:

(1) the minor, if the minor is 12 years of age or older; and

(2) each parent of the minor, unless the court finds by clear-and-convincing evidence that the parent cannot with due diligence be located and served or the parent waived, in a record, the right to notice.

(d) If a petitioner is unable to serve notice under subsection (a)(1) on a parent of a minor or alleges that the parent waived, in a record, the right to notice under this section, the court shall appoint a [visitor] who shall:

(1) interview the petitioner and the minor;

(2) if the petitioner alleges the parent cannot be located, ascertain whether the parent cannot be located with due diligence; and

(3) investigate any other matter relating to the petition the court directs.

Legislative Note: The term “visitor” is bracketed because some states use a different term for the person appointed by the court to investigate and report on certain facts.

Comment

This section builds on the notice provisions found in Section 205(a) of the 1997 act. It recognizes that families have grown more complex over the years and that the minor is more likely to be residing with individuals other than a parent or parents. It also recognizes that the age at which a minor may participate in the proceeding, which has long been age 14, should be

revised in light of changes in other areas of child welfare law. Under this section and under the act generally, a minor acquires significant rights at age 12.

Paragraph (a)(1) lists the persons who must receive personal notice of a petition and hearing for guardianship of a minor. Personal service must be given to: (1) the minor if the minor will be at least 12 years of age at the time of the hearing on the petition; (2) each parent of the minor (unless there is none, in which case notice is to be provided to the adult nearest in kinship who can be located with reasonable diligence); (3) any adult with whom the minor resides; (4) any person who had primary care or custody of the minor for at least 60 days during the two years immediately before the petition was filed; or at least 730 days (i.e., two years' worth of days) during the 5 years immediately before the filing; and (5) any other person the court directs. The petitioner may give personal notice to other persons, including a younger minor who is the subject of a proceeding, but is not required to do so.

Paragraph (a)(2) lists the persons who must receive notice of the petition and hearing for guardianship of a minor, but for whom personal service is not required. Persons in this category are: (1) any person nominated to serve as guardian by a parent of the minor or by a minor who is at least 12 years old; (2) each grandparent of the minor; (3) each adult sibling of the minor; (4) any guardian or conservator already acting for the minor; and (5) any other person whom the court determines.

Subsection (c) provides that failure to give notice to a minor who is at least 12 years of age is jurisdictional. Likewise, failure to give notice to a parent of the minor is jurisdictional unless the court finds by clear-and-convincing evidence that the parent cannot be located and served even with due diligence, or that the parent waived the right to notice in a record. By contrast, the other notice requirements in this section are not jurisdictional.

Subsection (c) and subsection (d) taken together allow the court to grant a guardianship over a minor without notice to a parent of that minor if the parent waived the right to notice in a record. This is something a parent might do if the parent was fearful of being located, or anticipated that future events would make him or her difficult to locate. For example, an undocumented parent might fear deportation, or a parent with an ongoing fear of domestic violence or other targeted victimization might fear being located by an aggressor. Under subsection (d), if the petitioner is unable to serve notice on a parent or alleges the parent waived, in a record, the right to that notice, the court must appoint a visitor to investigate. The visitor, at a minimum, must interview both the petitioner and the minor, and, if the petitioner alleges that the parent cannot be located, ascertain whether it is in fact true that the parent cannot be located with due diligence.

SECTION 204. ATTORNEY FOR MINOR OR PARENT.

(a) The court shall appoint an attorney to represent a minor who is the subject of a proceeding under Section 202 if:

- (1) requested by the minor and the minor is 12 years of age or older;

- (2) recommended by a guardian ad litem; or
- (3) the court determines the minor needs representation.

(b) An attorney appointed under subsection (a) shall:

- (1) make a reasonable effort to ascertain the minor's wishes;
- (2) advocate for the minor's wishes to the extent reasonably ascertainable; and
- (3) if the minor's wishes are not reasonably ascertainable, advocate for the

minor's best interest.

(c) A minor who is the subject of a proceeding under Section 202 may retain an attorney to represent the minor in the proceeding.

(d) A parent of a minor who is the subject of a proceeding under Section 202 may retain an attorney to represent the parent in the proceeding.

[(e) The court shall appoint an attorney to represent a parent of a minor who is the subject of a proceeding under Section 202 if:

- (1) the parent objects to appointment of a guardian for the minor;
- (2) the court determines that counsel is needed to ensure that consent to appointment of a guardian is informed; or
- (3) the court otherwise determines the parent needs representation.]

Legislative Note: Subsection (e) is in brackets because states have different policies regarding rights of parents in these cases.

Comment

Section 204 covers both the right to retain an attorney and the right to have an attorney appointed by the court, as well as the role of the attorney for the minor. The 1997 treatment of these issues was limited to a provision in Section 205(c) of that act permitting the court to appoint an attorney for a minor.

As set forth in subsections (c) and (d), a minor who is the subject of a guardianship proceeding has a right to retain an attorney to represent the minor's interest, and a parent of that minor has a

right to retain an attorney to represent the parent's interest.

Subsection (a) requires the court to appoint an attorney for a minor if the minor requests an attorney and the minor is at least 12 years old, appointment is recommended by the guardian ad litem, or the court determines that the minor needs representation. The court is not required to appoint the particular attorney requested by the minor or suggested by the guardian ad litem.

Subsection (b) provides that an attorney appointed for a minor under subsection (a) is to make a reasonable effort to determine the minor's wishes with respect to the guardianship petition, and to advocate for those wishes. The attorney may advocate for the minor's best interest only if the minor's wishes are not reasonably ascertainable, or if the minor's wishes are the same as the minor's best interest. Thus, the role of the attorney for a minor is quite different than the role of a guardian ad litem. The two serve different purposes and different masters. The attorney for the minor serves as the minor's representative. As indicated in Section 115, by contrast, the guardian ad litem serves as an extension of the court.

Subsection (e), which is in brackets, requires a court in certain situations to appoint an attorney to represent a parent of a minor who is the subject of a guardianship proceeding. Specifically, appointment is required if (1) the parent objects to appointment of a guardian, (2) the parent is purporting to consent to the guardianship or is considering consenting to the guardianship and the court determines an appointment is needed to make sure that the consent is informed, or (3) the court determines that the parent needs representation for some other reason. Including subsection (e) in the act provides greater protection for the rights of parents, and may also help parents protect the interests of their minor children. The subsection is in brackets, however, in recognition that the provisions in subsection (e) have a fiscal cost and that states have different policies with regards to parents' rights to representation. In determining whether to enact subsection (e) states will likely wish to weigh the benefit of representation to protect parents' fundamental rights and interests in parenting their children against fiscal constraints.

SECTION 205. ATTENDANCE AND PARTICIPATION AT HEARING FOR APPOINTMENT OF GUARDIAN FOR MINOR.

(a) The court shall require a minor who is the subject of a hearing under Section 203 to attend the hearing and allow the minor to participate in the hearing unless the court determines, by clear-and-convincing evidence presented at the hearing or a separate hearing, that:

(1) the minor consistently and repeatedly refused to attend the hearing after being fully informed of the right to attend and, if the minor is 12 years of age or older, the potential consequences of failing to do so;

(2) there is no practicable way for the minor to attend the hearing;

(3) the minor lacks the ability or maturity to participate meaningfully in the hearing; or

(4) attendance would be harmful to the minor.

(b) Unless excused by the court for good cause, the person proposed to be appointed as guardian for a minor shall attend a hearing under Section 203.

(c) Each parent of a minor who is the subject of a hearing under Section 203 has the right to attend the hearing.

(d) A person may request permission to participate in a hearing under Section 203. The court may grant the request, with or without hearing, on determining that it is in the best interest of the minor who is the subject of the hearing. The court may impose appropriate conditions on the person's participation.

Comment

Section 205 is new to the act as the 1997 act did not address the minor's participation in the hearing.

Subsection (a) requires the minor alleged to need a guardian to be present at the hearing on the guardianship petition with an opportunity to participate in that hearing unless the court finds by clear-and-convincing evidence that one of the four exceptions listed in subsection (a) exists.

The first exception is that the minor consistently and repeatedly refused to attend after being informed of the right to attend. If 12 years of age or older, the minor must also have been informed of the potential consequences of non-attendance. This requirement recognizes that merely telling a minor he or she should attend a hearing may not be sufficient to protect the minor's right to attend. To make an informed decision, the minor needs to know why it might be in the minor's interest to attend.

The second exception applies when there is no practicable way for the minor to attend the hearing. The fact that the minor may have a substantial disability that makes it impossible to access the location where hearings are traditionally held does not mean there is no practicable way for the minor to attend. Hearing locations can be moved to accommodate the minor's challenges.

The third exception applies when the minor lacks the ability or maturity to participate meaningfully in the hearing. This exception, for example, could excuse the participation of an

infant. It should be used sparingly, however, as the best way for the court to determine whether the minor has the requisite ability and maturity is to have the minor present at the hearing on the guardianship.

The fourth exception applies when attendance would be harmful to the minor. This exception should also be used sparingly. The fact that the hearing may be upsetting for the minor is not adequate justification for denying the minor the right to attend and participate. In determining whether this exception applies, the court must consider not merely the potential harms to the minor, but also the potential benefits of attendance. Benefits to the minor may include: (1) the opportunity to voice his or her preferences, (2) a more appropriate order because the court had the benefit of observing the minor and potentially hearing from the minor, (3) the minor gaining a better understanding of what is happening to him or her, and (4) the minor avoiding feelings of disempowerment.

Subsection (b) requires a person proposed as guardian to attend the hearing unless the court excuses that attendance for good cause.

Subsection (c) provides that each parent of the minor has the right to attend the hearing. Under the act, this right is absolute.

Subsection (d) allows any person to request permission to participate in a hearing for guardianship of a minor. The request should be granted if the court finds that the person's participation is in the best interest of the minor. Even if the court grants the request, the court may impose conditions on the person's participation. For example, the court could limit the person's participation to testimony on a particular issue.

SECTION 206. ORDER OF APPOINTMENT; PRIORITY OF NOMINEE; LIMITED GUARDIANSHIP FOR MINOR.

(a) After a hearing under Section 203, the court may appoint a guardian for a minor, if appointment is proper under Section 201, dismiss the proceeding, or take other appropriate action consistent with this [act] or law of this state other than this [act].

(b) In appointing a guardian under subsection (a), the following rules apply:

(1) The court shall appoint a person nominated as guardian by a parent of the minor in a will or other record unless the court finds the appointment is contrary to the best interest of the minor.

(2) If multiple parents have nominated different persons to serve as guardian, the

court shall appoint the nominee whose appointment is in the best interest of the minor, unless the court finds that appointment of none of the nominees is in the best interest of the minor.

(3) If a guardian is not appointed under paragraph (1) or (2), the court shall appoint the person nominated by the minor if the minor is 12 years of age or older unless the court finds that appointment is contrary to the best interest of the minor. In that case, the court shall appoint as guardian a person whose appointment is in the best interest of the minor.

(c) In the interest of maintaining or encouraging involvement by a minor's parent in the minor's life, developing self-reliance of the minor, or for other good cause, the court, at the time of appointment of a guardian for the minor or later, on its own or on motion of the minor or other interested person, may create a limited guardianship by limiting the powers otherwise granted by this [article] to the guardian. Following the same procedure, the court may grant additional powers or withdraw powers previously granted.

(d) The court, as part of an order appointing a guardian for a minor, shall state rights retained by any parent of the minor, which may include contact or visitation with the minor, decision making regarding the minor's health care, education, or other matter, or access to a record regarding the minor.

(e) An order granting a guardianship for a minor must state that each parent of the minor is entitled to notice that:

- (1) the guardian has delegated custody of the minor subject to guardianship;
- (2) the court has modified or limited the powers of the guardian; or
- (3) the court has removed the guardian.

(f) An order granting a guardianship for a minor must identify any person in addition to a parent of the minor which is entitled to notice of the events listed in subsection (e).

Comment

Subsection (a) sets forth the possible dispositions for a hearing under Section 203. In addition to appointing a guardian or dismissing the proceeding, the court may take other appropriate action consistent with the law. This could include, for example, a transfer to another court such as a juvenile or family court that may be better positioned to address the specific situation.

Subsection (b) creates a limited list of people with priority for appointment. Absent a nomination by a parent of the minor, the only person having preference for appointment as guardian under this section is the person nominated by a minor age 12 or older. Regardless of the preference granted, the court may not appoint a person whose appointment the court finds would be contrary to the best interest of the minor.

Subsection (c) applies the concept of limited guardianship to minors. A court, whenever possible, should only grant to the guardian those powers actually needed. A limited guardianship may be appropriate, for example, in situations where the minor's parents are only unable or unwilling to exercise some rights. For example, a parent may have an intellectual disability that significantly limits the parent's ability to make certain types of informed decisions for the minor but does not prevent the parent from making other decisions for the minor, potentially with support. The court should be specific about identifying the powers of the guardian regarding the minor's education, care, health, safety, and welfare. This section gives the court flexibility to design the guardianship in a way to preserve parental authority to make certain decisions regarding the minor or to empower the minor as much as possible to make the minor's own decisions (either at the time of appointment or at a later date when the minor is more mature) when appropriate. Subsection (c) can be used by the court to either expand or limit the guardian's powers. Although the court can grant additional powers, the court cannot grant powers beyond those provided in Section 210.

Subsection (d) requires the court to specify in the order which parental rights, if any, are to be retained by the parent as part of a limited guardianship. Representative rights listed in subsection (d) include contact or visitation with the minor, decision making regarding the minor's health care, education, or other matter, or access to a record concerning the minor. This listing is not exclusive.

Subsection (e) requires orders granting guardianship of a minor give parents of the minor the right to notice of certain major changes: (1) the guardian delegates custody of the minor, (2) the court modifies or limits the guardian's powers, or (3) the court removes the guardian. This provision is designed to protect the fundamental rights of parents, and to provide some additional degree of monitoring. As set forth in subsection (f), the court may choose to grant the same right to notice to a person other than a parent who has an interest in the minor's welfare.

SECTION 207. STANDBY GUARDIAN FOR MINOR.

(a) A standby guardian appointed under this section may act as guardian, with all duties and powers of a guardian under Sections 209 and 210, when no parent of the minor is willing or

able to exercise the duties and powers granted to the guardian.

(b) A parent of a minor, in a signed record, may nominate a person to be appointed by the court as standby guardian for the minor. The parent, in a signed record, may state desired limitations on the powers to be granted the standby guardian. The parent, in a signed record, may revoke or amend the nomination at any time before the court appoints a standby guardian.

(c) The court may appoint a standby guardian for a minor on:

(1) petition by a parent of the minor or a person nominated under subsection (b);

and

(2) finding that no parent of the minor likely will be able or willing to care for or make decisions with respect to the minor not later than [two years] after the appointment.

(d) A petition under subsection (c)(1) must include the same information required under Section 202 for the appointment of a guardian for a minor.

(e) On filing a petition under subsection (c)(1), the petitioner shall:

(1) serve a copy of the petition personally on:

(A) the minor, if the minor is 12 years of age or older, and the minor's attorney, if any;

(B) each parent of the minor;

(C) the person nominated as standby guardian; and

(D) any other person the court determines; and

(2) include with the copy of the petition served under paragraph (1) a statement of the right to request appointment of an attorney for the minor or to object to appointment of the standby guardian, and a description of the nature, purpose, and consequences of appointment of a standby guardian.

(f) A person entitled to notice under subsection (e), not later than 60 days after service of the petition and statement, may object to appointment of the standby guardian by filing an objection with the court and giving notice of the objection to each other person entitled to notice under subsection (e).

(g) If an objection is filed under subsection (f), the court shall hold a hearing to determine whether a standby guardian should be appointed and, if so, the person that should be appointed. If no objection is filed, the court may make the appointment.

(h) The court may not grant a petition for a standby guardian of the minor if notice substantially complying with subsection (e) is not served on:

- (1) the minor, if the minor is 12 years of age or older; and
- (2) each parent of the minor, unless the court finds by clear-and-convincing evidence that the parent, in a record, waived the right to notice or cannot be located and served with due diligence.

(i) If a petitioner is unable to serve notice under subsection (e) on a parent of the minor or alleges that a parent of the minor waived the right to notice under this section, the court shall appoint a [visitor] who shall:

- (1) interview the petitioner and the minor;
- (2) if the petitioner alleges the parent cannot be located and served, ascertain whether the parent cannot be located with due diligence; and
- (3) investigate any other matter relating to the petition the court directs.

(j) If the court finds under subsection (c) that a standby guardian should be appointed, the following rules apply:

- (1) The court shall appoint the person nominated under subsection (b) unless the

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

(2) If the parents have nominated different persons to serve as standby guardian, the court shall appoint the nominee whose appointment is in the best interest of the minor, unless the court finds that appointment of none of the nominees is in the best interest of the minor.

(k) An order appointing a standby guardian under this section must state that each parent of the minor is entitled to notice, and identify any other person entitled to notice, if:

- (1) the standby guardian assumes the duties and powers of the guardian;
- (2) the guardian delegates custody of the minor;
- (3) the court modifies or limits the powers of the guardian; or
- (4) the court removes the guardian.

(l) Before assuming the duties and powers of a guardian, a standby guardian must file with the court an acceptance of appointment as guardian and give notice of the acceptance to:

- (1) each parent of the minor, unless the parent, in a record, waived the right to notice or cannot be located and served with due diligence;
- (2) the minor, if the minor is 12 years of age or older; and
- (3) any person, other than the parent, having care or custody of the minor.

(m) A person that receives notice under subsection (l) or any other person interested in the welfare of the minor may file with the court an objection to the standby guardian's assumption of duties and powers of a guardian. The court shall hold a hearing if the objection supports a reasonable belief that the conditions for assumption of duties and powers have not been satisfied.

Comment

Section 207 creates an option for a court to appoint a standby guardian for a minor. This section is substantially different and hopefully much improved from the standby guardianship provisions

under the 1997 act, which were located in Sections 202 and 203. The standby guardian, as stated in subsection (a), becomes empowered to act as guardian when no parent of the minor is able and willing to exercise the duties granted to the guardian. This provision is most likely to be used by parents who anticipate losing the ability to care for their children. This includes parents facing a terminal illness, incarceration, or deportation. While there are similarities in the process for appointing a guardian to act immediately and for appointing a standby guardian, a key difference is that—unless someone entitled to object does so—a court may appoint a standby guardian without holding a hearing.

As set forth in subsections (b) and (c), for the court to appoint a standby guardian, a parent of the minor must nominate someone to serve as standby guardian, and either the nominee or a parent of the minor must petition the court to appoint the nominee. Before appointing a standby guardian, the court must find it is likely that no parent of the minor will be able or willing to care for or make decisions for the minor within two years of the appointment (or, if the state selects a different period, within the applicable period). The limited timeframe is designed to ensure the appointment is close enough in time to when the standby guardian would likely serve that the court has sufficient information to make an appointment that likely will be appropriate at the time needed. If the timeframe were too long—say five or ten years—there would be a much greater risk of circumstances changing in a material way between the time of appointment and acceptance of that appointment by the standby guardian.

Subsection (e) requires notice of the petition and hearing to be served personally on each parent of the minor, the person nominated as standby guardian, the minor if the minor is at least 12 years old, and any other person the court determines. To ensure that those receiving notice understand what is being sought and the key rights at stake, subsection (e)(2) requires the notice to explain the role of a standby guardian and the consequences of an appointment, the right to object, and the right to a request that an attorney be appointed for the minor.

As set forth in subsection (h), notice to a minor 12 years of age or older is jurisdictional. Notice to a parent of the minor is also jurisdictional. Failure to provide personal notice to each parent of the minor precludes the court from appointing the standby guardian unless the court finds by clear-and-convincing evidence that (1) the parent waived, in a record, the right to notice or (2) cannot be located and served with due diligence. If a petitioner is unable to serve notice on a parent or alleges that the parent waived the right to notice, subsection (i) requires the court to appoint a visitor to investigate. The visitor, at a minimum, must interview both the petitioner and the minor, and, if the petitioner alleges that the parent cannot be located, ascertain whether it is in fact true that the parent cannot be located with due diligence.

Subsections (f) and (g) provide for objection to an appointment and require a court hearing if an objection is received. Specifically, any person entitled to notice under subsection (e) has a right to object to the appointment of the nominee. If an objection is filed in a timely manner, the court must then hold a hearing to determine whether a standby guardian should be appointed for the minor and, if so, who should be appointed as standby guardian. If no timely objection is made, the court may make the appointment without any hearing. The court may, of course, choose to hold a hearing even if no objection is filed.

Subsection (j) contains provisions governing priority for appointment. It creates a limited list for priority. The court must appoint the person nominated unless the court finds doing so to be contrary to the best interest of the minor. Subsection (j) also recognizes that different parents may have nominated different people to serve as standby guardian. In choosing between the nominees, the best interest of the minor governs.

Subsection (k) requires that an order appointing a standby guardian state that each parent must be notified if and when the standby guardian assumes the duties and powers of the guardian. In addition, the order must state that each parent is entitled to notice that the guardian has delegated custody of the minor, the court has modified or limited the guardian's powers, or the court has removed the guardian. This provision is designed to protect the fundamental rights of parents, and to provide some additional degree of monitoring. Similar to Section 206(f) on the appointment of a regular guardian, the court may grant the same right of notice to a person other than a parent.

Subsection (l) requires a standby guardian to file notice of acceptance of the appointment and give notice of that acceptance before assuming the duties and powers of a guardian. Under subsection (m), persons who are entitled to notice under subsection (l), or any other person interested in the welfare of the minor, may file an objection to that assumption of duties. The court then must hold a hearing if the objection supports a reasonable belief that the guardian is attempting to assume duties when assumption is not appropriate. For example, a parent might object on the grounds that the parent is still able and willing to exercise their parental duties.

Subsections (f) and (g) require that the court hold a hearing on an objection to the initial appointment of a standby guardian if the objection is filed not later than 60 days after service of the petition and statement. Subsection (m) grants an additional right to object upon the standby guardian's assumption of duties and powers of a guardian. The court must hold a hearing on an objection filed under subsection (m) if the objection supports a reasonable belief that the conditions for assumption of duties and powers have not been satisfied.

SECTION 208. EMERGENCY GUARDIAN FOR MINOR.

(a) On its own, or on petition by a person interested in a minor's welfare, the court may appoint an emergency guardian for the minor if the court finds:

(1) appointment of an emergency guardian is likely to prevent substantial harm to the minor's health, safety, or welfare; and

(2) no other person appears to have authority and willingness to act in the circumstances.

(b) The duration of authority of an emergency guardian for a minor may not exceed [60]

days and the emergency guardian may exercise only the powers specified in the order of appointment. The emergency guardian's authority may be extended once for not more than [60] days if the court finds that the conditions for appointment of an emergency guardian in subsection (a) continue.

(c) Except as otherwise provided in subsection (d), reasonable notice of the date, time, and place of a hearing on a petition for appointment of an emergency guardian for a minor must be given to:

- (1) the minor, if the minor is 12 years of age or older;
- (2) any attorney appointed under Section 204;
- (3) each parent of the minor;
- (4) any person, other than a parent, having care or custody of the minor; and
- (5) any other person the court determines.

(d) The court may appoint an emergency guardian for a minor without notice under subsection (c) and a hearing only if the court finds from an affidavit or testimony that the minor's health, safety, or welfare will be substantially harmed before a hearing with notice on the appointment can be held. If the court appoints an emergency guardian without notice to an unrepresented minor or the attorney for a represented minor, notice of the appointment must be given not later than 48 hours after the appointment to the individuals listed in subsection (c). Not later than [five] days after the appointment, the court shall hold a hearing on the appropriateness of the appointment.

(e) Appointment of an emergency guardian under this section, with or without notice, is not a determination that a basis exists for appointment of a guardian under Section 201.

(f) The court may remove an emergency guardian appointed under this section at any

time. The emergency guardian shall make any report the court requires.

Comment

Section 208 governs emergency guardians for minors. An emergency guardian is a person appointed for a limited period to address an urgent concern. The emergency guardianship allows a court to make a time-limited appointment without the full process otherwise required to appoint a guardian. Specifically, the court may appoint an emergency guardian only if the appointment is needed to prevent substantial harm to the minor's health, safety, or welfare and there is no one with authority who is willing to act in the circumstances. Thus, appointment is not permitted where the evidence indicates the minor's needs can be adequately met without an appointment. Likewise, appointment is not permitted to address trifling or non-consequential harms.

Any person interested in the welfare of a minor may petition for appointment of an emergency guardian. The court may also appoint one on its own motion, without a petition, if a basis for appointment exists under subsection (a). An emergency guardianship is intended to address urgent situations. It can be an appropriate intervention when a minor is having a health care crisis or other urgent situation requiring decisions but one or both parents are temporarily absent, refusing to act, or unable to act.

Prior notice is required before appointment of an emergency guardian unless the court finds from affidavit or testimony that the minor will be seriously harmed during the time needed to give notice. Only then may the court act without notice. Subsection (c) provides that unless an exception applies, notice of the hearing on a petition for an emergency guardian must be given to the minor if the minor is at least 12 years of age, to each parent of the minor, to any attorney appointed by the court for the minor or the minor's parent, to any person other than a parent having care or custody of the minor, and to any other person the court directs. Subsection (c) does not require personal service, but simply reasonable notice. State law and state practice on expedited matters, particularly expedited matters involving minors, should be consulted to determine what constitutes reasonable notice in this context.

Proceedings without prior notice should be the *rare exception* rather than the rule. A court should have a process established to provide notice on an emergency basis. However, Section 208 recognizes that occasionally there will be situations where giving prior notice on an emergency guardianship petition is simply not feasible. Subsection (d), therefore, allows an appointment of an emergency guardian for a minor without notice if the court makes certain findings based on affidavit or testimony. Specifically, the court must find that the minor's health, safety, or welfare will be substantially harmed before a hearing with notice could be held. Furthermore, when an emergency guardianship is established without prior notice, notice must be given within 48 hours of the appointment and a return hearing held within five days of the appointment. Although the five days is bracketed, giving states the option of adopting a different time limit, five days is the minimum notice requirement in most states for an *ex parte* hearing. If the enacting states chooses to enact a time limit other than five days, to adequately protect the minor the time chosen should be relatively short.

As set forth in subsection (b), the court must limit the duration of the emergency guardian's authority to a set period of time, which may be extended only once. The 60-day limit suggested in brackets is designed to strike a balance between creating a long enough appointment that the court can reasonably go through a full guardianship process during that period if necessary, and a short enough period that fundamental due process rights are not denied.

Subsection (e) states that an emergency guardian appointment does not mean the court made the findings necessary to appoint a guardian for a period longer than the maximum duration of an emergency appointment. Thus, the existence of an emergency guardianship should not be treated as evidence the requirements set forth in Section 201 have been satisfied.

Finally, Subsection (f) allows the court to remove an emergency guardian at any time, and to require the guardian to report to the court.

The procedures under this subsection are similar to the procedures for emergency appointments for adults, found in Section 312. This section builds upon Section 204(e) of the 1997 act. Key modifications from the 1997 version include a longer duration for an emergency appointment, the ability to extend the appointment once, and a clear statement that appointment of an emergency guardian is not a determination that a basis for appointment of a guardian exists under Section 201.

SECTION 209. DUTIES OF GUARDIAN FOR MINOR.

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

(b) A guardian for a minor shall:

(1) be personally acquainted with the minor and maintain sufficient contact with the minor to know the minor's abilities, limitations, needs, opportunities, and physical and mental health;

(2) take reasonable care of the minor's personal effects and bring a proceeding for a conservatorship or protective arrangement instead of conservatorship if necessary to protect other property of the minor;

(3) expend funds of the minor which have been received by the guardian for the

minor's current needs for support, care, education, health, safety, and welfare;

(4) conserve any funds of the minor not expended under paragraph (3) for the minor's future needs, but if a conservator is appointed for the minor, pay the funds at least quarterly to the conservator to be conserved for the minor's future needs;

(5) report the condition of the minor and account for funds and other property of the minor in the guardian's possession or subject to the guardian's control, as required by court rule or ordered by the court on application of a person interested in the minor's welfare;

(6) inform the court of any change in the minor's dwelling or address; and

(7) in determining what is in the minor's best interest, take into account the minor's preferences to the extent actually known or reasonably ascertainable by the guardian.

Comment

Typically, a guardian of a minor functions as a substitute parent, but without the parents' personal financial responsibility for the minor's support. As provided in subsection (a), the duties of a parent to which the guardian succeeds are those relating to the minor's support, care, education, health, safety, and welfare. A guardian is also a fiduciary with fiduciary responsibilities. A guardian must always act in the minor's best interest and exercise reasonable care, diligence, and prudence. Subsection (b) of this section, and Section 210 are, in substantial part, expansions on the underlying responsibilities set forth in subsection (a).

A guardian is more than a caretaker. The guardian must, as required by subsection (b)(1), become or remain personally acquainted with the minor and maintain sufficient contact to know of the capacities, limitations, needs, opportunities, and physical and mental health of the minor. Such contact is also essential if the guardian is to act in the best interest of the minor. To determine what is in the minor's best interest, the guardian should engage with the minor to learn the minor's preferences. As provided in subsection (b)(7), the guardian must take these expressed preferences into account to the extent actually known or reasonably ascertainable. Engagement with the minor is also essential to involve the minor in decision making. Such involvement is important to develop the minor's own decision-making skills to prepare the minor for future independence.

A guardian's powers with respect to the property of the minor are very limited. If the minor has significant property requiring management, the guardian should petition the court for the appointment of a conservator or other protective order as provided in subsection (b)(2). However, subsection (b)(3) requires that the guardian use the minor's funds, including government benefits received for the minor, for the minor's support, care, education, health,

safety and welfare. The guardian must conserve any funds not expended for the minor's future needs, and periodically turn over the excess to the conservator, if one has been appointed. *See* subsection (b)(4). A guardian may also be required to report the minor's condition to the court as well as to account for money and other assets in the guardian's possession or subject to the guardian's control. *See* subsection (b)(5). Regardless of whether the court has specifically ordered it, a guardian must also always inform the court of any change in the minor's dwelling or address. *See* subsection (b)(6). Temporary absences, such as for vacations, need not be reported. This required reporting to the court is consistent with the recommendation in National Probate Court Standards, Standard 3.3.16 "Reports by the Guardian" (2013). Keeping the court informed of the minor's location helps the court to exercise appropriate oversight of the guardianship. If the minor is removed to another state, it will also prevent the court from losing jurisdiction over the case without the court's knowledge. *See* also Section 210(b)(2), which requires the permission of the court before the minor may be relocated to another state.

This section is based on Section 207 of the 1997 act. A key change from that version is the explicit instruction that the guardian must take into account the minor's known or reasonably ascertainable preferences. This requirement was only arguably implied by the 1997 act.

SECTION 210. POWERS OF GUARDIAN FOR MINOR.

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

(b) Except as otherwise limited by court order, a guardian for a minor may:

(1) apply for and receive funds and benefits otherwise payable for the support of the minor to the minor's parent, guardian, or custodian under a statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;

(2) unless inconsistent with a court order entitled to recognition in this state, take custody of the minor and establish the minor's place of dwelling and, on authorization of the court, establish or move the minor's dwelling outside this state;

(3) if the minor is not subject to conservatorship, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the minor or make a payment for the benefit of the minor;

(4) consent to health or other care, treatment, or service for the minor; or

(5) to the extent reasonable, delegate to the minor responsibility for a decision affecting the minor's well-being.

(c) The court may authorize a guardian for a minor to consent to the adoption of the minor if the minor does not have a parent.

(d) A guardian for a minor may consent to the marriage of the minor [if authorized by the court].

Legislative Note: *An enacting state should consider its existing law governing consent to marriage by minors when determining whether to require specific authorization of consent to marriage.*

Comment

This section should be read with Section 209. Section 209 sets out the duties of the guardian for a minor: those responsibilities which a guardian may not ignore. Section 210 sets out the guardian's powers, the grant of which are necessary in order for the guardian to carry out the duties specified in Section 209.

Section 209(a) imposes on the guardian certain of the duties of a parent. To enable the guardian to properly carry out those duties, subsection (a) of this section grants the guardian corresponding powers of a parent with regard to the support, care, education, health, safety, and welfare of the minor. Subsection (b) of this section then lays out specific applications of the general powers granted in subsection (a).

Subsections (b)(1) and (3) enable the guardian to carry out the guardian's limited duties with respect to the management of the property of the minor. The powers of the guardian over the minor's property are quite limited, recognizing that a conservator should be appointed or other protective order sought for the minor if the minor owns a significant amount of property. The guardian is authorized under subsection (b)(1) to apply for government benefits to which the minor is entitled. Under Section 209(b)(3), the guardian must use those benefits for the minor's support, care, education, health, safety, and welfare. Upon appointment, a guardian should also investigate whether proper application has been made for all governmental benefits to which the minor may be entitled. It may also be necessary for the guardian to seek appointment as a representative payee, should the governmental agency in question use a representative payee mechanism for making payments on behalf of beneficiaries without legal capacity.

Subsection (b)(2) recognizes that other courts may have a role in determining the custody of the minor. While a guardian generally has a right to take custody of the minor, the guardian is denied this power if to assume custody would be inconsistent with the custody order of a court of

competent jurisdiction. Such an order may have been entered by a juvenile court, by a court responsible for making involuntary mental health commitments, or even by the court supervising the guardianship.

Subsection (b)(2) also prevents the guardian from moving the minor out of state without the court's prior approval. The court must determine whether such a move would be in the best interest of the minor. The court should make certain that this provision is not used to circumvent a custody order or to avoid a determination of custody by an appropriate court. The court should also be aware that the move to another state with the court's approval will eventually result in the loss of the court's jurisdiction pursuant to the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, and the Uniform Child Custody Jurisdiction and Enforcement Act.

If there is no conservator, subsection (b)(3) authorizes the guardian to file a proceeding to collect child support. In implementing this power, the guardian should consult the state's applicable child support statutes, which should be read as if incorporated into this section.

Under subsection (b)(4), the guardian may consent to health care or other care, treatment, or service for the minor. The guardian may ordinarily make health-care decisions for the minor without prior court authorization, but for certain types of health-care decisions, prior court approval may be required or at least be considered. For example, a guardian may ordinarily consent to elective surgery for the minor, but the guardian is strongly advised to consider seeking prior court authorization before consenting to experimental medical treatment. While this act does not specifically require that a guardian seek prior court approval before making a particular health-care decision, such prior court approval may be required by other statute, especially when the minor's constitutional rights are in question. For example, a guardian may not be able to place a minor in a mental health care facility or consent to electroconvulsive therapy (ECT) or other types of shock therapy without the court's order. State statutes may require that specific procedures be followed before a guardian can consent to an abortion or certain medical treatment for the minor. Because of the important and competing interests at stake, a guardian should at least consult with, and may need to obtain an order from, the court if the guardian plans to refuse medical treatment on behalf of the minor on the grounds of the minor's religious beliefs.

Consistent with the act's focus on recognizing the personhood and abilities of those subject to guardianship, subsection (b)(5) permits the guardian, if reasonable under all of the circumstances, to delegate to the minor certain responsibilities for decisions affecting the minor's well-being. Such delegation may help the minor to develop a sense of self and decision-making skills. Notably, unlike the 1997 act, this act does not use the term "self-reliance." This change reflects a modern understanding that one can be independent and in control of one's own life and still receive support and assistance from others.

Under subsection (c), the court may specifically authorize the guardian to consent to the minor's adoption. This provision was carried forward from Section 208(c) of the 1997 act, which was in turn carried forward from Section 2-109(c)(5) of the 1982 act. This court is chosen because under Section 211 of this act the adoption of the minor will have the effect of terminating the guardianship. An enacting jurisdiction should verify that subsection (c) is in harmony with the state's existing adoption laws.

To the extent that the guardian's consent may be necessary for the minor to marry, subsection (d) does allow a guardian to consent to the marriage of the minor. Whether such consent is relevant or required will depend on the state's laws on the requirements of marriage. This provision was included in order to create a workable provision for states that still recognize child marriage despite a strong movement to curtail this practice. Recognizing that state law on this issue varies, the language requiring that the guardian's consent to marriage be authorized by the court has been placed in brackets.

This section is based on Section 208 of the 1997 act. However, the 1997 act did not address the issue of whether a guardian could consent to the minor's marriage.

SECTION 211. REMOVAL OF GUARDIAN FOR MINOR; TERMINATION OF GUARDIANSHIP; APPOINTMENT OF SUCCESSOR.

(a) Guardianship under this [act] for a minor terminates:

(1) on the minor's death, adoption, emancipation, or attainment of majority; or

(2) when the court finds that the standard in Section 201 for appointment of a

guardian is not satisfied, unless the court finds that:

(A) termination of the guardianship would be harmful to the minor; and

(B) the minor's interest in the continuation of the guardianship outweighs

the interest of any parent of the minor in restoration of the parent's right to make decisions for the minor.

(b) A minor subject to guardianship or a person interested in the welfare of the minor may petition the court to terminate the guardianship, modify the guardianship, remove the guardian and appoint a successor guardian, or remove a standby guardian and appoint a different standby guardian.

(c) A petitioner under subsection (b) shall give notice of the hearing on the petition to the minor, if the minor is 12 years of age or older and is not the petitioner, the guardian, each parent of the minor, and any other person the court determines.

(d) The court shall follow the priorities in Section 206(b) when selecting a successor

guardian for a minor.

(e) Not later than 30 days after appointment of a successor guardian for a minor, the court shall give notice of the appointment to the minor subject to guardianship, if the minor is 12 years of age or older, each parent of the minor, and any other person the court determines.

(f) When terminating a guardianship for a minor under this section, the court may issue an order providing for transitional arrangements that will assist the minor with a transition of custody and is in the best interest of the minor.

(g) A guardian for a minor that is removed shall cooperate with a successor guardian to facilitate transition of the guardian's responsibilities and protect the best interest of the minor.

Comment

Subsection (a) lists the grounds for terminating a guardianship for a minor. It recognizes the traditional grounds for termination that were recognized in Section 210(a) of the 1997 act: the minor's death, adoption, emancipation, attainment of majority, or as ordered by the court. While a guardianship terminates upon emancipation of a minor, the grounds of emancipation are left to the state's law on the subject. In many states a minor is emancipated by marriage, military service, or order of emancipation.

Unlike the termination provisions in the 1997 act, this section requires the court to order termination where the court finds that the original standard for appointing a guardian in Section 201 is not met. The only exception to this requirement is if termination would be harmful to the minor and the minor's interest in the guardianship continuing outweighs the interest of the minor's parents in having their rights restored. Thus, as a general matter, the fact that a guardian has been appointed in the past does not mean that the guardianship should continue. By way of example, consider a situation in which a guardian is appointed because the minor's only parent was incarcerated. Upon release, the parent petitions for termination of the guardianship. Upon review, the court should terminate the guardianship. The guardianship may continue only if the court finds that some other basis for imposition of guardianship exists under Section 201, or that termination would result in harm to the minor and the minor's interest in having a continued guardianship outweighs the parent's interest in resuming parental powers.

Termination of the guardianship does not relieve the guardian of all duties. Even though the guardianship is terminated, the guardian is still liable for previous acts and has an obligation to account for any funds of the minor within the guardian's possession or control. *See* Section 112(c).

Subsection (b) authorizes the minor or any person interested in the minor's welfare to seek

termination of the guardianship, an expansion of or restriction on the guardian's powers, removal of the guardian or standby guardian, and appointment of a successor guardian or different standby guardian. Pursuant to subsection (c), the petitioner must give notice of a petition under subsection (b) to the minor if the minor is at least 12 years old (and not the petitioner), the minor's parents, and any other person the court determines.

Subsection (d) requires the court to use the same priorities when selecting a successor guardian for a minor that it would use in appointing any other guardian for a minor.

Subsection (e) governs notice of the appointment of a successor guardian.

Subsections (f) and (g) address the transition to a new custodial or guardianship relationship. They authorize the court to order transitional arrangements to help the minor with a transition in custody. Subsection (g) requires a guardian for a minor to cooperate with a successor guardian to facilitate transition of responsibilities and protect the minor's interests.

[ARTICLE] 3

GUARDIANSHIP OF ADULT

SECTION 301. BASIS FOR APPOINTMENT OF GUARDIAN FOR ADULT.

(a) On petition and after notice and hearing, the court may:

(1) appoint a guardian for an adult if the court finds by clear-and-convincing evidence that:

(A) the respondent lacks the ability to meet essential requirements for physical health, safety, or self-care because the respondent is unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making; and

(B) the respondent's identified needs cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative; or

(2) with appropriate findings, treat the petition as one for a conservatorship under [Article] 4 or protective arrangement under [Article] 5, issue any appropriate order, or dismiss the proceeding.

(b) The court shall grant a guardian appointed under subsection (a) only those powers necessitated by the demonstrated needs and limitations of the respondent and issue orders that will encourage development of the respondent's maximum self-determination and independence. The court may not establish a full guardianship if a limited guardianship, protective arrangement instead of guardianship, or other less restrictive alternatives would meet the needs of the respondent.

Comment

This section replaces Section 311(a) and (b) of the 1997 act. Placement of the basis for appointment at the start of Article 3 is designed to signal that this is a threshold question and to alert all parties, and the public more generally, to the strict standard necessary to impose guardianship on an adult. Unlike Section 311(a) and (b) of the 1997 act, this section does not speak of capacity and incapacity. Rather than being asked to assign a status (e.g., "incapacitated" or "has capacity") to the individual, the court is called upon to make particularized findings about the adult's individual needs in light of what the adult can and cannot do. This change is also consistent with the act's avoidance of the term "incapacitated person," which has been criticized as unnecessarily stigmatizing. *See Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191, 1199 (2012) (recommending, as part of Recommendation 1.7, that the term be avoided).

Under subsection (a)(1) of this section, a guardian may be appointed for an adult only if the court finds by clear-and-convincing evidence that: (1) the adult cannot meet essential requirements for physical health, safety, or self-care; (2) guardianship is the least restrictive approach to meeting the adult's identified need; and (3) the adult cannot receive and evaluate information or make or communicate decisions even with appropriate supportive services, technological assistance, or supported decision making. Thus, if the adult's needs could be met by providing the individual with support for decision making, adaptive devices, caregiving services, or a wide variety of other interventions that remove fewer rights than guardianship, the court may not impose a guardianship on an adult.

Subsection (a)(2) allows the court, with appropriate findings, to treat a petition for guardianship for an adult under this section as a petition for a protective arrangement instead of guardianship or conservatorship under Article 5, or a petition for conservatorship under Article 4, or to dismiss the Article 3 proceeding. To guarantee the respondent the maximum possible personal liberty, the court should treat the petition as one for a conservatorship or protective arrangement instead of conservatorship under this subsection whenever it concludes that court intervention is necessary and appropriate, but the respondent's needs can be met by the entry of orders with respect to the respondent's property without the need to limit the respondent's personal freedom.

As set forth under subsection (b), a guardian may never be granted powers that are not required

by the adult's demonstrated limitations and needs. Thus, most guardianships should be limited, not full, as almost all respondents possess some ability to act or make decisions on their own behalf.

Notably, this section provides the only grounds for appointment of a guardian for an adult. This is in contrast to Sections 301 through 303 of the 1997 act, which allowed for the appointment of a guardian of an adult by a will or other writing of the adult's spouse or parent. This act eliminates these alternative grounds, which are at odds with the act's overall commitment to due process and least-restrictive alternatives.

While the standard for appointment of a guardian for an adult under this section is similar to the standard for appointment of a conservator for an adult under Section 401, the two standards are distinct. The fact that one is satisfied does not indicate that the other is satisfied.

Overall, as in the 1997 act, the section's emphasis on less restrictive alternatives, a high evidentiary standard, and the use of limited guardianship is consistent with the act's philosophy that a guardian should be appointed only when necessary, only for as long as necessary, and with only the powers that are necessary.

SECTION 302. PETITION FOR APPOINTMENT OF GUARDIAN FOR ADULT.

(a) A person interested in an adult's welfare, including the adult for whom the order is sought, may petition for appointment of a guardian for the adult.

(b) A petition under subsection (a) must state the petitioner's name, principal residence, current street address, if different, relationship to the respondent, interest in the appointment, the name and address of any attorney representing the petitioner, and, to the extent known, the following:

(1) the respondent's name, age, principal residence, current street address, if different, and, if different, address of the dwelling in which it is proposed the respondent will reside if the petition is granted;

(2) the name and address of the respondent's:

(A) spouse [or domestic partner] or, if the respondent has none, an adult with whom the respondent has shared household responsibilities for more than six months in the 12-month period immediately before the filing of the petition;

(B) adult children or, if none, each parent and adult sibling of the respondent, or, if none, at least one adult nearest in kinship to the respondent who can be found with reasonable diligence; and

(C) adult stepchildren whom the respondent actively parented during the stepchildren's minor years and with whom the respondent had an ongoing relationship in the two-year period immediately before the filing of the petition;

(3) the name and current address of each of the following, if applicable:

(A) a person responsible for care of the respondent;

(B) any attorney currently representing the respondent;

(C) any representative payee appointed by the Social Security

Administration for the respondent;

(D) a guardian or conservator acting for the respondent in this state or in another jurisdiction;

(E) a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary;

(F) any fiduciary for the respondent appointed by the Department of Veterans Affairs;

(G) an agent designated under a [power of attorney for health care] in which the respondent is identified as the principal;

(H) an agent designated under a power of attorney for finances in which the respondent is identified as the principal;

(I) a person nominated as guardian by the respondent;

(J) a person nominated as guardian by the respondent's parent or spouse

[or domestic partner] in a will or other signed record;

(K) a proposed guardian and the reason the proposed guardian should be selected; and

(L) a person known to have routinely assisted the respondent with decision making during the six months immediately before the filing of the petition;

(4) the reason a guardianship is necessary, including a brief description of:

(A) the nature and extent of the respondent's alleged need;

(B) any protective arrangement instead of guardianship or other less restrictive alternatives for meeting the respondent's alleged need which have been considered or implemented;

(C) if no protective arrangement instead of guardianship or other less restrictive alternatives have been considered or implemented, the reason they have not been considered or implemented; and

(D) the reason a protective arrangement instead of guardianship or other less restrictive alternative is insufficient to meet the respondent's alleged need;

(5) whether the petitioner seeks a limited guardianship or full guardianship;

(6) if the petitioner seeks a full guardianship, the reason a limited guardianship or protective arrangement instead of guardianship is not appropriate;

(7) if a limited guardianship is requested, the powers to be granted to the guardian;

(8) the name and current address, if known, of any person with whom the petitioner seeks to limit the respondent's contact;

(9) if the respondent has property other than personal effects, 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

(10) whether the respondent needs an interpreter, translator, or other form of support to communicate effectively with the court or understand court proceedings.

Comment

This section lists the information that must be contained in the petition for appointment of a guardian. The comparable provisions of the 1997 act were located in Section 304 although this section adds further detail.

Although subsection (a) allows adults to petition for appointment of a guardian for themselves, the court should scrutinize such petitions closely to confirm that they are truly voluntary, and that petitioners fully understand the nature and consequences of petitioning. Normally, where an adult seeks to obtain assistance, it is preferable for the adult to execute a durable power of attorney, engage in supported decision making, or both.

Subsection (b)(1) requires the petitioner to state the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made or a guardianship instead of protective arrangement is ordered. This provision is designed to alert the respondent, and others who receive notice of the petition, of potential consequences of the guardianship that are likely to raise concerns. Giving the respondent, and those entitled to a copy of the petition under Section 303, full information will enable them to make more informed decisions about whether to oppose the petition, oppose appointment of the petitioner as guardian, or seek to limit the powers granted to the guardian.

Subsections (b)(2)-(3) require that the petition list family members and others who may have information useful to the court and to whom notice of the proceeding must be given under Section 303. These persons will likely have the greatest interest in protecting the respondent and in making certain that the proposed guardianship is appropriate.

Subsection (b)(2)(A) requires that the petition contain the name and address of the respondent's spouse or domestic partner (if the enacting state uses the term) or, if none, then an adult with whom the respondent has shared household responsibilities for more than six months in the 12-month period immediately before the filing of the petition. This is a change from Section 304 of the 1997 act, which omitted the term domestic partner and required notice to a person with whom the respondent has resided for more than six months before the filing of the petition. By requiring shared household responsibilities, and not simply co-residence, the new language better captures the underlying intent of the provision: providing notice to individuals with whom the respondent has a close personal relationship.

Subsection (b)(2)(B) also requires that the petition contain the names and addresses of the respondent's adult children or, if none, parents and adult brothers and sisters or, if none, an adult

relative of the nearest degree in which a relation can be found. If there are no adult children, parents, or adult siblings and there are several adults of equal degree of kinship to the respondent, the name and address of one is all that is required, not the names and addresses of the members of the entire class.

Subsection (b)(2)(C) requires the petition to list adult stepchildren whom the respondent parented during their minority and with whom the respondent had an ongoing relationship in the two-year period immediately before the filing of the petition. This is an expansion from Section 304 of the 1997 act, which did not require notice to adult stepchildren, and is designed to better reflect the diversity of family structures.

Subsection (b)(3) requires the petition to list a series of other persons who must be provided notice, including existing agents, care providers, and decision-making supporters. Notice to such individuals of the pending guardianship proceeding, as required by Section 303, is especially critical for ascertaining whether a guardianship is necessary. For example, the court may conclude there is no need to appoint a guardian if a guardian has already been appointed in another jurisdiction, or if the respondent has executed a durable power of attorney for finances or health care.

Subsection (b)(4) emphasizes that guardianship is a last resort and that less restrictive alternatives are to be preferred. The petitioner is required to identify all less restrictive alternatives for meeting that respondent's alleged needs that have been considered or implemented, to justify any failure to pursue less restrictive alternatives, and to explain why less restrictive alternatives would not meet the respondent's alleged needs. These requirements serve to provide the court with important information relevant to whether guardianship is appropriate. These also prompt would-be petitioners to explore less restrictive alternatives.

Subsections (b)(5)-(7) encourage the petitioner to consider limited guardianship. The petition must state whether the petitioner seeks a limited or full guardianship, or a protective arrangement instead of guardianship. When requesting a full guardianship, the petition must state why a limited guardianship or protective arrangement instead of guardianship would not meet the respondent's needs. If a limited guardianship is requested, the petition must set out the recommended powers to be granted to the guardian. "If probate courts determine that a guardianship or conservatorship is necessary, the respondent's self-reliance, autonomy, and independence should be promoted by restricting the authority of the guardian or conservator to the minimum required for the situation, rather than routinely granting full powers of guardianship/conservatorship in every case." National Probate Court Standards 3.3.10 (2013).

Section (b)(8) requires the petitioner to list any person with whom the petitioner seeks to limit the respondent's contact. Subsection (b)(1) requires the petitioner to state the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made or the protective arrangement instead of guardianship is ordered. These provisions are designed to alert the respondent, and others who receive notice of the petition, of potential consequences of the guardianship that are especially likely to raise concerns. Giving the respondent, and those persons entitled to a copy of the petition under Section 303, full information will enable them to make more informed decisions about whether to support or oppose the petition for guardianship.

or the appointment of the proposed guardian, and whether to seek to limit the powers granted to the guardian.

Subsection (b)(9) requires the petitioner to include a general statement of the respondent's property, including an estimated value, insurance and pension information, and information about other anticipated income or receipts. This information should be detailed to enable the court visitor to expeditiously complete the report required by Section 304, and to enable the court to determine whether a conservatorship is needed. An exception is made if the respondent's only property is personal effects, in which case a conservator would usually not be needed regardless of the adult's abilities and limitations.

Finally, subsection (b)(10), requires the petitioner to set forth respondent's need, if any, for an interpreter, translator, or other form of support to effectively communicate with the court or to understand court proceedings. Thus, if the respondent uses another person to assist with communication or comprehension, the petitioner should include this information.

To help petitioners satisfy the requirements of this section, Section 603 contains a sample petition form that petitioners may use.

SECTION 303. NOTICE OF HEARING FOR APPOINTMENT OF GUARDIAN FOR ADULT.

(a) On filing of a petition under Section 302 for appointment of a guardian for an adult, the court shall set a date, time, and place for hearing the petition.

(b) A copy of a petition under Section 302 and notice of a hearing on the petition must be served personally on the respondent. The notice must inform the respondent of the respondent's rights at the hearing, including the right to an attorney and to attend the hearing. The notice must include a description of the nature, purpose, and consequences of granting the petition. The court may not grant the petition if notice substantially complying with this subsection is not served on the respondent.

(c) In a proceeding on a petition under Section 302, the notice required under subsection (b) must be given to the persons required to be listed in the petition under Section 302(b)(1) through (3) and any other person interested in the respondent's welfare the court determines. Failure to give notice under this subsection does not preclude the court from appointing a

guardian.

(d) After the appointment of a guardian, notice of a hearing on a petition for an order under this [article], together with a copy of the petition, must be given to:

- (1) the adult subject to guardianship;
- (2) the guardian; and
- (3) any other person the court determines.

Comment

This section is similar to Section 309 of the 1997 act except that subsection (d) of this section also addresses notice requirements for hearings on petitions filed after the appointment of a guardian.

On filing of the petition, subsection (a) requires that the court set a date, time, and place for the hearing. Subsection (b) requires that the respondent be personally served with the petition and notice of hearing. Failure to personally serve the respondent is jurisdictional, as is notice that does not substantially comply with the requirements of subsection (b). Notice of hearing must be given to the persons who are listed in the petition, but as provided in subsection (c) failing to give notice to those listed (other than the respondent) is not jurisdictional. The purpose of providing notice to the others listed in the petition is because they may have information that is useful to the court. They are not indispensable parties for the resolution of the case. If notice to them were made jurisdictional, the proceeding would have to be dismissed or continued if one of them could not be immediately located. This would delay and otherwise complicate the proceeding. The notice of hearing not only informs the respondent and others of the date of the hearing and the contents of the petition, but it must also include a statement of rights. Subsection (b) requires that the notice inform the respondent of the respondent's rights at the hearing, including the right to an attorney and the right to attend the hearing. The notice must also include a description of the nature, purpose, and consequences of granting the petition.

Subsection (d) addresses the notice requirements for hearings on petitions for orders subsequent to the appointment of a guardian for an adult.

The adult subject to guardianship, the guardian, and anyone else the court directs, must be given copies of any notice of hearing and a copy of any petition. This provision helps ensure that the adult is kept informed of developments. In its original guardianship order, the court should direct notice of future hearings be given to any other party who, in the court's view, will help to monitor the guardian and protect the interest of the person subject to guardianship. Subsection (d) is closely related to Section 310(e), which provides that as part of an order establishing the guardianship, the court must identify persons subsequently entitled to notice of the various actions listed in Sections 310(e) and 311.

Notice under this section is also governed by the general notice requirements for hearings under Section 113, which requires that notice be given at least 14 days prior to the hearing.

SECTION 304. APPOINTMENT AND ROLE OF [VISITOR].

(a) On receipt of a petition under Section 302 for appointment of a guardian for an adult, the court shall appoint a [visitor]. The [visitor] must be an individual with training or experience in the type of abilities, limitations, and needs alleged in the petition.

(b) A [visitor] appointed under subsection (a) shall interview the respondent in person and, in a manner the respondent is best able to understand:

(1) explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, the respondent's rights at the hearing on the petition, and the general powers and duties of a guardian;

(2) determine the respondent's views about the appointment sought by the petitioner, including views about a proposed guardian, the guardian's proposed powers and duties, and the scope and duration of the proposed guardianship;

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

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, may be paid from the respondent's assets.

(c) The [visitor] appointed under subsection (a) shall:

(1) interview the petitioner and proposed guardian, if any;

(2) visit the respondent's present dwelling and any dwelling in which it is reasonably believed the respondent will live if the appointment is made;

(3) obtain information from any physician or other person known to have treated, advised, or assessed the respondent's relevant physical or mental condition; and

(4) investigate the allegations in the petition and any other matter relating to the petition the court directs.

(d) A [visitor] appointed under subsection (a) promptly shall file a report in a record with the court, which must include:

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

(2) a summary of self-care and independent-living tasks the respondent can manage without assistance or with existing supports, could manage with the assistance of appropriate supportive services, technological assistance, or supported decision making, and cannot manage;

(3) a recommendation regarding the appropriateness of guardianship, including whether a protective arrangement instead of guardianship or other less restrictive alternative for meeting the respondent's needs is available and:

(A) if a guardianship is recommended, whether it should be full or limited;
and

(B) if a limited guardianship is recommended, the powers to be granted to the guardian;

(4) a statement of the qualifications of the proposed guardian and whether the respondent approves or disapproves of the proposed guardian;

(5) a statement whether the proposed dwelling meets the respondent's needs and whether the respondent has expressed a preference as to residence;

(6) a recommendation whether a professional evaluation under Section 306 is necessary;

(7) a statement whether the respondent is able to attend a hearing at the location court proceedings typically are held;

(8) a statement whether the respondent is able to participate in a hearing and which identifies any technology or other form of support that would enhance the respondent's ability to participate; and

(9) any other matter the court directs.

Legislative Note: The term “visitor” is bracketed because some states use a different term for the person appointed by the court to investigate and report on certain facts.

Comment

Subsection (a) requires the court to appoint a visitor upon receipt of a petition under Section 302. “Visitor” is bracketed in recognition that states use, and may wish to substitute, different words to refer to this position. This section is similar to Section 305(c)-(e) of the 1997 act except that the responsibilities of the visitor have been adjusted to accommodate changes in the petition requirements and other changes in this act in the procedure for appointing a guardian.

Visitors may be selected from a variety of professions. Visitors may include, among others, physicians, psychologists, social workers, or nurses, among others. Regardless of the visitor's profession, subsection (a) requires that the visitor have training and experience in the type of abilities, limitations, and needs alleged in the petition. This training and experience should be sufficient so that the visitor may serve as the “eyes and ears” of the court. Thus, for example, a visitor appointed for a respondent alleged to have Alzheimer's disease must have training or experience in assessing the needs of those with Alzheimer's disease. As the appropriate disposition of the petition may well depend on what services are available to the respondent, the visitor should also be knowledgeable about less restrictive alternatives, including supportive services in the respondent's community. As the visitor's role is to provide objective information to the court, it is essential that the visitor not have a conflict of interest. For example, the visitor should not be an employee of an institution where the respondent resides. Similarly, the petitioner should not nominate a visitor, and any such nomination should be disregarded by the court.

Under subsection (b), the visitor is tasked with interviewing the respondent in person and explaining to the respondent the nature and potential consequences of the petition and the respondent's rights. The visitor must determine the respondent's views about the appointment or order sought. This includes the respondent's views about any proposed guardian, as such views will help the court to determine who—if anyone—to appoint as guardian consistent with Section 309(a)(2) and (b). The visitor should communicate in plain language and in a language in which the respondent is proficient or be accompanied by a qualified and disinterested interpreter. While the visitor is not required to speak the respondent's primary language, it is best practice to

use visitors who do. Where this is not practicable, then both good practice and due process dictate the use of interpreters so the respondent can understand and communicate. If assistive devices are needed for the visitor to explain to the respondent in a manner the respondent can understand, or for the respondent to communicate with the visitor, then the visitor should use those assistive devices.

Under subsection (c), the visitor is also tasked with interviewing the petitioner and the proposed guardian, visiting the respondent's present dwelling and any dwelling in which it is reasonably believed that the respondent will live if the appointment is made; obtaining information from any physician or other person who is known to have treated, advised, or assessed the respondent's relevant physical or mental condition; and investigating the allegations in the petition and any other matter relating to the petition the court directs.

As set forth in subsection (d), the visitor is responsible for reporting to the court on a variety of matters about which the court will need information to act on the petition. The visitor's report must be in a record and include a list of recommendations and statements. Specifically, the visitor's report must provide information and recommendations to the court regarding the respondent's needs, the appropriateness of the guardianship, whether less restrictive alternatives might meet the respondent's needs and what supports might be necessary to enhance the respondent's abilities, recommendations about further evaluations, powers to be given the guardian, and the advisability of appointment of independent counsel for the respondent. For states enacting Alternative A to Section 305(a), if the visitor does not recommend that an attorney be appointed, the visitor should include in the report the reasons why an attorney need not be appointed. States enacting this act should consider developing a checklist for visitors containing the required items enumerated in subsection (d).

The visitor should talk with the respondent's physician or other person who is known to have assessed, treated, or advised about the respondent's relevant physical or mental condition. This information is crucial to the court in determining whether to grant the petition because a professional evaluation is not required in every case. If the physician or other health-care or other treating professional refuses to talk to the visitor because of a concern that such a conversation would violate HIPAA or for other reason, the visitor may need to seek from the appointing court an order authorizing the release of information from that physician or professional.

If the petition is withdrawn prior to the appointment of a visitor, no appointment of a visitor is necessary.

While appointment of a visitor is not without financial cost, visitors may reduce the states' overall costs by discovering information that avoids unnecessary guardianships. Courts faced with limited resources may also wish to consider using volunteer visitor programs. *See Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community*, which was published by the American Bar Association Commission on Law and Aging in 2011.

SECTION 305. APPOINTMENT AND ROLE OF ATTORNEY FOR ADULT.

Alternative A

(a) The court shall appoint an attorney to represent the respondent in a proceeding for appointment of a guardian for an adult if:

- (1) the respondent requests an appointment;
- (2) the [visitor] recommends an appointment; or
- (3) the court determines the respondent needs representation.

Alternative B

(a) Unless the respondent in a proceeding for appointment of a guardian for an adult is represented by an attorney, the court shall appoint an attorney to represent the respondent, regardless of the respondent's ability to pay.

End of Alternatives

(b) An attorney representing the respondent in a proceeding for appointment of a guardian for an adult shall:

- (1) make reasonable efforts to ascertain the respondent's wishes;
- (2) advocate for the respondent's wishes to the extent reasonably ascertainable;

and

(3) if the respondent's wishes are not reasonably ascertainable, advocate for the result that is the least restrictive in type, duration, and scope, consistent with the respondent's interests.

Legislative Note: A state that enacts Alternative B of subsection (a) should not enact Section 304(d)(1).

Comment

Similar to Section 305(a) of the 1997 act, alternative provisions on the appointment of an

attorney for the respondent are offered in subsection (a). Alternative A relies on the use of a “visitor,” who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues. Appointment of an attorney, nevertheless, is *required* under Alternative A when the court determines that the respondent needs representation, or counsel is requested by the respondent or recommended by the visitor. Alternative A is in accord with the National Probate Court Standards, Standard 3.3.5 “Appointment of Counsel” (2013), which provides:

- (a) Counsel should be appointed by the probate court to represent the respondent when:
 - (1) requested by an unrepresented respondent;
 - (2) recommended by a court visitor;
 - (3) the court, in the exercise of its discretion, determines that the respondent is in need of representation; or
 - (4) otherwise required by law.
- (b) The role of counsel should be that of an advocate for the respondent.

It is expected that courts in states enacting Alternative A of subsection (a), will appoint counsel in virtually all cases in which the respondent would otherwise be unrepresented. In such jurisdictions, courts should err on the side of protecting the respondent’s rights by finding, absent a compelling reason otherwise, that the respondent needs representation. A guardianship proceeding can involve complex legal issues and can strip the adult of many of the most basic rights. It should be the rare case in which the court does not find that an unrepresented respondent is in need of representation. Visitors in such jurisdictions should also be sensitive to the fact that the respondent may lack the ability to knowingly waive appointment of counsel.

In light of these concerns and in the interest of providing full due process to respondents, states may wish instead to adopt Alternative B, which provides for mandatory appointment of counsel. Mandatory appointment has been strongly urged by the A.B.A. Commission on Law and Aging (formerly known as the A.B.A. Commission on Legal Problems of the Elderly) and helps ensure that the respondent’s rights are fully represented and protected in the proceeding.

Subsection (b), which is new to the act, specifies the role of the attorney for the respondent, regardless of whether the state has chosen alternative A or B. It specifies that the attorney must make reasonable efforts to ascertain what the respondent wishes and must advocate for those wishes. This has the effect of directing the attorney to maintain a normal attorney-client relationship with the respondent. A.B.A. Model Rule of Professional Conduct 1.14, which is also applicable here, directs the attorney to maintain, as far as reasonably possible, a normal attorney-client relationship with a client of diminished capacity, and provides guidance on what may be done if maintaining a normal attorney-client relationship becomes difficult. Subsection (b) is also in accord with National Probate Court Standards, Standard 3.3.5 “Appointment of Counsel” (2013) with respect to the role of counsel.

SECTION 306. PROFESSIONAL EVALUATION.

(a) At or before a hearing on a petition for a guardianship for an adult, the court shall order a professional evaluation of the respondent:

(1) if the respondent requests the evaluation; or

(2) in other cases, unless the court finds that it has sufficient information to determine the respondent's needs and abilities without the evaluation.

(b) If the court orders an evaluation under subsection (a), the respondent must be examined by a licensed physician, psychologist, social worker, or other individual appointed by the court who is qualified to evaluate the respondent's alleged cognitive and functional abilities and limitations and will not be advantaged or disadvantaged by a decision to grant the petition or otherwise have a conflict of interest. The individual conducting the evaluation promptly shall file report in a record 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 cognitive and functional abilities and 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 recommendation for the appropriate treatment, support, or habilitation plan; and

(4) the date of the examination on which the report is based.

(c) The respondent may decline to participate in an evaluation ordered under subsection (a).

Comment

Like the 1997 act, this act does not require a professional evaluation in all cases before the court appoints a guardian. It thus continues the 1997 act's departure from the predecessor 1982 Uniform Guardianship and Protective Proceedings Act (UGPPA), which mandated professional evaluations. *See* UGPPA (1982) Section 2-203(b) (UPC Section 5-303(b) (1982)).

A professional evaluation is required in two circumstances. First, as under Section 306 of the 1997 act, subsection (a)(1) of this section mandates a professional evaluation when demanded by the respondent. When represented by counsel, the respondent may demand the evaluation through counsel. If the respondent is truly incapacitated and not represented by counsel, it is unlikely that the respondent will demand an evaluation. However, the court still can order a professional evaluation either on the visitor's recommendation or on its own motion.

Second, subsection (a)(2) mandates a professional evaluation in other cases unless the court explicitly finds it has sufficient information to determine both the respondent's needs and abilities without that evaluation. This requirement was not in the 1997 act, but was consistent with instruction provided in the Comment to Section 306 of that act indicating that professional evaluations should be the default.

Consistent with this new requirement, a court should order a professional evaluation any time the nature and scope of the respondent's abilities, limitations, and needs are not absolutely clear based on its own assessment and on the visitor's report. By providing the court with an expert evaluation of the respondent's abilities and limitations, the professional evaluation not only helps the court determine whether a guardianship is necessary, but also helps the court determine how to craft an appropriate limited guardianship.

If an evaluation is ordered, subsection (b) requires it to be performed by a professional who is qualified to evaluate the respondent's alleged cognitive and functional abilities and limitations. The act extends the list of examples of types of individuals who might reasonably conduct a professional evaluation beyond that listed in Section 306 of the 1997 act to include social workers; this expansion recognizes that, in some cases, a social worker may be well suited for this task.

Unlike the 1997 act, this act requires the professional evaluation to do more than merely assess the individual's deficits. The evaluator must also assess the individual's abilities. This is important because an individual's functional needs will likely reflect the interaction between abilities and limitations. As part of the evaluation described in subsection (b), the professional evaluator should generally include a summary of the consultation with the respondent's treating physician.

Subsection (c) recognizes the right of the respondent to decline to participate in the evaluation. A respondent might so decline because of concern about undue invasion of privacy. However, if the respondent refuses participation, the court will have less information on which to base its conclusion. For respondents who wish to avoid imposition of a guardianship, this may be particularly problematic as the bulk of the court's information may be supplied by the petitioner.

SECTION 307. ATTENDANCE AND RIGHTS AT HEARING.

(a) Except as otherwise provided in subsection (b), a hearing under Section 303 may not proceed unless the respondent attends the hearing. If it is not reasonably feasible for the

respondent to attend a hearing at the location court proceedings typically are held, the court shall make reasonable efforts to hold the hearing at an alternative location convenient to the respondent or allow the respondent to attend the hearing using real-time audio-visual technology.

(b) A hearing under Section 303 may proceed without the respondent in attendance if the court finds by clear-and-convincing evidence that:

(1) the respondent consistently and repeatedly has refused to attend the hearing after having been fully informed of the right to attend and the potential consequences of failing to do so; or

(2) there is no practicable way for the respondent to attend and participate in the hearing even with appropriate supportive services and technological assistance.

(c) The respondent may be assisted in a hearing under Section 303 by a person or persons of the respondent's choosing, assistive technology, or an interpreter or translator, or a combination of these supports. If assistance would facilitate the respondent's participation in the hearing, but is not otherwise available to the respondent, the court shall make reasonable efforts to provide it.

(d) The respondent has a right to choose an attorney to represent the respondent at a hearing under Section 303.

(e) At a hearing held under Section 303, the respondent may:

(1) present evidence and subpoena witnesses and documents;

(2) examine witnesses, including any court-appointed evaluator and the [visitor];

and

(3) otherwise participate in the hearing.

(f) Unless excused by the court for good cause, a proposed guardian shall attend a hearing

under Section 303.

(g) A hearing under Section 303 must be closed on request of the respondent and a showing of good cause.

(h) Any person may request to participate in a hearing under Section 303. The court may grant the request, with or without a hearing, on determining that the best interest of the respondent will be served. The court may impose appropriate conditions on the person's participation.

Comment

Section 308 of the 1997 act required both the respondent and proposed guardian to attend the hearing unless attendance of either was excused for good cause. This section continues the good cause standard for excusing attendance by the proposed guardian. But due to the importance of attendance by the respondent and a concern that a good cause standard was open to abuse, the revised section spells out in greater detail the circumstances when attendance by the respondent will be excused.

Subsection (a) provides that, except under the unusual circumstances set forth in subsection (b), no hearing on a petition for guardianship may proceed without the presence of the respondent. The fact that the respondent may not be able to attend the hearing at the location where the court normally conducts hearings does not justify holding the hearing without the respondent. Rather, the court must try to hold the hearing at a location that the respondent can attend or by using real-time, audio-visual technology. As a general matter, it is preferable to do the former, as in-person interactions will allow the court to observe the respondent's context, which can help the court to understand factors that may be influencing the respondent's behavior and communications. However, real-time, audio-visual technology can provide a reasonable alternative in appropriate situations if the technology allows both the court and respondent to communicate with one another to the best of their abilities.

The exceptions in subsection (b) to the requirement that the respondent must attend the hearing are deliberately very narrow. In order for the hearing to proceed without the respondent in attendance, the court must find at least one of two things by clear-and-convincing evidence.

The first exception is that the respondent consistently and repeatedly refused to attend the hearing despite being fully informed of the right to attend and potential consequences of not doing so. Thus, for example, a respondent who cannot physically access the courthouse where the hearing is scheduled must understand that she has a right to have the hearing held at an alternative location or by using real-time, audio-visual technology. The respondent should also understand that a guardian could be appointed for her in her absence, and that this appointment could strip her of the right to make important, personal decisions for herself. Among the

responsibilities of the visitor listed in Section 304(b) is a requirement that the visitor explain the effect of the proceeding, the respondent's rights at the hearing, and general powers of a guardian.

The second exception is that there is no practicable way for the respondent to attend and participate in the hearing even with appropriate supportive services and technological assistance. Both parts of this requirement—that the respondent cannot practically attend and that the respondent cannot participate even with support—must be fully satisfied for this exception to apply. The exception should be used very sparingly as best practice is to hold the hearing in the presence of the respondent regardless of the respondent's abilities. Without the respondent's presence the court is relying on third-party information to determine that it is in fact not feasible for the respondent to attend and that the respondent is not being prevented from attending for some other reason. Especially where this information is presented by the petitioner, or does not include a professional evaluation, courts should be extremely hesitant to rely on it to excuse the respondent's presence.

The respondent has the right to take an active role in the hearing, as detailed in subsection (e). Subsection (c) recognizes that to exercise this right, the respondent may need assistance. It therefore provides that the respondent has a right to assistance at the hearing and places an affirmative duty on the court to take reasonable measures to facilitate the respondent receiving that assistance.

As indicated in subsection (d), the respondent has a right to choose an attorney to represent the respondent at the hearing. The respondent is free to choose an attorney other than the one who would otherwise be appointed by the court. This provision does not govern payment of the attorney. That issue is addressed in Section 119.

Subsection (f) requires the proposed guardian to attend the hearing. The court may excuse the proposed guardian's attendance but this should be rare. This provision is consistent with a recommendation from National Probate Court Standards, Standard 3.3.8(G), "Hearing" (2013). The proposed guardian's presence at the hearing gives the court the opportunity to determine the person's appropriateness for appointment and to make any other inquiry of the person that the court deems to be appropriate, as well as to emphasize to the proposed guardian the gravity of the guardian's responsibilities.

Under subsection (g), the respondent can request that the hearing be closed, but the court may grant the request only upon a showing of good cause.

Under subsection (h), others may request to participate, which the court can approve without a hearing if the court finds the respondent's best interest is served by the participation. The court's order granting the request to participate may include appropriate conditions or limitations.

SECTION 308. CONFIDENTIALITY OF RECORDS.

(a) The existence of a proceeding for or the existence of a guardianship for an adult is a matter of public record unless the court seals the record after:

(1) the respondent or individual subject to guardianship requests the record be sealed; and

(2) either:

(A) the petition for guardianship is dismissed; or

(B) the guardianship is terminated.

(b) An adult subject to a proceeding for a guardianship, whether or not a guardian is appointed, an attorney designated by the adult, and a person entitled to notice under Section 310(e) or a subsequent order are entitled to access court records of the proceeding and resulting guardianship, including the guardian's plan under Section 316 and report under Section 317. A person not otherwise entitled to access court records under this subsection for good cause may petition the court for access to court records of the guardianship, including the guardian's report and plan. The court shall grant access if access is in the best interest of the respondent or adult subject to guardianship or furthers the public interest and does not endanger the welfare or financial interests of the adult.

[(c) A report under Section 304 of a [visitor] or a professional evaluation under Section 306 is confidential and must be sealed on filing, but is available to:

(1) the court;

(2) the individual who is the subject of the report or evaluation, without limitation as to use;

(3) the petitioner, [visitor], and petitioner's and respondent's attorneys, for purposes of the proceeding;

(4) unless the court orders otherwise, an agent appointed under a [power of attorney for health care] or power of attorney for finances in which the respondent is the

principal; and

(5) any other person if it is in the public interest or for a purpose the court orders for good cause.]

Legislative Note: Subsection (c) is bracketed in recognition that states have different policies and procedures regarding the sealing of court records.

Comment

Guardianship involves highly personal and other data. It is important that the respondent's privacy be protected before and after the appointment. Furthermore, data found in guardianship records, such as Social Security numbers and information concerning financial accounts, can be used to facilitate fraud. Concern about access by the general public has increased as electronic filing of court records has made these records more accessible.

On the other hand, public access is important. One criticism of guardianship in some states is that too much happens behind closed doors. The public, and "watch-dog" groups in particular, want to know how the guardianship system is functioning. In addition, this act encourages family and others interested in the welfare of the respondent to participate in the proceeding, both before and after the appointment. Sections 302 and 303 taken together require that notice of the proceeding be given to family and others whose participation might enhance the proceeding. Section 310(e) encourages the court to establish a list of family and other persons to receive notice of various actions following the appointment. In order for these persons to effectively monitor the guardianship, they need access to records. However, with the move to electronic filing and increasing concerns about protecting sensitive information, more courts are limiting access to guardianship records to the immediate parties and their counsel.

This section attempts to balance these conflicting policy concerns. Subsection (a) provides that the existence of the guardianship case itself is a matter of public record. But even then, similar to the expungement of criminal records, the court has the authority to seal even the existence of the guardianship if the subject of the proceeding so requests and either the petition for guardianship was dismissed or, if a guardian was appointed, the guardianship is terminated.

Subsection (b) addresses access to the underlying records of the guardianship. In addition to the adult and the adult's attorney, access is granted to persons entitled to notice under Section 310(e), including the guardian's plan under Section 316 and report under Section 317. Other persons must petition for access. The court shall grant the petitioner access if access is in the best interest of the adult or is in furtherance of the public interest and does not endanger the welfare or financial interests of the adult.

The documents most likely to contain highly sensitive information is the visitor report under Section 304 and professional evaluation under Section 306. Consequently, access to these documents is more restricted than other documents filed, which are covered by subsection (b). Pursuant to subsection (c), access to the visitor or evaluation report is available only to the court,

the individual who is the subject of the proceeding and that individual's attorney, the petitioner and petitioner's attorney, and the visitor. Access is also available to agents under powers of attorney for health care or finances unless the court orders otherwise, and to other persons if the court determines it is in the public interest or for other good cause. A partial or complete redaction of sensitive personal or financial information may be a practical solution for courts in balancing the need for disclosure to the public and the interests of family and friends, with the need to protect the individual's privacy and avoid misuse of sensitive data.

Subsection (c) is similar to Section 307 of the 1997 act, but because states vary considerably on their policies with regard to confidentiality in guardianship cases, subsection (c) has been placed in brackets, signaling that states are free to modify the language to match their local practice.

SECTION 309. WHO MAY BE GUARDIAN FOR ADULT; ORDER OF PRIORITY.

(a) Except as otherwise provided in subsection (c), the court in appointing a guardian for an adult shall consider persons qualified to be guardian in the following order of priority:

(1) a guardian, other than a temporary or emergency guardian, currently acting for the respondent in another jurisdiction;

(2) a person nominated as guardian by the respondent, including the respondent's most recent nomination made in a power of attorney;

(3) an agent appointed by the respondent under [a power of attorney for health care];

(4) a spouse [or domestic partner] of the respondent; and

(5) a family member or other individual who has shown special care and concern for the respondent.

(b) If two or more persons have equal priority under subsection (a), the court shall select as guardian the person the court considers best qualified. In determining the best qualified person, the court shall consider the person's relationship with the respondent, the person's skills, the expressed wishes of the respondent, the extent to which the person and the respondent have

similar values and preferences, and the likelihood the person will be able to perform the duties of a guardian successfully.

(c) The court, acting in the best interest of the respondent, may decline to appoint as guardian a person having priority under subsection (a) and appoint a person having a lower priority or no priority.

(d) A person that provides paid services to the respondent, or an individual who is employed by a person that provides paid services to the respondent or is the spouse, [domestic partner,] parent, or child of an individual who provides or is employed to provide paid services to the respondent, may not be appointed as guardian unless:

(1) the individual is related to the respondent by blood, marriage, or adoption; or

(2) the court finds by clear-and-convincing evidence that the person is the best qualified person available for appointment and the appointment is in the best interest of the respondent.

(e) 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 the owner, operator, or employee is related to the respondent by blood, marriage, or adoption.

Legislative Note: Each state enacting the act needs to insert in subsection (e) the particular term or terms used in the state or statutory references for facilities considered long-term care institutions.

Comment

This section specifies who has priority for appointment as guardian (subsection (a)), specifies how to resolve a dispute if two or more persons have an equal priority (subsection (b)), empowers the court to select someone with lower priority in appropriate circumstances (subsection (c)), and specifies certain caregivers and others who are automatically disqualified from being appointed as guardian (subsections (d)-(e)).

Subsection (a) of this section gives top priority for appointment as guardian to a guardian who has already been appointed for the adult by another court. Existing guardians are granted first

priority for two reasons. First, some cases will involve transfers of a guardianship from another state. To assure a smooth transition, the currently appointed guardian, whether appointed in this state or another, should have priority for appointment at the new location. Second, other cases will involve situations where a guardianship appointment is sought despite the appointment in another place. Granting the existing guardian priority will deter such forum shopping. If the existing guardian is inappropriate for some reason, subsection (c) permits the court to pass over the existing guardian and appoint another with or without priority. This approach is consistent with the Uniform Adult Guardianship and Protective Proceeding Jurisdiction Act's respect for out-of-state appointments

While an existing guardian is generally granted a first priority for appointment, a temporary substitute guardian and an emergency guardian are excluded from priority because of the short-term nature of their involvement and because their appointment may have been made with a less thorough and inclusive process than that required for a guardian appointed for an indefinite period.

Subsection (a)(2) grants a second priority to a person nominated as guardian by the respondent. The nomination may include anyone nominated orally at the hearing or communicated to the visitor, if the respondent is able to express a preference. The nomination may also be made by a separate document. While it is generally good practice for an individual to nominate as the guardian the agent named in a power of attorney for health care, subsection (a)(3) grants such an agent a third priority for appointment even in the absence of a specific nomination. The agent is granted priority on the theory that the agent is the person the respondent would most likely prefer to act. The nomination of the agent will also make it more difficult for someone to use a guardianship to thwart the authority of the agent. To assure that the agent will be in a position to assert this priority, Section 302 and Section 303 work together to require that the agent receive notice of the proceeding.

Subsection (a)(4) grants a fourth priority to the respondent's spouse or domestic partner but the section does not otherwise grant a priority to specific relatives. Rather, subsection (a)(5) gives a final level of priority to any family member or other person who has shown special care and concern for the respondent. This section represents a significant change from Section 310 of the 1997 act, which also created a priority for an adult child followed by a parent. The decision to collapse the strict kinship hierarchy into a single category other than for the spouse or domestic partner reflects a recognition that the court should favor those who have shown care for and about the respondent, an understanding that the act should be sensitive to respondents' diverse family structures and systems, and a concern that a strict hierarchy based on kinship may result in appointments that are not in the best interest of respondents.

Subsection (b) provides the court with a framework for selecting among persons with equal priority. This framework is especially important given the collapse of the detailed family hierarchy into a single category in subsection (a)(4) for the spouse or domestic partner with all other family members and others who have shown special care and concern for the respondent having equal priority under subsection (a)(5). Under subsection (b), a court shall choose the best qualified person when selecting among those with equal priority. In determining who is best qualified, the court should consider the potential guardian's relationship with the respondent, the

potential guardian's skills, the expressed wishes of the respondent, the extent to which the potential guardian and the respondent have similar values and preferences, and the likelihood that the potential guardian will be able to successfully perform the duties of a guardian, including the ability to periodically visit the adult subject to guardianship. Thus, whether a person is best qualified depends, in large part, on the quality of their relationship with the respondent. Since surrogate decision makers typically make the decisions for others that they would want made for themselves, requiring the court to consider the extent to which the potential guardian and the respondent share values and preferences increases the likelihood that the selected guardian will make the decision the individual subject to guardianship would have made if able. *See Nina A. Kohn, Matched Values & Preferences: A New Approach to Selecting Legal Surrogates*, 22 SAN DIEGO L. REV. 399 (2015).

Consistent with respecting the wishes of the individual and appointing a person who understands the adult's values and preferences, courts should resist the temptation to appoint a professional guardian simply because it is difficult to choose among family members and friends. While a professional guardian avoids the need to select between family members who are feuding or who are otherwise in disagreement, appointment of a professional is likely not to be consistent with the adult's wishes. The extensive literature on surrogate decision-making shows that people typically prefer to have decisions made by close family members. *See id.* In addition, appointment of a professional guardian comes at significant financial cost to the adult.

Subsection (d) prohibits the appointment as guardian of persons who provide paid services to respondents, as well as the affiliates of those who provide paid services, except in specific circumstances where such an appointment is appropriate. Subsection (e) more specifically prohibits appointment of an owner, operator, or employee of a long-term care institution at which the respondent is receiving care from being appointed as guardian unless related to the respondent by blood, marriage, or adoption. Strict application of these subsections is crucial to avoid a conflict of interest and to protect the individual subject to guardianship.

SECTION 310. ORDER OF APPOINTMENT FOR GUARDIAN.

(a) A court order appointing a guardian for an adult must:

(1) include a specific finding that clear-and-convincing evidence established that the identified needs of the respondent cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative, including use of appropriate supportive services, technological assistance, or supported decision making;

(2) include a specific finding that clear-and-convincing evidence established the respondent was given proper notice of the hearing on the petition;

(3) state whether the adult subject to guardianship retains the right to vote and, if

the adult does not retain the right to vote, include findings that support removing that right [which must include a finding that the adult cannot communicate, with or without support, a specific desire to participate in the voting process]; and

(4) state whether the adult subject to guardianship retains the right to marry and, if the adult does not retain the right to marry, include findings that support removing that right.

(b) An adult subject to guardianship retains the right to vote unless the order under subsection (a) includes the statement required by subsection (a)(3). An adult subject to guardianship retains the right to marry unless the order under subsection (a) includes the findings required by subsection (a)(4).

(c) A court order establishing a full guardianship for an adult must state the basis for granting a full guardianship and include specific findings that support the conclusion that a limited guardianship would not meet the functional needs of the adult subject to guardianship.

(d) A court order establishing a limited guardianship for an adult must state the specific powers granted to the guardian.

(e) The court, as part of an order establishing a guardianship for an adult, shall identify any person that subsequently is entitled to:

(1) notice of the rights of the adult under Section 311(b);

(2) notice of a change in the primary dwelling of the adult;

(3) notice that the guardian has delegated:

(A) the power to manage the care of the adult;

(B) the power to make decisions about where the adult lives;

(C) the power to make major medical decisions on behalf of the adult;

(D) a power that requires court approval under Section 315; or

(E) substantially all powers of the guardian;

(4) notice that the guardian will be unavailable to visit the adult for more than two months or unavailable to perform the guardian's duties for more than one month;

(5) a copy of the guardian's plan under Section 316 and the guardian's report under Section 317;

(6) access to court records relating to the guardianship;

(7) notice of the death or significant change in the condition of the adult;

(8) notice that the court has limited or modified the powers of the guardian; and

(9) notice of the removal of the guardian.

(f) A spouse[, domestic partner,] and adult children of an adult subject to guardianship are entitled to notice under subsection (e) unless the court determines notice would be contrary to the preferences or prior directions of the adult subject to guardianship or not in the best interest of the adult.

Legislative Note: *The bracketed language in subsection (a)(3) may conflict with an enacting state's existing law relating to voting rights and a state should consider whether the language is consistent with the state's policy preference.*

Comment

This section explains what must be included in a court's order appointing a guardian, and the consequences of certain omissions in that order. It contains provisions that are critical both to ensuring that guardianship orders are properly limited and that parties are aware of the consequences of an appointment. In addition, it contains provisions that facilitate guardianship monitoring. The section is an update and considerable expansion of Section 311 of the 1997 act.

Subsection (a) requires any court appointing a guardian for an adult to specifically state its finding that there is clear-and-convincing evidence that the respondent's identified needs cannot be met by a protective arrangement or other less restrictive alternative. The court must also include a specific finding that there was clear-and-convincing evidence the respondent was given proper notice.

In addition, subsection (a) requires the court to state whether the adult retains the right to vote and to marry and, if not, findings that support removal these rights. These provisions recognize

that the right to vote and the right to marry are fundamental rights and should not be removed without a compelling reason. In the case of voting, the bracketed language in subsection (a)(3) requires that the court find that the adult “cannot communicate, with or without support, a specific desire to participate in the voting process.” This standard is adapted from the standard for removal of voting rights recommended by an expert group assembled by the University of the Pacific, McGeorge School of Law, the Borchard Foundation Center on Law and Aging, and the American Bar Association Commission on Law and Aging as part of a 2006 symposium entitled “Facilitating Voting As People Age: Implications of Cognitive Impairment,” *McGeorge Law Review*, Vol. 38, Issue 4 (2006). The American Bar Association subsequently adopted this standard as part of its policy on voting rights. Resolution 121, adopted at the 2007 American Bar Association Annual Meeting.

Subsection (b) explains the consequences of the court not addressing voting rights, or the right to marry in the order, or of failing to do so in the way required by subsection (a). If the court does not state whether the adult retains the right to vote or marry, or states that the adult does not retain the right to vote or marry but does not make the necessary findings to support that restriction, the adult retains that right.

Subsection (c) requires a court creating a full guardianship for an adult to clearly state the reason for doing so, as well as to provide specific findings that support its conclusion that a limited guardianship would be inappropriate. This provision is designed to ensure that courts engage in thorough fact-finding and consider less restrictive alternatives and approaches to tailor orders before appointing a full guardian. It also recognizes that it has often been—as a practical matter—easier for courts to appoint a full guardian than a limited one because the former has often allowed the court to avoid the need to make a lengthy finding as to specific rights retained, and to secure additional assessments if needed. Requiring additional fact finding for imposition of full guardianships helps counter such perverse incentives.

Subsection (d) requires a court order establishing a limited guardianship for an adult to clearly state the powers that are being granted to the guardian. This statement will then define the scope of the guardianship. It is important for third parties relying on the order to easily ascertain the guardian’s powers. In addition to a clear statement in the order, Section 108(c) requires that any limitations on the guardian’s powers must be stated on the letters of office.

Subsection (e) requires the court appointing a guardian for an adult to identify any person entitled to notice of the rights of the adult, a copy of the guardian’s plan, access to records related to the guardianship, notice of changes in the appointment, and notice of certain important events that may occur in the life of the adult or in the course of the guardianship. The events include a change in the adult’s primary dwelling, the guardian delegating certain important powers, and the guardian’s unavailability to perform key duties.

Subsection (f) requires that the spouse, domestic partner, and adult children of the adult be included in the list of persons entitled to notice under subsection (e) unless the court makes an explicit finding that this would be inconsistent with the preferences or prior directions of the adult, or otherwise not in the adult’s best interest. Thus, the default is that the spouse, domestic partner, and adult children are entitled to this notice. It should only be the rare case in which the

court does not grant the right to such notice to all persons in these categories. Moreover, where a court is concerned about a particular family member receiving particular information, the court should simply limit the right to that information—and not the right to all information identified in subsection (e).

Subsection (e) represents an important innovation in this act. It leverages the interest of private individuals to monitor guardianships at minimal cost to the public by requiring courts to—absent good cause—order that guardians give to the adult’s family or friends notice of certain suspect actions. These individuals can then act as extra sets of eyes and ears for the court to prevent or remedy abuse.

SECTION 311. NOTICE OF ORDER OF APPOINTMENT; RIGHTS.

(a) A guardian appointed under Section 309 shall give the adult subject to guardianship and all other persons given notice under Section 303 a copy of the order of appointment, together with notice of the right to request termination or modification. The order and notice must be given not later than 14 days after the appointment.

(b) Not later than 30 days after appointment of a guardian under Section 309, the court shall give to the adult subject to guardianship, the guardian, and any other person entitled to notice under Section 310(e) or a subsequent order a statement of the rights of the adult subject to guardianship and procedures to seek relief if the adult is denied those rights. The statement must be in at least 16-point font, in plain language, and, to the extent feasible, in a language in which the adult subject to guardianship is proficient. The statement must notify the adult subject to guardianship of the right to:

(1) seek termination or modification of the guardianship, or removal of the guardian, and choose an attorney to represent the adult in these matters;

(2) be involved in decisions affecting the adult, including decisions about the adult’s care, dwelling, activities, or social interactions, to the extent reasonably feasible;

(3) be involved in health-care decision making to the extent reasonably feasible and supported in understanding the risks and benefits of health-care options to the extent

reasonably feasible;

(4) be notified at least 14 days before a change in the adult's primary dwelling or permanent move to a nursing home, mental-health facility, or other facility that places restrictions on the individual's ability to leave or have visitors unless the change or move is proposed in the guardian's plan under Section 316 or authorized by the court by specific order;

(5) object to a change or move described in paragraph (4) and the process for objecting;

(6) communicate, visit, or interact with others, including receiving visitors, and making or receiving telephone calls, personal mail, or electronic communications, including through social media, unless:

(A) the guardian has been authorized by the court by specific order to restrict communications, visits, or interactions;

(B) a protective order or protective arrangement instead of guardianship is in effect that limits contact between the adult and a person; or

(C) the guardian has good cause to believe restriction is necessary because interaction with a specified person poses a risk of significant physical, psychological, or financial harm to the adult, and the restriction is:

(i) for a period of not more than seven business days if the person has a family or pre-existing social relationship with the adult; or

(ii) for a period of not more than 60 days if the person does not have a family or pre-existing social relationship with the adult;

(7) receive a copy of the guardian's plan under Section 316 and the guardian's report under Section 317; and

(8) object to the guardian's plan or report.

Comment

This section, which is new to the act, is designed to ensure that the guardian, the adult subject to guardianship, and family members and friends identified by the court understand the appointment and the most important rights of the adult subject to guardianship. The provisions help guardians to better understand their roles, thus reducing the risk of guardians acting inappropriately. They also increase transparency, help set reasonable expectations, and facilitate monitoring of the guardianship by the adult, to the extent he or she is able, and by the adult's family and friends.

Subsection (a) requires a guardian to give to the adult subject to guardianship and to all persons entitled to notice of the original petition, a copy of the order of appointment as well as notice of the right to request termination or modification of the guardianship. This notice must be given within 14 days after the appointment.

Subsection (b) requires the court not later than 30 days after the appointment to give notice of key rights to the adult subject to guardianship, to the guardian, and to other persons whom the court stated in its order of appointment were entitled to notice under Section 310(e). Providing notice of key rights is new to the act. It was added so that individuals subject to guardianship and their families are in a better position to act on their rights. Among the key rights are the right to seek termination or modification of the guardianship (Section 319); the right to petition for the guardian's removal (Section 318); the right to be involved in decision-making; the right to be notified of a change in the primary dwelling or permanent move to an institutional facility; and the right to communicate, visit, and interact with others (Section 315).

SECTION 312. EMERGENCY GUARDIAN FOR ADULT.

(a) On its own after a petition has been filed under Section 302, or on petition by a person interested in an adult's welfare, the court may appoint an emergency guardian for the adult if the court finds:

(1) appointment of an emergency guardian is likely to prevent substantial harm to the adult's physical health, safety, or welfare;

(2) no other person appears to have authority and willingness to act in the circumstances; and

(3) there is reason to believe that a basis for appointment of a guardian under Section 301 exists.

(b) The duration of authority of an emergency guardian for an adult may not exceed [60] days, and the emergency guardian may exercise only the powers specified in the order of appointment. The emergency guardian's authority may be extended once for not more than [60 days] if the court finds that the conditions for appointment of an emergency guardian in subsection (a) continue.

(c) Immediately on filing of a petition for appointment of an emergency guardian for an adult, the court shall appoint an attorney to represent the respondent in the proceeding. Except as otherwise provided in subsection (d), reasonable notice of the date, time, and place of a hearing on the petition must be given to the respondent, the respondent's attorney, and any other person the court determines.

(d) The court may appoint an emergency guardian for an adult without notice to the adult and any attorney for the adult only if the court finds from an affidavit or testimony that the respondent's physical health, safety, or welfare will be substantially harmed before a hearing with notice on the appointment can be held. If the court appoints an emergency guardian without giving notice under subsection (c), the court must:

(1) give notice of the appointment not later than 48 hours after the appointment to:

(A) the respondent;

(B) the respondent's attorney; and

(C) any other person the court determines; and

(2) hold a hearing on the appropriateness of the appointment not later than [five] days after the appointment.

(e) Appointment of an emergency guardian under this section is not a determination that a basis exists for appointment of a guardian under Section 301.

(f) The court may remove an emergency guardian appointed under this section at any time. The emergency guardian shall make any report the court requires.

Comment

This section provides for the short-term appointment of an emergency guardian. The purpose of the section is to provide an expeditious means for the court to immediately protect an individual in urgent need of such protection.

Appointment of an emergency guardian is in order only when three conditions are met. First, the court must find that appointment of an emergency guardian is likely to prevent substantial harm to the respondent's health, safety or welfare. Second, there needs to be no one else willing and with authority to act to meet the adult's need. The effect of these first two requirements is that appointment of an emergency guardian is not proper where there is not an urgent need for such an appointment. Third, the court must have reason to believe that there is a basis to appoint a guardian under Section 301. Thus, an emergency guardian cannot be appointed for an individual where all indications are that the individual has the ability to receive and evaluate information, and make and communicate decisions. In such circumstances, the court would not have reason to believe that the basis for appointment under Section 301 exists.

Appointment of an emergency guardian represents a significant deprivation of liberty. As such, subsection (c) requires appointment of counsel for the respondent. Counsel for the respondent, consistent with the provisions of Section 305, should advocate for the respondent's wishes to the extent reasonably ascertainable. If counsel cannot reasonably ascertain those wishes, then counsel should advocate for a result that is least restrictive in type, duration, and scope, consistent with the respondent's interests. In some cases, this might mean advocating for a protective arrangement instead of guardianship under Article 5.

Emergency guardians may only be empowered to act for a limited time. Subsection (b) specifies a maximum duration of 60 days although this time limit is placed in brackets to signal that enacting jurisdictions are free to adjust the period. This 60-day limit is designed to protect the due process rights of the respondent, as this section allows appointment of an emergency guardian without the full process otherwise required.

Subsection (d) authorizes the appointment of an emergency guardian without notice to the respondent only under compelling circumstances. Appointment of an emergency guardian without notice to the respondent should be a very rare occurrence. An emergency guardian may only be appointed without prior notice when there is testimony that the respondent's physical health, safety, or welfare would be substantially harmed before the hearing on the appointment with notice could be held. In such case, notice must be given within 48 hours after the appointment. A hearing must then be held within five days after the appointment, or such number of days selected by the enacting state. States enacting this act should look at their requirements for an *ex parte* hearing and determine whether to adopt the time limit contained in this subsection or whether to impose different time limits. Five days appears to be the most common time period for a return hearing following an *ex parte* appointment. If the enacting

state uses a different time period for a hearing following an *ex parte* appointment of a guardian, the time period used should be relatively short.

Unless stated to the contrary in this section, other sections of this act applicable to guardians generally apply to an emergency guardian appointed under this section, including the provisions relating to the duties of guardians.

This section revises Section 312 of the 1997 act. A key difference from the 1997 act is that this act only permits appointment of an emergency guardian in situations in which the court has reason to believe that a basis exists for appointing a guardian under Section 301. However, the appointment of an emergency guardian under this section is not a determination that such a basis in fact exists.

SECTION 313. DUTIES OF GUARDIAN FOR ADULT.

(a) A guardian for an adult is a fiduciary. Except as otherwise limited by the court, a guardian for an adult shall make decisions regarding the support, care, education, health, and welfare of the adult subject to guardianship to the extent necessitated by the adult's limitations.

(b) A guardian for an adult shall promote the self-determination of the adult and, to the extent reasonably feasible, encourage the adult to participate in decisions, act on the adult's own behalf, and develop or regain the capacity to manage the adult's personal affairs. In furtherance of this duty, the guardian shall:

(1) become or remain personally acquainted with the adult and maintain sufficient contact with the adult, including through regular visitation, to know the adult's abilities, limitations, needs, opportunities, and physical and mental health;

(2) to the extent reasonably feasible, identify the values and preferences of the adult and involve the adult in decisions affecting the adult, including decisions about the adult's care, dwelling, activities, or social interactions; and

(3) make reasonable efforts to identify and facilitate supportive relationships and services for the adult.

(c) A guardian for an adult at all times shall exercise reasonable care, diligence, and

prudence when acting on behalf of or making decisions for the adult. In furtherance of this duty, the guardian shall:

(1) take reasonable care of the personal effects, pets, and service or support animals of the adult and bring a proceeding for a conservatorship or protective arrangement instead of conservatorship if necessary to protect the adult's property;

(2) expend funds and other property of the adult received by the guardian for the adult's current needs for support, care, education, health, and welfare;

(3) conserve any funds and other property of the adult not expended under paragraph (2) for the adult's future needs, but if a conservator has been appointed for the adult, pay the funds and other property at least quarterly to the conservator to be conserved for the adult's future needs; and

(4) monitor the quality of services, including long-term care services, provided to the adult.

(d) In making a decision for an adult subject to guardianship, the guardian shall make the decision the guardian reasonably believes the adult would make if the adult were able unless doing so would unreasonably harm or endanger the welfare or personal or financial interests of the adult. To determine the decision the adult subject to guardianship would make if able, the guardian shall consider the adult's previous or current directions, preferences, opinions, values, and actions, to the extent actually known or reasonably ascertainable by the guardian.

(e) If a guardian for an adult cannot make a decision under subsection (d) because the guardian does not know and cannot reasonably determine the decision the adult probably would make if able, or the guardian reasonably believes the decision the adult would make would unreasonably harm or endanger the welfare or personal or financial interests of the adult, the

guardian shall act in accordance with the best interest of the adult. In determining the best interest of the adult, the guardian shall consider:

(1) information received from professionals and persons that demonstrate sufficient interest in the welfare of the adult;

(2) other information the guardian believes the adult would have considered if the adult were able to act; and

(3) other factors a reasonable person in the circumstances of the adult would consider, including consequences for others.

(f) A guardian for an adult immediately shall notify the court if the condition of the adult has changed so that the adult is capable of exercising rights previously removed.

Comment

Section 313 lays out the duties of a guardian for an adult. It is a major expansion and revision of Section 314 of the 1997 act. As a threshold matter, subsection (a) unequivocally states that the guardian is a fiduciary. This basic principle should guide the guardian throughout the course of his or her activities. Subsection (a) further emphasizes that regardless of the breadth of the guardian's appointment, the guardian may only exercise this authority to the extent necessitated by the adult's limitations. This limitation on exercise of the guardian's powers applies whether or not a limited guardian is formally appointed. In a limited guardianship, the court formally sets limits on what decisions the guardian can make. The guardian cannot make decisions outside those formal limitations. Subsection (a) makes clear that even though a full guardian may *potentially* exercise all powers, the guardian may *actually* exercise only powers that are consistent with the adult's limitations.

Subsection (b) outlines the guardian's basic duty to promote the adult's self-determination and to involve the adult in decision-making. The guardian is instructed to encourage the adult's participation in decisions and in developing or regaining capacity to act without a guardian. The adult's personal values and preferences, whether past or present, are to be considered when making decisions. Unlike Section 314(a) of the 1997 act, which required the guardian to consider the adult's values and preferences "to the extent known to the guardian," subsection (b) imposes a duty on the guardian to ascertain those preferences and values to the extent reasonably ascertainable.

Subsection (c) elaborates on the guardian's fiduciary duty by clearly stating the guardian must exercise reasonable care, diligence, and prudence in acting on behalf of the adult. It then provides a non-exclusive list of duties that flow from this standard of care.

Subsections (d) and (e) provide a clear decision-making standard for guardians for adults. Subsection (d) instructs the guardian to use what is frequently referred to as “substituted judgment”—that is, to make the decision the adult would make if able. The guardian, however, is authorized to deviate from using substituted judgment where doing so would unreasonably harm or endanger the welfare or interests of the adult.

Subsection (e) provides a decision-making standard for guardians who are unable to use the substituted judgment standard outlined in subsection (d). In such situations, the guardian is instructed to act in the adult’s best interest and is given direction on what must be considered in order to determine the adult’s best interest. The decision-making standards in subsections (d) and (e) are similar to National Guardianship Association Standard No. 7 and follow in broad outline the recommendations of the Third National Guardianship Summit. *See* David M. English, *Amending the Uniform Guardianship and Protective Proceedings Act to Implement the Standards and Recommendations of the Third National Guardianship Summit*, 12 NAELA J. 33, 41-43 (2016).

Finally, in furtherance of the concepts of limited guardianship and least restrictive alternatives, subsection (f) obligates the guardian to immediately notify the court when an adult becomes capable of exercising rights previously removed. The guardian is not to wait until the next reporting period.

Section 313 represents a substantial revision to the 1997 act’s Section 314, which likewise described the duties of a guardian. The revised section is designed to more clearly spell out the guardian’s duties and provide clear standards for making decisions in conjunction with or on behalf of the adult, thus reducing confusion for all involved. Notably, unlike Section 314 of the 1997 act, this section does not instruct the guardian to act in the adult’s best interest. There was concern that this language could lead a guardian to act in an overly paternalistic manner. Specifically, it might lead the guardian to think that he or she must make the decision that is objectively “best” or “safest” for the individual even if that decision was not necessary to protect the adult from substantial harm and would not be consistent with what the adult would decide if able. Instead, the guardian is to use the substituted judgment standard unless substantial harm would result.

SECTION 314. POWERS OF GUARDIAN FOR ADULT.

(a) Except as limited by court order, a guardian for an adult may:

(1) apply for and receive funds and benefits for the support of the adult, unless a conservator is appointed for the adult and the application or receipt is within the powers of the conservator;

(2) unless inconsistent with a court order, establish the adult’s place of dwelling;

(3) consent to health or other care, treatment, or service for the adult;

(4) if a conservator for the adult has not been appointed, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel another person to support the adult or pay funds for the adult's benefit;

(5) to the extent reasonable, delegate to the adult responsibility for a decision affecting the adult's well-being; and

(6) receive personally identifiable health-care information regarding the adult.

(b) The court by specific order may authorize a guardian for an adult to consent to the adoption of the adult.

[(c) The court by specific order may authorize a guardian for an adult to:

(1) consent or withhold consent to the marriage of the adult if the adult's right to marry has been removed under Section 310;

(2) petition for divorce, dissolution, or annulment of marriage of the adult or a declaration of invalidity of the adult's marriage; or

(3) support or oppose a petition for divorce, dissolution, or annulment of marriage of the adult or a declaration of invalidity of the adult's marriage.]

(d) In determining whether to authorize a power under subsection (b) [or (c)], the court shall consider whether the underlying act would be in accordance with the adult's preferences, values, and prior directions and whether the underlying act would be in the adult's best interest.

(e) In exercising a guardian's power under subsection (a)(2) to establish the adult's place of dwelling, the guardian shall:

(1) select a residential setting the guardian believes the adult would select if the adult were able, in accordance with the decision-making standard in Section 313(d) and (e). If

the guardian does not know and cannot reasonably determine what setting the adult subject to guardianship probably would choose if able, or the guardian reasonably believes the decision the adult would make would unreasonably harm or endanger the welfare or personal or financial interests of the adult, the guardian shall choose in accordance with Section 313(e) a residential setting that is consistent with the adult's best interest;

(2) in selecting among residential settings, give priority to a residential setting in a location that will allow the adult to interact with persons important to the adult and meet the adult's needs in the least restrictive manner reasonably feasible unless to do so would be inconsistent with the decision-making standard in Section 313(d) and (e);

(3) not later than 30 days after a change in the dwelling of the adult:

(A) give notice of the change to the court, the adult, and any person identified as entitled to the notice in the court order appointing the guardian or a subsequent order; and

(B) include in the notice the address and nature of the new dwelling and state whether the adult received advance notice of the change and whether the adult objected to the change;

(4) establish or move the permanent place of dwelling of the adult to a nursing home, mental-health facility, or other facility that places restrictions on the adult's ability to leave or have visitors only if:

(A) the establishment or move is in the guardian's plan under Section 316;

(B) the court authorizes the establishment or move; or

(C) the guardian gives notice of the establishment or move at least 14 days before the establishment or move to the adult and all persons entitled to notice under Section

310(e)(2) or a subsequent order, and no objection is filed;

(5) establish or move the place of dwelling of the adult outside this state only if consistent with the guardian's plan and authorized by the court by specific order; and

(6) take action that would result in the sale of or surrender of the lease to the primary dwelling of the adult only if:

(A) the action is specifically included in the guardian's plan under Section 316;

(B) the court authorizes the action by specific order; or

(C) notice of the action was given at least 14 days before the action to the adult and all persons entitled to the notice under Section 310(e)(2) or a subsequent order and no objection has been filed.

(f) In exercising a guardian's power under subsection (a)(3) to make health-care decisions, the guardian shall:

(1) involve the adult in decision making to the extent reasonably feasible, including, when practicable, by encouraging and supporting the adult in understanding the risks and benefits of health-care options;

(2) defer to a decision by an agent under a [power of attorney for health care] executed by the adult and cooperate to the extent feasible with the agent making the decision; and

(3) take into account:

(A) the risks and benefits of treatment options; and

(B) the current and previous wishes and values of the adult, if known or reasonably ascertainable by the guardian.

Legislative Note: Subsection (c) is bracketed because states have different policies with respect to a guardian's authority as to marriage and divorce.

Comment

This section is a substantial expansion and revision of Section 315 of the 1997 act.

Subsection (a) lists default powers that all guardians have unless those powers are limited or otherwise inconsistent with the underlying court order. Thus, a guardian who is appointed under a limited guardianship order may only have a subset of the powers in subsection (a). These powers include the authority to apply for and receive benefits for the adult, including government benefits, unless doing so would usurp the powers of a conservator appointed for the adult.

Subsection (a) is similar to Section 315(a) of the 1997 act although subsection (a) of this act clarifies that a guardian has authority to receive personally identifiable health-care information regarding the adult. The remaining subsections of this section are a substantial expansion of the previous version.

Subsections (b) and (c) list powers that guardians have only if the court entered an order specifically granting the power. The court must clearly name the particular power and grant it to the guardian. Thus, a guardian would not have any of the powers under these subsections if a court order simply granted the guardian "all powers available under state law." The powers in these subsections are sometimes referred to as "hot powers" and implicate some of the most fundamental and politically sensitive rights of adults.

The powers in subsection (c) are placed in brackets in recognition of the split in opinion as to whether guardians should ever have such powers. For example, jurisdictions are split on whether a guardian has power to initiate a divorce for an adult. *See* Matthew Branson, *Guardian-Initiated Divorces: A Survey*, 29 J. AM. ACAD. MATRIM. L. 171 (2016) (surveying case law on the subject); Bella Feinstein, *A New Solution to an Age-Old Problem: Statutory Authorization for Guardian-Initiated Divorces*, 10 NAELA J. 203 (2014) (discussing statutory approaches). Jurisdictions that do not allow the guardian to initiate a divorce generally base that policy on the very personal nature of marriage. Jurisdictions that allow the guardian to initiate a divorce have cited, among other reasons, the potential need to protect the adult from an abusive spouse. *See, e.g.,* Karbin v. Karbin, 977 N.E.2d 154 (Ill. 2012). Enacting states that have not yet addressed this issue should decide whether to give the guardian this power. Statutes dealing with the dissolution of marriage should be reviewed to determine whether this issue is already addressed.

Subsection (d) provides guidance to courts considering whether to grant guardians the hot powers listed in subsections (b) and (c). Courts are to consider whether such grants would be consistent with the adult's preferences, values, directions, and best interests.

Subsection (e) provides the guardian with substantial direction as to how to exercise the power to establish the adult's place of dwelling. This subsection recognizes that the decision where to live is among the most consequential decisions in an adult's life. An adult's dwelling impacts quality

of life, availability of important services, and connectivity to family and friends. As such, the decision of where the adult will live is critical. As a general matter, subsection (e) instructs guardians to use a decision-making approach consistent with the guardian's general duties under Section 313(d) and (e). In addition, the guardian is instructed to give priority to living situations located in a place that will allow the adult to continue important social relationships, and that meet the adult's needs without unnecessary restrictions.

In order to keep better track of where the individual subject to guardianship is located, to ensure that the individual's residential placement is appropriate, and to ensure the adult has a voice in the process where feasible, subsection (e)(3) requires the guardian to provide notice of a change in dwelling within 30 days after the change to the court, the adult, and other persons the court ordered were entitled to such notice when appointing the guardian. In addition, pursuant to subsection (e)(4), the guardian may permanently place the adult in certain particularly restrictive settings (e.g., a nursing home) only if the move was in the guardian's plan (Section 316), specifically authorized by the court, or the adult and other persons so entitled received advance notice. Similar process is required under subsection (e)(6) before the guardian may take any action that would result in the sale of or surrender of the lease to the adult's primary dwelling. In addition, if the move is to a location outside of the state, mere prior notice is insufficient. Rather, subsection (e)(5) requires that all moves outside of the state be expressly authorized by the court and set forth in the guardian's plan. This limitation helps not only to protect the adult but discourages forum shopping. Subsection (e) is based in substantial part on Third National Guardianship Summit Standard 6.1 et seq. *See Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191, 1197-98 (2012).

Subsection (f) provides the guardian with substantial direction as to how to exercise the power to make health-care decisions on behalf of the adult, and draws from Third National Guardianship Summit Standard 5.1 et seq. *See Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191, 1196-98 (2012). As health-care decisions are among the most intimate of all decisions, the guardian is required to involve the adult to the extent reasonably feasible, and is reminded that doing so may require helping the adult to understand risks and benefits associated with different options. As a threshold matter, a guardian must also ascertain whether a power of attorney for health care is in effect. If there is a valid power of attorney for health care, the decision of the health-care agent takes precedence over that of the guardian, absent a court order to the contrary. Further, the guardian may not revoke a health-care power of attorney except by court order. If the individual has not appointed a health-care agent, the guardian may proceed to make a health-care decision. In making a decision, the guardian must ascertain and take into account the adult's current and previous wishes and values, whether written or oral. Like all decisions by a guardian, in making health-care decisions, the guardian must follow the general decision-making standards in Section 313(d)-(e). Also, Section 315(b) limits a guardian's ability to commit the individual subject to guardianship to a mental-health institution. There may be similar restrictions under other law governing a guardian's power to consent to electroconvulsive therapy (ECT) or other shock treatment, experimental treatment, sterilization, forced medication with psychotropic drugs, or abortion.

SECTION 315. SPECIAL LIMITATIONS ON GUARDIAN'S POWER.

(a) Unless authorized by the court by specific order, a guardian for an adult does not have the power to revoke or amend a [power of attorney for health care] or power of attorney for finances executed by the adult. If a [power of attorney for health care] is in effect, unless there is a court order to the contrary, a health-care decision of an agent takes precedence over that of the guardian and the guardian shall cooperate with the agent to the extent feasible. If a power of attorney for finances is in effect, unless there is a court order to the contrary, a decision by the agent which the agent is authorized to make under the power of attorney for finances takes precedence over that of the guardian and the guardian shall cooperate with the agent to the extent feasible.

(b) A guardian for an adult may not initiate the commitment of the adult to a [mental health] facility except in accordance with the state's procedure for involuntary civil commitment.

(c) A guardian for an adult may not restrict the ability of the adult to communicate, visit, or interact with others, including receiving visitors and making or receiving telephone calls, personal mail, or electronic communications, including through social media, or participating in social activities, unless:

(1) authorized by the court by specific order;

(2) a protective order or a protective arrangement instead of guardianship is in effect that limits contact between the adult and a person; or

(3) the guardian has good cause to believe restriction is necessary because interaction with a specified person poses a risk of significant physical, psychological, or financial harm to the adult and the restriction is:

(A) for a period of not more than seven business days if the person has a

family or pre-existing social relationship with the adult; or

(B) for a period of not more than 60 days if the person does not have a family or pre-existing social relationship with the adult.

Comment

Section 315 address three important limitations on a guardian's powers: (1) limitations related to advance-planning documents in existence at the time of the guardian's appointment, (2) limitations related to commitment of the adult to a mental health facility, and (3) limitations on the guardian's ability to restrict the adult's interactions with others. The provisions relating to the adult's interactions are new to the act. The other provisions of this section are found in Section 316 of the 1997 act although the provisions relating to advanced-planning documents have been revised.

Subsection (a) provides that if the adult subject to guardianship has executed a power of attorney for health care or finances, the guardian cannot revoke it without a court order. Further, the agent's decision takes priority over that of the guardian unless the power of attorney has been revoked, and the guardian has a duty to cooperate with the agent to the extent feasible. Requiring deference to the agent appointed by the adult subject to guardianship helps ensure that the adult's wishes are respected. In addition, it discourages petitioners from seeking a guardianship for the sole purpose of displacing an agent who is acting in a manner consistent with the agent's fiduciary duties. Subsection (a) is an expansion of Section 316(c) of the 1997 act. Under the 1997 act, the guardian did not have authority to revoke a power of attorney for finances even with court approval. That power was reserved to the conservator. *See* Section 411(d) of the 1997 act.

Subsection (b) precludes commitment of an adult subject to guardianship to a mental health facility without following the state's procedures for civil commitment. Although a guardian may not commit an adult to a mental health facility, the guardian may initiate proceedings in accordance with the state's applicable mental health care statutes for civil commitment, outpatient treatment, or involuntary medication for mental health treatment. Subsection (b) is identical to Section 316(d) of the 1997 act.

Subsection (c), which is new, limits the ability of the guardian to restrict the adult's interactions with others. The guardian is only empowered to restrict the adult's ability to communicate, visit, or interact with others for an extended period of time if required by a separate court order or specifically authorized by the court. Thus, for example, a court order granting the guardian "all powers available under state law" would not authorize such a restriction. Rather, the guardian should be considered to be so empowered only if the court has expressly authorized restricting interaction with a particular person or a very specific category of persons. The section includes a non-exhaustive list of types of interactions to which it applies—including in-person visits, telephone conversations, personal mail, and social media use.

Subsection (c)(3) permits a short-term restriction on the adult's right to interact with others where the guardian has good cause to believe the restriction is necessary because a specific person poses significant risk of harm to the adult. The restriction may not last more than seven business days if the adult has a familial or pre-existing social relationship with the other person, and otherwise may not last more than 60 days. For longer restrictions, the guardian would need to petition the court under this section for express authorization.

Subsection (c)(3) responds to growing concerns about guardians improperly isolating adults subject to guardianship and estranging them from family members or friends who are important to them. It recognizes that adults subject to guardianship have a right to interactions with family and friends, and severely limits the circumstances under which this important right may be curtailed. While the act is sensitive to the interests of family members and friends, it situates the right to choose whether or not to interact with the adult subject to guardianship, not with the would-be visitor. Locating the right with a visitor, by contrast, would be an affront to the rights of the adult subject to guardianship as it would limit the adult's ability to make choices for himself or herself as to with whom to interact.

SECTION 316. GUARDIAN'S PLAN.

(a) A guardian for an adult, not later than 60 days after appointment and when there is a significant change in circumstances, or the guardian seeks to deviate significantly from the guardian's plan, shall file with the court a plan for the care of the adult. The plan must be based on the needs of the adult and take into account the best interest of the adult as well as the adult's preferences, values, and prior directions, to the extent known to or reasonably ascertainable by the guardian. The guardian shall include in the plan:

(1) the living arrangement, services, and supports the guardian expects to arrange, facilitate, or continue for the adult;

(2) social and educational activities the guardian expects to facilitate on behalf of the adult;

(3) any person with whom the adult has a close personal relationship or relationship involving regular visitation and any plan the guardian has for facilitating visits with the person;

(4) the anticipated nature and frequency of the guardian's visits and

communication with the adult;

(5) goals for the adult, including any goal related to the restoration of the adult's rights, and how the guardian anticipates achieving the goals;

(6) whether the adult has an existing plan and, if so, whether the guardian's plan is consistent with the adult's plan; and

(7) a statement or list of the amount the guardian proposes to charge for each service the guardian anticipates providing to the adult.

(b) A guardian shall give notice of the filing of the guardian's plan under subsection (a), together with a copy of the plan, to the adult subject to guardianship, a person entitled to notice under Section 310(e) or a subsequent order, and any other person the court determines. The notice must include a statement of the right to object to the plan and be given not later than 14 days after the filing.

(c) An adult subject to guardianship and any person entitled under subsection (b) to receive notice and a copy of the guardian's plan may object to the plan.

(d) The court shall review the guardian's plan filed under subsection (a) and determine whether to approve the plan or require a new plan. In deciding whether to approve the plan, the court shall consider an objection under subsection (c) and whether the plan is consistent with the guardian's duties and powers under Sections 313 and 314. The court may not approve the plan until [30] days after its filing.

(e) After the guardian's plan filed under this section is approved by the court, the guardian shall provide a copy of the plan to the adult subject to guardianship, a person entitled to notice under Section 310(e) or a subsequent order, and any other person the court determines.

Comment

Section 316, which is new to the act, requires a guardian to create an individualized plan for the adult subject to guardianship. The requirement that the guardian file a plan is consistent with National Probate Court Standard 3.3.16 (2013), and with Third Summit Guardianship Summit Recommendation 1.1. The plan serves as a tool for the guardian to identify the adult's needs and desires, and as a guide for the guardian to meet those needs and respect those desires consistent with the guardian's duties and powers. The planning process creates an opportunity for guardians to consider and develop an approach to their role that is transparent and consistent with the requirements of this act. The existence of the plan also allows for more meaningful monitoring of guardians as the court and others can hold a guardian accountable for compliance with the plan.

In addition, the guardian's plan plays an important role in avoiding subsequent problems. It alerts the court, the adult, and others entitled to a copy of the plan of the guardian's plans. This allows the court, adult, and such other persons to identify potential problems before they occur. From the guardian's perspective, this can be advantageous as well, creating a mechanism to alert the guardian to objections in advance of action, at a time when the guardian can still change course. Thus, the filing of the plan may assist the guardian in avoiding future conflicts and other problems.

The inclusion of Section 316 is consistent with the standards adopted by the Third National Guardianship Summit. In particular, it aligns with Standard 1.1, which calls on each guardian to "develop and implement a plan setting forth short-term and long-term goals for meeting the needs of the person" and explains that such plans must "emphasize a 'person-centered philosophy.'" See *Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191, 1192 (2012). The inclusion thus represents an advance over the 1997 act, which did not require guardianship plans although Section 418 of the earlier act did require that conservators file plans.

Subsection (a) establishes when the guardian must file a plan with the court. A new or revised plan is required not later than 60 days after the guardian is appointed, anytime there is a significant change in the adult's circumstances, and anytime the guardian seeks to deviate from the guardian's previously filed plan. Thus, for example, a new plan is in order when the adult loses or regains significant abilities, important supporters leave or enter the adult's life, or the guardian determines what was previously planned is no longer appropriate.

Subsection (a) further provides for the plan to be a person-centered plan, and lists the topics it must cover. The plan must be based on the adult's needs and best interests, as well as the adult's preferences, values, and prior directions, to the extent known to or reasonably ascertainable by the guardian. In crafting a plan, guardians should strive to produce a plan that is not only person-centered and reflects a robust understanding of the resources potentially available to the adult, but also one that is clear, organized, and detailed.

Under subsection (a)(7), one topic that must be addressed in the plan is the amount of any fees the guardian proposes to charge for each anticipated service. While earlier disclosure of the

proposed fees is not required, best practice will typically be to disclose fees even before crafting the plan. It is helpful, for example, for the court to have a sense of the likely fees in determining whether or not to make the appointment.

Subsection (b) requires the guardian to provide a copy of the plan and notice of its filing to the adult subject to guardianship, to persons entitled to notice under the terms of the order appointing the guardian, and to anyone else the court has determined is entitled to notice, including persons entitled to notice under Section 310(e). The notice must be given no later than 14 days after the filing of the plan and must explain that the person receiving the notice has a right to object to the plan, as established in subsection (c).

Subsection (d) requires the court to review the guardian's plan, whether it be a new plan or a revision, and to determine whether or not to approve it. In order to ensure that those receiving copies of the plan have sufficient time to object to it, the court may not approve the plan until 30 days after it was filed. The court is not required to approve the plan but implementing a system for monitoring the plan, similar to the system required by Section 317(e) for monitoring the annual report, will help make certain that the guardian is properly discharging the guardian's duties. The court may decide to approve the plan or direct the guardian to revise the plan. Section 317(c) authorizes a court to appoint a visitor to review not only a report filed under that section but also a plan filed under this section. A court should not approve a plan if it is inconsistent with the guardian's duties or powers, or without seriously considering any objections made to it.

Finally, subsection (e) requires the guardian to provide any plan approved by the court to the adult subject to guardianship, to persons entitled to notice under the terms of the order appointing the guardian, and to anyone else the court has determined is entitled to notice.

SECTION 317. GUARDIAN'S REPORT; MONITORING OF GUARDIANSHIP.

(a) A guardian for an adult, not later than 60 days after appointment and at least annually thereafter, shall file with the court a report in a record regarding the condition of the adult and accounting for funds and other property in the guardian's possession or subject to the guardian's control.

(b) A report under subsection (a) must state or contain:

- (1) the mental, physical, and social condition of the adult;
- (2) the living arrangements of the adult during the reporting period;
- (3) a summary of the supported decision making, technological assistance, medical services, educational and vocational services, and other supports and services provided

to the adult and the guardian's opinion as to the adequacy of the adult's care;

(4) a summary of the guardian's visits with the adult, including the dates of the visits;

(5) action taken on behalf of the adult;

(6) the extent to which the adult has participated in decision making;

(7) if the adult is living in a [mental health] facility or living in a facility that provides the adult with health-care or other personal services, whether the guardian considers the facility's current plan for support, care, treatment, or habilitation consistent with the adult's preferences, values, prior directions, and best interest;

(8) anything of more than de minimis value which the guardian, any individual who resides with the guardian, or the spouse, [domestic partner,] parent, child, or sibling of the guardian has received from an individual providing goods or services to the adult;

(9) if the guardian delegated a power to an agent, the power delegated and the reason for the delegation;

(10) any business relation the guardian has with a person the guardian has paid or that has benefited from the property of the adult;

(11) a copy of the guardian's most recently approved plan under Section 316 and a statement whether the guardian has deviated from the plan and, if so, how the guardian has deviated and why;

(12) plans for future care and support of the adult;

(13) a recommendation as to the need for continued guardianship and any recommended change in the scope of the guardianship; and

(14) whether any co-guardian or successor guardian appointed to serve when a

designated event occurs is alive and able to serve.

(c) The court may appoint a [visitor] to review a report submitted under this section or a guardian's plan submitted under Section 316, interview the guardian or adult subject to guardianship, or investigate any other matter involving the guardianship.

(d) Notice of the filing under this section of a guardian's report, together with a copy of the report, must be given to the adult subject to guardianship, a person entitled to notice under Section 310(e) or a subsequent order, and any other person the court determines. The notice and report must be given not later than 14 days after the filing.

(e) The court shall establish procedures for monitoring a report submitted under this section and review each report at least annually to determine whether:

- (1) the report provides sufficient information to establish the guardian has complied with the guardian's duties;
- (2) the guardianship should continue; and
- (3) the guardian's requested fees, if any, should be approved.

(f) If the court determines there is reason to believe a guardian for an adult has not complied with the guardian's duties or the guardianship should be modified or terminated, the court:

- (1) shall notify the adult, the guardian, and any other person entitled to notice under Section 310(e) or a subsequent order;
- (2) may require additional information from the guardian;
- (3) may appoint a [visitor] to interview the adult or guardian or investigate any matter involving the guardianship; and
- (4) consistent with Sections 318 and 319, may hold a hearing to consider removal

of the guardian, termination of the guardianship, or a change in the powers granted to the guardian or terms of the guardianship.

(g) If the court has reason to believe fees requested by a guardian for an adult are not reasonable, the court shall hold a hearing to determine whether to adjust the requested fees.

(h) A guardian for an adult may petition the court for approval of a report filed under this section. The court after review may approve the report. If the court approves the report, there is a rebuttable presumption the report is accurate as to a matter adequately disclosed in the report.

Legislative Note: The term “visitor” is bracketed because some states use a different term for the person appointed by the court to investigate and report on certain facts.

Comment

This section is an expansion of Section 317 of the 1997 act. This section requires that a guardian regularly file a report detailing the care and needs of the adult, describing the guardian’s actions since the last report, and accounting for funds or other property under the guardian’s control. As set forth in subsection (a), the first report must be filed within 60 days of the guardian’s appointment. A new report is required at least annually. Subsection (a) gives the guardian 30 more days to file a report than did Section 317 of the 1997 act. This extension of time reflects the fact that the guardian is now also required to create a person-centered plan for the adult, and this extension gives the guardian the time to do so in a considered manner.

Subsection (b) describes the required contents of the report. The list has been expanded from that in Section 317(a) of the 1997 act to provide the court with more comprehensive and useful information about the needs of the adult subject to guardianship and the guardian’s performance. Key changes include required reporting on support and assistance provided by the guardian to the adult; a requirement that the guardian report on whether care in an institution is consistent with the adult’s preferences, values, and directions (not just the adult’s best interest); and a requirement that the guardian include information related to delegation of duties, deviations from the guardian’s plan, and potential conflicts of interest. Similar to Section (a)(6)-(7) of the 1997 act, subsections (b)(12)-(13) emphasize the importance of limited guardianship by requiring the guardian to report information relevant to determining whether the guardianship should be modified or terminated. Compliance with subsection (b)(13) should not be read as relieving the guardian of the duty under Section 313(f) to immediately notify the court that the adult’s condition has changed such that the adult is capable of exercising rights previously removed.

The guardian should provide supporting documentation to assist the court’s review of the report where practicable. For example, to support the guardian’s description of the adult’s mental, physical and social condition, it may be helpful to provide a copy of the adult’s current treatment plan.

Subsection (c) authorizes the court to appoint a visitor to review a report submitted under this section or the guardian's plan, interview the guardian or the adult, and investigate any other matter involving the guardianship. The visitor can provide the court with additional information and context to understand the guardian's report and potential omissions in that report. The appointment of a visitor can form a vital part of the monitoring procedures required under subsection (e).

Subsection (d) requires the report, and notice of its filing, be given in a timely manner to the adult subject to guardianship, any person entitled to such notice of the report by the terms of the original order appointing the guardian or a subsequent court order, and any other person the court determines. It thus works in tandem with Section 310(e) to increase the ability of interested individuals to monitor guardianships at minimal cost to the public. As explained in the comments to Section 310, such persons can act as extra sets of eyes and ears for the court to prevent or remedy abuse.

Subsection (e) requires the court to establish procedures for monitoring guardians' reports. Under this subsection, the court is required to review such reports at least annually to determine whether the guardian has complied with the guardian's duties, whether the guardianship should continue, and whether any fees requested by the guardian should be approved. In performing this review, the court should carefully consider not only the report, but the supporting documentation and the adequacy of such supporting documentation. The establishment of a monitoring system was also required by Section 317(c) of the 1997 act although that provision lacked the depth of subsection (e) of this act.

An independent monitoring system is crucial for a court to adequately safeguard against abuses in guardianship cases. Monitors can be paid court personnel, court appointees, or volunteers. Subsection (e) does not specify the procedures the court must use. The key is to develop an independent monitoring system that can not only safeguard against obvious abuse and neglect, but also hold guardians accountable for their fiduciary duties. For guidance, courts are directed to National Probate Court Standards 3.3.17 (2013). Monitoring systems are also discussed in the National Association of Court Management Adult Guardianship Guide (2014), and the handbook, *Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community*, which was published by the American Bar Association Commission on Law and Aging in 2011.

Subsection (f) sets forth the next steps for courts that determine there is reason to believe the guardian has not complied with the duties imposed by this act, or that the guardianship should be modified or terminated. The court is required to act in response to this finding, but is given significant discretion in how to proceed. In some cases, the best practice will be to move directly to holding a hearing. In others, the court may simply request additional information or appoint a visitor. Regardless of which approach it takes, however, the court must notify the adult subject to guardianship, the guardian, and any other person entitled to notice under Section 310(e) of the court's action or proposed action.

Subsection (g) requires a court with reason to believe the guardian's fees are unreasonable to

hold a hearing to determine whether to adjust those fees. In considering the reasonableness of proposed fees, the court should consult Section 120 of this act, which lists factors the court is to consider in setting the guardian's compensation.

Finally, subsection (h) permits a guardian for an adult to petition the court to approve a report filed under this section. A court must review the report before approval. If the court approves the report following a review, it creates a rebuttable presumption that the report is accurate as to any matter that was adequately disclosed.

SECTION 318. REMOVAL OF GUARDIAN FOR ADULT; APPOINTMENT OF SUCCESSOR.

(a) The court may remove a guardian for an adult for failure to perform the guardian's duties or for other good cause and appoint a successor guardian to assume the duties of guardian.

(b) The court shall hold a hearing to determine whether to remove a guardian for an adult and appoint a successor guardian on:

(1) petition of the adult, guardian, or person interested in the welfare of the adult, which contains allegations that, if true, would support a reasonable belief that removal of the guardian and appointment of a successor guardian may be appropriate, but the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed during the preceding six months;

(2) communication from the adult, guardian, or person interested in the welfare of the adult which supports a reasonable belief that removal of the guardian and appointment of a successor guardian may be appropriate; or

(3) determination by the court that a hearing would be in the best interest of the adult.

(c) Notice of a petition under subsection (b)(1) must be given to the adult subject to guardianship, the guardian, and any other person the court determines.

(d) An adult subject to guardianship who seeks to remove the guardian and have a

successor guardian appointed has the right to choose an attorney to represent the adult in this matter. [If the adult is not represented by an attorney, the court shall appoint an attorney under the same conditions as in Section 305.] The court shall award reasonable attorney's fees to the attorney for the adult as provided in Section 119.

(e) In selecting a successor guardian for an adult, the court shall follow the priorities under Section 309.

(f) Not later than 30 days after appointing a successor guardian, the court shall give notice of the appointment to the adult subject to guardianship and any person entitled to notice under Section 310(e) or a subsequent order.

Legislative Note: A state may make the policy decision to include the bracketed language in subsection (d). This policy decision parallels Alternative A in Section 305.

Comment

This section is based in part on Section 112 of the 1997 act, which covered both termination of guardianship or conservatorship as well as changes in a guardian's or conservator's appointment. This act, by comparison, divides the issue of removal of an appointee (which focuses on the appointee's abilities and actions), which is addressed here, from the issue of termination or modification of an appointment (which focuses on the needs, abilities, and limitations of the individual subject to the appointment), which is addressed in Section 319. The section mirrors Section 430, which governs removal of a conservator and appointment of a successor conservator.

Subsection (a) empowers the court to remove a guardian for failure to perform duties or for other good cause. Removal for failure to perform duties includes situations in which the guardian is not performing the guardian's duties either because the guardian is failing to act or because the guardian is otherwise acting in a manner inconsistent with the requirements of this act. Good cause may exist even if the guardian is not at fault. Similar to Section 706(b) of the Uniform Trust Code, which includes a request by the qualified beneficiaries as one factor the court may consider in deciding whether to remove a trustee, a guardianship court may similarly consider a request of the individual under guardianship as a factor in deciding whether good cause exists to remove a guardian. In determining whether to remove the guardian, every effort should be made to determine the wishes of the individual subject to guardianship with regard to the proposed removal. Courts seeking examples of good cause for removal may wish to consult their state's law on removal of a trustee. *See generally* Uniform Trust Code §706 and comment; Restatement (Third) of Trusts §37 (2003).

Section 112(b) of the 1997 act authorized the court to remove a guardian if removal was in the best interest of the individual subject to guardianship or for other good cause. In light of this act's emphasis on substituted judgment as the standard for a guardian's decisions, subsection (a) removes "best interest" as an independent basis for removal. The drafting committee concluded that the reference to "best interest" might unnecessarily restrict the court's ability to apply the more flexible "good cause" standard.

Subsection (b)(1) authorizes a petition for removal of the guardian to be filed by the adult subject to guardianship, the guardian, or any person interested in the adult's welfare. Thus, the fact that the adult is subject to guardianship in no way limits the adult's right to seek removal.

Subsection (b) requires the court to hold a hearing on whether the guardian should be removed under three specified circumstances: (1) if the court determines a hearing would be in the best interest of the adult subject to guardianship; (2) if the adult, guardian, or another person interested in the welfare of the adult petitions for removal and the petition contains allegations that—if true—would support a reasonable belief that removal is in order; and (3) if the court receives a communication from any such person that supports a reasonable belief that removal may be appropriate. The form that the communication takes is not determinative, and could include a grievance filed under Section 127. The fact that the court has reason to believe that the allegations are not true is not a sufficient reason to refuse to hold a hearing. It is important that the court hear the evidence as to whether removal is appropriate, and not reach conclusions without a considered process. To avoid excessive drain on judicial resources, however, the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed within the preceding six months.

Subsection (c) requires that notice of a petition to remove the guardian that is filed by the adult, guardian, or person interested in the adult's welfare under subsection (b)(1) must be given to the adult, the guardian, and any other person the court determines. Subsection (c) does not expressly require that notice be given if a hearing is held pursuant to an informal communication under subsection (b)(2) or independent determination by the court under subsection (b)(3), but it would appear that the notice given would as a practical matter be the same. For a hearing on the guardian's removal, notice should always be given to the individual under guardianship and to the guardian, and the court always has authority to order notice to other persons.

Subsection (d) provides the adult subject to guardianship seeking to have the guardian removed with the right to choose an attorney to represent him or her in the matter. Such representation is essential to protecting the adult's due process rights. To ensure the availability of such representation, the court is required to award reasonable attorney fees to such an attorney in accordance with Section 119 of this act. Subsection (d) includes bracketed language that an enacting jurisdiction may adapt to indicate its preferences on when to require a court to appoint an attorney for the adult.

If the court removes a guardian, the court must then appoint a successor guardian. This is because removal simply ends the particular appointment, it does not terminate the guardianship or modify other terms of the guardianship. Subsection (e) instructs the court to use the same priorities it uses in appointing a guardian in the first place when appointing a successor guardian.

Subsection (f) requires timely notice of the appointment of the successor guardian to the adult, and other persons entitled to such notice.

**SECTION 319. TERMINATION OR MODIFICATION OF GUARDIANSHIP
FOR ADULT.**

(a) An adult subject to guardianship, the guardian for the adult, or a person interested in the welfare of the adult may petition for:

(1) termination of the guardianship on the ground that a basis for appointment under Section 301 does not exist or termination would be in the best interest of the adult or for other good cause; or

(2) modification of the guardianship on the ground that the extent of protection or assistance granted is not appropriate or for other good cause.

(b) The court shall hold a hearing to determine whether termination or modification of a guardianship for an adult is appropriate on:

(1) petition under subsection (a) which contains allegations that, if true, would support a reasonable belief that termination or modification of the guardianship may be appropriate, but the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed during the preceding six months;

(2) communication from the adult, guardian, or person interested in the welfare of the adult which supports a reasonable belief that termination or modification of the guardianship may be appropriate, including because the functional needs of the adult or supports or services available to the adult have changed;

(3) a report from a guardian or conservator which indicates that termination or modification may be appropriate because the functional needs of the adult or supports or services

available to the adult have changed or a protective arrangement instead of guardianship or other less restrictive alternative for meeting the adult's needs is available; or

(4) a determination by the court that a hearing would be in the best interest of the adult.

(c) Notice of a petition under subsection (b)(1) must be given to the adult subject to guardianship, the guardian, and any other person the court determines.

(d) On presentation of prima facie evidence for termination of a guardianship for an adult, the court shall order termination unless it is proven that a basis for appointment of a guardian under Section 301 exists.

(e) The court shall modify the powers granted to a guardian for an adult if the powers are excessive or inadequate due to a change in the abilities or limitations of the adult, the adult's supports, or other circumstances.

(f) Unless the court otherwise orders for good cause, before terminating or modifying a guardianship for an adult, the court shall follow the same procedures to safeguard the rights of the adult which apply to a petition for guardianship.

(g) An adult subject to guardianship who seeks to terminate or modify the terms of the guardianship has the right to choose an attorney to represent the adult in the matter. [If the adult is not represented by an attorney, the court shall appoint an attorney under the same conditions as in Section 305.] The court shall award reasonable attorney's fees to the attorney for the adult as provided in Section 119.

Legislative Note: A state may make the policy decision to include the bracketed language in subsection (g). This policy decision parallels Alternative A in Section 305.

Comment

Section 319 governs termination and modification of a guardianship. This topic was addressed

in Section 112 of the 1997 act, which also covered changes in the guardian's appointment, which is now addressed in Section 318.

Termination occurs when the guardianship and the authority of the guardian is terminated and all powers granted to the guardian are restored to the individual who was formerly subject to guardianship. Termination also occurs upon the individual's death. Modification occurs when the court changes the powers granted to the guardian under a continuing guardianship. Modification can expand or contract the guardian's powers.

Subsection (a) provides that the adult subject to guardianship, the guardian, or any person interested in the adult's welfare may petition for termination or modification of the guardianship. Thus, the fact that the adult is subject to guardianship in no way limits the adult's right to seek court review.

Pursuant to subsection (b), the court must hold a hearing to determine whether termination or modification is appropriate under four circumstances: (1) if the court concludes that such a hearing would be in the best interest of the adult subject to guardianship; (2) if a report from either a guardian or conservator indicated that termination or modification may be appropriate because the needs of the adult have changed or a less restrictive alternative may be available; (3) if the adult, guardian, or another person interested in the welfare of the adult petitions for termination or removal and the petition contains allegations that—if true—would support a reasonable belief that termination or modification is in order; and (4) if the court receives a communication from the adult, guardian, or person interested in the adult's welfare that supports a reasonable belief that termination or modification may be appropriate. The form that the communication takes is not determinative, and could include a grievance filed under Section 127.

The fact that the court has reason to believe that the allegations are not true is not a sufficient reason to refuse to hold a hearing. It is important that the court hear the evidence as to whether modification or termination is appropriate, and not reach conclusions without a considered process. To avoid excessive drain on judicial resources, however, the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed within the preceding six months. Permitting a communication that falls short of a petition to trigger reconsideration of the guardianship is necessary to make restoration a practical possibility for adults subject to guardianship. *See* Erica Wood, Pamela Teaster, and Jenica Cassidy, *Restoration of Rights in Adult Guardianship* (American Bar Association Commission on Law and Aging with the Virginia Tech Center for Gerontology, 2017) (reporting that “[t]he filing of a formal petition requesting restoration is burdensome or impossible for many individuals subject to guardianship”).

Subsection (c) requires that notice of a petition to terminate or modify the guardianship that is filed by the adult, guardian, or person interested in the adult's welfare under subsection (b)(1) must be given to the adult, the guardian, and any other person the court determines. Subsection (c) does not expressly require that notice be given if a hearing is held pursuant to an informal communication under subsection (b)(2) or independent determination by the court under subsection (b)(3), but it would appear that the notice given would as a practical matter be the

same. For a hearing on the guardian's removal, notice should always be given to the individual under guardianship and to the guardian, and the court always has authority to order notice to other persons.

Subsection (d) requires a court to terminate a guardianship on presentation of prima facie evidence that supports termination unless it is proven that it would be proper to impose a guardianship if a petition for guardianship were brought at the current time. That is, if there is no basis for imposing a guardianship under Section 301, then the court may not continue the guardianship.

Subsection (e) requires the court to modify the guardian's powers if they are excessive or inadequate due to a change in the abilities or limitations of the adult, the adult's supports, or other circumstances. Thus, even if the adult's abilities have not improved, the court might be required to reduce the powers granted to the guardian if new, less restrictive alternatives become available (for example, the individual now has access to greater decision-making support, or technological assistance). Similarly, the court might be required to increase the powers granted the guardian if the adult's abilities have deteriorated creating an unmet need, and no less restrictive alternatives are available.

Subsection (f) requires that unless the court otherwise orders for good cause, before terminating or modifying a guardianship for an adult under this section, the court must follow the same procedures to safeguard the rights of the respondent as apply at a hearing on a petition for an original appointment. These procedures include appointment of a visitor and may also include appointment of counsel. This subsection is intended to ensure that the due process rights of the adult subject to guardianship are fully respected, and that the court is using a process that will provide the court with the evidence needed to make an appropriate and considered decision.

Finally, subsection (g) recognizes the right of an adult subject to guardianship who seeks to terminate or modify that guardianship to be represented by counsel. Such representation is essential to protect the individual's due process rights. To ensure the availability of such representation, the court is required to award reasonable attorney fees to such an attorney in accordance with Section 119 of this act. As noted in the comments to Section 119, such compensation is important to ensure access to counsel for those seeking to restore rights. *See* Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Ethics and Legality of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581, 603 (2016) ("having the right to directly challenge the continued necessity or terms of the guardianship, including who serves as guardian, is virtually meaningless without the accompanying right to legal representation."). Attorneys' concerns about payment for their services are a significant barrier to attorneys accepting representation of individuals subject to guardianship or conservatorship. *See* Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L. J. 83, 102 (2015). Subsection (g) includes bracketed language that an enacting jurisdiction may adapt to indicate its preferences on when to require a court to appoint an attorney for the adult.

As a general matter, Section 319 is responsive to concerns that adults subject to guardianship have historically faced often insurmountable barriers to restoration of rights. *See generally* Erica Wood, Pamela Teaster, and Jenica Cassidy, *Restoration of Rights in Adult Guardianship*

(American Bar Association Commission on Law and Aging with the Virginia Tech Center for Gerontology, 2017). Section 319, together with other provisions in this act, is designed to reduce those barriers so that individuals' whose needs could be met by less restrictive means do not face unnecessary deprivations of liberty.

On the extent to which a guardian may be compensated for opposing a petition to modify or terminate the guardianship or remove the guardian, see Section 120(e).

[ARTICLE] 4

CONSERVATORSHIP

SECTION 401. BASIS FOR APPOINTMENT OF CONSERVATOR.

(a) On petition and after notice and hearing, the court may appoint a conservator for the property or financial affairs of a minor if the court finds by a preponderance of evidence that appointment of a conservator is in the minor's best interest, and:

(1) if the minor has a parent, the court gives weight to any recommendation of the parent whether an appointment is in the minor's best interest; and

(2) either:

(A) the minor owns funds or other property requiring management or protection that otherwise cannot be provided;

(B) the minor has or may have financial affairs that may be put at unreasonable risk or hindered because of the minor's age; or

(C) appointment is necessary or desirable to obtain or provide funds or other property needed for the support, care, education, health, or welfare of the minor.

(b) On petition and after notice and hearing, the court may appoint a conservator for the property or financial affairs of an adult if the court finds by clear-and-convincing evidence that:

(1) the adult is unable to manage property or financial affairs because:

(A) of a limitation in the adult's ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate supportive services,

technological assistance, or supported decision making; or

(B) the adult is missing, detained, or unable to return to the United States;

(2) appointment is necessary to:

(A) avoid harm to the adult or significant dissipation of the property of the adult; or

(B) obtain or provide funds or other property needed for the support, care, education, health, or welfare of the adult or of an individual entitled to the adult's support; and

(3) the respondent's identified needs cannot be met by a protective arrangement instead of conservatorship or other less restrictive alternative.

(c) The court shall grant a conservator only those powers necessitated by demonstrated limitations and needs of the respondent and issue orders that will encourage development of the respondent's maximum self-determination and independence. The court may not establish a full conservatorship if a limited conservatorship, protective arrangement instead of conservatorship, or other less restrictive alternative would meet the needs of the respondent.

Comment

Section 401, which replaces a section with the same number in the 1997 act, covers the standard for appointment of a conservator for both minors and adults. The standard for minors, however, differs from that for adults. This reflects a recognition that adults have rights that children do not have. It also reflects a recognition that a conservatorship for a minor is necessarily time-limited, whereas a conservatorship for an adult can continue indefinitely.

Under subsection (a)(1) of this section, a conservator may be appointed for a minor only if the court finds by a preponderance of evidence that appointment is in the minor's best interest. In determining whether the appointment is in the minor's best interest, the court must give weight to any relevant recommendation of the parent of the minor. This requirement is designed both to protect the minor and to provide adequate deference to parental rights, in accordance with the U.S. Supreme Court's ruling in *Troxel v. Granville*, 530 U.S. 57 (2000).

Subsection 401(a) further limits appointment of conservators for minors to situations where there is a sufficient need for a conservator. Subsection (a)(2) creates an exclusive list of circumstances for which a sufficient need can be found.

Under subsection (b), a conservator may be appointed for an adult only if the court makes three findings by clear-and-convincing evidence. First, the court must find that the adult cannot manage property or financial affairs either because (1) of a limitation in the adult's ability to receive or evaluate information or make or communicate decisions even with appropriate supportive services, technological assistance, or supported decision making, or (2) the adult is missing, detained, or unable to return to the United States. Thus, if the adult's needs could be met by providing the individual with support for decision making, adaptive devices, caregiving services, or a wide variety of other interventions that remove fewer rights than conservatorship, the court may not impose a conservatorship. Second, the court must find that appointment is necessary to either (1) avoid harm to the adult or significant dissipation of the adult's property; or (2) to provide support for the adult or for an individual entitled to such support from the adult. Third, the court must find that the adult's needs cannot be met by a less restrictive alternative. Notably, the mere fact that the adult is making financial choices that are objectively imprudent, or seem wasteful to others, is not a sufficient reason to impose a conservatorship.

As set forth under subsection (c), a conservator may never be granted powers that are not in fact required by the individuals' demonstrated limitations and needs. Thus, most conservatorships should be limited, not full, as almost all respondents possess some ability to act or make decisions on their own behalf. For example, an adult might have the ability to manage small amounts of discretionary spending money even if not the ability to manage his or her full financial affairs.

Overall, as in the Article 3 provisions on guardianship of adults, the section's emphasis on less restrictive alternatives, a high evidentiary standard, and the use of limited conservatorship is consistent with the act's philosophy that a conservator should be appointed only when necessary, only for as long as necessary, and with only those powers as are necessary. While the standard for appointment of a conservator for an adult under this section is similar to the standard for appointment of a guardian for an adult under Section 301, the two standards are distinct. The fact that one is satisfied does not indicate that the other is satisfied.

SECTION 402. PETITION FOR APPOINTMENT OF CONSERVATOR.

(a) The following may petition for the appointment of a conservator:

(1) the individual for whom the order is sought;

(2) a person interested in the estate, financial affairs, or welfare of the individual, including a person that would be adversely affected by lack of effective management of property or financial affairs of the individual; or

(3) the guardian for the individual.

(b) A petition under subsection (a) must state the petitioner's name, principal residence,

current street address, if different, relationship to the respondent, interest in the appointment, the name and address of any attorney representing the petitioner, and, to the extent known, the following:

(1) the respondent's name, age, principal residence, current street address, if different, and, if different, address of the dwelling in which it is proposed the respondent will reside if the petition is granted;

(2) the name and address of the respondent's:

(A) spouse [or domestic partner] or, if the respondent has none, an adult with whom the respondent has shared household responsibilities for more than six months in the 12-month period before the filing of the petition;

(B) adult children or, if none, each parent and adult sibling of the respondent, or, if none, at least one adult nearest in kinship to the respondent who can be found with reasonable diligence; and

(C) adult stepchildren whom the respondent actively parented during the stepchildren's minor years and with whom the respondent had an ongoing relationship during the two years immediately before the filing of the petition;

(3) the name and current address of each of the following, if applicable:

(A) a person responsible for the care or custody of the respondent;

(B) any attorney currently representing the respondent;

(C) the representative payee appointed by the Social Security

Administration for the respondent;

(D) a guardian or conservator acting for the respondent in this state or another jurisdiction;

(E) a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary;

(F) the fiduciary appointed for the respondent by the Department of Veterans Affairs;

(G) an agent designated under a [power of attorney for health care] in which the respondent is identified as the principal;

(H) an agent designated under a power of attorney for finances in which the respondent is identified as the principal;

(I) a person known to have routinely assisted the respondent with decision making in the six-month period immediately before the filing of the petition;

(J) any proposed conservator, including a person nominated by the respondent, if the respondent is 12 years of age or older; and

(K) if the individual for whom a conservator is sought is a minor:

(i) an adult not otherwise listed with whom the minor resides; and

(ii) each person not otherwise listed that had primary care or custody of the minor for at least 60 days during the two years immediately before the filing of the petition or for at least 730 days during the five years immediately before the filing of the petition;

(4) 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;

(5) the reason conservatorship is necessary, including a brief description of:

(A) the nature and extent of the respondent's alleged need;

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

(C) any protective arrangement instead of conservatorship or other less restrictive alternative for meeting the respondent's alleged need which has been considered or implemented;

(D) if no protective arrangement or other less restrictive alternatives have been considered or implemented, the reason it has not been considered or implemented; and

(E) the reason a protective arrangement or other less restrictive alternative is insufficient to meet the respondent's need;

(6) whether the petitioner seeks a limited conservatorship or a full conservatorship;

(7) if the petitioner seeks a full conservatorship, the reason a limited conservatorship or protective arrangement instead of conservatorship is not appropriate;

(8) if the petition includes the name of a proposed conservator, the reason the proposed conservator should be appointed;

(9) if the petition is for a limited conservatorship, a description of the property to be placed under the conservator's control and any requested limitation on the authority of the conservator;

(10) whether the respondent needs an interpreter, translator, or other form of support to communicate effectively with the court or understand court proceedings; and

(11) the name and address of an attorney representing the petitioner, if any.

Comment

This section lists the information that must be contained in the petition for appointment of a conservator. This section represents a substantial revision of Section 403 of the 1997 act. The title of the section has been changed from “Original Petition for Appointment or Protective Order” to “Petition for Appointment of Conservator.” In the 1997 act, the term “protective order” referred to both conservatorships and court orders instead of conservatorship. This act makes two advancements. First, it reflects the move away from using the term “protective order.” This terminology was found to be confusing by many, in part because the term “protective order” is frequently used in the context of domestic violence to refer to restraining orders. Second, it reflects the fact that court orders instead of conservatorship are now controlled by provisions in Article 5.

Although subsection (a)(1) of this section allows adults to petition for appointment of a conservator for themselves, the court should scrutinize such petitions closely to confirm that they are truly voluntary, and that petitioners fully understand the nature and consequences of petitioning. Normally, where an adult seeks to obtain assistance, it is preferable for the adult to execute a durable power of attorney, engage in supported decision making, or both.

Subsection (b)(1) requires the petitioner to state the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made or the protective arrangement instead of conservatorship is ordered. This provision is designed to alert the respondent, and others who receive notice of the petition, of potential consequences of the conservatorship that are likely to raise concerns. Giving the respondent, and those entitled to a copy of the petition under Section 403, full information will enable them to make more informed decisions about whether to oppose the petition, oppose appointment of the petitioner as conservator, or seek to limit the powers granted to the conservator.

Subsections (b)(2)-(3) require that the petition list family members and others who may have information useful to the court and to whom notice of the proceeding must be given under Section 403. These persons will likely have the greatest interest in protecting the respondent and in making certain that the proposed conservatorship is appropriate.

Subsection (b)(2)(A) requires that the petition contain the name and address of the respondent’s spouse or domestic partner (if the enacting state uses the term) or, if none, then an adult with whom the respondent has shared household responsibilities for more than six months in the 12-month period immediately before the filing of the petition. This is a change from Section 403 of the 1997 act, which omitted the term “domestic partner,” and required notice to a person with whom the respondent has resided for more than six months before the filing of the petition. By requiring shared household responsibilities, and not simply co-residence, the new language better captures the underlying intent of the provision: providing notice to individuals with whom the respondent has a close personal relationship.

Subsection (b)(2)(B) also requires that the petition contain the names and addresses of the respondent’s adult children or, if none, parents and adult brothers and sisters or, if none, an adult relative of the nearest degree in which a relation can be found. If there are no adult children,

parents, or adult siblings and there are several adults of equal degree of kinship to the respondent, the name and address of one is all that is required, not the names and addresses of the members of the entire class.

Subsection (b)(2)(C) requires the petition to list adult stepchildren whom the respondent parented during their minority and with whom the respondent had an ongoing relationship in the two-year period immediately before the filing of the petition. This is an expansion from Section 403 of the 1997 act, which did not require notice to adult stepchildren, and is designed to better reflect the diversity of family structures.

Subsection (b)(3) requires the petition to list a series of other persons who must be provided notice, including existing agents and decision-making supporters. Notice to such individuals, as required by Section 403, is especially critical for ascertaining whether a conservatorship is necessary. For example, the court may conclude that there is no need to appoint a conservator if a conservator has already been appointed elsewhere, or the respondent has executed a durable power of attorney for finances.

In addition, if the respondent is a minor, subsection (b)(3)(K) requires the petitioner to list an adult not otherwise listed with whom the minor resides. If the minor resides with more than one other such adult, the petitioner can choose to only list one. In addition, if the respondent is a minor, the petitioner is to list persons not otherwise listed who had primary care or custody for a certain period of time. These time periods roughly equate to the equivalent of at least two months in the two years immediately before the filing of the petition, or the equivalent of two years out of the five years immediately before the filing of the petition.

While the list of persons who must be included in subsection (b)(3) appears quite lengthy, in reality the number of persons listed is likely to be rather small as the roles listed typically overlap.

Subsection (b)(4) requires a general statement regarding the respondent's property, anticipated income, and other financial affairs. This information should be as detailed as possible to enable the visitor to better complete the report required by Section 405, and to enable the court to determine whether a conservatorship or other protective arrangement is necessary.

Subsection (b)(5) emphasizes that conservatorship is a last resort and that less restrictive alternatives are to be preferred. The petitioner is required to identify all less restrictive alternatives for meeting that respondent's alleged needs that have been considered or implemented, to justify any failure to pursue less restrictive alternatives, and to explain why less restrictive alternatives would not meet the respondent's alleged needs. These requirements serve to provide the court with important information relevant to whether conservatorship is appropriate. These also prompt would-be petitioners to explore less restrictive alternatives.

Subsection (b)(6) requires that the petition state whether a limited or full conservatorship is being sought. Subsections (b)(7) and (b)(9) emphasize the importance of limited conservatorship, the encouragement of which is a major theme of this act. When requesting a full conservatorship, the petition must state why a limited conservatorship or protective arrangement instead of

conservatorship would not meet the respondent's needs. If a limited conservatorship is requested, the petition must set out a description of the property to be placed under the conservator's control and any requested limitation on the authority of the conservator.

Subsection (b)(8) requires the petition to justify the nomination of any proposed appointee. Notably, the petition need not include a proposed conservator. If it does, however, the petitioner must explain why the petitioner believes the proposed conservator should be appointed.

Finally, subsection (b)(10), requires the petitioner to set forth respondent's need, if any, for an interpreter, translator, or other form of support to effectively communicate with the court or understand court proceedings. Thus, if the respondent uses another person to help the respondent communicate or understand, the petitioner should include this information.

To help petitioners satisfy the requirements of this section, Section 603 contains a sample petition form which petitioners may use.

SECTION 403. NOTICE AND HEARING FOR APPOINTMENT OF CONSERVATOR.

(a) On filing of a petition under Section 402 for appointment of a conservator, the court shall set a date, time, and place for a hearing on the petition.

(b) A copy of a petition under Section 402 and notice of a hearing on the petition must be served personally on the respondent. If the respondent's whereabouts are unknown or personal service cannot be made, service on the respondent must be made by [substituted service] [or] [publication]. The notice must inform the respondent of the respondent's rights at the hearing, including the right to an attorney and to attend the hearing. The notice must include a description of the nature, purpose, and consequences of granting the petition. The court may not grant a petition for appointment of a conservator if notice substantially complying with this subsection is not served on the respondent.

(c) In a proceeding on a petition under Section 402, the notice required under subsection (b) must be given to the persons required to be listed in the petition under Section 402(b)(1) through (3) and any other person interested in the respondent's welfare the court determines.

Failure to give notice under this subsection does not preclude the court from appointing a conservator.

(d) After the appointment of a conservator, notice of a hearing on a petition for an order under this [article], together with a copy of the petition, must be given to:

- (1) the individual subject to conservatorship, if the individual is 12 years of age or older and not missing, detained, or unable to return to the United States;
- (2) the conservator; and
- (3) any other person the court determines.

Comment

This section is similar to Section 404 of the 1997 act except that subsection (d) of this section also addresses notice requirements for hearings on petitions filed after the appointment of a conservator.

On filing of the petition, subsection (a) requires that the court set a date, time, and place for the hearing. Subsection (b) requires that the respondent be personally served with the petition and notice of hearing unless the respondent is missing or personal service cannot be made, in which event the state's method for substituted service must be used. A failure to serve the respondent is jurisdictional, as is notice that does not substantially comply with the requirements of subsection (b). Notice of hearing must be given to the persons who are listed in the petition, but as provided in subsection (c) failing to give notice to those listed (other than the respondent) is not jurisdictional. The purpose of providing notice to the others listed in the petition is because they may have information that is useful to the court. They are not indispensable parties for the resolution of the case. If notice to them were made jurisdictional, the proceeding would have to be dismissed or continued if one of them could not be immediately located. This would delay and otherwise complicate the proceeding.

The notice of hearing not only informs the respondent and others of the date of the hearing and the contents of the petition, but it must also include a statement of rights. Subsection (b) requires the notice to inform the respondent of the respondent's rights at the hearing, including the right to be represented by an attorney and the right to attend the hearing. The notice must also include a description of the nature and purpose of the hearing, and the consequences of granting the petition.

Subsection (d) addresses the notice requirements for hearings on petitions for orders subsequent to the appointment of a conservator. The individual subject to conservatorship (unless missing, detained, unable to return to the United States, or under the age of 12), the conservator, and anyone else the court directs, must be given copies of any notice of hearing and a copy of any

petition. This provision helps ensure that the individual is kept informed of developments. In its original conservatorship order, the court should direct that notice of future hearings be given to any other party who, in the court's view, will help to monitor the conservator and protect the interest of the person subject to conservatorship.

Notice under this section is also governed by the general notice requirements for hearings under Section 113, which requires that notice be given at least 14 days prior to the hearing.

SECTION 404. ORDER TO PRESERVE OR APPLY PROPERTY WHILE

PROCEEDING PENDING. While a petition under Section 402 is pending, after preliminary hearing and without notice to others, the court may issue an order to preserve and apply property of the respondent as required for the support of the respondent or an individual who is in fact dependent on the respondent. The court may appoint a [master] to assist in implementing the order.

***Legislative Note:** The term “master” is bracketed in recognition that states have different terms for this role.*

Comment

This section parallels language that was in Section 406(g) of the 1997 act. It allows the court to enter an order to protect the property of the respondent while the petition for conservatorship is pending. It also allows the court to enter an order to provide for the support of the respondent, or someone who is in fact dependent on the respondent, while the petition is pending. The descriptor “in fact dependent” refers to an individual who is in fact receiving support from the respondent. Whether the individual is a “dependent” for income tax purposes is not determinative.

SECTION 405. APPOINTMENT AND ROLE OF [VISITOR].

(a) If the respondent in a proceeding to appoint a conservator is a minor, the court may appoint a [visitor] to investigate a matter related to the petition or inform the minor or a parent of the minor about the petition or a related matter.

(b) If the respondent in a proceeding to appoint a conservator is an adult, the court shall appoint a [visitor] [unless the adult is represented by an attorney appointed by the court]. The duties and reporting requirements of the [visitor] are limited to the relief requested in the

petition. The [visitor] must be an individual with training or experience in the type of abilities, limitations, and needs alleged in the petition.

(c) A [visitor] appointed under subsection (b) for an adult shall interview the respondent in person and in a manner the respondent is best able to understand:

(1) explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, the respondent's rights at the hearing on the petition, and the general powers and duties of a conservator;

(2) determine the respondent's views about the appointment sought by the petitioner, including views about a proposed conservator, the conservator's proposed powers and duties, and the scope and duration of the proposed conservatorship;

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

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, may be paid from the respondent's assets.

(d) A [visitor] appointed under subsection (b) for an adult shall:

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

(2) review financial records of the respondent, if relevant to the [visitor's] recommendation under subsection (e)(2);

(3) investigate whether the respondent's needs could be met by a protective arrangement instead of conservatorship or other less restrictive alternative and, if so, identify the arrangement or other less restrictive alternative; and

(4) investigate the allegations in the petition and any other matter relating to the petition the court directs.

(e) A [visitor] appointed under subsection (b) for an adult promptly shall file a report in a record with the court, which must include:

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

(2) a recommendation:

(A) regarding the appropriateness of conservatorship, or whether a protective arrangement instead of conservatorship or other less restrictive alternative for meeting the respondent's needs is available;

(B) if a conservatorship is recommended, whether it should be full or limited; and

(C) if a limited conservatorship is recommended, the powers to be granted to the conservator, and the property that should be placed under the conservator's control;

(3) a statement of the qualifications of the proposed conservator and whether the respondent approves or disapproves of the proposed conservator;

(4) a recommendation whether a professional evaluation under Section 407 is necessary;

(5) a statement whether the respondent is able to attend a hearing at the location court proceedings typically are held;

(6) a statement whether the respondent is able to participate in a hearing and which identifies any technology or other form of support that would enhance the respondent's ability to participate; and

(7) any other matter the court directs.

Legislative Note: The term "visitor" is bracketed because some states use a different term for the person appointed by the court to investigate and report on certain facts.

Comment

Subsections (a) and (b) govern when a court may and must appoint a visitor. A court *may* appoint a visitor upon receipt of a petition for conservatorship of a minor under Section 402. A court *must* appoint a visitor upon receipt of a petition for conservatorship of an adult under Section 402 unless: (1) the enacting state has included the bracketed language that no such appointment is required if the adult is represented by an attorney appointed by the court; and (2) the court has in fact appointed an attorney to represent the adult. Notably, if the adult is represented by an attorney appointed by the court, the court may still appoint a visitor if it so chooses. “Visitor” is bracketed in recognition that states use, and may wish to substitute, different words to refer to this position.

Subsection (b) differs from Section 406(a) of the 1997 act in that it includes bracketed language to give states the option of not appointing a visitor where the court has appointed counsel for the adult. The decision to limit the exception to situations where the adult is represented by court-appointed counsel, as opposed to all situations where the adult is represented by counsel, reflects concerns that the attorney purporting to represent a respondent in such proceedings may have a conflict of interest or be influenced by others.

Visitors may be selected from a variety of professions, including physicians, psychologists, social workers, or nurses, among others. Regardless of the visitor’s profession, subsection (b) requires the visitor to have training and experience in the type of abilities, limitations, and needs alleged in the petition. This training and experience should be sufficient so that the visitor may serve as the “eyes and ears” of the court. Thus, for example, a visitor appointed for a respondent alleged to have Alzheimer’s disease must have training or experience in assessing the needs of those with Alzheimer’s disease. As the appropriate disposition of the petition may well depend on what services are available to the respondent, the visitor should also be knowledgeable about less restrictive alternatives, including supportive services in the respondent’s community. As the visitor’s role is to provide objective information to the court, it is essential that the visitor not have a conflict of interest. For example, the visitor should not be an employee of an institution where the respondent resides. Similarly, the petitioner should not nominate a visitor, and any such nomination should be disregarded by the court.

Under subsection (c), the visitor is tasked with interviewing the respondent in person and explaining to the respondent the nature and potential consequences of the petition and the respondent’s rights. The visitor must determine the respondent’s views about the appointment or order sought. This includes the respondent’s views about any proposed conservator, as such views will help the court to determine who—if anyone—to appoint as conservator consistent with Section 410(a)(2) and (b). The visitor should communicate in plain language and in a language in which the respondent is proficient, accompanied by a qualified and disinterested interpreter if an interpreter is needed to communicate successfully with the respondent. While the visitor is not required to speak the respondent’s primary language, it is best practice to use visitors who do. Where this is not practicable, then both good practice and due process dictate the use of interpreters so the respondent can understand and communicate. If assistive devices are needed for the visitor to explain to the respondent in a manner the respondent can understand,

or for the respondent to communicate with the visitor, then the visitor should use those assistive devices.

Under subsection (d), the visitor is also tasked with interviewing the petitioner and the proposed conservator, reviewing the financial records of the respondent if relevant to the visitor's recommendation, investigating whether the respondent's needs could be met by a less restrictive alternative, and investigating the allegations in the petition and any other matter relating to the petition the court directs. Unlike a visitor appointed for a respondent in a guardianship proceeding under Article 3, the visitor is not necessarily required to obtain information from a physician or other persons who have treated, advised, or assessed the respondent's physical and mental condition. However, the visitor may need to do so in order to sufficiently investigate the allegations contained in the petition and less restrictive alternatives.

As set forth in subsection (e), the visitor is responsible for reporting to the court on a variety of matters about which the court will need information to act on the petition. The visitor's report must be in a record and include a list of recommendations or statements. Specifically, the visitor's report must contain 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, if a limited conservatorship is requested, the property to be placed under the conservator's control, and the appointment of counsel. The visitor's report also might appropriately include a recommendation concerning bond under Section 416 and whether an alternate asset-protection arrangement should be considered. States enacting this act should consider developing a visitor's checklist for the items enumerated in subsection (e).

If the petition is withdrawn prior to the appointment of a visitor, no appointment of a visitor is necessary.

While appointment of a visitor is not without financial cost, appointment of visitors may reduce the states' overall costs by avoiding unnecessary conservatorships. Courts faced with limited resources may also wish to consider using volunteer visitor programs. *See American Bar Association Commission on Law and Aging, Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community* (2011).

SECTION 406. APPOINTMENT AND ROLE OF ATTORNEY.

Alternative A

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

- (1) the respondent requests an appointment;
- (2) the [visitor] recommends an appointment; or

(3) the court determines the respondent needs representation.

Alternative B

(a) Unless the respondent in a proceeding for appointment of a conservator is represented by an attorney, the court shall appoint an attorney to represent the respondent, regardless of the respondent's ability to pay.

End of Alternatives

(b) An attorney representing the respondent in a proceeding for appointment of a conservator shall:

(1) make reasonable efforts to ascertain the respondent's wishes;

(2) advocate for the respondent's wishes to the extent reasonably ascertainable;

and

(3) if the respondent's wishes are not reasonably ascertainable, advocate for the result that is the least-restrictive in type, duration, and scope, consistent with the respondent's interests.

[(c) The court shall appoint an attorney to represent a parent of a minor who is the subject of a proceeding under Section 402 if:

(1) the parent objects to appointment of a conservator;

(2) the court determines that counsel is needed to ensure that consent to appointment of a conservator is informed; or

(3) the court otherwise determines the parent needs representation.]

Legislative Note: *A state that enacts Alternative B should not enact Section 405(e)(1).*

Subsection (c) is in brackets because states have differing policies regarding the rights of parents in these cases.

Comment

Similar to Section 406(b) of the 1997 act, alternative provisions on the appointment of an attorney are offered in subsection (a). Alternative A relies on the use of a “visitor,” who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues. Appointment of an attorney, nevertheless, is required under Alternative A when the court determines that the respondent needs representation, or counsel is requested by the respondent or recommended by the visitor. Alternative A is in accord with the National Probate Court Standards. National Probate Court Standards, Standard 3.3.5 “Appointment of Counsel” (2013) provides:

- (a) Counsel should be appointed by the probate court to represent the respondent when:
 - (1) requested by an unrepresented respondent;
 - (2) recommended by a court visitor;
 - (3) the court, in the exercise of its discretion, determines that the respondent is in need of representation; or
 - (4) otherwise required by law.
- (b) The role of counsel should be that of an advocate for the respondent.

It is expected that courts in states enacting Alternative A of subsection (b), will appoint counsel in virtually all cases in which the respondent would otherwise be unrepresented. In such jurisdictions, courts should err on the side of protecting the respondent’s rights by finding, absent a compelling reason otherwise, that the respondent needs representation. It should be the rare case in which the court does not find that an unrepresented respondent is in need of representation. Visitors in such jurisdictions should also be sensitive to the fact that the respondent may lack the ability to knowingly waive appointment of counsel.

In light of these concerns and in the interest of providing full due process to respondents, states may wish instead to adopt Alternative B, which provides for mandatory appointment of counsel. Mandatory appointment has been strongly urged by the American Bar Association (A.B.A.) Commission on Law and Aging and helps ensure the respondent’s rights are fully represented and protected in the proceeding.

Subsection (b), which is new to the act, specifies the role of the attorney for the respondent, regardless of whether the state has chosen alternative A or B. It specifies that the attorney must make reasonable efforts to ascertain what the respondent wishes and must advocate for those wishes. This has the effect of directing the attorney to maintain a normal attorney-client relationship with the respondent. A.B.A. Model Rule of Professional Conduct 1.14, which is also applicable here, directs the attorney to maintain, as far as reasonably possible, a normal attorney-client relationship with a client of diminished capacity, and provides guidance on what may be done if maintaining a normal attorney-client relationship becomes difficult. Subsection (b) is in accord with National Probate Court Standards, Standard 3.3.5 “Appointment of Counsel” (2013), which provides that “[t]he role of counsel should be that of an advocate for the respondent.”

Subsection (c), which is in brackets, gives states the option of creating a limited right to

appointed counsel for parents whose minor children are the subject of a proceeding under Section 402. Subsection (c), if enacted, would require the court to appoint an attorney to represent such a parent if the parent objected to appointment of a conservator, the parent appeared to be consenting to appointment of a conservator but the court determined that counsel was needed to make sure that consent was informed, or the court otherwise determined that the parent needed counsel. Subsection (c) is designed not only to protect the interests of parents, but also to potentially empower parents to better protect the rights of their minor children. In determining whether to enact subsection (c), states should consider the substantial benefit of representation in protecting parents' fundamental rights and the important interest in parenting their own children.

SECTION 407. PROFESSIONAL EVALUATION.

(a) At or before a hearing on a petition for conservatorship for an adult, the court shall order a professional evaluation of the respondent:

(1) if the respondent requests the evaluation; or

(2) in other cases, unless the court finds it has sufficient information to determine the respondent's needs and abilities without the evaluation.

(b) If the court orders an evaluation under subsection (a), the respondent must be examined by a licensed physician, psychologist, social worker, or other individual appointed by the court who is qualified to evaluate the respondent's alleged cognitive and functional abilities and limitations and will not be advantaged or disadvantaged by a decision to grant the petition or otherwise have a conflict of interest. The individual conducting the evaluation promptly shall file a report in a record 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 cognitive and functional abilities and limitations with regard to the management of the respondent's property and financial affairs;

(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 with regard to the ability to manage the respondent's property and financial affairs; and

(4) the date of the examination on which the report is based.

(c) A respondent may decline to participate in an evaluation ordered under subsection (a).

Comment

Section 407 requires a court to order a professional evaluation of the respondent in a conservatorship proceeding in two circumstances, which parallel the circumstances under which a professional evaluation of an adult respondent in a guardianship proceeding is required under Section 306. Section 407 of this act is a departure from Section 406(f) of the 1997 act, which left the decision of whether and when to order a professional evaluation of a respondent in a conservatorship proceeding to the discretion of the court. This departure reflects a recognition of the profound implications of imposition of a conservatorship on the rights and well-being of the individual subject to conservatorship, and the importance of limiting appointments to situations where there is a need which cannot be satisfied by a less restrictive alternative.

First, under subsection (a)(1), the court must order a professional evaluation when such an evaluation is demanded by the respondent. When represented by counsel, the respondent may demand the evaluation through counsel. If the respondent is truly incapacitated and not represented by counsel, it is unlikely that the respondent will demand an evaluation. However, the court still can order a professional evaluation either on the visitor's recommendation or on its own motion.

Second, under subsection (a)(2), the court must order a professional evaluation of the respondent unless the court explicitly finds it has sufficient information to determine both the respondent's needs and abilities without that evaluation. Consistent with this requirement, a court should order a professional evaluation any time that the nature and scope of the respondent's abilities, limitations, and needs are not absolutely clear based on its own assessment and on the visitor's report. By providing the court with an expert evaluation of the respondent's abilities and limitations, the professional evaluation not only helps the court determine whether a guardianship is necessary, but also helps the court determine how to craft an appropriate limited guardianship.

If an evaluation is ordered, subsection (b) requires it to be performed by a professional who is qualified to evaluate the respondent's alleged cognitive and functional abilities and limitations. Subsection (b) lists examples of types of individuals who might reasonably conduct a professional evaluation. The list parallels that in Section 306.

Subsection (b) requires the professional to evaluate the individual's abilities and limitations regarding the management of the respondent's property and financial affairs. This is important because an individual's functional needs will likely reflect the interaction between abilities and

limitations. As part of the evaluation described in subsection (b), the professional evaluator should generally include a summary of the consultation with the respondent's treating physician.

Subsection (c) recognizes the right of the respondent to decline to participate in the evaluation. A respondent might so decline because of concern about undue invasion of privacy. However, if the respondent refuses participation, the court will have less information on which to base its conclusion. For those respondents who wish to avoid imposition of a conservatorship, this may be particularly problematic as the bulk of the court's information may thus end up being supplied by the petitioner.

SECTION 408. ATTENDANCE AND RIGHTS AT HEARING.

(a) Except as otherwise provided in subsection (b), a hearing under Section 403 may not proceed unless the respondent attends the hearing. If it is not reasonably feasible for the respondent to attend a hearing at the location court proceedings typically are held, the court shall make reasonable efforts to hold the hearing at an alternative location convenient to the respondent or allow the respondent to attend the hearing using real-time audio-visual technology.

(b) A hearing under Section 403 may proceed without the respondent in attendance if the court finds by clear-and-convincing evidence that:

(1) the respondent consistently and repeatedly has refused to attend the hearing after having been fully informed of the right to attend and the potential consequences of failing to do so;

(2) there is no practicable way for the respondent to attend and participate in the hearing even with appropriate supportive services or technological assistance; or

(3) the respondent is a minor who has received proper notice and attendance would be harmful to the minor.

(c) The respondent may be assisted in a hearing under Section 403 by a person or persons of the respondent's choosing, assistive technology, or an interpreter or translator, or a combination of these supports. If assistance would facilitate the respondent's participation in the

hearing, but is not otherwise available to the respondent, the court shall make reasonable efforts to provide it.

(d) The respondent has a right to choose an attorney to represent the respondent at a hearing under Section 403.

(e) At a hearing under Section 403, the respondent may:

(1) present evidence and subpoena witnesses and documents;

(2) examine witnesses, including any court-appointed evaluator and the [visitor];

and

(3) otherwise participate in the hearing.

(f) Unless excused by the court for good cause, a proposed conservator shall attend a hearing under Section 403.

(g) A hearing under Section 403 must be closed on request of the respondent and a showing of good cause.

(h) Any person may request to participate in a hearing under Section 403. The court may grant the request, with or without a hearing, on determining that the best interest of the respondent will be served. The court may impose appropriate conditions on the person's participation.

Comment

Section 408 of the 1997 act required that both the respondent and proposed conservator attend the hearing unless attendance for either was excused for good cause. This section continues the good cause standard for excusing attendance by the proposed conservator. But due to the importance of attendance by the respondent and a concern that a good cause standard was open to abuse, the revised section spells out in greater detail the circumstances when attendance by the respondent will be excused.

Subsection (a) provides that, except under the unusual circumstances set forth in subsection (b), no hearing on a petition for conservatorship may proceed without the presence of the respondent. The fact that the respondent may not be able to attend the hearing at the location where the court

normally conducts hearings does not justify holding the hearing without the respondent. Rather, the court must try to hold the hearing at a location that the respondent can attend or by using real-time, audio-visual technology. As a general matter, it is preferable to do the former, as in-person interactions will allow the court to observe the respondent's context, which can help the court to understand factors that may be influencing the respondent's behavior and communications. However, real-time, audio-visual technology can provide a reasonable alternative in appropriate situations if the technology allows both the court and respondent to communicate with one another to the best of their abilities.

The exceptions in subsection (b) to the requirement that the respondent must attend the hearing are deliberately very narrow. For the hearing to proceed without the respondent in attendance, the court must find at least one of three things by clear-and-convincing evidence.

The first exception is that the respondent consistently and repeatedly refused to attend the hearing despite being fully informed of the right to attend and potential consequences of not doing so. Thus, for example, a respondent who cannot physically access the courthouse where the hearing is scheduled must understand that she has a right to have the hearing held at an alternative location or by using real-time, audio-visual technology. The respondent should also understand that a conservator could be appointed for her in her absence, and that this appointment could strip her of the right to make important, financial decisions for herself.

The second exception is that there is no practicable way for the respondent to attend and participate in the hearing even with appropriate supportive services and technological assistance. Both parts of this requirement—that the respondent cannot practically attend and that the respondent cannot participate even with support—must be fully satisfied for this exception to apply. The exception should be used very sparingly as best practice is to hold the hearing in the presence of the respondent regardless of the respondent's abilities. Without the respondent's presence the court is relying on third-party information to determine that it is in fact not feasible for the respondent to attend and that the respondent is not being prevented from attending for some other reason. Especially where this information is presented by the petitioner, or does not include a professional evaluation, courts should be extremely hesitant to rely on it to excuse the respondent's presence.

The third exception is that the respondent is a minor who has received proper notice and attendance by the minor would be harmful to the minor. This third exception is the only part of Section 408 which does not mirror Section 307, which governs the attendance and rights at hearings for guardianships for adults. A similar exception does not exist in Section 307 because that section does not apply to minors.

The respondent has the right to take an active role in the hearing, as detailed in subsection (e). Subsection (c) recognizes that to exercise this right, the respondent may need assistance. It therefore provides that the respondent has a right to assistance at the hearing and places an affirmative duty on the court to take reasonable measures to facilitate the respondent receiving that assistance.

As indicated in subsection (d), the respondent has a right to choose an attorney to represent the

respondent at the hearing. The respondent is free to choose an attorney other than the one who would otherwise be appointed by the court. This provision does not govern payment of the attorney. That issue is addressed in Section 119.

Subsection (f) requires the proposed conservator to attend the hearing. The court may excuse the proposed conservator's attendance but this should be rare. This provision is consistent with a recommendation from National Probate Court Standards, Standard 3.3.8(G), "Hearing" (2013). The proposed conservator's presence at the hearing gives the court the opportunity to determine the person's appropriateness for appointment and to make any other inquiry of the person the court deems appropriate as well as to emphasize to the person the gravity of the conservator's responsibilities.

Under subsection (g), the respondent can request that the hearing be closed, but the court may grant the request only upon a showing of good cause.

Under subsection (h), others may make a request to participate, which can be granted by the court without a hearing, if the court finds that the respondent's best interest is served by the participation. The court's order granting the request to participate may include appropriate conditions or limitations.

SECTION 409. CONFIDENTIALITY OF RECORDS.

(a) The existence of a proceeding for or the existence of conservatorship is a matter of public record unless the court seals the record after:

(1) the respondent, the individual subject to conservatorship, or the parent of a minor subject to conservatorship requests the record be sealed; and

(2) either:

(A) the petition for conservatorship is dismissed; or

(B) the conservatorship is terminated.

(b) An individual subject to a proceeding for a conservatorship, whether or not a conservator is appointed, an attorney designated by the individual, and a person entitled to notice under Section 411(e) or a subsequent order may access court records of the proceeding and resulting conservatorship, including the conservator's plan under Section 419 and the conservator's report under Section 423. A person not otherwise entitled to access to court

records under this section for good cause may petition the court for access to court records of the conservatorship, including the conservator's plan and report. The court shall grant access if access is in the best interest of the respondent or individual subject to conservatorship or furthers the public interest and does not endanger the welfare or financial interests of the respondent or individual.

[(c) A report under Section 405 of a [visitor] or professional evaluation under Section 407 is confidential and must be sealed on filing, but is available to:

- (1) the court;
- (2) the individual who is the subject of the report or evaluation, without limitation as to use;
- (3) the petitioner, [visitor], and petitioner's and respondent's attorneys, for purposes of the proceeding;
- (4) unless the court directs otherwise, an agent appointed under a power of attorney for finances in which the respondent is identified as the principal; and
- (5) any other person if it is in the public interest or for a purpose the court orders for good cause.]

Legislative Note: Subsection (c) is bracketed in recognition that states have different policies and procedures regarding the sealing of court records.

Comment

Conservatorship involves highly personal and other data. It is important that the respondent's privacy be protected before and after the appointment. Furthermore, data found in conservatorship records, such as Social Security numbers and information concerning financial accounts, can be used to facilitate fraud. Concern about access by the general public has increased as electronic filing of court records has made these records more accessible.

On the other hand, public access is important. One criticism of conservatorship in some states is that too much happens behind closed doors. The public, and "watch-dog" groups in particular, want to know how the conservatorship system is functioning. In addition, this act encourages

family and others interested in the welfare of the respondent to participate in the proceeding, both before and after the appointment. Sections 402 and 403 working together require that notice of the proceeding be given to family and others whose participation might enhance the proceeding. Section 411(e) encourages the court to establish a list of family and other persons to receive notice of various actions following the appointment. In order for these persons to effectively monitor the conservatorship, they need access to records. However, with the move to electronic filing and increasing concerns about protecting sensitive information, more courts are limiting access to conservatorship records to the immediate parties and their counsel.

This section attempts to balance these conflicting policy concerns. Subsection (a) provides that the existence of the conservatorship case itself is a matter of public record. But even then, similar to the expungement of criminal records, the court has the authority to seal even the existence of the conservatorship if the subject of the proceeding so requests and either the petition for conservatorship was dismissed or, if a conservator was appointed, the conservatorship is terminated.

Subsection (b) addresses access to the underlying records of the conservatorship. In addition to the adult and the adult's attorney, access is granted to persons entitled to notice under Section 411(e), including the guardian's plan under Section 419 and report under Section 423. Other persons must petition for access. The court shall grant the petitioner access if access is in the best interest of the adult or is in furtherance of the public interest and does not endanger the welfare or financial interests of the adult.

The documents most likely to contain highly sensitive information is the visitor report under Section 405 and professional evaluation under Section 407. Consequently, access to these documents is more restricted than other documents filed, which are covered by subsection (b). Pursuant to subsection (c), access to the visitor or evaluation report is available only to the court, the individual who is the subject of the proceeding and that individual's attorney, the petitioner and petitioner's attorney, and the visitor. Access is also available to agents under powers of attorney for health care or finances unless the court orders otherwise, and to other persons if the court determines it is in the public interest or for other good cause. A partial or complete redaction of sensitive personal or financial information may be a practical solution for courts in balancing the need for disclosure to the public and the interests of family and friends, with the need to protect the individual's privacy and avoid misuse of sensitive data.

Subsection (c) is similar to Section 407 of the 1997 act, but because states vary considerably on their policies with regard to confidentiality in guardianship cases, subsection (c) has been placed in brackets, signaling that states are free to modify the language to match their local practice.

SECTION 410. WHO MAY BE CONSERVATOR; ORDER OF PRIORITY.

(a) Except as otherwise provided in subsection (c), the court in appointing a conservator shall consider persons qualified to be a conservator in the following order of priority:

- (1) a conservator, other than a temporary or emergency conservator, currently

acting for the respondent in another jurisdiction;

(2) a person nominated as conservator by the respondent, including the respondent's most recent nomination made in a power of attorney for finances;

(3) an agent appointed by the respondent to manage the respondent's property under a power of attorney for finances;

(4) a spouse [or domestic partner] of the respondent; and

(5) a family member or other individual who has shown special care and concern for the respondent.

(b) If two or more persons have equal priority under subsection (a), the court shall select as conservator the person the court considers best qualified. In determining the best qualified person, the court shall consider the person's relationship with the respondent, the person's skills, the expressed wishes of the respondent, the extent to which the person and the respondent have similar values and preferences, and the likelihood the person will be able to perform the duties of a conservator successfully.

(c) The court, acting in the best interest of the respondent, may decline to appoint as conservator a person having priority under subsection (a) and appoint a person having a lower priority or no priority.

(d) A person that provides paid services to the respondent, or an individual who is employed by a person that provides paid services to the respondent or is the spouse, [domestic partner,] parent, or child of an individual who provides or is employed to provide paid services to the respondent, may not be appointed as conservator unless:

(1) the individual is related to the respondent by blood, marriage, or adoption; or

(2) the court finds by clear-and-convincing evidence that the person is the best

qualified person available for appointment and the appointment is in the best interest of the respondent.

(e) 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 the owner, operator, or employee is related to the respondent by blood, marriage, or adoption.

Legislative Note: *Each state enacting the act needs to insert in subsection (e) the particular term or terms used in the state or statutory references for facilities considered long-term care institutions.*

Comment

This section specifies who has priority for appointment as conservator (subsection (a)), specifies how to resolve a dispute if two or more persons have an equal priority (subsection (b)), empowers the court to select someone with lower priority in appropriate circumstances (subsection (c)), and specifies certain caregivers and others who are automatically disqualified from being appointed as conservator (subsections (d)-(e)).

Subsection (a) of this section gives top priority for appointment as conservator to a conservator who has already been appointed for the respondent by another court. Existing conservators are granted first priority for two reasons. First, some cases will involve transfers of a conservatorship from another state. To assure a smooth transition, the currently appointed conservator, whether appointed in this state or another, should have priority for appointment at the new location. Second, other cases will involve situations where a conservatorship appointment is sought despite the appointment in another place. Granting the existing conservator priority will deter such forum shopping. If the existing conservator is inappropriate for some reason, subsection (c) permits the court to pass over the existing conservator and appoint another with or without priority. This approach is consistent with Uniform Adult Guardianship and Protective Proceeding Jurisdiction Act's respect for out-of-state appointments

While an existing conservator is generally granted first priority for appointment, a temporary substitute conservator and an emergency conservator are excluded from priority because of the short-term nature of their involvement and because their appointment may have been made with a less thorough and inclusive process than that required for a conservator appointed for an indefinite period.

Subsection (a)(2) grants second priority to a person nominated as conservator by the respondent. The nomination may include anyone nominated orally at the hearing or communicated to the visitor, if the respondent is able to express a preference. The nomination may also be made in a separate document. While it is generally good practice for an individual to nominate as the conservator the agent named in a power of attorney for finances, subsection (a)(3) grants such an agent third priority for appointment even in the absence of a specific nomination. The agent is

granted priority on the theory that the agent is the person the respondent would most likely prefer to act with respect to the respondent's finances. The nomination of the agent will also make it more difficult for someone to use a conservatorship to thwart the authority of the agent. To assure the agent will be in a position to assert this priority, Section 402 and Section 403 work together to require the agent to receive notice of the proceeding.

Subsection (a)(4) grants fourth priority to the respondent's spouse or domestic partner but the section does not otherwise grant a priority to specific relatives. Rather, subsection (a)(5) gives a final level of priority to any family member or other person who has shown special care and concern for the respondent. This section represents a significant change from Section 413 of the 1997 act, which also created a priority for an adult child followed by a parent. The decision to collapse the strict kinship hierarchy into a single category other than for the spouse or domestic partner reflects a recognition that the court should favor those who have shown care for and about the respondent, an understanding that the act should be sensitive to respondents' diverse family structures and systems, and a concern that a strict hierarchy based on kinship may result in appointments that are not in the best interest of respondents.

Subsection (b) provides the court with a framework for selecting among persons with equal priority. This framework is especially important given the collapse of the detailed family hierarchy into a single category in subsection (a)(4) for the spouse or domestic partner with all other family members and others who have shown special care and concern for the respondent having equal priority under subsection (a)(5). Under subsection (b), a court shall choose the best qualified person when selecting among those with equal priority. In determining who is best qualified, the court should consider the potential conservator's relationship with the respondent, the potential conservator's skills, the expressed wishes of the respondent, the extent to which the potential conservator and the respondent have similar values and preferences, and the likelihood that the potential conservator will be able to successfully perform the duties of a conservator. Thus, whether a person is best qualified depends, in large part, on the quality of their relationship with the respondent. Since surrogate decision makers typically make the decisions for others that they would want made for themselves, requiring the court to consider the extent to which the potential conservator and the respondent share values and preferences increases the likelihood that the selected conservator will make the decision the individual subject to conservatorship would have made if able. *See* Nina A. Kohn, *Matched Values & Preferences: A New Approach to Selecting Legal Surrogates*, 22 SAN DIEGO L. REV. 399 (2015).

Consistent with respecting the wishes of the individual and appointing a person who understands the respondent's values and preferences, courts should resist the temptation to appoint a professional conservator simply because it is difficult to choose among family members and friends. While a professional conservator avoids the need to select between family members who are feuding or who are otherwise in disagreement, appointment of a professional is likely not to be consistent with the respondent's wishes. The extensive literature on surrogate decision-making shows that people typically prefer to have decisions made by close family members. *See* Nina A. Kohn, *Matched Values & Preferences: A New Approach to Selecting Legal Surrogates*, 22 SAN DIEGO L. REV. 399 (2015). In addition, appointment of a professional conservator comes at significant financial cost to the respondent.

Subsection (d) limits appointment as conservator of persons who provide paid services to respondents, as well as the affiliates of those who provide paid services. Subsection (e) more specifically prohibits an owner, operator, or employee of a long-term care institution at which the respondent is receiving care from being appointed as conservator unless related to the respondent by blood, marriage, or adoption. Strict application of these subsections is crucial to avoid a conflict of interest and to protect the individual subject to conservatorship.

SECTION 411. ORDER OF APPOINTMENT OF CONSERVATOR.

(a) A court order appointing a conservator for a minor must include findings to support appointment of a conservator and, if a full conservatorship is granted, the reason a limited conservatorship would not meet the identified needs of the minor.

(b) A court order appointing a conservator for an adult must:

(1) include a specific finding that clear-and-convincing evidence has established that the identified needs of the respondent cannot be met by a protective arrangement instead of conservatorship or other less restrictive alternative, including use of appropriate supportive services, technological assistance, or supported decision making; and

(2) include a specific finding that clear-and-convincing evidence established the respondent was given proper notice of the hearing on the petition.

(c) A court order establishing a full conservatorship for an adult must state the basis for granting a full conservatorship and include specific findings to support the conclusion that a limited conservatorship would not meet the functional needs of the adult.

(d) A court order establishing a limited conservatorship must state the specific property placed under the control of the conservator and the powers granted to the conservator.

(e) The court, as part of an order establishing a conservatorship, shall identify any person that subsequently is entitled to:

(1) notice of the rights of the individual subject to conservatorship under Section 412(b);

(2) notice of a sale of or surrender of a lease to the primary dwelling of the individual;

(3) notice that the conservator has delegated a power that requires court approval under Section 414 or substantially all powers of the conservator;

(4) notice that the conservator will be unavailable to perform the conservator's duties for more than one month;

(5) a copy of the conservator's plan under Section 419 and the conservator's report under Section 423;

(6) access to court records relating to the conservatorship;

(7) notice of a transaction involving a substantial conflict between the conservator's fiduciary duties and personal interests;

(8) notice of the death or significant change in the condition of the individual;

(9) notice that the court has limited or modified the powers of the conservator;

and

(10) notice of the removal of the conservator.

(f) If an individual subject to conservatorship is an adult, the spouse[, domestic partner,] and adult children of the adult subject to conservatorship are entitled under subsection (e) to notice unless the court determines notice would be contrary to the preferences or prior directions of the adult subject to conservatorship or not in the best interest of the adult.

(g) If an individual subject to conservatorship is a minor, each parent and adult sibling of the minor is entitled under subsection (e) to notice unless the court determines notice would not be in the best interest of the minor.

Comment

This section explains what must be included in a court's order appointing a conservator, and the consequences of certain omissions in that order. It contains provisions that are critical both to ensuring that conservatorship orders are properly limited and that parties are aware of the consequences of an appointment. In addition, it contains provisions that facilitate conservatorship monitoring. The section is an update and considerable expansion of Section 409 of the 1997 act.

Subsection (a) requires any court appointing a conservator for a minor to include findings that support that appointment. If the court is establishing a full conservatorship, the order must also explain why a limited conservatorship would not meet the minor's identified needs.

Subsection (b) requires any court appointing a conservator for an adult to specifically state its finding that there is clear-and-convincing evidence that the respondent's identified needs cannot be met by a protective arrangement or other less restrictive alternative. The court must also include a specific finding that there was clear-and-convincing evidence that the respondent was given proper notice.

Subsection (c) requires a court that is creating a full conservatorship for an adult to state the reason for doing so, as well as to provide specific findings that support its conclusion that a limited conservatorship would be inappropriate. This provision is designed to ensure that courts engage in thorough fact-finding and consider less restrictive alternatives and approaches to tailor orders before appointing a full conservator. It also recognizes that it has often been—as a practical matter—easier for courts to appoint a full conservator than a limited one because the former has often allowed the court to avoid the need to make a lengthy finding as to specific rights retained, and to secure additional assessments if needed. Requiring additional fact finding for imposition of full conservatorships helps counter such perverse incentives.

Subsection (d) requires a court order establishing a limited conservatorship for an adult to clearly state the specific property being placed under the conservator's control and the powers that are being granted to the conservator. This statement will then define the scope of the conservatorship. It is important for third parties relying on the order to easily ascertain the conservator's powers. In addition to a clear statement in the order, Section 108(c) requires that the letters of office state any limitations on the conservator's powers or on the property subject to conservatorship.

Subsection (e) requires the court appointing a conservator for an adult to identify any person entitled to notice of the rights of the adult, a copy of the conservator's plan, access to records related to the conservatorship, notice of changes in the appointment, notice of a sale of the adult's primary dwelling or the surrender of the lease to that dwelling, and notice of certain other important events that may occur in the life of the adult or in the course of the conservatorship. The events include a change in the adult's condition, the conservator delegating certain important powers, and the conservator's unavailability to perform key duties.

Subsection (f) requires that the spouse, domestic partner, and adult children of an adult subject to conservatorship be included in the list of persons so entitled to notice under subsection (e) unless the court makes an explicit finding that this would be inconsistent with the preferences or prior directions of the adult, or otherwise not in the adult's best interest. Thus, the default is that the spouse, domestic partner, and adult children are entitled to this notice. It should only be the rare case in which the court does not grant the right to such notice to all persons in these categories. Moreover, where a court is concerned about a particular family member receiving particular information, the court should simply limit the right to that information—and not the right to all information identified in subsection (e).

Subsection (g) sets forth who is to be included in the list of persons entitled to notice under subsection (e) if the individual subject to conservatorship is a minor. Under subsection (g), each parent and adult sibling of a minor subject to conservatorship is entitled to notice under subsection (e) unless the court makes an explicit finding that this would not be in the minor's best interest. Thus, the default is that the parents and adult siblings are entitled to this notice. It should only be the rare case in which the court does not grant the right to such notice to all persons in these categories. Moreover, where a court is concerned about a particular parent or adult sibling receiving particular information, the court should simply limit the right to that information—and not the right to all information identified in subsection (e).

Subsection (e) represents an important innovation in this act. It leverages the interest of private individuals to monitor conservatorships at minimal cost to the public by requiring courts to—absent good cause—order that conservator give to the adult's family or friends notice of certain suspect actions. These individuals on notice can then act as an extra set of eyes and ears for the court to prevent or remedy abuse.

SECTION 412. NOTICE OF ORDER OF APPOINTMENT; RIGHTS.

(a) A conservator appointed under Section 411 shall give to the individual subject to conservatorship and to all other persons given notice under Section 403 a copy of the order of appointment, together with notice of the right to request termination or modification. The order and notice must be given not later than 14 days after the appointment.

(b) Not later than 30 days after appointment of a conservator under Section 411, the court shall give to the individual subject to conservatorship, the conservator, and any other person entitled to notice under Section 411(e) a statement of the rights of the individual subject to conservatorship and procedures to seek relief if the individual is denied those rights. The statement must be in plain language, in at least 16-point font, and to the extent feasible, in a

language in which the individual subject to conservatorship is proficient. The statement must notify the individual subject to conservatorship of the right to:

- (1) seek termination or modification of the conservatorship, or removal of the conservator, and choose an attorney to represent the individual in these matters;
- (2) participate in decision making to the extent reasonably feasible;
- (3) receive a copy of the conservator's plan under Section 419, the conservator's inventory under Section 420, and the conservator's report under Section 423; and
- (4) object to the conservator's inventory, plan, or report.

(c) If a conservator is appointed for the reasons stated in Section 401(b)(1)(B) and the individual subject to conservatorship is missing, notice under this section to the individual is not required.

Comment

This section, which is new to the act, is designed to ensure that the conservator, the individual subject to conservatorship, and family members and friends identified by the court, understand the appointment and the most important rights of the individual subject to conservatorship. The provisions help conservators to better understand their roles, thus reducing the risk of conservators acting inappropriately. They also increase transparency, help set reasonable expectations, and facilitate monitoring of the conservatorship by the individual, to the extent he or she is able, and by family and friends.

Subsection (a) requires a conservator to give to the individual subject to conservatorship and all persons entitled to notice of the original petition, a copy of the order of appointment as well as notice of the right to request termination or modification of the conservatorship. This notice must be given within 14 days after the appointment.

Subsection (b) requires the court not later than 30 days after the appointment to give notice of key rights to the individual subject to conservatorship, to the conservator, and to other persons whom the court stated in its order of appointment were entitled to notice under Section 411(e). Providing notice of key rights is new to the act. It was added so that individuals subject to guardianship and their families are in a better position to act on their rights. Among the key rights are the right to seek termination or modification of the conservatorship (Section 431); the right to petition for the conservator's removal (Section 430); the right to participate in decision making to the extent reasonably feasible (Section 418); and the right to receive and object to a conservator's plan (Section 419), inventory (Section 420), and report (Section 423).

Subsection (c) excuses notice to the individual subject to conservatorship in cases in which the individual is missing and a conservator was appointed because the adult was missing, detained, or unable to return to the United States.

SECTION 413. EMERGENCY CONSERVATOR.

(a) On its own or on petition by a person interested in an individual's welfare after a petition has been filed under Section 402, the court may appoint an emergency conservator for the individual if the court finds:

(1) appointment of an emergency conservator is likely to prevent substantial and irreparable harm to the individual's property or financial interests;

(2) no other person appears to have authority and willingness to act in the circumstances; and

(3) there is reason to believe that a basis for appointment of a conservator under Section 401 exists.

(b) The duration of authority of an emergency conservator may not exceed [60] days and the emergency conservator may exercise only the powers specified in the order of appointment. The emergency conservator's authority may be extended once for not more than [60] days if the court finds that the conditions for appointment of an emergency conservator under subsection (a) continue.

(c) Immediately on filing of a petition for an emergency conservator, the court shall appoint an attorney to represent the respondent in the proceeding. Except as otherwise provided in subsection (d), reasonable notice of the date, time, and place of a hearing on the petition must be given to the respondent, the respondent's attorney, and any other person the court determines.

(d) The court may appoint an emergency conservator without notice to the respondent and any attorney for the respondent only if the court finds from an affidavit or testimony that the

respondent's property or financial interests will be substantially and irreparably harmed before a hearing with notice on the appointment can be held. If the court appoints an emergency conservator without giving notice under subsection (c), the court must give notice of the appointment not later than 48 hours after the appointment to:

- (1) the respondent;
- (2) the respondent's attorney; and
- (3) any other person the court determines.

(e) Not later than [five] days after the appointment, the court shall hold a hearing on the appropriateness of the appointment.

(f) Appointment of an emergency conservator under this section is not a determination that a basis exists for appointment of a conservator under Section 401.

(g) The court may remove an emergency conservator appointed under this section at any time. The emergency conservator shall make any report the court requires.

Comment

This section provides for the short-term appointment of an emergency conservator. The purpose of the section is to provide an expeditious means for the court to immediately protect an individual in urgent need of such protection. This section is new to this act. The 1997 act made no provision for the appointment of an emergency conservator.

Appointment of an emergency conservator is in order only when three conditions are met. First, there needs to be no one else willing or with authority to act to meet the individual's need. Second, the court must find that appointment of an emergency conservator is likely to prevent substantial and irreparable harm to the individual's property or financial interests. Thus, appointment of an emergency conservator is not proper where there is not an urgent need for such an appointment. Third, the court must have reason to believe that there is a basis to appoint a conservator under Section 401. Thus, the circumstances under which an emergency conservator can be appointed for a minor differ from those in which one can be appointed for an adult because Section 401 contains separate standards for appointment of a conservator for a minor and for an adult. In the case of an adult, an emergency conservator cannot be appointed where all indications are that the adult has the ability to receive and evaluate information and make and communicate decisions. In such circumstances, the court would not have reason to believe that the basis for appointment of a conservator for the adult under Section 401 exists.

Appointment of an emergency conservator represents a significant deprivation of liberty. As such, subsection (c) requires appointment of counsel for the respondent. Counsel for the respondent, consistent with the provisions of Section 406, should advocate for the respondent's wishes to the extent reasonably ascertainable. If counsel cannot reasonably ascertain those wishes, then counsel should advocate for a result that is least restrictive in type, duration, and scope, consistent with the respondent's interests. In some cases, this might mean advocating for a protective arrangement instead of conservatorship under Article 5.

Emergency conservators may only be empowered to act for a limited time. Subsection (b) specifies a maximum duration of 60 days although this time limit is placed in brackets to signal that enacting jurisdictions are free to adjust the period. This 60-day limit is designed to protect the due process rights of the respondent, as this section allows appointment of an emergency conservator without the full process otherwise required.

Subsection (d) authorizes the appointment of an emergency conservator without notice to the respondent only under compelling circumstances. Appointment of an emergency conservator without notice to the respondent should be a very rare occurrence. An emergency conservator may only be appointed without prior notice when there is testimony that the respondent's property or financial interests would be substantially and irreparably harmed before the hearing on the appointment with notice could be held. In such case, notice must be given within 48 hours. A hearing must then be held within five days after the appointment, or such number of days selected by the enacting state that the enacting state selects. States enacting this act should look at their requirements for an *ex parte* hearing and determine whether to adopt the time limit contained in this subsection or whether to impose different time limits. Five days appears to be the most common time period for a return hearing following an *ex parte* appointment. If the enacting state uses a different time period for a hearing following an *ex parte* appointment of a conservator, the time period used should be relatively short.

Unless stated to the contrary in this section, other sections of this act applicable to conservators generally apply to an emergency conservator appointed under this section, including the provisions relating to the duties of conservators.

SECTION 414. POWERS OF CONSERVATOR REQUIRING COURT

APPROVAL.

(a) Except as otherwise ordered by the court, a conservator must give notice to persons entitled to notice under Section 403(d) and receive specific authorization by the court before the conservator may exercise with respect to the conservatorship the power to:

- (1) make a gift, except a gift of de minimis value;
- (2) sell, encumber an interest in, or surrender a lease to the primary dwelling of

the individual subject to conservatorship;

(3) convey, release, or disclaim a contingent or expectant interest in property, including marital property and any right of survivorship incident to joint tenancy or tenancy by the entireties;

(4) exercise or release a power of appointment;

(5) create a revocable or irrevocable trust of property of the conservatorship estate, whether or not the trust extends beyond the duration of the conservatorship, or revoke or amend a trust revocable by the individual subject to conservatorship;

(6) exercise a right to elect an option or change a beneficiary under an insurance policy or annuity or surrender the policy or annuity for its cash value;

(7) exercise a right to an elective share in the estate of a deceased spouse [or domestic partner] of the individual subject to conservatorship or renounce or disclaim a property interest; [and]

(8) grant a creditor priority for payment over creditors of the same or higher class if the creditor is providing property or services used to meet the basic living and care needs of the individual subject to conservatorship and preferential treatment otherwise would be impermissible under Section 428(e); and

(9) make, modify, amend, or revoke the will of the individual subject to conservatorship in compliance with [the state's statute for executing a will]].

(b) In approving a conservator's exercise of a power listed in subsection (a), the court shall consider primarily the decision the individual subject to conservatorship would make if able, to the extent the decision can be ascertained.

(c) To determine under subsection (b) the decision the individual subject to

conservatorship would make if able, the court shall consider the individual's prior or current directions, preferences, opinions, values, and actions, to the extent actually known or reasonably ascertainable by the conservator. The court also shall consider:

(1) the financial needs of the individual subject to conservatorship and individuals who are in fact dependent on the individual subject to conservatorship for support, and the interests of creditors of the individual;

(2) possible reduction of income, estate, inheritance, or other tax liabilities;

(3) eligibility for governmental assistance;

(4) the previous pattern of giving or level of support provided by the individual;

(5) any existing estate plan or lack of estate plan of the individual;

(6) the life expectancy of the individual and the probability the conservatorship will terminate before the individual's death; and

(7) any other relevant factor.

(d) A conservator may not revoke or amend a power of attorney for finances executed by the individual subject to conservatorship. If a power of attorney for finances is in effect, a decision of the agent takes precedence over that of the conservator, unless the court orders otherwise.

Legislative Note: Language in subsection (a)(9) is bracketed to allow an enacting state to reference its statute on will execution.

Comment

This section, which is similar to Section 411 of the 1997 act lists actions for which a conservator must obtain prior court approval. The actions listed in the comparable provision of the 1997 act all related to the individual's estate plan.

This section adds two non-estate planning actions requiring court approval that were not part of the 1997 act. First, subsection (a)(2) requires court approval to "sell, encumber an interest in, or surrender a lease to the primary dwelling of the individual subject to conservatorship." This

provision is a corollary to Section 314(e)(6), which prohibits a guardian from surrendering a lease to or selling the individual's primary residence unless the proposed action was included in the guardian's plan; the court authorized the action by specific order; or at least 14 days advance notice was given to the persons listed under Section 310(e) and no objection has been filed.

Second, subsection (a)(8) permits a court to grant a creditor who has provided basic living expenses a higher priority for payment from an insolvent estate than would otherwise apply. Under Section 428(d), such a creditor would ordinarily have a fifth priority claim. Before paying such a higher priority claim, however, the conservator should be cautioned that the higher priority provided does not alter creditor priority stated in federal bankruptcy law or the Internal Revenue Code.

The estate planning powers listed in subsection (a) are all carried over from Section 411 of the 1997 act. However, under subsection (a)(1) of this section, court approval is not required for a gift of *de minimis* value, only for larger gifts. The act does not try to draw the line on what is and what is not a "*de minimis*" gift. Under Sections 411(a) and 427(b) of the 1997 act the line had been drawn at 20% of the estate income.

Subsection (a)(9), which provides that a conservator with court approval may make, modify, amend, or revoke the individual's will, is copied from Section 411(a)(7) and (b) of the 1997 act, which had in turn been taken from the California and South Dakota statutes. *See* Cal. Prob. Code Sections 2580, 6100.5(c), 6110(b); S.D. Codified Laws Ann. Section 29A-2-420(8). A place is provided in subsection (a)(9) for the enacting jurisdiction to insert the citation for its statute on the execution requirements for ordinary attested wills. Subsection (a)(9) follows the approach taken by the South Dakota statute, which is to contain the needed will execution authority within the conservatorship statutes. The other approach, followed by California, is to amend the statute on execution of wills to specifically allow execution by a conservator.

Pursuant to subsection (b), decisions by the conservator under this section must be based primarily on the decision that the individual subject to conservatorship would have made if able. Subsection (c) lists other factors the court is to consider with primacy given to the individual's personal values and expressed desires, past and present. In this regard, the act confirms what is likely already the law with respect to many of the transactions listed in this section. Even in the absence of a statute, the conservator should consider the individual's probable wishes when making decisions, particularly with respect to gifts and other estate planning related transactions. For the history of the judicially-created doctrine of substituted judgment and a sampling of representative cases, see Restatement (Third) of the Law of Trusts, § 11, Reporter's note to cmt. f (2003). The authority of a court to authorize a conservator to engage in estate planning related transactions with approval of the court is also expressly confirmed by statute in numerous states.

While not so limited, the authority confirmed by this section will often be used to minimize tax liabilities. For example, by making annual exclusion gifts, the federal estate tax liability at the protected person's death may be substantially reduced. Also quite valuable is the ability to seek court approval to amend the protected person's estate planning documents. For example, failures to meet the technical requirements for the federal estate tax marital or charitable deduction

sometimes may be corrected through a judicially-approved amendment of the relevant will or trust document.

This section can also be used for a non-tax transaction to qualify for governmental benefits, or the court may authorize the conservator to continue the individual's prior pattern of giving to charities and others. For smaller donors, such gifts would typically fit within the exception for "*de minimis*" gifts in subsection (a)(1) which do not require court approval.

Under subsection (d), a conservator may not revoke or amend the individual's power of attorney for finances. Furthermore, if a durable power of attorney is in effect, the decision of the agent takes precedence over that of the conservator, absent a court order to the contrary. However, the court always has authority to revoke the power of attorney in an appropriate case. The purpose of this provision is to make certain that the court is aware of the power of attorney and only the court has determined that it is appropriate to revoke or amend the power. To make certain that the court is aware of the power of attorney, Section 402(b)(3)(H) requires that the petition for the appointment of a conservatorship list the name and address of any agent, if known. Also, Section 403(c) includes the agent among the persons who must be given notice of the petition.

The persons who must be given notice of hearing on a petition under this section are as determined under Section 403(d), which prescribes the notice requirements for petitions for orders subsequent to the appointment of a conservator. Notice of the hearing, together with a copy of the petition, must be given to the individual subject to conservatorship, if the individual has attained 12 years of age and is not missing, detained, or unable to return to the United States. Notice must also be given to the conservator and to any other person the court determines.

SECTION 415. PETITION FOR ORDER AFTER APPOINTMENT. An individual subject to conservatorship or a person interested in the welfare of the individual may petition for an order:

- (1) requiring the conservator to furnish a bond or collateral or additional bond or collateral or allowing a reduction in a bond or collateral previously furnished;
- (2) requiring an accounting for the administration of the conservatorship estate;
- (3) directing distribution;
- (4) removing the conservator and appointing a temporary or successor conservator;
- (5) modifying the type of appointment or powers granted to the conservator, if the extent of protection or management previously granted is excessive or insufficient to meet the individual's needs, including because the individual's abilities or supports have changed;

(6) rejecting or modifying the conservator’s plan under Section 419, the conservator’s inventory under Section 420, or the conservator’s report under Section 423; or

(7) granting other appropriate relief.

Comment

Once a conservator has been appointed, the court supervising the conservatorship will ordinarily act only following the request of some moving party. This section, which is similar to Section 414 of the 1997 act, lists six of the more common types of petitions, and then adds a paragraph (7), which allows for petitions for “other appropriate relief”. The six common petitions are requests relating to bond, a demand for an accounting, a request for distribution, a petition to remove the conservator, a request to modify the type of appointment and give the conservator less or more powers, and a request for an order rejecting or modifying the conservator’s plan, inventory, or report.

It is essential that the individual subject to conservatorship have the right to petition for appropriate relief, and this section so provides. It is also important that other persons with an interest in the individual’s welfare have access to the courts, which this provision also provides.

While a limited conservatorship should be ordered at the time of the original appointment whenever feasible, limited appointments may also be made at a later date. Perhaps the possibility of a limited conservatorship was not adequately considered, or perhaps the individual’s situation has improved to the point that a limited conservatorship is now realistic. Also, when a limited conservatorship is ordered in the first instance, it is sometimes necessary to grant the conservator additional powers or control over additional property. Paragraph (5) therefore authorizes petitions to increase or decrease the powers granted to the conservator or property subject to the conservatorship. Section 401(b) requires that a need for increased powers in an adult proceeding be proven by clear-and-convincing evidence.

SECTION 416. BOND; ALTERNATIVE ASSET-PROTECTION

ARRANGEMENT.

(a) Except as otherwise provided in subsection (c), the court shall require a conservator to furnish a bond with a surety the court specifies, or require an alternative asset-protection arrangement, conditioned on faithful discharge of all duties of the conservator. The court may waive the requirement only if the court finds that a bond or other asset-protection arrangement is not necessary to protect the interests of the individual subject to conservatorship. Except as otherwise provided in subsection (c), the court may not waive the requirement if the conservator

is in the business of serving as a conservator and is being paid for the conservator's service.

(b) Unless the court directs otherwise, the bond required under this section must be in the amount of the aggregate capital value of the conservatorship estate, plus one year's estimated income, less the value of property deposited under an arrangement requiring a court order for its removal and real property the conservator lacks power to sell or convey without specific court authorization. The court, in place of surety on a bond, may accept collateral for the performance of the bond, including a pledge of securities or a mortgage of real property.

(c) [A regulated financial-service institution qualified to do trust business] in this state is not required to give a bond under this section.

Legislative Note: *Each state enacting the act can insert in subsection (c) the particular term or terms used in the state or statutory reference for such an institution or, alternatively, use the language provided.*

Comment

Bond for a conservator is nearly always required under this act. The bond may be waived only if (1) the conservator is a financial institution with trust powers, (2) the court finds that a bond is not necessary to protect the interests of the individual, or (3) the court orders an alternate asset arrangement. This approach is a significant shift from Section 415 of the 1997 act under which bond was discretionary with the court. This change parallels a similar significant shift in the National Probate Court Standards. In Standard 3.3.14 of the 1993 edition, bond was discretionary with the court. By contrast, Standard 3.3.15 of the 2013 edition requires that a conservator post bond except in unusual circumstances.

One possible way to avoid bond is for the court to order the placement of the conservatorship estate into an asset protection arrangement. Subsection (b) provides examples, but not a complete list, of asset protection arrangements. Mentioned are the deposit of the estate assets in a financial institution requiring a court order for their removal and prohibiting the sale of the individual's real property without order of court. Such asset protection arrangements may be reasonable alternatives to bond where the expense associated with the bond is not justified in light of the circumstances of the case. This may include a situation where the conservator is an individual who is unable to economically obtain bond due to the individual's credit rating or other factors but who the court nevertheless believes is best suited to serve as conservator.

Subsection (b) specifies that bond, where required, must be in the amount of the capital value of the conservatorship estate plus one year's income, although the court can adjust the amount. "One year's income" refers to the anticipated income of the conservatorship estate. Ideally, the

bond should be in an amount adequate to guard against financial exploitation of the assets of the individual subject to conservatorship by the conservator, even in cases where a relative or friend is appointed as conservator. National Probate Court Standard 3.3.15 (2013) contains a useful list of factors that the court may wish to consult when setting bond. Factors mentioned are (1) the value of the estate and annual gross income and other receipts; (2) the extent to which the estate has been deposited under an asset protection arrangement, including requiring a court order for the sale of real estate and placement of estate funds in a restricted account with proof that the bank will enforce the restrictions; (3) the frequency of the conservator's required reporting; (4) the extent to which the income and receipts are payable directly to a facility responsible for the individual's care; (5) whether the conservator was appointed pursuant to a nomination that requested that bond be waived; (6) any information received through a background check; and (7) the financial responsibility of the proposed conservator.

Bond may be ordered either at the time of the original appointment or at any later time. The court may also increase or decrease bond at any time.

SECTION 417. TERMS AND REQUIREMENTS OF BOND.

(a) The following rules apply to the bond required under Section 416:

(1) Except as otherwise provided by the bond, the surety and the conservator are jointly and severally liable.

(2) By executing a bond provided by a conservator, the surety submits to the personal jurisdiction of the court that issued letters of office to the conservator in a proceeding relating to the duties of the conservator in which the surety is named as a party. Notice of the proceeding must be given to the surety at the address shown in the records of the court in which the bond is filed and any other address of the surety then known to the person required to provide the notice.

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

(4) A proceeding against the bond may be brought until liability under the bond is exhausted.

(b) A proceeding may not be brought under this section against a surety of a bond on a matter as to which a proceeding against the conservator is barred.

(c) If a bond under Section 416 is not renewed by the conservator, the surety or sureties immediately shall give notice to the court and the individual subject to conservatorship.

Comment

This section specifies various technical requirements that apply when bond is required. The cost of the bond is payable from the conservatorship estate. Subsection (c), which is new to the act, was copied from S.D. Codified Laws Ann. § 29A-5-111 (2017).

SECTION 418. DUTIES OF CONSERVATOR.

(a) A conservator is a fiduciary and has duties of prudence and loyalty to the individual subject to conservatorship.

(b) A conservator shall promote the self-determination of the individual subject to conservatorship and, to the extent feasible, encourage the individual to participate in decisions, act on the individual's own behalf, and develop or regain the capacity to manage the individual's personal affairs.

(c) In making a decision for an individual subject to conservatorship, the conservator shall make the decision the conservator reasonably believes the individual would make if able, unless doing so would fail to preserve the resources needed to maintain the individual's well-being and lifestyle or otherwise unreasonably harm or endanger the welfare or personal or financial interests of the individual. To determine the decision the individual would make if able, the conservator shall consider the individual's prior or current directions, preferences, opinions, values, and actions, to the extent actually known or reasonably ascertainable by the conservator.

(d) If a conservator cannot make a decision under subsection (c) because the conservator does not know and cannot reasonably determine the decision the individual subject to

conservatorship probably would make if able, or the conservator reasonably believes the decision the individual would make would fail to preserve resources needed to maintain the individual's well-being and lifestyle or otherwise unreasonably harm or endanger the welfare or personal or financial interests of the individual, the conservator shall act in accordance with the best interest of the individual. In determining the best interest of the individual, the conservator shall consider:

(1) information received from professionals and persons that demonstrate sufficient interest in the welfare of the individual;

(2) other information the conservator believes the individual would have considered if the individual were able to act; and

(3) other factors a reasonable person in the circumstances of the individual would consider, including consequences for others.

(e) Except when inconsistent with the conservator's duties under subsections (a) through (d), a conservator shall invest and manage the conservatorship estate as a prudent investor would, by considering:

(1) the circumstances of the individual subject to conservatorship and the conservatorship estate;

(2) general economic conditions;

(3) the possible effect of inflation or deflation;

(4) the expected tax consequences of an investment decision or strategy;

(5) the role of each investment or course of action in relation to the conservatorship estate as a whole;

(6) the expected total return from income and appreciation of capital;

(7) the need for liquidity, regularity of income, and preservation or appreciation of capital; and

(8) the special relationship or value, if any, of specific property to the individual subject to conservatorship.

(f) The propriety of a conservator's investment and management of the conservatorship estate is determined in light of the facts and circumstances existing when the conservator decides or acts and not by hindsight.

(g) A conservator shall make a reasonable effort to verify facts relevant to the investment and management of the conservatorship estate.

(h) A conservator that has special skills or expertise, or is named conservator in reliance on the conservator's representation of special skills or expertise, has a duty to use the special skills or expertise in carrying out the conservator's duties.

(i) In investing, selecting specific property for distribution, and invoking a power of revocation or withdrawal for the use or benefit of the individual subject to conservatorship, a conservator shall consider any estate plan of the individual known or reasonably ascertainable to the conservator and may examine the will or other donative, nominative, or appointive instrument of the individual.

(j) A conservator shall maintain insurance on the insurable real and personal property of the individual subject to conservatorship, unless the conservatorship estate lacks sufficient funds to pay for insurance or the court finds:

(1) the property lacks sufficient equity; or

(2) insuring the property would unreasonably dissipate the conservatorship estate or otherwise not be in the best interest of the individual.

(k) If a power of attorney for finances is in effect, a conservator shall cooperate with the agent to the extent feasible.

(l) A conservator has access to and authority over a digital asset of the individual subject to conservatorship to the extent provided by [the Revised Uniform Fiduciary Access to Digital Assets Act] or court order.

(m) A conservator for an adult shall notify the court if the condition of the adult has changed so that the adult is capable of exercising rights previously removed. The notice must be given immediately on learning of the change.

Comment

This section is a greatly expanded version of Section 418 of the 1997 act.

Notably, subsection (a) makes a significant change in the basic responsibilities of the conservator. Instead of providing that a conservator shall observe the standards of care applicable to trustees, as was the case under Section 418(a) of the 1997 act, subsection (a) makes clear that the conservator's obligations are not owed to the estate but are owed directly to the individual subject to conservatorship. Subsection (a), after reciting that a conservator is a fiduciary, continues by stating that the conservator has duties of prudence and loyalty running directly to the individual under conservatorship.

This emphasis on the individual under conservatorship is also evident in subsection (b). The role of the conservator is not merely to conserve assets. The conservator is also required to reach out to the individual subject to conservatorship and to make the individual a partner in decision making where feasible. To the extent feasible, the conservator is to encourage the individual to participate in decisions, act on the individual's own behalf, and develop or regain the capacity to manage the individual's own affairs. This is consistent with the act's philosophy that guardianship and conservatorship should be as unobtrusive as possible. Intrusion is minimized when the views of the individual subject to conservatorship are respected by the conservator.

Subsections (c) and (d) provide a clear decision-making standard for conservators and are broadly similar to the decision-making standard for guardians for adults in Section 313(d) and (e). Subsection (c) of this section instructs the conservator to use what is frequently referred to as "substituted judgment" – that is, to make the decision the individual subject to conservatorship would make if able. But the conservator may diverge from substituted judgment when necessary to preserve assets to assure the individual's well-being or where using substituted judgment would unreasonably harm or endanger the individual's welfare or personal or financial interests.

Subsection (d) provides a decision-making standard for conservators who lack sufficient information to use the substituted judgment standard in subsection (c). In such situations, the conservator is instructed to act in the individual's best interest and is given direction on what must be considered in order to determine the individual's best interest. The decision-making standards in subsections (c) and (d) follow in broad outline the recommendations of the Third National Guardianship Summit. *See* David M. English, *Amending the Uniform Guardianship and Protective Proceedings Act to Implement the Standards and Recommendations of the Third National Guardianship Summit*, 12 NAELA J. 33, 45-47 (2016).

While a conservator's role is not identical to that of a trustee, many principles of trust law are relevant to conservators. Section 418(a) of the 1997 act provided that a conservator must observe the standards of care applicable to trustees but this simple statement left open the issue whether that standard of care included only the basic obligation of prudence or whether it also included the many other duties of a trustee such as the duties listed in Article 8 of the Uniform Trust Code. This act is more selective, incorporating only those powers and duties that the drafting committee concluded were clearly applicable to conservators.

Subsections (e)-(h) list a number of duties based on trust law concepts, all of which are drawn from the widely enacted Uniform Prudent Investor Act, which was approved by the Uniform Law Commission in 1994. Subsection (e), which is copied from Section 2(c) of the Prudent Investor Act, requires the conservator to invest as a prudent investor and incorporates seven of the factors from the other act that are used to judge the investment decisions of a trustee. Subsection (e) also adds a requirement that the conservator consider the circumstances of the individual subject to conservatorship and the conservatorship estate.

Subsection (f) is copied from Section 8 of the Uniform Prudent Investor Act. It emphasizes that a conservator's actions as a prudent investor are to be judged at the time of the decision and not by hindsight.

Subsection (g) is copied from Section 2(d) of the Uniform Prudent Investor Act. One aspect of a conservator's obligation to invest with prudence is a requirement that the conservator use reasonable efforts to verify facts relevant to the investment and management of the conservatorship estate.

Subsection (h) is copied from Section 2(f) of the Uniform Prudent Investor Act. It restates the well-known doctrine, based on trust law principles, that a conservator who either has special skills or expertise, or represents that he or she has special skills or expertise, has a duty to use those special skills or expertise. Such a conservator is therefore held to a higher standard but only for those tasks for which the conservator has special skills or expertise. As stated in the comment to Section 2 of the Uniform Prudent Investor Act:

The prudent investor standard applies to a range of fiduciaries, from the most sophisticated professional investment management firms and corporate fiduciaries, to family members of minimal experience. Because the standard of prudence is relational, it follows that the standard for professional trustees is the standard of prudent professionals; for amateurs, it is the standard of prudent amateurs.

Subsection (i), which was copied from Section 418(d) of the 1997 act, but which is contrary to at least some case law, allows a conservator access to and the right to examine the will of the individual subject to conservatorship and other documents comprising the individual's estate plan. Such access is essential for the conservator to carry out the obligation, stated in subsection (c), to give substantial weight to the preferences of the individual under conservatorship when making decisions. For example, by allowing the conservator access to the estate plan, the risk of inadvertent sales of specifically devised property and the difficult ademption problems such sales often create may be avoided. Access to the estate plan also facilitates, where appropriate, the filing of a petition with respect to the individual's estate plan as authorized by Section 414.

Although one might assume that the obligation to carry adequate insurance is fundamental to acting as a prudent conservator, the drafting committee concluded that some clarification would be helpful. Subsection (j) requires that a conservator maintain insurance on the insurable real and personal property unless the conservatorship estate lacks sufficient funds or the court concludes that the property lacks sufficient equity or insuring the property would unreasonably dissipate the estate or otherwise not be in the individual's best interest.

Subsection (k) requires a conservator to cooperate with the agent under any power of attorney for finances that may be in effect. Pursuant to Section 414, however, the decision of the agent takes precedence over that of the conservator unless the court orders otherwise. If the power of attorney is brought to the court's attention during the appointment process and the court concludes that the power of attorney is valid and the agent is acting appropriately under it, the court should not normally appoint a conservator unless the agent's authority is inadequate for some reason. If the court concludes that the agent under the power of attorney is unable to satisfactorily perform the agent's functions due to abuse by the agent or for other reason, an appropriate course of action is for the court to terminate the power of attorney.

While the appointment of a conservator normally gives the conservator the automatic rights to take control of the assets under conservatorship, access to digital assets such as social media accounts, is often restricted by terms-of-service agreements (TOSA). Typically, TOSA will deny access to anyone other than the owner, even a conservator or personal representative acting for the owner. The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), which was approved by the Uniform Law Commission in 2015 and has been enacted in over 40 states as of June 2018, grants a conservator access to such assets. Under Section 14 of that other act, which this act incorporates by reference in subsection (l), a conservator may access digital assets if expressly authorized by the court. Obtaining such specific orders upon opening of a conservatorship should become standard practice.

Finally, in furtherance of the concepts of limited conservatorship and least restrictive alternatives, subsection (m) obligates the conservator to immediately notify the court when the condition of an adult subject to conservatorship has sufficiently changed so that the adult is capable of exercising rights previously removed. The conservator should not wait until the next reporting period to inform the court.

SECTION 419. CONSERVATOR'S PLAN.

(a) A conservator, not later than 60 days after appointment and when there is a significant change in circumstances or the conservator seeks to deviate significantly from the conservator's plan, shall file with the court a plan for protecting, managing, expending, and distributing the assets of the conservatorship estate. The plan must be based on the needs of the individual subject to conservatorship and take into account the best interest of the individual as well as the individual's preferences, values, and prior directions, to the extent known to or reasonably ascertainable by the conservator. The conservator shall include in the plan:

(1) a budget containing projected expenses and resources, including an estimate of the total amount of fees the conservator anticipates charging per year and a statement or list of the amount the conservator proposes to charge for each service the conservator anticipates providing to the individual;

(2) how the conservator will involve the individual in decisions about management of the conservatorship estate;

(3) any step the conservator plans to take to develop or restore the ability of the individual to manage the conservatorship estate; and

(4) an estimate of the duration of the conservatorship.

(b) A conservator shall give notice of the filing of the conservator's plan under subsection (a), together with a copy of the plan, to the individual subject to conservatorship, a person entitled to notice under Section 411(e) or a subsequent order, and any other person the court determines. The notice must include a statement of the right to object to the plan and be given not later than 14 days after the filing.

(c) An individual subject to conservatorship and any person entitled under subsection (b)

to receive notice and a copy of the conservator's plan may object to the plan.

(d) The court shall review the conservator's plan filed under subsection (a) and determine whether to approve the plan or require a new plan. In deciding whether to approve the plan, the court shall consider an objection under subsection (c) and whether the plan is consistent with the conservator's duties and powers. The court may not approve the plan until [30] days after its filing.

(e) After a conservator's plan under this section is approved by the court, the conservator shall provide a copy of the plan to the individual subject to conservatorship, a person entitled to notice under Section 411(e) or a subsequent order, and any other person the court determines.

Comment

This section is an expansion of Section 418(c) of the 1997 act, which required that the conservator file a plan but did not provide much detail on what the plan should contain. The requirement that the conservator file a plan is consistent with National Probate Court Standard 3.3.16 (2013), and with Third Summit Guardianship Summit Recommendation 1.1. *See Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191, 1192 (2012).

The plan serves as a tool for the conservator to manage the estate in accordance with the conservator's duties under the act. The existence of the plan also allows for more meaningful monitoring of the conservator as the court and others can hold a conservator accountable for compliance with the plan. The conservator's plan also plays an important role in avoiding subsequent problems. It allows the court, the individuals subject to conservatorship, and other persons who have received the plan to identify potential problems. From the conservator's perspective, this can be advantageous as well, creating a mechanism to alert the conservator to objections in advance of action, at a time when the conservator can still change course.

Subsection (a) requires that the conservator file a plan with the court within 60 days after appointment, whenever there is a significant change of circumstances, or if the conservator seeks to deviate significantly from the plan currently on file. In addition to plans for expenditures, investments, and distributions, the plan must list the steps that will be taken to develop or restore the individual's ability to manage the person's property and an estimate of the duration of the conservatorship. The plan must take into account the individual's preferences, values, and prior directions to the extent known to or reasonably ascertainable to the conservator in addition to the individual's best interest.

Under subsection (a)(1), one topic that must be addressed in the plan is the amount the

conservator proposes to charge for each service the conservator anticipates providing to the adult. While earlier disclosure of the proposed fees is not required, best practice will typically be to disclose fees even before crafting the plan. For example, it is helpful for the court to have a sense of the likely fees in determining whether or not to make the appointment.

While a conservator need not request a hearing on the plan, subsection (b) requires that the conservator, within 14 days after its filing, give notice of the filing of the plan to the individual subject to conservatorship, to a person entitled to notice under Section 411(e), and to any other person the court directs. The notice must include a statement of the right to object to the plan, a right which is granted in subsection (c). Should those notified object or have other concerns about the plan, a hearing on the plan may be requested pursuant to Section 415.

Subsection (d) requires the court to review the conservator's plan, whether it is a new plan or a revision, and to determine whether or not to approve it. In order to ensure that those receiving copies of the plan have sufficient time to object, the court may not approve the plan until 30 days after it was filed. The court is not required to approve the plan but implementing a system for monitoring the plan, similar to the system for monitoring the annual report required by Section 423(e), will help assure that the conservator is properly discharging the conservator's duties. If there are concerns, the court can direct the conservator to revise the plan or take other appropriate action, including appointing a visitor under Section 423(c) to review the plan. A court should not approve a plan if it is inconsistent with the conservator's duties or powers, or without seriously considering any objections made to it.

Finally, subsection (e) requires the conservator to provide any plan approved by the court to the adult subject to guardianship, to persons entitled to notice under the terms of the order appointing the guardian, and to anyone else the court has determined is entitled to notice.

SECTION 420. INVENTORY; RECORDS.

(a) Not later than 60 days after appointment, a conservator shall prepare and file with the appointing court a detailed inventory of the conservatorship estate, together with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits.

(b) A conservator shall give notice of the filing of an inventory to the individual subject to conservatorship, a person entitled to notice under Section 411(e) or a subsequent order, and any other person the court determines. The notice must be given not later than 14 days after the filing.

(c) A conservator shall keep records of the administration of the conservatorship estate

and make them available for examination on reasonable request of the individual subject to conservatorship, a guardian for the individual, or any other person the conservator or the court determines.

Comment

This section is similar to Section 419 of the 1997 act except that the notice provisions now found in this section were formerly included in a different section of that act. Subsection (b) of this section requires that the conservator give notice of the filing of the inventory to the individual subject to conservatorship, to persons entitled to notice under Section 411(e), and to any other person the court determines. The 60-day filing deadline for the inventory is the same as for the filing of the conservatorship plan required by Section 419. While technically separate documents, the conservatorship plan and inventory should ideally be prepared in tandem, with the inventory providing backup data for the course of action recommended in the conservatorship plan.

An inventory should list the complete assets of the conservatorship estate, not merely those with significant monetary value. Documenting tangible personal property included in the conservatorship estate, especially items of particular sentimental value to the individual subject to conservatorship or the individual's family, helps ensure that personal items of importance to the individual are properly managed.

SECTION 421. ADMINISTRATIVE POWERS OF CONSERVATOR NOT REQUIRING COURT APPROVAL.

(a) Except as otherwise provided in Section 414 or qualified or limited in the court's order of appointment and stated in the letters of office, a conservator has all powers granted in this section and any additional power granted to a trustee by law of this state other than this [act].

(b) A conservator, acting reasonably and consistent with the fiduciary duties of the conservator to accomplish the purpose of the conservatorship, without specific court authorization or confirmation, may with respect to the conservatorship estate:

(1) collect, hold, and retain property, including property in which the conservator has a personal interest and real property in another state, until the conservator determines disposition of the property should be made;

- (2) receive additions to the conservatorship estate;
- (3) continue or participate in the operation of a business or other enterprise;
- (4) acquire an undivided interest in property in which the conservator, in a fiduciary capacity, holds an undivided interest;
- (5) invest assets;
- (6) deposit funds or other property in a financial institution, including one operated by the conservator;
- (7) acquire or dispose of property, 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 property;
- (8) make ordinary or extraordinary repairs or alterations in a building or other structure, demolish any improvement, or raze an existing or erect a new party wall or building;
- (9) subdivide or develop land, dedicate land to public use, make or obtain the vacation of a plat and adjust a boundary, adjust a difference in valuation of land, exchange or partition land by giving or receiving consideration, and dedicate an easement to public use without consideration;
- (10) enter for any purpose into a lease of property as lessor or lessee, with or without an 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 a pooling or unitization agreement;
- (12) grant an option involving disposition of property or accept or exercise an option for the acquisition of property;

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

(14) pay a call, assessment, or other sum chargeable or accruing against or on account of a security;

(15) sell or exercise a stock subscription or conversion right;

(16) consent, directly or through a committee or 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:

(A) the conservatorship estate, in whole or in part, against damage or loss in accordance with Section 418(j); and

(B) the conservator against liability with respect to a third person;

(19) borrow funds, with or without security, to be repaid from the conservatorship estate or otherwise;

(20) advance funds for the protection of the conservatorship estate or the individual subject to conservatorship and all expenses, losses, and liability sustained in the administration of the conservatorship estate or because of holding any property for which the conservator has a lien on the conservatorship estate;

(21) pay or contest a claim, settle a claim by or against the conservatorship estate or the individual subject to conservatorship by compromise, arbitration, or otherwise, or release, in whole or in part, a claim belonging to the conservatorship estate to the extent the claim is uncollectible;

(22) pay a tax, assessment, compensation of the conservator or any guardian, and

other expense incurred in the collection, care, administration, and protection of the conservatorship estate;

(23) pay a sum distributable to the individual subject to conservatorship or an individual who is in fact dependent on the individual subject to conservatorship by paying the sum to the distributee or for the use of the distributee:

(A) to the guardian for the distributee;

(B) to the custodian of the distributee under [the Uniform Transfers to Minors Act] or custodial trustee under [the Uniform Custodial Trust Act]; or

(C) if there is no guardian, custodian, or custodial trustee, to a relative or other person having physical custody of the distributee;

(24) bring or defend an action, claim, or proceeding in any jurisdiction for the protection of the conservatorship estate or the conservator in the performance of the conservator's duties;

(25) structure the finances of the individual subject to conservatorship to establish eligibility for a public benefit, including by making gifts consistent with the individual's preferences, values, and prior directions, if the conservator's action does not jeopardize the individual's welfare and otherwise is consistent with the conservator's duties; and

(26) execute and deliver any instrument that will accomplish or facilitate the exercise of a power of the conservator.

Comment

This section is similar to Section 425 of the 1997 act. One significant addition is subsection (b)(25) which grants the conservator authority to structure the finances of the individual subject to conservatorship in order to establish eligibility for a public benefit. Another significant change was the revision of subsection (a) to clarify that the specific powers listed in subsection (b) are subject to the requirement that certain actions must be approved by the court as provided

in Section 414 and the authority of the conservator may be limited as stated in the order of appointment or letters of office.

This section lists administrative powers that a conservator may exercise. Because of the reluctance of some third parties to accept the authority of a fiduciary without evidence that the fiduciary has authority to exercise the specific power in question, it is customary for a fiduciary powers list to be lengthy in an effort to catalog every type of transaction the fiduciary might need to carry out.

While this section is primarily based on Section 425 of the 1997 act, the specific wording of that section was strongly influenced by Section 3-715 of the Uniform Probate Code, which lists the powers of a personal representative of a decedent's estate. In drafting this section, Section 816 of the 2000 Uniform Trust Code (UTC) was also consulted. The comments to UTC Section 816 contain detailed explanations of the specific administrative powers of a trustee. Because many of the powers listed in UTC Section 816 are identical to the powers listed in this section, the comments to UTC Section 816 are a useful resource for understanding the powers listed in this section.

Certain of the powers listed in subsection (b) can only be fully understood by reference to other parts of the act. Subsection (b)(5), which authorizes the conservator to invest assets, must be read in conjunction with the specific duties relating to investment that are listed in Section 418. In addition, subsection (b)(18) requires that the conservator insure the conservatorship estate against damage or loss in accordance with Section 418(j). More broadly, and as specified in the lead-in language to subsection (b), all of the powers listed in this section must be exercised in a manner consistent with the conservator's fiduciary duties and the purpose of the conservatorship.

This section lists the administrative powers of a conservator. The powers of a conservator with respect to distribution are listed in Section 422. The power of a conservator to deal with digital property is controlled by the Revised Uniform Fiduciary Access to Digital Assets Act, which requires that the conservator obtain specific court authorization. *See* Section 418(l) and accompanying comment.

SECTION 422. DISTRIBUTION FROM CONSERVATORSHIP ESTATE. Except as otherwise provided in Section 414 or qualified or limited in the court's order of appointment and stated in the letters of office, and unless contrary to a conservator's plan under Section 419, the conservator may expend or distribute income or principal of the conservatorship estate without specific court authorization or confirmation for the support, care, education, health, or welfare of the individual subject to conservatorship or an individual who is in fact dependent on the individual subject to conservatorship, including the payment of child or spousal support, in

accordance with the following rules:

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

(2) The conservator acting in compliance with the conservator's duties under Section 418 is not liable for an expenditure or distribution made based on a recommendation under paragraph (1) unless the conservator knows the expenditure or distribution is not in the best interest of the individual subject to conservatorship.

(3) In making an expenditure or distribution under this section, the conservator shall consider:

(A) the size of the conservatorship estate, the estimated duration of the conservatorship, and the likelihood the individual subject to conservatorship, at some future time, may be fully self-sufficient and able to manage the individual's financial affairs and the conservatorship estate;

(B) the accustomed standard of living of the individual subject to conservatorship and individual who is dependent on the individual subject to conservatorship;

(C) other funds or source used for the support of the individual subject to conservatorship; and

(D) the preferences, values, and prior directions of the individual subject to conservatorship.

(4) Funds expended or distributed under this section may be paid by the conservator to

any person, including the individual subject to conservatorship, as reimbursement for expenditures the conservator might have made, or in advance for services to be provided to the individual subject to conservatorship or individual who is dependent on the individual subject to conservatorship if it is reasonable to expect the services will be performed and advance payment is customary or reasonably necessary under the circumstances.

Comment

This section, which sets forth a conservator's specific duties and powers with respect to ongoing distributions, is a revision of Section 427 of the 1997 act. Distributions upon termination of the conservatorship are addressed in Section 431. Additional rules with respect to a termination due to the death of the individual subject to conservatorship are covered in Section 427 of this act.

Distributions under this section may be made without court authorization or confirmation. The principal change from the 1997 act is to eliminate the provision authorizing a conservator to make gifts from the individual's estate of up to 20 percent of the estate's annual income without prior approval of the court. Under Section 414(a)(1) of this act, the 20 percent limit has been changed to an authority to make "*de minimis*" gifts.

This section authorizes the conservator to make distributions for the support of the individual subject to conservatorship or any other individual who is in fact dependent on the individual subject to conservatorship. "Dependents" within the meaning of this section and elsewhere in the act includes individuals who are in fact dependent on the individual subject to conservatorship, as is common with children in college and adult children with developmental disabilities. The conservator is also expressly authorized to pay child or spousal support.

The four numbered paragraphs in the section establish certain standards for the making of distributions. Paragraph (1) requires that the conservator consider recommendations from the guardian, if any and, in the case of a minor, a recommendation by a parent. Under paragraph (2), a conservator may rely on such a recommendation without liability unless the conservator knows the expenditure or distribution is not in the best interest of the individual subject to conservatorship. Paragraph (3) specifies various factors that the conservator must consider when making expenditures or distributions. These include not only traditional factors such as the size of the conservatorship estate, the expected duration of the conservatorship, and other resources, such as government benefits, which may be available for support, but also the preferences, values, and prior directions of the individual subject to conservatorship. Paragraph (4) provides that the conservator may make payments in advance for services to be provided to the individual and can also reimburse for expenditures already made, including reimbursement of the individual subject to conservatorship.

**SECTION 423. CONSERVATOR'S REPORT AND ACCOUNTING;
MONITORING.**

(a) A conservator shall file with the court a report in a record regarding the administration of the conservatorship estate annually unless the court otherwise directs, on resignation or removal, on termination of the conservatorship, and at any other time the court directs.

(b) A report under subsection (a) must state or contain:

(1) an accounting that lists property included in the conservatorship estate and the receipts, disbursements, liabilities, and distributions during the period for which the report is made;

(2) a list of the services provided to the individual subject to conservatorship;

(3) a copy of the conservator's most recently approved plan and a statement whether the conservator has deviated from the plan and, if so, how the conservator has deviated and why;

(4) a recommendation as to the need for continued conservatorship and any recommended change in the scope of the conservatorship;

(5) to the extent feasible, a copy of the most recent reasonably available financial statements evidencing the status of bank accounts, investment accounts, and mortgages or other debts of the individual subject to conservatorship with [all but the last four digits of the] account numbers and Social Security number redacted;

(6) anything of more than de minimis value which the conservator, any individual who resides with the conservator, or the spouse, [domestic partner,] parent, child, or sibling of the conservator has received from a person providing goods or services to the individual subject to conservatorship;

(7) any business relation the conservator has with a person the conservator has paid or that has benefited from the property of the individual subject to conservatorship; and

(8) whether any co-conservator or successor conservator appointed to serve when a designated event occurs is alive and able to serve.

(c) The court may appoint a [visitor] to review a report under this section or conservator's plan under Section 419, interview the individual subject to conservatorship or conservator, or investigate any other matter involving the conservatorship. In connection with the report, the court may order the conservator to submit the conservatorship estate to appropriate examination in a manner the court directs.

(d) Notice of the filing under this section of a conservator's report, together with a copy of the report, must be provided to the individual subject to conservatorship, a person entitled to notice under Section 411(e) or a subsequent order, and other persons the court determines. The notice and report must be given not later than 14 days after filing.

(e) The court shall establish procedures for monitoring a report submitted under this section and review each report at least annually to determine whether:

(1) the reports provide sufficient information to establish the conservator has complied with the conservator's duties;

(2) the conservatorship should continue; and

(3) the conservator's requested fees, if any, should be approved.

(f) If the court determines there is reason to believe a conservator has not complied with the conservator's duties or the conservatorship should not continue, the court:

(1) shall notify the individual subject to conservatorship, the conservator, and any other person entitled to notice under Section 411(e) or a subsequent order;

(2) may require additional information from the conservator;

(3) may appoint a [visitor] to interview the individual subject to conservatorship or conservator or investigate any matter involving the conservatorship; and

(4) consistent with Sections 430 and 431, may hold a hearing to consider removal of the conservator, termination of the conservatorship, or a change in the powers granted to the conservator or terms of the conservatorship.

(g) If the court has reason to believe fees requested by a conservator are not reasonable, the court shall hold a hearing to determine whether to adjust the requested fees.

(h) A conservator may petition the court for approval of a report filed under this section. The court after review may approve the report. If the court approves the report, there is a rebuttable presumption the report is accurate as to a matter adequately disclosed in the report.

(i) An order, after notice and hearing, approving an interim report of a conservator filed under this Section adjudicates liabilities concerning a matter adequately disclosed in the report, as to a person given notice of the report or accounting.

(j) An order, after notice and hearing, approving a final report filed under this Section discharges the conservator from all liabilities, claims, and causes of action by a person given notice of the report and the hearing as to a matter adequately disclosed in the report.

Legislative Note: The brackets in subsection (b) are included so that an enacting state may make a policy choice as to whether to require full or partial redaction of Social Security numbers and account numbers.

The term “visitor” is bracketed because some states use a different term for the person appointed by the court to investigate and report on certain facts.

Comment

This section is an expansion of Section 420 of the 1997 act. This section requires a conservator to periodically file a report regarding the administration of the conservatorship. As set forth in subsection (a), the report must be filed on or about the anniversary of the conservator’s

appointment, with subsequent reports due annually thereafter. Reports must also be filed on the conservator's resignation or removal and upon termination of the conservatorship.

Subsection (b) lists the required contents of the report. The list has been expanded from that in Section 420(b) of the 1997 act to provide the court with more comprehensive and useful information about the needs of the individual subject to conservatorship and the conservator's performance. The 1997 act required that the conservator file an accounting listing the assets under the conservator's control and the receipts, disbursements, and distributions made during the reporting period. The report was also required to include a list of the services provided to the individual and any recommended changes in the conservatorship plan, the scope of the conservatorship, as well as a recommendation on the continued need for conservatorship.

In addition to continuing the requirements in the 1997 act, this act adds several additional requirements. First, to verify that the conservator has followed the conservatorship plan, subsection (b)(3) requires that the conservator, in addition to including a copy of the most recently approved conservator plan, state whether the conservator has deviated from the plan and, if so, why. Second, to enable the court to verify the financial data included in the report, subsection (b)(5) requires the conservator file copies of relevant financial statements supporting the entries in the account. The filing of such supporting documentation is already required in many jurisdictions as a matter of probate rule or local probate practice. Third, to allow the court to address any issues involving conflict of interest, subsection (b)(6) requires that the report state whether the conservator or a member of the conservator's family has received anything of more than *de minimis* value from a person providing goods or services to the individual subject to conservatorship. In addition, pursuant to subsection (b)(7), the conservator must disclose any business relation the conservator has with a person the conservator has paid or who has benefitted from property of the individual subject to conservatorship. Finally, to facilitate the advance appointment of co-conservators or successor conservators as authorized by Sections 110 and 111, subsection (b)(8) requires that the report state whether any co-conservator or successor conservator appointed to take office when a designated event occurs is still alive and able to serve.

Subsection (c) authorizes the court to appoint a visitor to review a report submitted under this section or the conservatorship plan filed under Section 419, interview the conservator or the individual, and investigate any other matter involving the conservatorship. The visitor can provide the court with additional information and context to understand the conservator's report and potential omissions in that report. The appointment of a visitor can form a vital part of the monitoring procedures required under subsection (e).

Subsection (d) requires the report, and notice of its filing, be given in a timely manner to the individual subject to conservatorship, any person entitled to such notice of the report by the terms of the original order appointing the guardian or a subsequent court order, and any other person the court determines. It thus works in tandem with Section 411(e) to increase the ability of interested individuals to monitor guardianships at minimal cost to the public. As explained in the comments to Section 411(e), such persons can act as extra sets of eyes and ears for the court to prevent or remedy abuse.

Subsection (e) requires the court to establish procedures for monitoring conservator's reports. Under this subsection, the court is required to review such reports at least annually to determine whether the conservator has complied with the conservator's duties, whether the conservatorship should continue, and whether any fees requested by the conservator should be approved. In performing this review, the court should carefully consider not only the report, but the supporting documentation and the adequacy of such supporting documentation. The establishment of a monitoring system was also required by Section 420(d) of the 1997 act although that provision lacked the depth of subsection (e) of this act.

An independent monitoring system is crucial for a court to adequately safeguard against abuses in conservatorship cases. Monitors can be paid court personnel, court appointees, or volunteers. Subsection (e) does not specify the procedures the court must use. The key is to develop an independent monitoring system that cannot only safeguard against obvious abuse and neglect, but also hold conservators accountable for their fiduciary duties. For guidance, courts are directed to National Probate Court Standards 3.3.17 (2013). Monitoring systems are also discussed in the National Association of Court Management Adult Guardianship Guide (2014), and the handbook, *Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community*, published by the American Bar Association Commission on Law and Aging in 2011.

Subsection (f) sets forth the next steps for courts that determine that there is reason to believe the conservator has not complied with the duties imposed by this act, or that the conservatorship should be modified or terminated. The court is required to act in response to this finding but is given significant discretion on how to proceed. In some cases, the best practice will be to move directly to holding a hearing. In others, the court may simply request additional information or appoint a visitor. Regardless of which approach it takes, however, the court must notify the individual subject to guardianship, the conservator, and any other person entitled to notice under Section 411(e) of the court's action or proposed action.

Subsection (g) requires a court with reason to believe the conservator's fees are unreasonable to hold a hearing to determine whether to adjust those fees. In considering the reasonableness of proposed fees, the court should consult Section 120 of this act, which lists factors the court is to consider in setting the conservator's compensation.

Subsection (h) permits a conservator for an adult to petition the court to approve a report filed under this section. A court must review the report before approval. If the court approves the report following a review, it creates a rebuttable presumption that the report is accurate as to any matter that was adequately disclosed.

Subsections (i) and (j) are new to the act but confirm the well-established doctrine that court approval of the conservator's interim and final reports is binding on persons given notice of the report as to all matters adequately disclosed in the report.

**SECTION 424. ATTEMPTED TRANSFER OF PROPERTY BY INDIVIDUAL
SUBJECT TO CONSERVATORSHIP.**

(a) The interest of an individual subject to conservatorship in property included in the conservatorship estate is not transferrable or assignable by the individual and is not subject to levy, garnishment, or similar process for claims against the individual unless allowed under Section 428.

(b) If an individual subject to conservatorship enters into a contract after having the right to enter the contract removed by the court, the contract is void against the individual and the individual's property but is enforceable against the person that contracted with the individual.

(c) A person other than the conservator that deals with an individual subject to conservatorship with respect to property included in the conservatorship estate is entitled to protection provided by law of this state other than this [act].

Comment

This section is a partial enactment and revision of Section 422 of the 1997 act. This section creates a "spendthrift effect" for property included in the conservatorship estate. That is, the conservatorship property is neither transferable nor assignable by the individual subject to conservatorship and is not subject to levy, garnishment, or similar process for claims against the individual.

Subsection (b) addresses the enforcement of contracts entered into by the individual subject to conservatorship. If the ability of the individual to enter into a contract has been removed by the court, any contract entered into by the individual is void as against the individual and the individual's property but is enforceable against the other party at the election of the conservator. Subsection (c) makes clear, however, that the inability of the contracting party to enforce the contract against the individual or conservatorship estate does not preclude resort to other remedies that may be available such as a right to restitution or remedies under the statutes regulating commercial transactions.

SECTION 425. TRANSACTION INVOLVING CONFLICT OF INTEREST. A
transaction involving a conservatorship estate which is affected by a substantial conflict between the conservator's fiduciary duties and personal interests is voidable unless the transaction is

authorized by court order after notice to persons entitled to notice under Section 411(e) or a subsequent order. A transaction affected by a substantial conflict includes a sale, encumbrance, or other transaction involving the conservatorship estate entered into by the conservator, an individual with whom the conservator resides, the spouse, [domestic partner,] descendant, sibling, agent, or attorney of the conservator, or a corporation or other enterprise in which the conservator has a substantial beneficial interest.

Comment

This section is similar to Section 423 of the 1997 act.

Transactions involving conservatorship assets entered into by the conservator or by persons with close business or personal ties to the conservator have the potential to be tainted by conflict of interest. Because of this serious risk, a transaction involving the conservatorship property entered into by the conservator or with persons having close ties to the conservator is voidable under this section without further proof. However, transactions involving conservatorship property with parties not on the list are not necessarily valid. A transaction involving other parties may still be voided if it is proven that a substantial conflict between personal and fiduciary interests exists and that the transaction was affected by the conflict.

The fact that the transaction is voidable does not extinguish any action for breach of fiduciary duty or for damages, separate and apart from voiding the transaction. The section intentionally does not provide any specific limitation of time on when an action to void the transaction must be brought. Rather, the limitations period for challenging the conservator's report on which the transaction was disclosed might apply.

Per Section 415, a petition to void a transaction may be filed either by the individual subject to conservatorship or by any person interested in the individual's welfare. Whether the court should grant or deny the petition will often depend on the financial impact on the conservatorship estate. Should the transaction have proven unprofitable to the conservator or related party, the court is more likely allow the transaction to stand.

Conservators considering entering into transactions that might implicate this section should consider obtaining prior court approval. Under this section, a transaction is not voidable if approved by the court following notice to interested persons.

Reference is made to Section 802 of the Uniform Trust Code (UTC) and related comments for additional information on conflicts of interest. However, under the UTC, a transaction entered into by the trustee with specified family members or business associates is only presumed to be tainted by a conflict of interest. Under this section, such a transaction that is entered into by a conservator is voidable without further proof.

SECTION 426. PROTECTION OF PERSON DEALING WITH CONSERVATOR.

(a) A person that assists or deals with a conservator in good faith and for value in any transaction, other than a transaction requiring a court order under Section 414, is protected as though the conservator properly exercised any power in question. Knowledge by a person that the person is dealing with a conservator alone does not require the person to inquire into the existence of authority of the conservator or the propriety of the conservator's exercise of authority, but restrictions on authority stated in letters of office, or otherwise provided by law, are effective as to the person. A person that pays or delivers property to a conservator is not responsible for proper application of the property.

(b) Protection under subsection (a) extends to a procedural irregularity or jurisdictional defect in the proceeding leading to the issuance of letters of office and does not substitute for protection for a person that assists or deals with a conservator provided by comparable provisions in law of this state other than this [act] relating to a commercial transaction or simplifying a transfer of securities by a fiduciary.

Comment

This section is similar to Section 424 of the 1997 act. The purpose of this section is to facilitate commercial transactions by negating the traditional duty of inquiry found under the common law of trusts. Even the third party's actual knowledge that the third party is dealing with a conservator does not require that the third party inquire into the possession of or propriety of the conservator's exercise of a power. Nor is the third party, contrary to the common law, responsible for the proper application of funds or property delivered to the conservator. But consistent with the emphasis of this act on limited conservatorship, the protection under this section that is extended to third parties is not unlimited. Third parties are charged with knowledge of restrictions on the authority of a conservator whether the restriction is specified in the letters of office or the restriction is one to which all conservators are subject under the law of the state. Pursuant to Section 108(c), any limitation on the assets subject to a conservatorship must be endorsed on the conservator's letters.

The protections provided by this section are of limited application. As provided in subsection (b), for many transactions, this section will be superseded by statutes relating to commercial transactions or transfers of securities by fiduciaries.

For background on Section 7 of the Uniform Trustees' Powers Act, upon which this section is ultimately based, see Jerome H. Curtis, Jr., *Transmogrification of the American Trust*, 31 REAL PROP. PROB. & TR. J. 251 (1996). *See also* Section 1012 of the Uniform Trust Code and comment.

SECTION 427. DEATH OF INDIVIDUAL SUBJECT TO CONSERVATORSHIP.

(a) If an individual subject to conservatorship dies, the conservator shall deliver to the court for safekeeping any will of the individual in the conservator's possession and inform the personal representative named in the will if feasible, or if not feasible, a beneficiary named in the will, of the delivery.

[(b) If 40 days after the death of an individual subject to conservatorship no personal representative has been appointed and no application or petition for appointment is before the court, the conservator may apply to exercise the powers and duties of a personal representative to administer and distribute the decedent's estate. The conservator shall give notice to a person nominated as personal representative by a will of the decedent of which the conservator is aware. The court may grant the application if there is no objection and endorse the letters of office to note that the individual formerly subject to conservatorship is deceased and the conservator has acquired the powers and duties of a personal representative.

(c) Issuance of an order under this section has the effect of an order of appointment of a personal representative under [Section 3-308 and Parts 6 through 10 of Article III of the Uniform Probate Code]].

(d) On the death of an individual subject to conservatorship, the conservator shall conclude the administration of the conservatorship estate as provided in Section 431.

Legislative Note: Subsections (b) and (c) are bracketed for several reasons. First, the enacting jurisdiction's probate code already may address the right of the conservator to petition for appointment as personal representative or the right of the conservator to distribute the conservatorship assets directly to the estate beneficiaries. Second, subsections (b) and (c) are

not essential and may be omitted if the enacting jurisdiction chooses. Finally, subsection (b) is specifically tailored for a state, such as one that has enacted the Uniform Probate Code, which allows appointment of a personal representative without prior notice to estate beneficiaries. A state that requires notice to interested persons before appointment of a personal representative should modify subsection (b) accordingly.

Comment

This section, which is a revision of Section 428 of the 1997 act, supplements Section 431 on termination of conservatorships. Unlike Section 431, which addresses termination generally, this section only addresses responsibilities incurred by reason of the death of the individual subject to conservatorship.

The general rule is stated in subsection (d), which provides that upon the death of the individual subject to conservatorship, the conservator shall conclude the administration of the conservatorship estate as provided in Section 431. Subsection (a) addresses the conservator's obligation to deliver the will. Subsections (b) and (c), which are both optional for enacting states, authorize a conservator to open a decedent's estate if no one else with authority takes action within 40 days after the death.

Pursuant to subsection (a), the conservator must deliver to the court for safekeeping any will of the individual subject to conservatorship which may have come into the conservator's possession, must inform the personal representative named in the will if feasible, or if not, a beneficiary, that the will has been delivered, and must retain the conservatorship estate for delivery to the personal representative or to another person entitled to it.

Subsections (b) and (c) address the particular problems that can arise if the estate beneficiaries fail to take action to appoint a personal representative for the individual's estate. The conservator will then be unable to close the estate because there is no "successor" to whom to deliver the individual's assets. To enable the conservator to expeditiously close the conservatorship estate, this section specifies a streamlined process whereby the conservator can secure appointment as personal representative. These subsections are bracketed and made optional for enacting states for several reasons. First, the enacting jurisdiction's probate code may already specifically address the right of the conservator to petition for appointment as personal representative or the right of the conservator to distribute the conservatorship assets directly to the estate beneficiaries. Second, subsections (b) and (c) are not essential and may be omitted if the enacting jurisdiction so chooses. Even though the state's statute may not specifically authorize a conservator to petition for appointment as personal representative, a conservator, like any other holder of a decedent's assets, may eventually take action to effect a distribution. Finally, subsection (b) is specifically tailored for states, such as states which have enacted the Uniform Probate Code, that allow the appointment of a personal representative without prior notice to the estate beneficiaries. For example, should the state enacting this act have also enacted the UPC, Section 3-705 of that Code would not require the conservator-personal representative to give notice until after the appointment. States which require notice to interested persons prior to the appointment of a personal representative would need to modify this section accordingly.

SECTION 428. PRESENTATION AND ALLOWANCE OF CLAIM.

(a) A conservator may pay, or secure by encumbering property included in the conservatorship estate, a claim against the conservatorship estate or the individual subject to conservatorship arising before or during the conservatorship, on presentation and allowance in accordance with the priorities under subsection (d). A claimant may present a claim by:

(1) sending or delivering to the conservator a statement in a record of the claim, indicating its basis, the name and address of the claimant, and the amount claimed; or

(2) filing the claim with the court, in a form acceptable to the court, and sending or delivering a copy of the claim to the conservator.

(b) A claim under subsection (a) is presented on receipt by the conservator of the statement of the claim or the filing with the court of the claim, whichever first occurs. A presented claim is allowed if it is not disallowed in whole or in part by the conservator in a record sent or delivered to the claimant not later than 60 days after its presentation. Before payment, the conservator may change an allowance of the claim to a disallowance in whole or in part, but not after allowance under a court order or order directing payment of the claim. Presentation of a claim tolls until 30 days after disallowance of the claim the running of a statute of limitations that has not expired relating to the claim.

(c) A claimant whose claim under subsection (a) has not been paid may petition the court to determine the claim at any time before it is barred by a statute of limitations, and the court may order its allowance, payment, or security by encumbering property included in the conservatorship estate. If a proceeding is pending against the individual subject to conservatorship at the time of appointment of the conservator or is initiated thereafter, the moving party shall give the conservator notice of the proceeding if it could result in creating a

claim against the conservatorship estate.

(d) If a 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) a claim of the federal or state government having priority under law other than this [act];

(3) a claim incurred by the conservator for support, care, education, health, or welfare previously provided to the individual subject to conservatorship or an individual who is in fact dependent on the individual subject to conservatorship;

(4) a claim arising before the conservatorship; and

(5) all other claims.

(e) Preference may not be given in the payment of a claim under subsection (d) over another claim of the same class. A claim due and payable may not be preferred over a claim not due unless:

(1) doing so would leave the conservatorship estate without sufficient funds to pay the basic living and health-care expenses of the individual subject to conservatorship; and

(2) the court authorizes the preference under Section 414(a)(8).

(f) If assets of a conservatorship estate are adequate to meet all existing claims, the court, acting in the best interest of the individual subject to conservatorship, may order the conservator to grant a security interest in the conservatorship estate for payment of a claim at a future date.

Comment

This section is similar to Section 429 of the 1997 act.

Subsection (a) provides for the conservator's payment of appropriate claims and sets forth the methods by which claims can be presented. Subsection (b) addresses when claims are deemed presented. Subsection (c) authorizes a claimant whose claim has not been paid to petition the court. Should the estate be insufficient to satisfy all claims, payment will then be made in accordance with the priorities specified in subsection (d). Subsection (e) addresses the conflict that can sometimes arise between claims that are due and payable versus claims that are valid but for which payment is not yet due. Subsection (f) permits a conservator, with court approval, to grant a creditor a security interest in the conservatorship for payment of a claim at a future date. The granting of such a security interest is sometimes done so that the estate may be closed even though some claims are still outstanding.

This section should be read in conjunction with Section 414(a)(8), which permits a court to grant a creditor who has provided basic living expenses a higher priority for payment from an insolvent estate than would otherwise apply under this section. But as stated in the comment to Section 414, the higher priority provided in this act does not alter creditor priority stated in federal bankruptcy law or the Internal Revenue Code. Nor does subsection (d), which addresses creditor priority in insolvent estates, preclude the filing of a petition for bankruptcy if the individual subject to conservatorship is otherwise eligible.

This section is in essence an abbreviated version of the claims procedure for decedent's estates found in Article III, Part 8 of the Uniform Probate Code (UPC) but is modified for purposes of conservatorship. For additional background on claims procedure, reference is made to UPC Article III, Part 8.

SECTION 429. PERSONAL LIABILITY OF CONSERVATOR.

(a) Except as otherwise agreed by a conservator, the conservator is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the conservatorship estate unless the conservator fails to reveal the conservator's representative capacity in the contract or before entering into the contract.

(b) A conservator is personally liable for an obligation arising from control of property of the conservatorship estate or an act or omission occurring in the course of administration of the conservatorship estate only if the conservator is personally at fault.

(c) A claim based on a contract entered into by a conservator in a fiduciary capacity, an obligation arising from control of property included in the conservatorship estate, or a tort committed in the course of administration of the conservatorship estate may be asserted against

the conservatorship estate in a proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable for the claim.

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

Comment

This section is similar to Section 430 of the 1997 act with modest revisions.

At common law, a fiduciary was personally liable on contracts entered into in a fiduciary capacity. If the contract was proper, the fiduciary could be reimbursed from the fiduciary assets but was personally liable for the deficiency if the assets were insufficient. Modern fiduciary statutes, such as Section 1010 of the Uniform Trust Code (UTC) and Section 3-808 of the Uniform Probate Code (UPC), limit the fiduciary's liability as long as the fiduciary relationship is properly disclosed.

This section is consistent with the provisions of the UTC and UPC although it varies in some details. Subsection (a) generally provides that the conservator is not personally liable for contracts entered into by the conservator as long as the conservator discloses the representative capacity in the contract and identifies the estate. But subsection (a) then goes beyond the UTC and the UPC by also limiting liability if the representative capacity was revealed prior to the contract even though not stated in the contract itself. The effect of subsection (a) is to limit the contracting party's recovery to the estate assets if the contracting party was aware of the fiduciary capacity at the time of the contract whether or not expressly stated in the contract. But even if the representative capacity is disclosed, the conservator will be personally liable if the contract expressly so provides.

Subsection (b) reverses the ordinary common law rule that a conservator, as a fiduciary, is liable for torts committed in the course of administering the conservatorship property regardless of the conservator's personal fault. The protection from liability provided by this subsection does not apply, however, if the conservator is "personally at fault," meaning that the conservator committed the tort either intentionally or negligently.

At common law, the claimant seeking to enforce a contract with the conservator would first sue the conservator personally and then the conservator would file a second action seeking reimbursement. Subsection (c) simplifies this process by providing that a conservator may be sued in a fiduciary capacity, whether or not the conservator is personally liable on the claim. As subsection (d) indicates, the types of proceedings in which the respective liabilities of the conservatorship estate and conservator can be determined include a proceeding for an accounting, surcharge, or indemnification.

SECTION 430. REMOVAL OF CONSERVATOR; APPOINTMENT OF SUCCESSOR.

(a) The court may remove a conservator for failure to perform the conservator's duties or other good cause and appoint a successor conservator to assume the duties of the conservator.

(b) The court shall hold a hearing to determine whether to remove a conservator and appoint a successor on:

(1) petition of the individual subject to conservatorship, conservator, or person interested in the welfare of the individual which contains allegations that, if true, would support a reasonable belief that removal of the conservator and appointment of a successor may be appropriate, but the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed during the preceding six months;

(2) communication from the individual subject to conservatorship, conservator, or person interested in the welfare of the individual which supports a reasonable belief that removal of the conservator and appointment of a successor may be appropriate; or

(3) determination by the court that a hearing would be in the best interest of the individual subject to conservatorship.

(c) Notice of a petition under subsection (b)(1) must be given to the individual subject to conservatorship, the conservator, and any other person the court determines.

(d) An individual subject to conservatorship who seeks to remove the conservator and have a successor appointed has the right to choose an attorney to represent the individual in this matter. [If the individual is not represented by an attorney, the court shall appoint an attorney under the same conditions as in Section 406.] The court shall award reasonable attorney's fees to the attorney as provided in Section 119.

(e) In selecting a successor conservator, the court shall follow the priorities under Section 410.

(f) Not later than 30 days after appointing a successor conservator, the court shall give notice of the appointment to the individual subject to conservatorship and any person entitled to notice under Section 411(e) or a subsequent order.

Legislative Note: *A state may make the policy decision to include the bracketed language in subsection (d). This policy decision parallels Alternative A in Section 405.*

Comment

This section is based in part on Section 112 of the 1997 act, which covered termination of the guardianship or conservatorship as well as changes in a guardian's or conservator's appointment. This act, by comparison, divides the issue of removal of an appointee (which focuses on the appointee's abilities and actions), which is addressed here, from the issue of termination or modification of an appointment (which focuses on the needs, abilities, and limitations of the individual subject to appointment), which is addressed in Section 431. This section mirrors Section 318, which governs removal of a guardian and appointment of a successor guardian.

Subsection (a) empowers the court to remove a conservator for failure to perform duties or for other good cause. Removal for failure to perform duties includes situations in which the conservator is not performing the conservator's duties either because the conservator is failing to act or because the conservator is acting in a manner inconsistent with the requirements of this act. Good cause sometimes may be found to exist even if the conservator is not personally at fault. Similar to the grounds set forth in Section 706(b) of the Uniform Trust Code, which include a request by qualified beneficiaries as a factor the court may consider in deciding whether to remove a trustee, a court may similarly consider a request of the individual under conservatorship, or a parent of a minor subject to conservatorship, as a factor in deciding whether good cause exists to remove a conservator. In determining whether to remove the conservator, every effort should be made to determine the wishes of the individual subject to conservatorship with regard to the proposed removal. Courts seeking examples of reasons why removal might be in order may wish to consult their state's law on removal of a trustee. *See generally* Uniform Trust Code §706 and comment; Restatement (Third) of Trusts §37 (2003).

Section 112(b) of the 1997 act authorized the court to remove a conservator if removal was in the best interest of the individual subject to conservatorship or for other good cause. In light of this act's emphasis on substituted judgment as the standard for conservator decisions, subsection (a) of removes "best interest" as an independent basis for removal. The drafting committee concluded that the reference to "best interest" might unnecessarily restrict the court's ability to apply the more flexible "good cause" standard.

Subsection (b)(1) authorizes a petition for removal of the conservator to be filed by the individual subject to conservatorship, the conservator, or any person interested in the individual's welfare. Thus, the fact that the individual is subject to conservatorship in no way limits the individual's right to seek removal.

Subsection (b) requires the court to hold a hearing on whether the conservator should be removed under three specified circumstances: (1) if the court determines a hearing would be in the best interest of the individual subject to conservatorship; (2) if the individual, conservator, or another person interested in the welfare of the individual petitions for removal and the petition contains allegations that—if true—would support a reasonable belief that removal is in order; and (3) if the court receives a communication from any such person that supports a reasonable belief that removal may be appropriate. The form that the communication takes is not determinative, and includes a grievance filed under Section 127. The fact that the court has reason to believe that the allegations are not true is not a sufficient reason to refuse to hold a hearing. It is important that the court hear the evidence as to whether removal is appropriate, and not reach conclusions without a considered process. To avoid excessive drain on judicial resources, however, the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed within the preceding six months.

Subsection (c) requires that notice of a petition to remove the conservator filed by the individual subject to conservatorship, conservator, or person interested in the individual's welfare under subsection (b)(1) be given to the individual, the conservator, and any other person the court determines. Subsection (c) does not expressly require notice be given if a hearing is held pursuant to an informal communication under subsection (b)(2) or independent determination by the court under subsection (b)(3), but it would appear that the notice given would, as a practical matter, be the same. For a hearing on the guardian's removal, notice should always be given to the individual under guardianship and to the guardian, and the court always has authority to order notice to other persons.

Subsection (d) provides that an individual subject to conservatorship seeking to have the conservator removed has the right to choose an attorney to represent him or her in the matter. Such representation is essential to protecting the individual's due process rights. To ensure the availability of such representation, the court is required to award reasonable attorney fees to such an attorney in accordance with Section 119 of this act. Subsection (d) includes bracketed language that an enacting jurisdiction may adapt to indicate its preferences on when to require a court to appoint an attorney for the individual subject to conservatorship.

If the court removes a conservator, the court must then appoint a successor conservator. This is because removal simply ends the particular appointment, it does not terminate the conservatorship or modify other terms of the conservatorship. Subsection (e) instructs the court to use the same priorities it uses in appointing a conservator in the first place when appointing a successor conservator.

Subsection (f) requires timely notice of the appointment of the successor conservator to the individual subject to conservatorship and other persons entitled to such notice.

**SECTION 431. TERMINATION OR MODIFICATION OF
CONSERVATORSHIP.**

(a) A conservatorship for a minor terminates on the earliest of:

(1) a court order terminating the conservatorship;

(2) the minor becoming an adult or, if the minor consents or the court finds by clear-and-convincing evidence that substantial harm to the minor's interests is otherwise likely, attaining 21 years of age;

(3) emancipation of the minor; or

(4) death of the minor.

(b) A conservatorship for an adult terminates on order of the court or when the adult dies.

(c) An individual subject to conservatorship, the conservator, or a person interested in the welfare of the individual may petition for:

(1) termination of the conservatorship on the ground that a basis for appointment under Section 401 does not exist or termination would be in the best interest of the individual or for other good cause; or

(2) modification of the conservatorship on the ground that the extent of protection or assistance granted is not appropriate or for other good cause.

(d) The court shall hold a hearing to determine whether termination or modification of a conservatorship is appropriate on:

(1) petition under subsection (c) which contains allegations that, if true, would support a reasonable belief that termination or modification of the conservatorship may be appropriate, but the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed within the preceding six months;

(2) a communication from the individual subject to conservatorship, conservator, or person interested in the welfare of the individual which supports a reasonable belief that termination or modification of the conservatorship may be appropriate, including because the functional needs of the individual or supports or services available to the individual have changed;

(3) a report from a guardian or conservator which indicates that termination or modification may be appropriate because the functional needs or supports or services available to the individual have changed or a protective arrangement instead of conservatorship or other less restrictive alternative is available; or

(4) a determination by the court that a hearing would be in the best interest of the individual.

(e) Notice of a petition under subsection (c) must be given to the individual subject to conservatorship, the conservator, and any such other person the court determines.

(f) On presentation of prima facie evidence for termination of a conservatorship, the court shall order termination unless it is proven that a basis for appointment of a conservator under Section 401 exists.

(g) The court shall modify the powers granted to a conservator if the powers are excessive or inadequate due to a change in the abilities or limitations of the individual subject to conservatorship, the individual's supports, or other circumstances.

(h) Unless the court otherwise orders for good cause, before terminating a conservatorship, the court shall follow the same procedures to safeguard the rights of the individual subject to conservatorship which apply to a petition for conservatorship.

(i) An individual subject to conservatorship who seeks to terminate or modify the terms

of the conservatorship has the right to choose an attorney to represent the individual in this matter. [If the individual is not represented by an attorney, the court shall appoint an attorney under the same conditions as in Section 406.] The court shall award reasonable attorney's fees to the attorney as provided in Section 119.

(j) On termination of a conservatorship other than by reason of the death of the individual subject to conservatorship, property of the conservatorship estate passes to the individual. The order of termination must direct the conservator to file a final report and petition for discharge on approval by the court of the final report.

(k) On termination of a conservatorship by reason of the death of the individual subject to conservatorship, the conservator promptly shall file a final report and petition for discharge on approval by the court of the final report. On approval of the final report, the conservator shall proceed expeditiously to distribute the conservatorship estate to the individual's estate or as otherwise ordered by the court. The conservator may take reasonable measures necessary to preserve the conservatorship estate until distribution can be made.

(l) The court shall issue a final order of discharge on the approval by the court of the final report and satisfaction by the conservator of any other condition the court imposed on the conservator's discharge.

Legislative Note: *A state may make the policy decision to include the bracketed language in subsection (i). This policy decision parallels Alternative A in Section 305.*

Comment

Section 431 governs termination and modification of a conservatorship. This topic was addressed in Section 112 of the 1997 act, which also covered changes in the conservator's appointment, which are now addressed in Section 430. When a conservatorship is terminated, the authority of the conservator ends and all powers granted to the conservator are restored to the individual who was formerly subject to conservatorship if that individual is still living. Modification occurs when the court changes the powers granted to the conservator under a continuing conservatorship. Modification can expand or contract the conservator's powers.

Subsection (a) provides that a conservatorship for a minor terminates when terminated by a court order, the minor is emancipated, or the minor dies. Subsection (a) further provides that a conservatorship for a minor terminates when the minor reaches adulthood unless either (1) the minor consents to the conservatorship continuing to the age of 21, or (2) the court finds by clear-and-convincing evidence that the minor's interests would be substantially harmed if the conservatorship did not continue to the age of 21. If either of these two conditions are met, the conservatorship may continue until the minor obtains 21 years of age. In no event may a conservatorship imposed on a minor continue after the age of 21. If the minor continues to need a conservator after the age of 21, a new proceeding must be instituted and the court must find that a basis exists for imposing a conservatorship on an adult under Section 401(b).

By allowing a conservatorship to continue after the age of majority up to age 21 in limited circumstances, subsection (a) is designed to support transition planning for persons with intellectual disabilities and developmental disabilities as they transition from childhood to adulthood. Extending the conservatorship in this manner may help avoid imposition of an Article 3 guardianship or a conservatorship that extends indefinitely in adulthood.

Subsection (b) states that a conservatorship for an adult terminates on court order or when the adult dies.

Subsection (c) provides that the individual subject to conservatorship, the conservator, or any person interested in the individual's welfare may petition for termination or modification of the conservatorship. Thus, the fact that the individual is subject to conservatorship in no way limits the individual's right to seek court review.

Pursuant to subsection (d), the court must hold a hearing to determine whether termination or modification is appropriate under four circumstances: (1) if the court concludes that such a hearing would be in the best interest of the individual subject to conservatorship; (2) if a report from either a guardian or conservator indicates that termination or modification may be appropriate because the needs of the individual have changed or a less restrictive alternative may be available; (3) if the individual, conservator, or another person interested in the welfare of the individual petitions for termination or removal and the petition contains allegations that—if true—would support a reasonable belief that termination or modification is in order; and (4) if the court receives a communication from the individual, conservator, or person interested in the individual's welfare that supports a reasonable belief that termination or modification may be appropriate. The form that the communication takes is not determinative, and could include a grievance filed under Section 127. The fact that the court has reason to believe that the allegations are not true is not a sufficient reason to refuse to hold a hearing. It is important that the court hear the evidence as to whether modification or termination is appropriate, and not reach conclusions without a considered process. To avoid excessive drain on judicial resources, however, the court may decline to hold a hearing if a petition based on the same or substantially similar facts was filed within the preceding six months. Permitting a communication that falls short of a petition to trigger reconsideration of the conservatorship is necessary to make restoration a practical possibility for individuals subject to conservatorship. *See Erica Wood, Pamela Teaster, and Jenica Cassidy, Restoration of Rights in Adult Guardianship 42 (American Bar Association Commission on Law and Aging with the Virginia Tech Center for Gerontology,*

2017) (reporting that “[t]he filing of a formal petition requesting restoration is burdensome or impossible for many individuals subject to guardianship”).

Subsection (e) requires notice of a petition to terminate or modify the conservatorship filed by the individual, conservator, or person interested in the individual’s welfare under subsection (c) be given to the individual, the conservator, and any other person the court determines.

Subsection (e) does not expressly require that notice be given if a hearing is held pursuant to an informal communication under subsection (d)(2) or independent determination by the court under subsection (d)(3), but it would appear that the notice given would, as a practical matter, be the same. For a hearing on the conservator’s removal, notice should always be given to the individual under conservatorship and to the conservator, and the court always has authority to order notice to other persons.

Subsection (f) requires a court to terminate a conservatorship on presentation of prima facie evidence that supports termination unless it is proven that it would be proper to impose a conservatorship if a petition for conservatorship were brought at the current time. That is, if there is no basis for imposing a conservatorship under Section 401, then the court may not continue the conservatorship.

Subsection (g) requires the court to modify the conservator’s powers if they are excessive or inadequate due to a change in the abilities or limitations of the individual, the individual’s supports, or other circumstances. Thus, even if the individual’s abilities have not improved, the court might be required to reduce the powers granted to the conservator if new, less restrictive alternatives become available (for example, the individual now has access to greater decision-making support, or technological assistance). Similarly, the court might be required to increase the powers granted the conservator if the individual’s abilities have deteriorated creating an unmet need, and no less restrictive alternatives are available.

Subsection (h) requires that unless the court otherwise orders for good cause, before terminating or modifying a conservatorship for an individual under this section, the court must follow the same procedures to safeguard the rights of the respondent that apply at a hearing on a petition for an original appointment. These procedures include appointment of a visitor and may also include appointment of counsel. This subsection is intended to ensure the due process rights of the individual subject to conservatorship are fully respected, and the court is using a process that will provide the court with the evidence needed to make an appropriate and considered decision.

Subsection (i) recognizes the right of an individual subject to conservatorship who seeks to terminate or modify that conservatorship to be represented by counsel. Such representation is essential to protect the individual’s due process rights. To ensure the availability of such representation, the court is required to award reasonable attorney fees to such an attorney in accordance with Section 119 of this act. As noted in the comments to Section 119, such compensation is important to ensure access to counsel for those seeking to restore rights. *See* Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Ethics and Legality of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581, 603 (2016) (“having the right to directly challenge the continued necessity or terms of the guardianship, including who serves as guardian, is virtually meaningless without the accompanying right to legal

representation.”). Attorneys’ concerns about payment for their services are a significant barrier to attorneys accepting representation of individuals subject to guardianship or conservatorship. *See* Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L. J. 83, 102 (2015). Subsection (g) includes bracketed language that an enacting jurisdiction may adapt to indicate its preferences on when to require a court to appoint an attorney for the individual.

Subsections (j) and (k) specify the effect of termination on property that is part of the conservatorship estate. If the conservatorship terminated for a reason other than the individual’s death, the property passes to the individual. If the conservatorship terminated because the individual died, the property passes to the individual’s estate or as otherwise ordered by the court. Distribution of the conservatorship estate upon the death of the individual is also addressed in Section 427, “Death of Individual Subject to Conservatorship.”

Subsections (j), (k), and (l) govern discharge of the conservator. Upon termination of a conservatorship, a conservator is not entitled to an order of discharge until the court approves the conservator’s final report and the conservator satisfies any other condition the court imposes for the conservator’s discharge. A “report” refers to a full and detailed accounting of monies received and expended, as well as other matters, including a description of the conservator’s activities. *See* Section 423 for the required contents. A report lacking sufficient detail will preclude entry of the final order of discharge. Until the final order of discharge is entered, a conservator remains liable for previous acts as well as the obligation to account for the assets and funds of the individual subject to conservatorship as provided in Section 423, “Conservator’s Report and Accounting; Monitoring.”

Prior to entering a final order of discharge, the court should confirm that the conservator has accounted sufficiently for the assets and other property and has executed the appropriate documents and delivered the property under the conservator’s control.

As a general matter, this section is responsive to concerns that individuals subject to conservatorship have historically faced often insurmountable barriers to restoration of rights. *See generally* Erica Wood, Pamela Teaster, and Jenica Cassidy, *Restoration of Rights in Adult Guardianship* (American Bar Association Commission on Law and Aging with the Virginia Tech Center for Gerontology, 2017). Subsection 431, together with other provisions in this act, is designed to reduce those barriers so that individuals’ whose needs could be met by less restrictive means do not face unnecessary deprivations of liberty.

SECTION 432. TRANSFER FOR BENEFIT OF MINOR WITHOUT APPOINTMENT OF CONSERVATOR.

(a) Unless a person required to transfer funds or other property to a minor knows that a conservator for the minor has been appointed or a proceeding is pending for conservatorship, the person may transfer an amount or value not exceeding \$[15,000] in a 12-month period to:

(1) a person that has care or custody of the minor and with whom the minor resides;

(2) a guardian for the minor;

(3) a custodian under [the Uniform Transfers to Minors Act or Uniform Gifts to Minors Act]; or

(4) a financial institution as a deposit in an interest-bearing account or certificate solely in the name of the minor and shall give notice to the minor of the deposit.

(b) A person that transfers funds or other property under this section is not responsible for its proper application.

(c) A person that receives funds or other property for a minor under subsection (a)(1) or (2) may apply it only to the support, care, education, health, or welfare of the minor, and may not derive a personal financial benefit from it, except for reimbursement for necessary expenses. Funds not applied for these purposes must be preserved for the future support, care, education, health, or welfare of the minor, and the balance, if any, transferred to the minor when the minor becomes an adult or otherwise is emancipated.

Comment

This section is similar to Section 104 of the 1997 act except that the suggested amount in subsection (a) that may be disbursed has been increased to \$15,000 on account of inflation. By contrast, the amount specified in the 1997 act was originally set at \$5,000 and was increased to \$10,000 in 2010.

The section is designed primarily to facilitate required transfers of funds such as child support. When a minor annually receives from a specific payor property or cash of \$15,000 or less over a 12-month period, it often would be cumbersome and unnecessarily expensive to require the establishment of a conservatorship to handle the payments. This section allows the person transferring the property to do so in a more expeditious way.

Subsection (a) provides several payment options to the person transferring the property. The person may make the transfer to the person having care and custody of the minor when the minor resides with that person, or may instead make payments to the minor's guardian, a custodian

under the Uniform Transfers to Minors Act or custodial trustee under the Uniform Custodial Trust Act, or to a financial institution as a deposit in an interest-bearing account in the sole name of the minor if notice of the deposit is given to the minor.

To encourage payors to make distributions under this section, subsection (b) provides that a person transferring money or property under this section is not responsible for its proper application. However, the protection does not apply if the person required to make the transfer knows that a conservator has been appointed or that there is a proceeding pending for the appointment of a conservator. Consequently, the fact that a guardian has been appointed does not require that payment be made to that guardian. Should a guardian desire such authority, the appropriate course is for the guardian to petition the court to be appointed as conservator.

Although the person making the transfer has no duty or obligation to see that the money or property is properly applied, this section is a default statute and does not override any specific provisions in a will or trust instrument relating to monies to be paid to a minor. In those cases, the duty of the person making the transfer would be dictated by the terms of the will or trust instrument. This section also does not override the provisions of other statutes in the enacting jurisdiction such as the Uniform Transfers to Minors Act, which allow payment by alternative means based on the size of the minor's total estate, as opposed to this section, which allows payment based on the annual payment obligation of the person making the payment.

Subsection (c) limits the use of the money or property to the minor's support, care, education, health or welfare. Only necessary expenses may be reimbursed from this money or property, with the balance being preserved for the minor's future education, health, support, care or welfare. This section does not apply to child support payments made pursuant to a court order because child support payments are made to another for the minor's benefit.

While a recipient of funds is not a fiduciary in the normally understood sense of a person appointed by the court or by written instrument, a recipient under this section is subject to fiduciary obligations. Under subsection (c), the recipient may not derive any personal benefit from the transfer and must preserve funds not used for the minor's benefit and transfer any balance to the minor upon emancipation or attainment of majority. Should the recipient misapply the funds or property transferred, the recipient, given this fiduciary role, could be liable for breach of trust.

The person receiving the monies may in appropriate cases consider the purchase of an annuity or some other financial arrangement whereby payout occurs at a time subsequent to the minor's attainment of majority. But to provide more certainty for the transaction the recipient should consider petitioning the court under Article 5 for approval of the purchase as a protective arrangement.

[ARTICLE] 5

OTHER PROTECTIVE ARRANGEMENTS

SECTION 501. AUTHORITY FOR PROTECTIVE ARRANGEMENT.

(a) Under this [article], a court:

(1) on receiving a petition for a guardianship for an adult may order a protective arrangement instead of guardianship as a less restrictive alternative to guardianship; and

(2) on receiving a petition for a conservatorship for an individual may order a protective arrangement instead of conservatorship as a less restrictive alternative to conservatorship.

(b) A person interested in an adult's welfare, including the adult or a conservator for the adult, may petition under this [article] for a protective arrangement instead of guardianship.

(c) The following persons may petition under this [article] for a protective arrangement instead of conservatorship:

(1) the individual for whom the protective arrangement is sought;

(2) a person interested in the property, financial affairs, or welfare of the individual, including a person that would be affected adversely by lack of effective management of property or financial affairs of the individual; and

(3) the guardian for the individual.

Comment

Section 501, together with the subsequent sections of Article 5, create an alternative to guardianship and conservatorship for individuals whose needs can be met without the imposition of such a restrictive arrangement. Specifically, these sections allow the court to enter an order that is precisely tailored to the individual's circumstances and needs, and that is limited in scope and, potentially, duration. By allowing the court to craft a simpler and less intrusive protective arrangement, Article 5 is responsive to the Third National Guardianship Summit's call to embrace such less restrictive alternatives. *See generally Third National Guardianship Summit Standards & Recommendations*, 2012 UTAH L. REV. 1191 (2012). In addition, such limited

orders may reduce the costs to the individual (e.g., by avoiding the expense of a paying a conservator) and costs to the court system (e.g., by avoiding the costs associated with monitoring a conservator).

Subsection (a)(1) allows a court to proceed with the process for ordering a protective arrangement instead of guardianship for an adult either upon a petition for such an arrangement or upon a petition for a guardianship of an adult. Subsection (a)(2) allows a court to proceed with the process for ordering a protective arrangement instead of conservatorship for either an adult or minor upon a petition for such an arrangement or upon a petition for conservatorship for the adult or minor.

Subsections (b) and (c) state who may petition for a protective arrangement instead of guardianship or conservatorship. It grants standing to petition to the persons who would have standing to petition for guardianship under Section 302 or conservatorship under Section 402. It also gives standing to the guardian for the respondent to petition for a protective arrangement instead of conservatorship. This additional standing to petition is designed to allow the guardian to protect the financial interests of the respondent without taking the more intrusive step of petitioning for conservatorship.

SECTION 502. BASIS FOR PROTECTIVE ARRANGEMENT INSTEAD OF GUARDIANSHIP FOR ADULT.

(a) After the hearing on a petition under Section 302 for a guardianship or under Section 501(b) for a protective arrangement instead of guardianship, the court may issue an order under subsection (b) for a protective arrangement instead of guardianship if the court finds by clear-and-convincing evidence that:

(1) the respondent lacks the ability to meet essential requirements for physical health, safety, or self-care because the respondent is unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making; and

(2) the respondent's identified needs cannot be met by a less restrictive alternative.

(b) If the court makes the findings under subsection (a), the court, instead of appointing a guardian, may:

(1) authorize or direct a transaction necessary to meet the respondent's need for health, safety, or care, including:

(A) a particular medical treatment or refusal of a particular medical treatment;

(B) a move to a specified place of dwelling; or

(C) visitation or supervised visitation between the respondent and another person;

(2) restrict access to the respondent by a specified person whose access places the respondent at serious risk of physical, psychological, or financial harm; and

(3) order other arrangements on a limited basis that are appropriate.

(c) In deciding whether to issue an order under this section, the court shall consider the factors under Sections 313 and 314 which a guardian must consider when making a decision on behalf of an adult subject to guardianship.

Comment

Subsection (a) allows the court to order a protective arrangement instead of guardianship for an adult if the court makes the findings required to appoint a guardian for that respondent and, as is required for appointment of a guardian, does so based on clear-and-convincing evidence. Thus, subsection (a) does not lower the standard for court-based intervention. Rather, it provides the court with the ability to order an arrangement that is less restrictive than guardianship where such an order would meet the adult's need.

As set forth in subsection (b), after making the findings required by subsection (a), the court may authorize or direct any transaction necessary to meet the adult's need for health, safety, or care. The list of transactions in subsection (b) is non-exclusive. Listed are (1) a particular medical treatment or refusal of a particular medical treatment, (2) a move to a specified place of dwelling, and (3) visitation or supervised visitation between the respondent and another person. An order requiring a third party to permit visitation with the respondent, and potentially setting forth a schedule for such visitation, may be appropriate where the respondent has been wrongfully denied the right to engage with others. The court may also order an arrangement that restricts access "to the respondent by a specified person whose access places the respondent at serious risk of physical, psychological, or financial harm."

When making an order under this section, the court is acting much like a guardian would in making a decision for an individual subject to guardianship. Accordingly, subsection (c) requires the court to consider factors a guardian must consider when making decisions for an adult. The result is that the court may not make an order simply because the court believes the order would be in the best interest of the adult. The court must enter an order consistent with what the court determines the adult would decide if the adult were able to make the decision. This standard will therefore require the court, for example, to consider the adult's wishes and values.

Deliberately not included in this section is a provision allowing for a protective order instead of guardianship for a minor. The possibility of such an order was considered as part of the drafting process, but was rejected amid concerns that it would provide inadequate protection for minors and could impinge on other areas of child welfare law.

SECTION 503. BASIS FOR PROTECTIVE ARRANGEMENT INSTEAD OF CONSERVATORSHIP FOR ADULT OR MINOR.

(a) After the hearing on a petition under Section 402 for conservatorship for an adult or under Section 501(c) for a protective arrangement instead of conservatorship for an adult, the court may issue an order under subsection (c) for a protective arrangement instead of conservatorship for the adult if the court finds by clear-and-convincing evidence that:

(1) the adult is unable to manage property or financial affairs because:

(A) of a limitation in the ability to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making; or

(B) the adult is missing, detained, or unable to return to the United States;

(2) an order under subsection (c) is necessary to:

(A) avoid harm to the adult or significant dissipation of the property of the adult; or

(B) obtain or provide funds or other property needed for the support, care, education, health, or welfare of the adult or an individual entitled to the adult's support; and

(3) the respondent's identified needs cannot be met by a less restrictive alternative.

(b) After the hearing on a petition under Section 402 for conservatorship for a minor or under Section 501(c) for a protective arrangement instead of conservatorship for a minor, the court may issue an order under subsection (c) for a protective arrangement instead of conservatorship for the respondent if the court finds by a preponderance of the evidence that the arrangement is in the minor's best interest, and:

(1) if the minor has a parent, the court gives weight to any recommendation of the parent whether an arrangement is in the minor's best interest;

(2) either:

(A) the minor owns money or property requiring management or protection that otherwise cannot be provided;

(B) the minor has or may have financial affairs that may be put at unreasonable risk or hindered because of the minor's age; or

(C) the arrangement is necessary or desirable to obtain or provide funds or other property needed for the support, care, education, health, or welfare of the minor; and

(3) the order under subsection (c) is necessary or desirable to obtain or provide money needed for the support, care, education, health, or welfare of the minor.

(c) If the court makes the findings under subsection (a) or (b), the court, instead of appointing a conservator, may:

(1) authorize or direct a transaction necessary to protect the financial interest or property of the respondent, including:

(A) an action to establish eligibility for benefits;

(B) payment, delivery, deposit, or retention of funds or property;

(C) sale, mortgage, lease, or other transfer of property;

(D) purchase of an annuity;

(E) entry into a contractual relationship, including a contract to provide for personal care, supportive services, education, training, or employment;

(F) addition to or establishment of a trust;

(G) ratification or invalidation of a contract, trust, will, or other transaction, including a transaction related to the property or business affairs of the respondent;

or

(H) settlement of a claim; or

(2) restrict access to the respondent's property by a specified person whose access to the property places the respondent at serious risk of financial harm.

(d) After the hearing on a petition under Section 501(a)(2) or (c), whether or not the court makes the findings under subsection (a) or (b), the court may issue an order to restrict access to the respondent or the respondent's property by a specified person that the court finds by clear-and-convincing evidence:

(1) through fraud, coercion, duress, or the use of deception and control caused or attempted to cause an action that would have resulted in financial harm to the respondent or the respondent's property; and

(2) poses a serious risk of substantial financial harm to the respondent or the respondent's property.

(e) Before issuing an order under subsection (c) or (d), the court shall consider the factors under Section 418 a conservator must consider when making a decision on behalf of an

individual subject to conservatorship.

(f) Before issuing an order under subsection (c) or (d) for a respondent who is a minor, the court also shall consider the best interest of the minor, the preference of the parents of the minor, and the preference of the minor, if the minor is 12 years of age or older.

Comment

Subsections (a) and (b) allow the court to order a protective arrangement instead of conservatorship for an adult or minor respondent if the court makes the findings required to appoint a conservator for that respondent. Thus, subsection (a), which applies to adults, does not lower the standard for court-based intervention. Rather, it provides the court with the ability to order an arrangement that is less restrictive than conservatorship (including a limited conservatorship) where such an order would meet the individual's need. Similarly, subsection (b) authorizes the court to order a protective arrangement instead of conservatorship for a minor if such an arrangement is in the minor's best interest. However, before ordering a protective arrangement for a minor, the court must give weight to the recommendation of a parent.

As set forth in subsection (c), after making the findings required by subsection (a) or (b), the court may authorize or direct any transaction necessary to protect the financial interest or property of the individual about whom the findings were made. The transactions listed in subsection (c) comprise a non-exclusive list. The list is similar to the list of transactions in Section 412(a) of the 1997 act except that this act expressly authorizes an action to establish eligibility for benefits.

Unlike subsections (a) and (b), subsection (d) creates a basis for court intervention that does not exist in Article 4. It allows a court to restrict access to the respondent or the respondent's property by another person who has already engaged in certain types of bad acts. In order to impose the restriction, the court must find by clear-and-convincing evidence that the person being restricted has used fraud, coercion, duress, or deception and control to either cause or attempt to cause some act that did or would have financially harmed the respondent or the respondent's property. The court must also find by clear-and-convincing evidence that the person currently poses a serious risk of substantial financial harm to the respondent or the respondent's property.

Subsection (d) is designed to provide protection for individuals who are at serious risk of substantial financial harm as a result of the types of behaviors frequently referred to as "undue influence." Such behaviors constitute a pernicious, and particularly common, form of financial exploitation. *See generally* Stacey Wood and Pi-Ju Li, *Undue Influence and Financial Capacity: A Clinical Perspective*, 36 GENERATIONS 53 (2012) (discussing the phenomenon of undue influence from a psychological perspective); Mary Joy Quinn, *Friendly Persuasion, Good Salesmanship, or Undue Influence*, 2 MARQUETTE ELDER'S ADVISOR 49 (2001) (describing undue influence and ways in which it can occur).

The relief provided by subsection (d) should be used sparingly and only if no less restrictive alternative is possible. While the restriction on access is placed on the third party who has engaged in bad acts, it also restricts the respondent's freedom of association and choices. Moreover, as the court does not need to find that the respondent's ability to reason or make choices is otherwise impaired before restricting access, subsection (d) can be used to restrict the liberty of an individual who would otherwise be considered fully able and entitled to make decisions for himself or herself.

While subsection (d) was drafted with situations often referred to as "undue influence" in mind, the term "undue influence" was deliberately not used. The decision not to use this term was made in part because the term has been used in so many diverse, and at times inconsistent ways, across a variety of contexts. See Mary Joy Quinn et. al, *Undue Influence: Definitions and Applications* (Report to the Borchard Center Foundation on Law and Aging, 2010) (describing the various ways states have defined undue influence and reporting that definitions are typically unclear or incomplete); Stacey Wood and Pi-Ju Li, *Undue Influence and Financial Capacity: A Clinical Perspective*, 36 GENERATIONS 53 (2012) (describing different ways undue influence has been defined in the psychology literature). In addition, the concept of undue influence developed in the in the context of testamentary challenges and, in that context, the "unnaturalness" of a disposition can be evidence of undue influence. See Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 KAN. L. REV. 245, 264–67 (2010). The drafting committee did not want to suggest that whether the conditions of this section are met depends on the perceived "naturalness" of the respondent's behavior as such perceptions are easily influenced by the cultural perspectives and biases of the perceiver.

Taken together, subsections (c) and (d) provide a concrete mechanism for protecting an individual from financial exploitation, without the more significant liberty restriction associated with imposition of a conservatorship. Under subsections (c) and (d), rather than imposing a conservatorship, a court may craft a remedy specifically targeted to the individual's circumstances and the threat. For example, a court might authorize a designated individual to apply for Veteran's, social security disability or Medicaid benefits on behalf of the individual; limit access to the adult's property by another person; order the creation and funding of a trust; change title to an account that was compromised by another; or order online automatic payment of a specified bill. These limited remedies can solve a specific problem without imposing a conservatorship with the accompanying management costs to both the individual and the court system. This is important because financial exploitation of older adults is a significant problem around the country, and exploitation is often perpetuated by individuals with whom the victim has an ongoing relationship and thus from whom they may need ongoing protection. See RON ACIERNO ET AL., NATIONAL ELDER MISTREATMENT STUDY (2009) (in a national telephone survey of non-institutionalized persons aged sixty and older in the continental United States, finding that more than 5% had experienced financial exploitation by a family member in the past year alone). Such financial exploitation not only has profound implications for the well-being of its victims, it can also have a negative impact on public resources as states may be called on to provide assistance to its victims.

When making an order under this section, the court is acting much like a conservator would in making a decision for an individual subject to guardianship. Accordingly, subsection (e)

requires the court to consider factors a conservator must consider when making decisions for the individual. The result is that the court may not make an order simply because the court believes the order would be in the best interest of the individual. The court must enter an order consistent with what the court determines the individual would decide if the individual were able to make the decision. This standard will therefore require the court to consider the individual's wishes and values, among other factors.

Finally, subsection (f) requires a court considering entering an order for a minor under this section to take into account the best interest of the minor, the preference of the parents of the minor, and the preference of the minor, if the minor is 12 years of age or older. This requirement is designed both to protect the minor and to provide adequate deference to parental rights in accordance with the U.S. Supreme Court's ruling in *Troxel v. Granville*, 530 U.S. 57 (2000).

SECTION 504. PETITION FOR PROTECTIVE ARRANGEMENT. A petition for a protective arrangement instead of guardianship or conservatorship must state the petitioner's name, principal residence, current street address, if different, relationship to the respondent, interest in the protective arrangement, the name and address of any attorney representing the petitioner, and, to the extent known, the following:

(1) the respondent's name, age, principal residence, current street address, if different, and, if different, address of the dwelling in which it is proposed the respondent will reside if the petition is granted;

(2) the name and address of the respondent's:

(A) spouse [or domestic partner] or, if the respondent has none, an adult with whom the respondent has shared household responsibilities for more than six months in the 12-month period before the filing of the petition;

(B) adult children or, if none, each parent and adult sibling of the respondent, or, if none, at least one adult nearest in kinship to the respondent who can be found with reasonable diligence; and

(C) adult stepchildren whom the respondent actively parented during the

stepchildren's minor years and with whom the respondent had an ongoing relationship in the two year period immediately before the filing of the petition;

(3) the name and current address of each of the following, if applicable:

(A) a person responsible for the care or custody of the respondent;

(B) any attorney currently representing the respondent;

(C) the representative payee appointed by the Social Security Administration for the respondent;

(D) a guardian or conservator acting for the respondent in this state or another jurisdiction;

(E) a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary;

(F) the fiduciary appointed for the respondent by the Department of Veterans Affairs;

(G) an agent designated under a [power of attorney for health care] in which the respondent is identified as the principal;

(H) an agent designated under a power of attorney for finances in which the respondent is identified as the principal;

(I) a person nominated as guardian or conservator by the respondent if the respondent is 12 years of age or older;

(J) a person nominated as guardian by the respondent's parent[,], [or] spouse [, or domestic partner]in a will or other signed record;

(K) a person known to have routinely assisted the respondent with decision making in the six-month period immediately before the filing of the petition; and

(L) if the respondent is a minor:

(i) an adult not otherwise listed with whom the respondent resides;

and

(ii) each person not otherwise listed that had primary care or custody of the respondent for at least 60 days during the two years immediately before the filing of the petition or for at least 730 days during the five years immediately before the filing of the petition;

(4) the nature of the protective arrangement sought;

(5) the reason the protective arrangement sought is necessary, including a brief description of:

(A) the nature and extent of the respondent's alleged need;

(B) any less restrictive alternative for meeting the respondent's alleged need which has been considered or implemented;

(C) if no less restrictive alternative has been considered or implemented, the reason less restrictive alternatives have not been considered or implemented; and

(D) the reason other less restrictive alternatives are insufficient to meet the respondent's alleged need;

(6) the name and current address, if known, of any person with whom the petitioner seeks to limit the respondent's contact;

(7) whether the respondent needs an interpreter, translator, or other form of support to communicate effectively with the court or understand court proceedings;

(8) if a protective arrangement instead of guardianship is sought and the respondent has property other than personal effects, 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; and

(9) if a protective arrangement instead of conservatorship is sought, 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.

Comment

This section lists the information that must be contained in the petition for a protective arrangement instead of guardianship for an adult under Section 502 or a protective arrangement instead of conservatorship for a minor or adult under Section 503. The requirements for a petition for a protective arrangement instead of guardianship for an adult largely mirror those for a petition for a guardianship of an adult under Section 302. Likewise, the requirements for a petition for a protective arrangement instead of conservatorship largely mirror those for a petition for a conservatorship under Section 402.

Paragraph (1) requires the petitioner to provide basic information about the respondent. If the petitioner is proposing a change in the respondent's place of dwelling, the petition must contain the address of the proposed new dwelling.

Paragraphs (2) and (3) require that the petition list family members and others who may have information useful to the court and to whom notice of the proceeding must be given under Section 505. These persons will likely have the greatest interest in protecting the respondent and in making certain that the proposed arrangement is appropriate.

Paragraph (4) requires the petition to state the type of protective arrangement sought. As a wide range of arrangements can be ordered under Article 5, this statement will be critical to helping the court understand what the petitioner is requesting.

Paragraph (5) emphasizes the importance of least restrictive alternatives. The petitioner is required to state the nature and extent of the need alleged. The petitioner must also identify all less restrictive alternatives for meeting that respondent's alleged needs that have been considered or implemented, to justify any failure to pursue less restrictive alternatives, and to explain why less restrictive alternatives would not meet the respondent's alleged needs. These requirements serve to provide the court with important information relevant to whether an order under Article 5 is appropriate. These requirements also prompt would-be petitioners to explore less restrictive alternatives.

Paragraph (6) requires the petitioner to state any person with whom the petitioner seeks to limit the respondent's contact. This provision is designed to alert the respondent, and others who receive notice of the petition, of a potential consequence of the order that may raise significant concerns. Giving the respondent, and those entitled to a copy of the petition under Section 504,

full information will enable them to make more informed decisions about whether to oppose the petition.

Paragraph (7) requires the petitioner to set forth respondent's need, if any, for an interpreter, translator, or other form of support to effectively communicate with the court or understand court proceedings. Thus, if the respondent uses another person to help the respondent communicate or understand, the petitioner should include this information.

Finally, paragraphs (8) and (9) require the petitioner to include a general statement of the respondent's property, including an estimated value, insurance and pension information, and information about other anticipated income or receipts. This information should be detailed to enable the visitor to expeditiously complete the report required by Section 506, and to enable the court to determine whether a protective arrangement is needed. An exception is made if the only property is personal effects and the petitioner is seeking a protective arrangement instead of guardianship; if the petitioner seeks a protective arrangement instead of conservatorship, personal effects must also be included in the general statement.

To help petitioners satisfy the requirements of this section, Section 603 contains a sample petition form that petitioners may use.

SECTION 505. NOTICE AND HEARING.

(a) On filing of a petition under Section 501, the court shall set a date, time, and place for a hearing on the petition.

(b) A copy of a petition under Section 501 and notice of a hearing on the petition must be served personally on the respondent. The notice must inform the respondent of the respondent's rights at the hearing, including the right to an attorney and to attend the hearing. The notice must include a description of the nature, purpose, and consequences of granting the petition. The court may not grant the petition if notice substantially complying with this subsection is not served on the respondent.

(c) In a proceeding on a petition under Section 501, the notice required under subsection (b) must be given to the persons required to be listed in the petition under Section 504(1) through (3) and any other person interested in the respondent's welfare the court determines. Failure to give notice under this subsection does not preclude the court from granting the petition.

(d) After the court has ordered a protective arrangement under this [article], notice of a hearing on a petition filed under this [act], together with a copy of the petition, must be given to the respondent and any other person the court determines.

Comment

The notice and hearing requirements of this section largely mirror those of Section 303 and Section 403. This reflects the fact that a proceeding under this article should provide the respondent with the same high level of due process as proceedings under Article 3 and Article 4.

Personal service of the petition and notice of hearing on the respondent is required. Failure to personally serve the respondent is jurisdictional, as is notice that does not substantially comply with the requirements of subsection (b). Notice of hearing must be given to the persons who are listed in the petition, but as provided in subsection (c) failing to give notice to those listed (other than the respondent) is not jurisdictional. For an explanation of why such notice is not jurisdictional, see the comments to Sections 303 and 403.

Subsection (d) addresses the notice requirements for hearings on petitions for orders subsequent to the entry of an order under Article 5. The individual subject to the order, and anyone else the court directs, must be given copies of any notice of hearing and a copy of any petition. This provision helps ensure that the individual subject to the order is kept informed of developments.

Notice under this section is also governed by the general notice requirements for hearings under Section 113, which requires that notice be given at least 14 days prior to the hearing.

SECTION 506. APPOINTMENT AND ROLE OF [VISITOR].

(a) On filing of a petition under Section 501 for a protective arrangement instead of guardianship, the court shall appoint a [visitor]. The [visitor] must be an individual with training or experience in the type of abilities, limitations, and needs alleged in the petition.

(b) On filing of a petition under Section 501 for a protective arrangement instead of conservatorship for a minor, the court may appoint a [visitor] to investigate a matter related to the petition or inform the minor or a parent of the minor about the petition or a related matter.

(c) On filing of a petition under Section 501 for a protective arrangement instead of conservatorship for an adult, the court shall appoint a [visitor][unless the respondent is represented by an attorney appointed by the court]. The [visitor] must be an individual with

training or experience in the types of abilities, limitations, and needs alleged in the petition.

(d) A [visitor] appointed under subsection (a) or (c) shall interview the respondent in person and in a manner the respondent is best able to understand:

(1) explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, and the respondent's rights at the hearing on the petition;

(2) determine the respondent's views with respect to the order sought;

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

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, may be paid from the respondent's assets;

(5) if the petitioner seeks an order related to the dwelling of the respondent, visit the respondent's present dwelling and any dwelling in which it is reasonably believed the respondent will live if the order is granted;

(6) if a protective arrangement instead of guardianship is sought, obtain information from any physician or other person known to have treated, advised, or assessed the respondent's relevant physical or mental condition;

(7) if a protective arrangement instead of conservatorship is sought, review financial records of the respondent, if relevant to the [visitor's] recommendation under subsection (e)(3); and

(8) investigate the allegations in the petition and any other matter relating to the petition the court directs.

(e) A [visitor] under this section promptly shall file a report in a record with the court, which must include:

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

(2) to the extent relevant to the order sought, a summary of self-care, independent-living tasks, and financial-management tasks the respondent:

(A) can manage without assistance or with existing supports;

(B) could manage with the assistance of appropriate supportive services, technological assistance, or supported decision making; and

(C) cannot manage;

(3) a recommendation regarding the appropriateness of the protective arrangement sought and whether a less restrictive alternative for meeting the respondent's needs is available;

(4) if the petition seeks to change the physical location of the dwelling of the respondent, a statement whether the proposed dwelling meets the respondent's needs and whether the respondent has expressed a preference as to the respondent's dwelling;

(5) a recommendation whether a professional evaluation under Section 508 is necessary;

(6) a statement whether the respondent is able to attend a hearing at the location court proceedings typically are held;

(7) a statement whether the respondent is able to participate in a hearing and which identifies any technology or other form of support that would enhance the respondent's ability to participate; and

(8) any other matter the court directs.

Legislative Note: The term “visitor” is bracketed because some states use a different term for the person appointed by the court to investigate and report on certain facts.

Comment

Subsections (a) through (c) govern when a court may and must appoint a visitor.

Subsection (a) requires the court to appoint a visitor upon receipt of a petition for a protective arrangement instead of guardianship under Section 501. This provision mirrors the requirement in Section 304(a).

Subsection (b) gives the court discretion to appoint a visitor upon receipt of a petition for a protective arrangement instead of conservatorship for a minor under Section 501. Appointment is not required, but may be very helpful in assisting the court to determine whether a protective arrangement is appropriate and, if so, what form the protective arrangement should take. This provision mirrors the requirement in Section 405(a).

Subsection (c) requires the court to appoint a visitor upon receipt of a petition for a protective arrangement instead of a conservatorship for an adult under Section 501 unless: (1) the enacting state has included the bracketed language that no such appointment is required if the adult is represented by an attorney appointed by the court; and (2) the court has in fact appointed an attorney to represent the adult. Notably, if the adult is represented by an attorney appointed by the court, the court may still appoint a visitor if it so chooses. “Visitor” is bracketed in recognition that states use, and may wish to substitute, different words to refer to this position. This provision mirrors the requirement in Section 405(b).

Visitors may be selected from a variety of professions, and may include physicians, psychologists, social workers, or nurses, among others. Regardless of the visitor’s profession, subsections (a) and (c) require the visitor for an adult to have training and experience in the type of abilities, limitations, and needs the adult is alleged to have. This training and experience should be sufficient so that the visitor may serve as the “eyes and ears” of the court. Thus, for example, a visitor appointed for a respondent alleged to have Alzheimer’s disease must have training or experience in assessing the needs of those with Alzheimer’s disease. As the appropriate disposition of the petition may well depend on what services are available to the respondent, the visitor should also be knowledgeable about less restrictive alternatives, including supportive services available in the respondent’s community. As the visitor’s role is to provide objective information to the court, it is essential that the visitor not have a conflict of interest. For example, the visitor should not be an employee of an institution where the respondent resides. Similarly, the petitioner should not nominate a visitor, and any such nomination should be disregarded by the court.

Under subsection (d), the visitor is tasked with interviewing the respondent in person and explaining to the respondent the nature and potential consequences of the petition and the respondent’s rights. The visitor must determine the respondent’s views about the order sought. The visitor should communicate in a language in which the respondent is proficient, accompanied by a qualified and disinterested interpreter as necessary. While the visitor is not required to speak the respondent’s primary language, it is best practice to use visitors who do. Where this is not practicable, both good practice and due process dictate the use of interpreters so the respondent can understand and communicate. If assistive devices are needed in order for

the visitor to explain to the respondent in a manner the respondent can understand, or for the respondent to communicate with the visitor, the visitor should use those assistive devices.

The visitor, as set forth in subsection (e), is responsible for reporting to the court about a variety of matters about which the court will need information to act on the petition. The visitor's report must be in a record and include a list of recommendations or statements. The particular statements or recommendation required depend, in part, on the type of protective arrangement sought and the type of needs alleged. States enacting this act should consider developing a checklist for the items enumerated in subsection (e).

If the petition is withdrawn prior to the appointment of a visitor, no appointment of a visitor is necessary.

While appointment of a visitor is not without financial cost, appointment of visitors may reduce the states' overall costs by avoiding unnecessary guardianships and conservatorships. Courts faced with limited resources may also wish to consider using volunteer visitor programs. *See Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community*, which was published by the American Bar Association Commission on Law and Aging in 2011.

SECTION 507. APPOINTMENT AND ROLE OF ATTORNEY.

Alternative A

(a) The court shall appoint an attorney to represent the respondent in a proceeding under this [article] if:

- (1) the respondent requests the appointment;
- (2) the [visitor] recommends the appointment; or
- (3) the court determines the respondent needs representation.

Alternative B

(a) Unless the respondent in a proceeding under this [article] is represented by an attorney, the court shall appoint an attorney to represent the respondent, regardless of the respondent's ability to pay.

End of Alternatives

(b) An attorney representing the respondent in a proceeding under this [article] shall:

- (1) make reasonable efforts to ascertain the respondent's wishes;

(2) advocate for the respondent's wishes to the extent reasonably ascertainable;

and

(3) if the respondent's wishes are not reasonably ascertainable, advocate for the result that is the least restrictive alternative in type, duration, and scope, consistent with the respondent's interests.

[(c) The court shall appoint an attorney to represent a parent of a minor who is the subject of a proceeding under this [article] if:

(1) the parent objects to the entry of an order for a protective arrangement instead of guardianship or conservatorship;

(2) the court determines that counsel is needed to ensure that consent to the entry of an order for a protective arrangement is informed; or

(3) the court otherwise determines the parent needs representation.]

Legislative Note: Subsection (c) is in brackets because some states have different policies regarding rights of parents in these cases.

Comment

Alternative provisions are offered in subsection (a). Alternative A relies on the use of a "visitor," who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues. Appointment of an attorney, nevertheless, is *required* under Alternative A when the court determines that the respondent needs representation, or counsel is requested by the respondent or recommended by the visitor. Alternative A is in accord with the National Probate Court Standards. National Probate Court Standards, Standard 3.3.5 "Appointment of Counsel" (2013) provides:

- (a) Counsel should be appointed by the probate court to represent the respondent when:
 - (1) requested by an unrepresented respondent;
 - (2) recommended by a court visitor;
 - (3) the court, in the exercise of its discretion, determines that the respondent is in need of representation; or
 - (4) otherwise required by law.
- (b) The role of counsel should be that of an advocate for the respondent.

It is expected that courts in states enacting Alternative A of subsection (a), will appoint counsel

in virtually all cases in which the respondent would otherwise be unrepresented. In such jurisdictions, courts should err on the side of protecting the respondent's rights and find, absent a compelling reason otherwise, that the respondent needs representation. Visitors in such jurisdictions also need to be sensitive to the fact that the respondent may lack the ability to knowingly waive appointment of counsel.

In light of these concerns and in the interest of providing full due process to respondents, states may wish to adopt Alternative B, which provides for mandatory appointment of counsel. Mandatory appointment has been strongly urged by the American Bar Association (A.B.A.) Commission on Law and Aging and helps ensure that the respondent's rights are fully represented and protected in the proceeding.

Subsection (b), which is new to the act, specifies the role of the attorney for the respondent, regardless of whether the state has chosen alternative A or B. It specifies that the attorney must make reasonable efforts to ascertain what the respondent wishes and must advocate for those wishes. This has the effect of directing the attorney to maintain a normal attorney-client relationship with the respondent. A.B.A. Model Rule of Professional Conduct 1.14, which is also applicable here, directs the attorney to maintain, as far as reasonably possible, a normal attorney-client relationship with a client of diminished capacity, and provides guidance on what may be done if maintaining a normal attorney-client relationship becomes difficult. Subsection (b) is also in accord with National Probate Court Standards, Standard 3.3.5 "Appointment of Counsel" (2013) with respect to the role of counsel.

Subsection (c), which is in brackets, gives states the option of creating a limited right to appointed counsel for parents whose minor children are the subject of a proceeding under Section 501. Subsection (c), if enacted, would require the court to appoint an attorney to represent such a parent if the parent objected to a protective arrangement instead of conservatorship, the parent appeared to be consenting to entry of an order for a protective arrangement instead of conservatorship but the court determined that counsel was needed to make sure that consent was informed, or the court otherwise determined that the parent needed counsel. Subsection (c) is designed not only to protect the interests of parents, but also to potentially empower parents to better protect the rights of their minor children. In determining whether to enact subsection (c), enacting jurisdictions should consider the substantial benefit of representation in protecting parents' fundamental rights and the important interest in parenting their own children.

Subsections (a) and (b) of this section mirror Section 305(a) and (b) and Section 406(a) and (b). Subsection (c) of this section mirrors Section 406(c).

SECTION 508. PROFESSIONAL EVALUATION.

(a) At or before a hearing on a petition under this [article] for a protective arrangement, the court shall order a professional evaluation of the respondent:

(1) if the respondent requests the evaluation; or

(2) or in other cases, unless the court finds that it has sufficient information to determine the respondent's needs and abilities without the evaluation.

(b) If the court orders an evaluation under subsection (a), the respondent must be examined by a licensed physician, psychologist, social worker, or other individual appointed by the court who is qualified to evaluate the respondent's alleged cognitive and functional abilities and limitations and will not be advantaged or disadvantaged by a decision to grant the petition or otherwise have a conflict of interest. The individual conducting the evaluation promptly shall file a report in a record 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 cognitive and functional abilities and 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, including with regard to the ability to manage the respondent's property and financial affairs if a limitation in that ability is alleged, and recommendation for the appropriate treatment, support, or habilitation plan; and

(4) the date of the examination on which the report is based.

(c) The respondent may decline to participate in an evaluation ordered under subsection (a).

Comment

A professional evaluation of the respondent is required in two circumstances. First, subsection (a)(1) mandates a professional evaluation when demanded by the respondent. When represented by counsel, the respondent may demand the evaluation through counsel. If the respondent is truly incapacitated and not represented by counsel, it is unlikely that the respondent will demand an evaluation. However, the court still can order a professional evaluation either on the visitor's recommendation or on its own motion.

Second, subsection (a)(2) mandates a professional evaluation in other cases unless the court explicitly finds it has sufficient information to determine both the respondent's needs and abilities without that evaluation. Consistent with this requirement, a court should order a professional evaluation any time the nature and scope of the respondent's abilities, limitations, and needs are not absolutely clear based on its own assessment and on the visitor's report. By providing the court with an expert evaluation of the respondent's abilities and limitations, the professional evaluation not only helps the court determine whether a protective arrangement is necessary, but also helps the court determine how to craft an appropriate order.

If an evaluation is ordered, subsection (b) requires that it be performed by a professional who is qualified to evaluate the respondent's alleged cognitive and functional abilities and limitations. Assessing both abilities and limitations is important because an individual's functional needs will likely reflect the interaction between abilities and limitations. As part of the evaluation described in subsection (b), the professional evaluator should generally include a summary of any consultation with the respondent's treating physician.

Subsection (c) recognizes the right of the respondent to decline to participate in the evaluation. A respondent might so decline because of concern about undue invasion of privacy. However, if the respondent refuses participation, the court will have less information on which to base its conclusion. For respondents who oppose the proposed protective arrangement, this may be particularly problematic as the bulk of the court's information may end up being supplied by the petitioner.

Section 508 largely mirrors Sections 306 and 407.

SECTION 509. ATTENDANCE AND RIGHTS AT HEARING.

(a) Except as otherwise provided in subsection (b), a hearing under this [article] may not proceed unless the respondent attends the hearing. If it is not reasonably feasible for the respondent to attend a hearing at the location court proceedings typically are held, the court shall make reasonable efforts to hold the hearing at an alternative location convenient to the respondent or allow the respondent to attend the hearing using real-time audio-visual technology.

(b) A hearing under this [article] may proceed without the respondent in attendance if the court finds by clear-and-convincing evidence that:

(1) the respondent consistently and repeatedly has refused to attend the hearing after having been fully informed of the right to attend and the potential consequences of failing

to do so;

(2) there is no practicable way for the respondent to attend and participate in the hearing even with appropriate supportive services and technological assistance; or

(3) the respondent is a minor who has received proper notice and attendance would be harmful to the minor.

(c) The respondent may be assisted in a hearing under this [article] by a person or persons of the respondent's choosing, assistive technology, or an interpreter or translator, or a combination of these supports. If assistance would facilitate the respondent's participation in the hearing, but is not otherwise available to the respondent, the court shall make reasonable efforts to provide it.

(d) The respondent has a right to choose an attorney to represent the respondent at a hearing under this [article].

(e) At a hearing under this [article], the respondent may:

(1) present evidence and subpoena witnesses and documents;

(2) examine witnesses, including any court-appointed evaluator and the [visitor];

and

(3) otherwise participate in the hearing.

(f) A hearing under this [article] must be closed on request of the respondent and a showing of good cause.

(g) Any person may request to participate in a hearing under this [article]. The court may grant the request, with or without a hearing, on determining that the best interest of the respondent will be served. The court may impose appropriate conditions on the person's participation.

Comment

Subsection (a) provides that, except under the unusual circumstances set forth in subsection (b), no hearing on a petition for a protective arrangement instead of guardianship or conservatorship may proceed without the presence of the respondent. The fact that the respondent may not be able to attend the hearing at the location where the court normally conducts hearings does not justify holding the hearing without the respondent. Rather, the court must try to hold the hearing at a location that the respondent can attend or by using real-time, audio-visual technology. As a general matter, it is preferable to do the former, as in-person interactions will allow the court to observe the respondent's context, which can help the court to understand factors that may be influencing the respondent's behavior and communications. However, real-time, audio-visual technology can provide a reasonable alternative in appropriate situations if the technology allows both the court and respondent to communicate with one another to the best of their abilities.

The exceptions in subsection (b) to the requirement that the respondent must attend the hearing are deliberately very narrow. For the hearing to proceed without the respondent in attendance, the court must find at least one of three things by clear-and-convincing evidence.

The first exception is that the respondent consistently and repeatedly refused to attend the hearing despite being fully informed of the right to attend and potential consequences of not doing so. Thus, for example, a respondent who cannot physically access the courthouse where the hearing is scheduled must understand that she has a right to have the hearing held at an alternative location or by using real-time, audio-visual technology. The respondent should also understand that a guardian could be appointed for her in her absence, and that this appointment could strip her of the right to make important, personal decisions for herself. Among the responsibilities of the visitor in Section 506(d) is to explain the effect of the proceeding, the respondent's rights at the hearing, and the effect of the order sought.

The second exception is that there is no practicable way for the respondent to attend and participate in the hearing even with appropriate supportive services and technological assistance. Both parts of this requirement—that the respondent cannot practically attend and that the respondent cannot participate even with support—must be fully satisfied for this exception to apply. The exception should be used very sparingly as best practice is to hold the hearing in the presence of the respondent regardless of the respondent's abilities. Without the respondent's presence the court is relying on third-party information to determine that it is in fact not feasible for the respondent to attend and that the respondent is not being prevented from attending for some other reason. Especially where this information is presented by the petitioner, or does not include a professional evaluation, courts should be extremely hesitant to rely on it to excuse the respondent's presence.

The third exception is that the respondent is a minor who has received proper notice and attendance by the minor would be harmful to the minor.

The respondent has the right to take an active role in the hearing, as detailed in subsection (e). Subsection (c) recognizes that to exercise this right, the respondent may need assistance. It therefore provides that the respondent has a right to assistance at the hearing and places an

affirmative duty on the court to take reasonable measures to facilitate the respondent with receiving that assistance.

As indicated in subsection (d), the respondent has a right to choose an attorney to represent the respondent at the hearing. The respondent is free to choose an attorney other than the one who would otherwise be appointed by the court. This provision does not govern payment of the attorney. That issue is addressed in Section 119.

Under subsection (f), the respondent can request that the hearing be closed, but the court may grant the request only upon a showing of good cause.

Under subsection (g), others may make a request to participate, which can be granted by the court without a hearing, if the court finds that the respondent's best interest is served by the participation. The court's order granting the request to participate may include appropriate conditions or limitation.

This section mirrors Section 408, except insofar as Section 408 requires a proposed conservator to attend the hearing unless excused for good cause. Section 408, in turn, largely mirrors Section 307, except that it does not contain the additional exception for allowing the proceeding to occur without the respondent when the respondent is a minor.

SECTION 510. NOTICE OF ORDER. The court shall give notice of an order under this [article] to the individual who is subject to the protective arrangement instead of guardianship or conservatorship, a person whose access to the individual is restricted by the order, and any other person the court determines.

Comment

Section 510 requires the court to give notice of an order entered under Article 5 to the individual subject to the protective arrangement, any person whose access to the individual subject to the protective arrangement is restricted by the order, and any other person the court determines. The general notice provisions of Section 113 govern the form and timing of the notice.

SECTION 511. CONFIDENTIALITY OF RECORDS.

(a) The existence of a proceeding for or the existence of a protective arrangement instead of guardianship or conservatorship is a matter of public record unless the court seals the record after:

(1) the respondent, the individual subject to the protective arrangement, or the

parent of a minor subject to the protective arrangement requests the record be sealed; and

(2) either:

(A) the proceeding is dismissed;

(B) the protective arrangement is no longer in effect; or

(C) an act authorized by the order granting the protective arrangement has been completed.

(b) A respondent, an individual subject to a protective arrangement instead of guardianship or conservatorship, an attorney designated by the respondent or individual, a parent of a minor subject to a protective arrangement, and any other person the court determines are entitled to access court records of the proceeding and resulting protective arrangement. A person not otherwise entitled to access to court records under this subsection for good cause may petition the court for access. The court shall grant access if access is in the best interest of the respondent or individual subject to the protective arrangement or furthers the public interest and does not endanger the welfare or financial interests of the respondent or individual.

[(c) A report of a [visitor] or professional evaluation generated in the course of a proceeding under this [article] must be sealed on filing but is available to:

(1) the court;

(2) the individual who is the subject of the report or evaluation, without limitation as to use;

(3) the petitioner[, visitor,] and petitioner's and respondent's attorneys, for purposes of the proceeding;

(4) unless the court orders otherwise, an agent appointed under a power of attorney for finances in which the respondent is the principal;

(5) if the order is for a protective arrangement instead of guardianship and unless the court orders otherwise, an agent appointed under a [power of attorney for health care] in which the respondent is identified as the principal; and

(6) any other person if it is in the public interest or for a purpose the court orders for good cause.]

Legislative Note: *Subsection (c) is bracketed in recognition that states have different policies and procedures regarding the sealing of court records.*

Comment

Protective arrangements involve highly personal and other data whether the arrangement is in lieu of guardianship or is in lieu of conservatorship. It is important that the respondent's privacy be protected. Furthermore, data found in guardianship or conservatorship records, such as Social Security numbers and information concerning financial accounts, can be used to facilitate fraud. Concern about access by the general public has increased as electronic filing of court records has made these records more accessible.

On the other hand, public access is important. One criticism of guardianship and conservatorship in some states is that too much happens behind closed doors. The public, and "watch-dog" groups in particular, want to know how the guardianship and conservatorship system is functioning. In addition, this act encourages family and others interested in the welfare of the respondent to participate in the proceeding. Sections 504 and 505 working together require notice of the proceeding to be given to family and others whose participation might enhance the proceeding. In order for these persons to effectively monitor the protective arrangement, they need access to records. However, with the move to electronic filing and increasing concerns about protecting sensitive information, more courts are limiting access to guardianship or conservatorship records to the immediate parties and their counsel.

This section attempts to balance these conflicting policy concerns. Subsection (a) provides that the existence of a proceeding for a protective arrangement and the protective arrangement itself is a matter of public record. But even then, similar to the expungement of criminal records, the court has the authority to seal even the existence of the protective arrangement if the proceeding was dismissed, the protective arrangement is no longer in effect, or the actions authorized to be performed by the protective arrangement have been completed.

Subsection (b) addresses access to the underlying records of the protective arrangement. In addition to the individual and the individual's attorney, access is granted to a parent of a minor who is subject to a protective arrangement. Access is also granted to other persons the court determines, including persons whose access is in the best interest of the individual or in furtherance of the public interest and whose access does not endanger the welfare of financial interests of the individual.

The documents most likely to contain highly sensitive information are the visitor report under Section 506 and the professional evaluation under Section 508. Consequently, access to these documents is more restricted than other documents filed, which are covered by subsection (b). Pursuant to subsection (c), access to the visitor or evaluation report is available only to the court, the individual who is the subject of the proceeding and that individual's attorney, the petitioner and petitioner's attorney, and the visitor. Unless the court orders otherwise, access is also available to agents under powers of attorney for finances and, if the protective arrangement is in lieu of guardianship, to an agent under a power of attorney for health care. The court may also order notice to other persons if in the public interest or for other good cause. A partial or complete redaction of sensitive personal or financial information may be a practical solution for courts in balancing the need for disclosure to the public and the interests of family and friends, with the need to protect the individual's privacy and avoid misuse of sensitive data.

Because states vary considerably on their policies with regard to confidentiality in guardianship and conservatorship cases, subsection (c) has been placed in brackets, signaling that states are free to modify the language to match their local practice.

SECTION 512. APPOINTMENT OF [MASTER]. The court may appoint a [master] to assist in implementing a protective arrangement under this [article]. The [master] has the authority conferred by the order of appointment and serves until discharged by court order.

***Legislative Note:** The term "master" is bracketed in recognition that states have different terms for this role.*

Comment

There may be times when it will be necessary, or simply advantageous, for the court to appoint a neutral party to help implement a protective arrangement under Article 5. The person appointed only has the authority conferred by the court in the order of appointment. Thus, the court order should specify the master's authority with respect to the particular transaction the court has approved. The person does not have the powers or duties of a guardian or conservator but only the powers or duties specific to the order.

[[ARTICLE] 6

FORMS

SECTION 601. USE OF FORMS. Use of the forms contained in this [article] is optional. Failure to use these forms does not prejudice any party.

***Legislative note:** An enacting state may wish to modify a form in this article to best reflect state practice. The Appendix to this act includes sample orders that a court may use to deny or grant*

a guardianship, conservatorship, or protective arrangement instead of guardianship or conservatorship for an adult in accordance with this act.

Comment

The forms in this act are designed to make it easier for parties to comply with the requirements of the act, as well as to make it easier for parties to act in accordance with the spirit and goals of this act. In particular, the forms help ensure the petitioner will conduct the thorough needs analysis required by the act, and help the court implement the least restrictive alternative that will meet the needs of the respondent. No party should be prejudiced in any way for failure to use the forms provided under this act. As indicated in the legislative note, states may wish to modify certain aspects of these forms to reflect state practice.

SECTION 602. PETITION FOR GUARDIANSHIP FOR MINOR. This form may be used to petition for guardianship for a minor.

Petition for Guardianship for Minor

State of:

[County] of:

Name and address of attorney representing Petitioner, if applicable:

Note to Petitioner: This form can be used to petition for a guardian for a minor. A court may appoint a guardian for a minor who does not have a guardian if the court finds the appointment is in the minor's best interest, and: (1) the parents, after being fully informed of the nature and consequences of guardianship, consent; (2) all parental rights have been terminated; or (3) the court finds by clear-and-convincing evidence that the parents are unwilling or unable to exercise their parental rights.

1. Information about the person filing this petition (the "Petitioner").

- a. Name:
- b. Principal residence:
- c. Current street address (if different):
- d. Relationship to minor:
- e. Interest in this petition:
- f. Telephone number (optional):
- h. Email address (optional):

2. Information about the minor alleged to need a guardian.

Provide the following information to the extent known.

- a. Name:
- b. Age:
- c. Principal residence:
- d. Current street address (if different):
- e. If Petitioner anticipates the minor moving, or seeks to move the minor,

- proposed new address:
- f. Does the minor need an interpreter, translator, or other form of support to communicate with the court or understand court proceedings? If so, please explain.
 - g. Telephone number (optional):
 - h. Email address (optional):
- 3. Information about the minor's parent(s).**
- a. Name(s) of living parent(s):
 - b. Current street address(es) of living parent(s):
 - d. Does any parent need an interpreter, translator, or other form of support to communicate with the court or understand court proceedings? If so, please explain.
- 4. People who are required to be notified of this petition.** State the name and current address of the people listed in Appendix A.
- 5. Appointment requested.** State the name and address of any proposed guardian and the reason the proposed guardian should be selected.
- 6. State why Petitioner seeks the appointment.** Include a description of the nature and extent of the minor's alleged need.
- 7. Property.** If the minor has property other than personal effects, state the minor's property with an estimate of its value.
- 8. Other proceedings.** If there are any other proceedings concerning the care or custody of the minor currently pending in any court in this state or another jurisdiction, please describe them.
- 9. Attorney(s).** If the minor or the minor's parent is represented by an attorney in this matter, state the name, [telephone number, email address,] and address of the attorney(s).

SIGNATURE

Signature of Petitioner

Date

Signature of Petitioner's Attorney if
Petitioner is Represented by Counsel

Date

APPENDIX A:

People whose name and address must be listed in Section 4 of this petition if they are not the Petitioner.

- The minor, if the minor is 12 years of age or older;

- Each parent of the minor or, if there are none, the adult nearest in kinship that can be found;
 - An adult with whom the minor resides;
 - Each person that had primary care or custody of the minor for at least 60 days during the two years immediately before the filing of the petition or for at least 730 days during the five years immediately before the filing of the petition;
 - If the minor is 12 years of age or older, any person nominated as guardian by the minor;
 - Any person nominated as guardian by a parent of the minor;
 - The grandparents of the minor;
 - Adult siblings of the minor; and
- Any current guardian or conservator for the minor appointed in this state or another jurisdiction.

Comment

This section contains a form that may be used to petition for guardianship of a minor consistent with the requirements of Article 2.

SECTION 603. PETITION FOR GUARDIANSHIP, CONSERVATORSHIP, OR PROTECTIVE ARRANGEMENT. This form may be used to petition for:

- (1) guardianship for an adult;
- (2) conservatorship for an adult or minor;
- (3) a protective arrangement instead of guardianship for an adult; or
- (4) a protective arrangement instead of conservatorship for an adult or minor.

Petition for Guardianship, Conservatorship, or Protective Arrangement

State of:

[County] of:

Name and address of attorney representing Petitioner, if applicable:

Note to Petitioner: This form can be used to petition for a guardian, conservator, or both, or for a protective arrangement instead of either a guardianship or conservatorship. This form should not be used to petition for guardianship for a minor.

The court may appoint a guardian or order a protective arrangement instead of guardianship for an adult if the adult lacks the ability to meet essential requirements for physical health, safety, or self-care because (1) the adult is unable to receive and evaluate information or make or communicate decisions even with the use of supportive services, technological assistance, and supported decision-making, and (2) the adult's identified needs cannot be met by a less restrictive alternative.

The court may appoint a conservator or order a protective arrangement instead of conservatorship for an adult if (1) the adult is unable to manage property and financial affairs because of a limitation in the ability to receive and evaluate information or make or communicate decisions even with the use of supportive services, technological assistance, and supported decision making or the adult is missing, detained, or unable to return to the United States, and (2) appointment is necessary to avoid harm to the adult or significant dissipation of the property of the adult, or to obtain or provide funds or other property needed for the support, care, education, health, or welfare of the adult, or of an individual who is entitled to the adult's support, and protection is necessary or desirable to provide funds or other property for that purpose.

The court may appoint a conservator or order a protective arrangement instead of conservatorship for a minor if (1) the minor owns funds or other property requiring management or protection that cannot otherwise be provided; or (2) it would be in the minor's best interest, and the minor has or may have financial affairs that may be put at unreasonable risk or hindered because of the minor's age, or appointment is necessary or desirable to provide funds or other property needed for the support, care, education, health, or welfare of the minor.

The court may also order a protective arrangement instead of conservatorship that restricts access to an individual or an individual's property by a person that the court finds: (1) through fraud, coercion, duress, or the use of deception and control, caused, or attempted to cause, an action that would have resulted in financial harm to the individual or the individual's property; and (2) poses a serious risk of substantial financial harm to the individual or the individual's property.

1. Information about the person filing this petition (the "Petitioner").

- a. Name:
- b. Principal residence:
- c. Current street address (if different):
- d. Relationship to Respondent:
- e. Interest in this petition:
- f. Telephone number (optional):
- g. Email address (optional):

2. Information about the individual alleged to need protection (the "Respondent").

Provide the following information to the extent known.

- a. Name:
- b. Age:
- c. Principal residence:
- d. Current street address (if different):
- e. If Petitioner anticipates Respondent moving, or seeks to move Respondent, proposed new address:
- f. Does Respondent need an interpreter, translator, or other form of support to communicate with the court or understand court proceedings? If so, please explain.

- g. Telephone number (optional):
 - h. Email address (optional):
3. **People who are required to be notified of this petition.** State the name and address of the people listed in Appendix A.
 4. **Existing agents.** State the name and address of any person appointed as an agent under a power of attorney for finances or [power of attorney for health care], or who has been appointed as the individual's representative for payment of benefits.
 5. **Action requested.** State whether Petitioner is seeking appointment of a guardian, a conservator, or a protective arrangement instead of an appointment.
 6. **Order requested or appointment requested.** If seeking a protective arrangement instead of a guardianship or conservatorship, state the transaction or other action you want the court to order. If seeking appointment of a guardian or conservator, state the powers Petitioner requests the court grant to a guardian or conservator.
 7. **State why the appointment or protective arrangement sought is necessary.** Include a description of the nature and extent of Respondent's alleged need.
 8. **State all less restrictive alternatives to meeting Respondent's alleged need that have been considered or implemented.** Less restrictive alternatives could include supported decision making, technological assistance, or the appointment of an agent by Respondent including appointment under a [power of attorney for health care] or power of attorney for finances. If no alternative has been considered or implemented, state the reason why not.
 9. **Explain why less restrictive alternatives will not meet Respondent's alleged need.**
 10. **Provide a general statement of Respondent's property and an estimate of its value.** Include any real property such as a house or land, insurance or pension, and the source and amount of any other anticipated income or receipts. As part of this statement, indicate, if known, how the property is titled (for example, is it jointly owned?).
 11. **For a petition seeking appointment of a conservator.** (skip this section if not asking for appointment of a conservator)
 - a. If seeking appointment of a conservator with all powers permissible under this state's law, explain why appointment of a conservator with fewer powers (i.e., a "limited conservatorship") or other protective arrangement instead of conservatorship will not meet the individual's alleged needs.
 - b. If seeking a limited conservatorship, state the property Petitioner requests be placed under the conservator's control and any proposed limitation on the conservator's powers and duties.

- c. State the name and address of any proposed conservator and the reason the proposed conservator should be selected.
- d. If Respondent is 12 years of age or older, state the name and address of any person Respondent nominates as conservator.
- e. If alleging a limitation in Respondent's ability to receive and evaluate information, provide a brief description of the nature and extent of Respondent's alleged limitation.
- f. If alleging that Respondent is missing, detained, or unable to return to the United States, state the relevant circumstances, including the time and nature of the disappearance or detention and a description of any search or inquiry concerning Respondent's whereabouts.

12. For a petition seeking appointment of a guardian. (skip this section if not asking for appointment of a guardian)

- a. If seeking appointment of a guardian with all powers permissible under this state's law, explain why appointment of a guardian with fewer powers (i.e., a "limited guardianship") or other protective arrangement instead of guardianship will not meet the individual's alleged needs.
- b. If seeking a limited guardianship, state the powers Petitioner requests be granted to the guardian.
- c. State the name and address of any proposed guardian and the reason the proposed guardian should be selected.
- d. State the name and address of any person nominated as guardian by Respondent, or, in a will or other signed writing or other record, by Respondent's parent or spouse [or domestic partner].

13. Attorney. If Petitioner, Respondent, or, if Respondent is a minor, Respondent's parent is represented by an attorney in this matter, state the name, [telephone number, email address, and] address of the attorney(s).

SIGNATURE

Signature of Petitioner

Date

Signature of Petitioner's Attorney if
Petitioner is Represented by Counsel

Date

APPENDIX A:

People whose name and address must be listed in Section 3 of this petition, if they are not the Petitioner.

- Respondent's spouse [or domestic partner], or if Respondent has none, any adult with whom Respondent has shared household responsibilities in the past six months;
- Respondent's adult children, or, if Respondent has none, Respondent's parents and adult siblings, or if Respondent has none, one or more adults nearest in kinship to Respondent who can be found with reasonable diligence;
- Respondent's adult stepchildren whom Respondent actively parented during the stepchildren's minor years and with whom Respondent had an ongoing relationship within two years of this petition;
- Any person responsible for the care or custody of Respondent;
- Any attorney currently representing Respondent;
- Any representative payee for Respondent appointed by the Social Security Administration;
- Any current guardian or conservator for Respondent appointed in this state or another jurisdiction;
- Any trustee or custodian of a trust or custodianship of which Respondent is a beneficiary;
- Any Veterans Administration fiduciary for Respondent;
- Any person Respondent has designated as agent under a power of attorney for finances;
- Any person Respondent has designated as agent under a [power of attorney for health care];
- Any person known to have routinely assisted the individual with decision making in the previous six months;
- Any person Respondent nominates as guardian or conservator; and
- Any person nominated as guardian by Respondent's parent or spouse [or domestic partner] in a will or other signed writing or other record.

Comment

This section contains a form that may be used to petition for: (1) a guardianship of an adult under Article 3 or a protective arrangement instead of such a guardianship under Article 5; (2) a conservatorship for either an adult or a minor under Article 4, or a protective arrangement instead of such a conservatorship under Article 5. This form addresses one of the key barriers to the limited guardianship: the fact that historically it has often been easier for petitioners to seek a full guardianship than a limited one. By showing petitioners how to request limited powers, and the justifications they must offer if seeking full powers, the form can help encourage petitioners to seek only those powers actually needed.

SECTION 604. NOTIFICATION OF RIGHTS FOR ADULT SUBJECT TO GUARDIANSHIP OR CONSERVATORSHIP. This form may be used to notify an adult subject to guardianship or conservatorship of the adult's rights under Sections 311 and 412.

Notification of Rights

You are getting this notice because a guardian, conservator, or both have been appointed for you.

It tells you about some important rights you have. It does not tell you about all your rights. If you have questions about your rights, you can ask an attorney or another person, including your guardian or conservator, to help you understand your rights.

General rights:

You have the right to exercise any right the court has not given to your guardian or conservator.

You also have the right to ask the court to:

- end your guardianship, conservatorship, or both;
- increase or decrease the powers granted to your guardian, conservator, or both;
- make other changes that affect what your guardian or conservator can do or how they do it; and
- replace the person that was appointed with someone else.

You also have a right to hire an attorney to help you do any of these things.

Additional rights for persons for whom a guardian has been appointed:

As an adult subject to guardianship, you have a right to:

- (1) be involved in decisions affecting you, including decisions about your care, where you live, your activities, and your social interactions, to the extent reasonably feasible;
- (2) be involved in decisions about your health care to the extent reasonably feasible, and to have other people help you understand the risks and benefits of health-care options;
- (3) be notified at least 14 days in advance of a change in where you live or a permanent move to a nursing home, mental-health facility, or other facility that places restrictions on your ability to leave or have visitors, unless the guardian has proposed this change in the guardian's plan or the court has expressly authorized it;
- (4) ask the court to prevent your guardian from changing where you live or selling or surrendering your primary dwelling by [insert process for asking the court to prevent such a move];
- (5) vote and get married unless the court order appointing your guardian states that you cannot do so;
- (6) receive a copy of your guardian's report and your guardian's plan; and
- (7) communicate, visit, or interact with other people (this includes the right to have visitors, to make and receive telephone calls, personal mail, or electronic communications) unless:
 - your guardian has been authorized by the court by specific order to restrict these communications, visits, or interactions;
 - a protective order is in effect that limits contact between you and other people; or
 - your guardian has good cause to believe the restriction is needed to protect you from significant physical, psychological, or financial harm and the restriction is for not more than seven business days if the person has a family or pre-existing social relationship with you or not more than 60 days if the person does not have that kind of relationship with you.

Additional rights for persons for whom a conservator has been appointed:

As an adult subject to conservatorship, you have a right to:

- (1) participate in decisions about how your property is managed to the extent feasible; and
- (2) receive a copy of your conservator's inventory, report, and plan.]

Comment

This section provides a form that courts and guardians or conservators can use to notify adults subject to guardianship or conservatorship of key rights retained by the adult. The notice is drafted using plain and easy-to-understand language that complies with Section 113. Its inclusion thus reduces the potential burden of the act's notice requirements. However, the form by itself will not be adequate to provide meaningful notice to those who are not proficient in English, who are illiterate, or who have very limited literacy.

[ARTICLE] 7

MISCELLANEOUS PROVISIONS

SECTION 701. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 702. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Comment

The Uniform Electronic Transactions Act (UETA) was approved by the Uniform Law Commission in 1999 to give legal effect to electronic signatures when parties agree to communicate electronically. In 2000, Congress enacted the Electronic Signatures in Global and National Commerce Act ("E-SIGN") for the same purpose. E-SIGN contains a provision stating that the federal law will not preempt a state's enactment of UETA or any other state law authorizing electronic transactions enacted after 2000 that makes specific reference to the federal law. This section fulfills the specific-reference requirement of E-SIGN and ensures the state's adoption of provisions in this uniform act involving electronic signatures will not be preempted by federal law.

SECTION 703. APPLICABILITY. This [act] applies to:

- (1) a proceeding for appointment of a guardian or conservator or for a protective

arrangement instead of guardianship or conservatorship commenced after [the effective date of this [act]]; and

(2) a guardianship, conservatorship, or protective arrangement instead of guardianship or conservatorship in existence on [the effective date of this [act]] unless the court finds application of a particular provision of this [act] would substantially interfere with the effective conduct of the proceeding or prejudice the rights of a party, in which case the particular provision of this [act] does not apply and the superseded law applies.

Comment

The provisions of this act apply to all proceedings for guardianships, conservatorships, and protective arrangements commenced after the effective date, and also to pre-existing guardianships, conservatorships, and other protective arrangements unless a court determines application of a state's prior law on the subject would be more equitable.

[SECTION 704. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: *Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

SECTION 705. REPEALS; CONFORMING AMENDMENTS.

(a)

(b)

(c)

SECTION 706. EFFECTIVE DATE. This [act] takes effect

Ensuring Trust:

Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans



November 2018



United States Senate
Special Committee on Aging



United States Senate
Special Committee on Aging

Senator Susan M. Collins (R-ME), Chairman
Senator Robert P. Casey, Jr. (D-PA), Ranking Member

Table of Contents

U.S. Senate Special Committee on Aging.....3

Abbreviations.....4

Executive Summary.....5

Key Findings

Recommendations

Introduction: Guardianship and Calls for Reform.....9

History of Guardianship and Reform Efforts

Creation and Operation of Guardianships, Generally

The Role of the Federal Government

Chapter One: Oversight of Guardians and Guardianship Arrangements.....14

Need for Improved Oversight of Guardians and Guardianship Arrangements

State and Local Reform Efforts

Recommendations

Chapter Two: Less Restrictive Alternatives and Restoration of Rights.....19

Less Restrictive Alternatives

Restoration of Rights

Barriers to Less Restrictive Alternatives and Restoration of Rights

Reform Efforts

Recommendations

Chapter Three: The Need for Better Data.....25

Barriers to Data Collection

National Reform Efforts

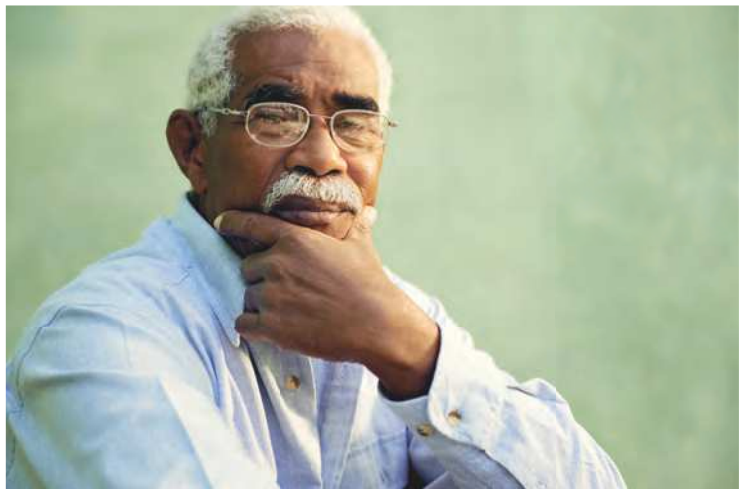
State and Local Reform Efforts

Recommendations

Conclusion.....29

Looking Ahead

Endnotes.....32



Ensuring Trust:
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Overhaul the Guardianship Process
and Protect Older Americans

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Abbreviations

Achieving a Better Life Experience (ABLE)

Administration for Community Living (ACL)

American Bar Association (ABA)

Adult Protective Service (APS)

Associated Press (AP)

Center for Advocacy for the Right & Interests of the Elderly (CARIE)

Conservator Account Monitoring Preparation and Electronic Reporting (CAMPER)

Government Accountability Office (GAO)

Guardianship Inventory Reports & Accountings for Florida (GIRAFF)

U.S. Department of Health and Human Service (HHS)

National Adult Maltreatment Reporting System (NAMRS)

National Adult Protective Services Association (NAPSA)

National Guardianship Association (NGA)

National Council on Disability (NCD)

National Center for State Courts (NCSC)

Supported decision-making (SDM)

Social Security Administration (SSA)

Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA)

Uniform Law Commission (ULC)

U.S. Department of Veterans Affairs (VA)

Volunteer Advocates for Seniors or Incapacitated Adults (VASIA)

Executive Summary

Guardians are entrusted with significant power over individuals who rely on their support. A guardian's authority can range from deciding where an individual will live and when to seek medical care to choosing if family members are allowed to visit and how to spend retirement savings. Most guardians are selfless, dedicated individuals who play an important role in safeguarding vulnerable individuals. However, recent reports of guardianship abuse highlight cases where guardians have abandoned their duty of doing what is in the best interest of the individual in their care. Unscrupulous guardians acting with little oversight have used guardianship proceedings to obtain control of vulnerable individuals and have then used that control to liquidate assets and savings for their own personal benefit. Earlier this year, a professional guardian and her colleagues in Nevada were indicted on more than 200 felony counts after they allegedly used the guardianship process to take advantage of and financially exploit over 150 individuals. In another case, two individuals from North Carolina lost hundreds of thousands of dollars through exploitation by a family member who served as their guardian. These examples are important reminders that guardianship must only be imposed when necessary and that all guardianships must be subject to regular and substantive oversight.

In order to protect individuals subject to guardianship from abuse, exploitation, and neglect, governments and courts must be vigilant in their enforcement of laws and procedures that provide oversight of these relationships. While all states have laws designed to protect due process rights and to ensure that guardians are performing their fiduciary duties, these laws are not always consistently enforced, and more must be done to protect individuals subject to guardianship.

The United States Senate Special Committee on Aging ("the Committee") recognizes the impact of the guardianship system on the health and well-being of seniors and people with disabilities. For example, at a hearing on the issue in 2016, the Committee heard from witnesses who testified about the lack of information available on guardianship, the financial abuses that individuals have suffered at the hands of guardians, and how states have engaged in efforts to address these and other related abuses. This report is a continuation of the Committee's effort to highlight opportunities to improve protections and supports for older Americans and people with disabilities. Through its work, including this report, the Committee seeks to encourage states to develop the proper tools to ensure that guardians and court officials have the resources necessary to serve the best interests of those under guardianship, and that guardians who instead use the system to exploit, abuse, or neglect are quickly identified and are held accountable.

As part of its examination of guardianship and survey of current practices, the Committee sent an official request for comments, recommendations, and best practices to states, courts, and organizations representing older Americans and people with disabilities throughout the country. We received more than 100 responses, which contributed to the findings and recommendations in this report. Many of these responses detailed stories of guardianship abuses from throughout the country, demonstrating the necessity of increased national attention.

This report presents a broad review of the guardianship system, provides insight into discrete issues from a variety of stakeholder perspectives, and identifies opportunities for improving the

lives of those individuals for whom decision-making authority has been entrusted to a guardian. It provides an overview of guardianship and related arrangements, data and information regarding the effect these relationships have on individuals nationally, common barriers to proper oversight, and alternatives to guardianship. Finally, the report contains recommendations for courts and policymakers that would improve outcomes for individuals subject to guardianship arrangements.

KEY FINDINGS

Through hearing testimony, meetings with stakeholders, letters from constituents, research, and a public comment process, the Committee has identified persistent and widespread challenges that require a nationwide focus in order to ensure the guardianship system works on behalf of the individuals it is intended to protect. This report focuses on three key areas that should be addressed to protect the well-being of individuals placed under guardianship:

- ***Oversight of Guardians and Guardianship Arrangements*** – A lack of clear guidelines and education for court officials, community-based organizations, family members, and guardians has resulted in guardianships being imposed without a full knowledge of the responsibilities needed to ensure that an individual subject to guardianship is properly protected and cared for. Once a guardianship is imposed, there are few safeguards in place to protect against individuals who choose to abuse the system. Greater oversight of guardians and guardianship arrangements would protect against abuse, neglect, and exploitation.
- ***Alternatives to Guardianship and Restoration of Rights*** – In some cases, a full guardianship order may remove more rights than necessary and may not be the best means of providing support and protection to an individual. Should individuals subject to guardianship regain capacity, all or some rights should be quickly and efficiently restored. Unfortunately, this rarely occurs. An alternative arrangement may better promote the individual's values and terminate fewer rights while also providing necessary support and oversight.
- ***The Need for Better Data*** – Few states are able to report accurate or detailed guardianship data, and figures related to the number of individuals subject to guardianship are largely unavailable. Reliable data would help policymakers make informed decisions on ways to improve the guardianship system.

RECOMMENDATIONS

Following its year-long investigation, the Committee recommends several actions to that will strengthen these arrangements and improve the well-being of those subject to guardianship.

To improve oversight of guardians and guardianship arrangements, the Committee recommends:

- ***Enhanced Monitoring*** – State courts should engage in more thorough and frequent reviews of guardianship arrangements, and should work with financial monitoring

companies to identify suspicious transactions and notify the court and guardian of potential risks.

- **Background Checks** – Courts should conduct criminal background checks on all prospective guardians.
- **Improved Collaboration** – Coordination and communication should occur between the court and federal agencies, including the SSA and VA, and between the court and community organizations.
- **Volunteer Visitor Programs** – Support for individuals who help to inform the court about the status of the respondent before a guardian is appointed and periodically throughout the guardianship should be increased.
- **Training** – All parties related to the guardianship, including the guardian, court staff, and family members, should be trained on guardian responsibilities and on the signs of abuse.

To encourage the use of less-restrictive alternatives and promote restoration of rights, when appropriate, the Committee recommends:

- **Promotion of Alternatives to Guardianship** – States should encourage courts to utilize alternatives to guardianship through state statutes and public awareness campaigns. Such efforts would officially promote less restrictive alternatives such as limited guardianships and supported decision-making.
- **Increased Training and Education** – Required comprehensive training for judicial officials, attorneys, and guardians would increase understanding and appreciation of less restrictive alternatives to guardianship and the availability of opportunities for restoration of rights, when and if it becomes appropriate.
- **Strengthened Protections for Individuals under Guardianship** – State laws need to be strengthened to ensure individuals seeking a restoration of rights are guaranteed unbiased legal representation and access to resources for a timely consideration by the courts.
- **Nationwide Adoption of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act** – State guardianship laws need greater uniformity to ensure better protections and control for individuals being considered for guardianship and those pursuing a restoration of their rights.

To provide policy makers and other stakeholders with improved data regarding guardianship arrangements, the Committee recommends:

- **Statewide Data Registries** – Such registries would create a single location to collect and disseminate data, allowing for more cohesive collection of data.
- **Increased Federal Support and Guidance to States** – Support to state court systems or other state entities would help create cohesive collection efforts, improving the ability to share information and collect national data.
- **Increased Data Collection by Federal Agencies** – Additional resources aimed at data collection from federal agencies would help states design, test, and improve data collection systems, complement increased federal guidance, and further help create a more consistent national data collection effort.

- ***Creation of a National Resource Center*** – A national resource center on guardianship would collect and publish information for the benefit of courts, policy makers, individuals subject to guardianship, guardians, community organizations, and other stakeholders. Information collected and published by the resource center may include statistics related to guardianship, information on laws and regulations, published research, and training materials.



Introduction: Guardianship and Calls for Reform

Members of the United States Senate Special Committee on Aging are dedicated to examining issues of importance to older Americans, and this report continues the Committee's work to support and protect individuals subject to guardianship from abuse, neglect, and exploitation. Over the last year, the Committee has engaged in a comprehensive review of the guardianship system with the goal of identifying opportunities for reform that will improve outcomes for individuals subject to these arrangements. Following a hearing in April 2018, the Committee solicited insight from guardianship stakeholders throughout the country, including state and local government entities, courts and judicial organizations, advocates for individuals subject to guardianship, organizations representing guardians, academics, lawyers, legal organizations, and others. Three recurring themes emerged during the course of the Committee's investigation: 1) the absence of consistent and reliable data related to guardianship arrangements; 2) the need for improved oversight of guardians; and 3) consideration for increased use of less-restrictive alternatives to guardianship. The Senate Aging Committee received more than 100 comments, which helped to inform its work; many of those comments are cited in this report. For a complete list of entities and individuals providing comments, along with the information provided, please contact the U.S. Senate Special Committee on Aging at (202) 224-5364.

As the Baby Boomer generation continues to age, guardianship increasingly touches the lives of individuals and their families. According to the National Center for State Courts (NCSC), an independent nonprofit organization dedicated to improving court administration and practices, there are approximately 1.3 million adult guardianship cases in the United States and an estimated \$50 billion of assets under guardianship.¹ Despite these staggering numbers, many Americans remain unaware of the central role guardianship can play in the lives of older adults and people with disabilities.²

Guardianship is often a necessary and valuable tool used to serve the needs of an individual that a court has determined lacks the capacity to manage his or her own affairs. It is a legal relationship created by a court between an individual whom it has determined is not capable of making decisions regarding his or her life or property and the person or organization appointed by that court to make such decisions. A guardian may be appointed to care for an individual due to a disability, injury, or illness, such as the onset of dementia, or, in some cases, a mistaken belief that, because of a certain disability, injury, or illness, an individual is unable to make decisions about his or her health or welfare.

A trusted and qualified guardian can provide years of support and protection for an individual by managing his or her finances, arranging for health care, coordinating residential support services, and performing other essential life tasks. However, individuals lose almost all of their rights when a full guardianship order is imposed on them, increasing the risk of abuse, neglect, and exploitation at the hands of unscrupulous guardians. A series of Associated Press stories in the late 1980s drew the nation's attention to a "dangerously burdened and troubled" guardianship system where "a few minutes of routine and the stroke of a judge's pen" were all that was necessary to remove an individual's most basic rights.³

Three decades later, recent stories of abuses in the guardianship system demonstrate a continued and pressing need for guardianship reform. For example, a professional guardian in Nevada was recently indicted on more than 200 felony charges, including racketeering, theft, exploitation, and perjury, after targeting a couple in their 60s, petitioning the court and becoming their guardian, moving them to a nursing home, and selling their property.⁴ Another article documents the exploitation that two brothers with intellectual disabilities in North Carolina experienced after 30 years in prison due to a wrongful conviction. In this case, “trusted” individuals, including a sibling who served as their guardian, a lawyer in Florida, an advocate in Georgia, and a professor from New York, squandered hundreds of thousands of dollars that the brothers had received from the state as compensation for wrongful imprisonment.⁵

History of Guardianship and Reform Efforts

“Guardianship” is an extension of a state’s power under the doctrine of *parens patriae*, a principle that holds that the government is the protector of citizens who are unable to protect themselves.⁶ It is primarily governed by laws, regulations, and practices of each of the states and the courts therein,⁷ and therefore practices can vary greatly from jurisdiction to jurisdiction. This chapter provides a brief review of the history of guardianship reform in the United States as well as a general overview of how guardianships are created and operate across the country.

Guardianship operated throughout much of early American history with little state or federal oversight. Older individuals and individuals with disabilities were provided only limited, if any, protections against being in an unnecessary guardianship arrangement. Court decisions in the 1960s began addressing concerns related to civil confinement and the due process rights of individuals subject to these proceedings, and studies funded by the American Bar Association (ABA) considered the adequacy of existing state safeguards and opportunities for legislative improvements.⁸ The Uniform Law Commission (ULC), which drafts nonpartisan legislation that states may adopt in order to help clarify and promote uniformity in areas of state law, released the first model legislation on guardianship in 1969 as Article V of its Uniform Probate Code.⁹ Introductory comments to Article V highlighted the drafters’ intent to minimize the need for guardianship and protect individuals from “unwise use” of the system by providing for alternative arrangements and giving judges greater discretion.¹⁰

Concerns related to due process protections for individuals subject to guardianship petitions continued into the 1970s and 1980s, but serious focus on legal reforms to the guardianship system did not begin until the Associated Press (AP) in *Guardians of the Elderly: An Ailing System* (1987)¹¹ documented ways in which the system stripped some seniors of their rights with little evidence, and then failed to protect them from abuse.¹² Following the AP’s shocking reports, the ABA convened the first National Guardianship Symposium in 1988, and many states took action by updating laws to improve due process protections and enacting statutes to regulate guardianship.¹³

The ULC adopted a significant revision to its model guardianship statute in 1997, continuing to focus on limited guardianships and enhanced due process protections.¹⁴ Guardianship stakeholders met again in 2001 and 2011, including judges, attorneys, guardians, doctors,

ethicists, professors, and others. The conversations focused on issues facing the guardianship system and recommendations for reform.¹⁵ Generally, the reforms advocated by the conferences followed five trends:

1. Strengthened procedural protections for individuals being considered for guardianship;
2. Provided greater scrutiny over the determination of incapacity;
3. Increased use of limited guardianship;
4. Provided stronger court oversight of guardians; and
5. Developed of public guardianship programs.¹⁶

Leveraging the work of the symposia and continued study and input by guardianship stakeholders, in 2017, the ULC released another significant revision to its model guardianship statute, the “Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act” (“UGCOPAA”).¹⁷ This revision continues the promotion of less-restrictive alternatives to guardianship, incorporates the term “protective arrangement” instead of “guardianship” or “conservatorship,” and includes model forms to be used for assessing an individual’s capacity and needs that will better inform courts making decisions about the most appropriate arrangements. As of 2018, 18 states have passed a version of the uniform guardianship law and several others have enacted specific provisions.¹⁸ However, only Maine has enacted the most recent version of UGCOPAA.¹⁹

Creation and Operation of Guardianships, Generally

Guardianship arrangements are traditionally separated in two categories: those created to oversee personal and health decisions and those created to oversee financial and property decisions. The latter is sometimes referred to as a “conservatorship” or “guardian of the estate,” but the term “guardianship” is often used to refer to both arrangements. For the purposes of this report, we will discuss the two together and use the term “guardianship” to refer to both.

Although every state has laws and procedures in place to protect an individual’s right to due process and provide for oversight of guardians, statutes and practices differ from state to state, and courts often possess significant discretion in deciding how these relationships are created and operate.²⁰ The process for the appointment of a guardian typically begins with the filing of a petition in court by a person or organization (the “petitioner”) that is interested in becoming the guardian of person they believe lacks the capacity to make important life decisions (the “respondent”). After the petition and any other required information have been filed with the court, a hearing will be held where the judge will determine the individual’s capacity and then grant, dismiss, or modify the petition.²¹

Often a family member or friend will petition and serve as an individual’s guardian, but a professional guardian paid for by the respondent’s estate or a public guardian funded by the government can be appointed in appropriate situations.²² The petition must include specific information required by the court, typically including the respondent’s name and address, the relationship of the parties, the circumstances that led to the need for a guardian, and the names and addresses of relatives. Courts generally require a report or other documentation from a medical professional who has recently evaluated the individual,²³ and some may also require a

guardianship plan that includes, among other items, a description of the proposed living arrangement for the respondent and an explanation of how financial, medical, and other needs will be met.²⁴ Legal counsel will be appointed in some states to represent the respondent if he or she has not hired one separately, while in others, courts may use a guardian *ad litem* or court visitor to conduct independent assessments of the respondent's capacity.

The length of the hearing depends on the court and the complexity of the case; many are short and take only a few minutes. The court may also choose to hold the hearing at a location outside the courtroom that is more convenient for the respondent, such as at a hospital or nursing home.²⁵ Although practices vary by jurisdiction, if the court determines that the individual lacks capacity and a guardian is necessary, the judge will enter an order appointing a guardian and outlining his or her powers. Once the guardianship is established, the court creating the relationship has responsibility for overseeing it for as long as it lasts unless it is transferred to another jurisdiction. The guardian has a fiduciary relationship with the individual subject to guardianship, which means the guardian has a "special obligation of trust and confidence, and a duty to act primarily for [the client's] benefit."²⁶

The primary way in which courts ensure guardians are fulfilling this obligation is through the enforcement and oversight of reporting requirements. Most jurisdictions require reports to be filed annually, but the timing and contents vary across jurisdictions, with annual reports being most common.²⁷ Guardians of individuals with assets are usually required to file an inventory of his or her belongings soon after the appointment is made, and then file reports regularly for the duration of the relationship that detail the transactions and financial status of the estate.²⁸ Procedures for reviewing and auditing reports filed by guardians also differ among jurisdictions.

A guardian who does not perform his or her duties appropriately may be removed or "discharged" by the court; however, as described later in the report, removal rarely occurs. Reasons for removal include the use of fraud in obtaining the position, failure to comply with court orders, failure to use the appropriate standards of care and diligence in performance of duties, and the existence of a conflict of interest, among others.²⁹ These proceedings can be initiated by the individual subject to guardianship or by the court on its own motion, or an interested person or agency may provide information to the court that it believes warrants a review.³⁰

The Role of the Federal Government

While states are responsible for appointing guardians and monitoring guardianships in order to protect individuals subject to guardianship from abuse, neglect, and exploitation, the federal government does play a role in the guardianship system. For example, federal agencies such as the Social Security Administration (SSA) and the Department of Veterans Affairs (VA) oversee benefits that are directly affected by guardianship. While some courts send notices of guardianship to the VA and SSA, coordination between federal agencies and states is sometimes lacking or delayed. For instance, federal agencies and state courts do not automatically notify each other when one or the other discovers that a guardian is abusing the incapacitated person.³¹

The federal government has taken steps to improve communication and cooperation between states and increase public understanding of guardianship by facilitating data collection on guardianship, supporting states with grants to improve oversight of guardians and the development of standards of practice, and creating guides for fiduciaries and financial institutions engaging in transactions involving guardianship arrangements.³² The Department of Health and Human Services (HHS) launched the National Adult Maltreatment Reporting System (NAMRS) in 2013, which created a national reporting system for elder abuse with the goal of providing consistent and accurate national data on all types of elder abuse.³³

Congress also took action when it passed the Elder Abuse Prevention and Prosecution Act, which was signed into law in October 2017. The law directs the U.S. Attorney General to publish best practices for improving guardianship proceedings and develop model legislation relating to guardianship proceedings for the purpose of preventing elder abuse. It also requires the Department of Justice to designate Elder Justice Coordinators in each federal judicial district to raise awareness about, advise on, and prosecute all types of elder abuse cases.³⁴



Chapter 1: Oversight of Guardians and Guardianship Arrangements

Guardianship arrangements can be a valuable means for ensuring the continued care and well-being of individuals whom a court has determined lacks capacity; however, such arrangements require appropriate oversight to prevent abuse. When a full guardianship order is imposed, the protected individual loses most of his or her basic rights, including the right to make medical decisions, to buy or sell property, to manage their own money, to marry, to choose where to live, or to choose with whom to associate.³⁵ Aside from incarceration or civil commitment, potentially no other court process infringes upon an individual's personal liberties more significantly than the appointment of a guardian.³⁶ Once a guardianship is imposed, and an individual's rights are removed, the court must monitor the guardian and the arrangement in order to protect the individual from abuse, neglect, and exploitation by the guardian or others.³⁷

Calls for improved oversight of guardianship arrangements are not new, however. Before the AP's landmark reporting on guardianship abuses in the late 1980s,³⁸ a grand jury in Florida documented insufficient monitoring by courts in a report published in 1982.³⁹ Unfortunately, reports of fraud abuse and neglect continued well beyond these reports. In February 2015, the Committee examined the 2006 case of New York philanthropist and socialite Brooke Astor, which involved allegations that Ms. Astor's son, who was also serving as her guardian, illegally enriched himself with assets from her estate. The high-profile case again called national attention to the need for guardianship reform.⁴⁰ More recently, *The New Yorker* documented the horrific story of an older couple in Nevada who lost control of their lives and assets to a professional guardian who was able to obtain a court order appointing her as the couple's guardian without providing any advance notice to the couple or their adult daughter.⁴¹ In "the most significant guardianship exploitation indictment in Nevada's history," in 2018, the guardian and her business colleagues were indicted on more than 200 felony counts stemming from allegations that they used their positions of authority to "prey on vulnerable people ranging in age from 40 to 90, and systematically bilk them out of their life savings."⁴²

As these and other cases demonstrate, without sufficient court oversight, individuals subject to guardianship can be exposed to abuse and exploitation with little or no defense. Every state has procedures in place intended to safeguard the protected individual's well-being and provide for oversight of guardians, but statutes and practices are different from state to state and even court to court.⁴³ Although state laws may govern some elements of guardianship appointment and oversight, courts and judges generally possess broad discretion.⁴⁴ Therefore, courts must be vigilant in overseeing guardians and monitoring guardianship arrangements.

Need for Improved Oversight of Guardians and Guardianship Arrangements

Protections against abusive guardianship arrangements begin before they are imposed. However, most states impose few limits on who can petition and become a guardian,⁴⁵ and although some states forbid a person convicted of a felony from serving as a guardian, background checks are not always required.⁴⁶ In response to an official request from the Committee, commenters recommended a number of reforms to improve the appointment and oversight of guardians and thereby overall outcomes in guardianship cases.

In their comments to the Committee, several organizations, including the ABA, called for jurisdictions to adopt a process for investigating the general background of prospective guardians.⁴⁷ The Baltimore Department of Human Services noted the importance of knowing about a prospective guardian's prior conviction for a crime related to exploitation as an example of why courts should engage in background checks before appointing a guardian.⁴⁸

Guardians who are friends or family of the protected individual may not be familiar with the duties and obligations expected of the position.⁴⁹ In comments to the Committee, some recommended that guardians receive training on record maintenance in addition to fiduciary and reporting obligations,⁵⁰ while AARP pointed out the importance of guardian education on substantive issues relating to advance planning, including long-term care.⁵¹ In an effort to address this concern, specific provisions were included in the recently approved UGCOPAA intended to "provide clearer guidance to guardians and conservators." The Act "clarifies how appointees are to make decisions, including decisions about particularly fraught issues such as medical treatment and residential placement."⁵² The NCSC and the ABA are also working to create online, interactive training for guardians with the support of funding from the Department of Justice's Elder Justice Initiative.⁵³

Several stakeholders also noted the need for court officials and staff to receive regular training on how to evaluate reports and oversee guardianship arrangements. The Conferences of Chief Justices and State Court Administrators, organizations which bring together state court leaders to study and advocate for improvements to state court systems, noted the need for training to identify signs of abuse, neglect, and exploitation.⁵⁴ Maine's Legal Services for the Elderly called attention to the need for training for court volunteers in order to promote uniformity in assessment and reporting on guardianship cases,⁵⁵ and Montana's Adult Protective Services Agency noted that strengthened visitor processes could also improve evaluation of the guardian's compliance with the plan of care for the individual subject to the arrangement.⁵⁶

Commenters also noted the need for improved procedures for the filing of complaints about guardians and for their investigation.⁵⁷ According to the Administrative Conference of the United States, a 2014 survey of 855 court personnel and 147 guardians and others found that 64 percent of courts took action related to misconduct against at least one guardian in the prior three years.⁵⁸ NCSC's Center for Elders and the Courts, in its 2016 Strategic Action Plan, highlighted the need for "proactively and timely responding to allegations of abuse, neglect or exploitation" against individuals subject to guardianship and for enhancing court oversight.⁵⁹ In the same vein, Americans Against Abusive Probate Guardianship, an organization founded to eliminate guardianship abuse and assist victims of guardianship abuse, recommended the formation of a single, federal organization for the investigation of complaints against guardians.⁶⁰

State and Local Reform Efforts

A persistent concern for individuals subject to guardianship has been legal representation or advocacy in court proceedings. Some courts utilize a guardian *ad litem* or court visitor to conduct independent assessments and provide information to assist the court in making decisions on the appropriateness of guardianship or of proposed actions.⁶¹ Acting as agents of the court, these individuals may meet with the person who may become subject to a guardianship, and often with

the proposed guardian, and report to the court on issues such as the circumstances that led to the guardianship petition, the appropriateness of guardianship or a more limited arrangement, and the proposed guardian's qualifications.⁶² Some courts also use these agents to investigate cases after the guardianship has been imposed. In Utah, for example, volunteer monitors, trained through the state's Guardianship Reporting and Monitoring Program, investigate cases and provide information to courts to support decisions related to any actions that may be needed.⁶³ Volunteers in Indiana are trained through the Volunteer Advocates for Seniors or Incapacitated Adults ("VASIA") program to support individuals subject to guardianship, and often act as advocates in court proceedings.⁶⁴ The individual subject to guardianship may also hire an attorney to represent their interests in the proceeding, or one may be appointed by the court in some jurisdictions.⁶⁵ As part of reforms the state enacted in 2017, Nevada now requires the appointment of an attorney for the respondent unless he or she chooses to retain an attorney independently.⁶⁶

Although courts rely heavily on the information filed in reports by guardians in order to oversee the arrangements, commenters noted that compliance with reporting requirements is difficult to evaluate. In his testimony before the Senate Aging Committee earlier this year, Texas court official David Slayton reported that 43 percent of guardianship cases reviewed by the state's Guardianship Compliance Project were found to be out of compliance with reporting requirements.⁶⁷ A number of commenters, including the ABA, noted the need for better communication of reporting requirements to guardians to improve compliance. The ABA recommended a number of actions, such as developing court systems for electronic filing of reports and making reports more easily accessible and available in "plain language."⁶⁸

Online filing and electronic monitoring systems have improved compliance and oversight in some jurisdictions. A 2014 survey of state courts found "that two-thirds of court respondents (67 percent) indicated they use an electronic case management system or database for guardianship cases and another ten percent expect to use an electronic system in the next three years."⁶⁹ In its comments to the Committee, the Conferences of Chief Justices and State Court Administrators recommended practices that would "improve the archaic paper-driven process" and highlighted Minnesota's leadership on this issue. Through its "MyMNConservator" system, Minnesota provides for online filing and professional auditing of annual reports.⁷⁰ Although other states have attempted to implement Minnesota's system, the Conferences of Chief Justices and State Court Administrators noted that none have been successful, "with the primary barrier being financial resources."⁷¹ Texas, however, is currently developing a similar system,⁷² and Mr. Slayton noted in his comments to the Committee that Texas's online reporting and monitoring system improves monitoring of cases and allows for "timely and accurate submission of information about the ward and his or her estate to the court."⁷³

The NCSC has developed a "Rapid Response" pilot project that would use a financial monitoring company to monitor accounts of individuals subject to guardianship and notify courts of suspicious transactions.⁷⁴ As previously discussed, Minnesota's online reporting system has improved audits of guardian filings, and Texas is developing a similar system as well.⁷⁵ Congress also took action by passing the SeniorSafe Act. Signed into law in May 2018, SeniorSafe is modeled after a successful program in Maine. This law allows financial institutions, such as

banks, credit unions, and investment advisers, to alert authorities without violating privacy laws when trained employees, acting in good faith, suspect fraud.⁷⁶

Many of the reforms that have been implemented in states have been the result of “compliance projects.” Texas has implemented a pilot project at the state’s Office of Court Administration, which assists courts in adequately monitoring guardianship cases by providing resources for staff to review cases and determine whether there were irregularities in financial dealings of the estate. The project was a \$250,000 endeavor, staffed by three employees who, as of April 2018, had reviewed over 27,000 guardianship cases in 27 counties.⁷⁷ This project found that 43 percent of cases were out of compliance with reporting requirements, and in most of those cases, the guardian was a family member or friend. The office also noted that the project “regularly found unauthorized withdrawals from accounts; unauthorized gifts to family members and friends; unsubstantiated and unauthorized expenses; and the lack of backup data to substantiate the accountings.”⁷⁸ These findings have led to improved procedures in Texas courts as well as calls for additional resources in order to provide enhanced oversight.

The National Guardianship Association (NGA), a group dedicated to advancing national guardianship standards, highlighted several projects that are showing success in improving guardianship arrangements. One example is a specialized Audit and Investigations program by the Palm Beach County, Florida County’s Clerk Office, which includes a guardianship “fraud hotline” program to report fraud. The NGA stated that the program is “rapidly scalable to collect data for all of Florida’s 40,000 to 50,000 guardianship cases.”⁷⁹ In addition, Idaho has worked toward a “differentiated case management tool” for allocating resources for better monitoring of high-risk cases.⁸⁰

Recommendations

Commenters who responded to the Committee’s request provided a number of recommendations for improving oversight of guardians. The Committee endorses the following recommendations

- **Enhanced Monitoring** – State courts should engage in more thorough and frequent reviews of guardianship arrangements, and should work with financial monitoring companies to identify suspicious transactions and notify the court and guardian of potential risks.
- **Background Checks** – Courts should conduct criminal background checks on all prospective guardians.
- **Improved Collaboration** – Coordination and communication should occur between the court and federal agencies, including the SSA and VA, and between the court and community organizations.
- **Volunteer Visitor Programs** – Support for individuals who help to inform the court about the status of the respondent before a guardian is appointed and periodically throughout the guardianship should be increased.
- **Training** – All parties related to the guardianship, including the guardian, court staff, and family members, should be trained on guardian responsibilities and on the signs of abuse.



Chapter 2: Less Restrictive Alternatives and Restoration of Rights

When an individual is placed under guardianship, the guardian is given the legal authority to make decisions on the individual's behalf. However, an order for a less-restrictive arrangement may provide sufficient support for individuals who retain or develop the ability to make certain decisions for themselves. If a court later determines guardianship is no longer necessary, or should be modified, the individual's rights to decide where to live, manage their finances, and remain independent may be partially or fully restored.⁸¹ Although many individuals subject to guardianship do not regain capacity, for those who do, and for those who should not have been ordered into such a restrictive relationship initially, rights are rarely restored. Commenters representing the courts, state agencies, and advocates generally agreed that "the time is ripe for restoration of rights to become a viable option for people subject to guardianship."⁸²

Less Restrictive Alternatives

In 2011, national organizations including AARP, the ABA, NGA, the National Disability Rights Network, and The Arc, among others, convened the Third National Guardianship Summit.⁸³ This conference passed a number of recommendations and proposed standards, including the least restrictive alternative standard, which requires the imposition of guardianship only if there is no less restrictive alternative available.⁸⁴ According to the National Council on Disability (NCD), an independent federal agency charged with advising the federal government on issues that affect people with disabilities, "most state statutes require consideration of less-restrictive alternatives, but courts and others in the guardianship system often do little to enforce this requirement."⁸⁵

Several commenters to this report recommended greater use of less restrictive alternatives to guardianship, such as durable power of attorney and supported decision-making agreements.⁸⁶ The Georgia Department of Human Services supports expanding "established alternatives to guardianship to include supportive decision making and exploring alternatives that would allow the individual to maintain a sense of independence."⁸⁷

In addition to preserving important rights and decision-making authority for those individuals who retain sufficient capacity, employing alternatives to full guardianship would also provide added health and financial benefits. Encouraging individuals to retain as much authority over their lives as possible is an important component of mental health.⁸⁸ Less restrictive alternatives and easily obtained restoration of rights, where appropriate, could also avoid high legal expenses and court fees.⁸⁹ Further, a focus on restoration of rights could help reduce the number of unnecessary guardianship cases brought to court, allowing the courts to focus on guardianship where fraud and abuse may be taking place.⁹⁰

Limited guardianships enable individuals subject to guardianship to retain certain decision-making rights while also providing the guardian with limited authority to make other decisions on the individual's behalf.⁹¹ The revised UGCOPAA makes changes to create options for courts to consider less restrictive alternatives and offers model forms to make it easier for petitions to seek limited guardianship.⁹² Tom Berry, a former probate judge from Maine who now works as an attorney in private practice, noted in comments to the Committee that, "[f]or at least five of

my final years as a probate judge, I would not and did not grant one full guardianship. Almost all of them limited the guardianship to residential placement, medical oversight and financial oversight: the big three.” He discussed his concern over how families might react to his orders for limited guardianship, and suggested surprise at often finding “the parents, wives, and others were glad that they did not have to strip their loved ones of all of their rights.”⁹³

Instead of a caretaker making unilateral decisions, as is the case under a full guardianship, supported decision-making (SDM) is a process in which the individual under care is given the support and information needed to make an informed decision on their own. The goal of SDM is to identify where assistance is needed and, in cooperation with the individual under SDM, find the system of supports that will help that person when needed.⁹⁴ SDM protocols consider that different people need help with different types of decisions. For example, the Administration for Community Living (ACL), a federal agency charged with improving the health and well-being of older adults and individuals with disabilities, explains that, “For some, it might be financial or health care decisions...Some people need one-on-one support and discussion about the issue at hand. For others, a team approach works best.”⁹⁵ The goal of SDM is to ensure the individual is able to have control over his or her own lives, but also able to access whatever level of assistance is needed.

There are also other limited options that some contributors to this report noted could be considered before pursuing guardianship, as listed below. Often, however, these options fall outside the scope of guardianship cases.

- **Power of Attorney** – Under a power of attorney, an individual is granted the authority to act on behalf of the person appointing them. The power of attorney is limited by clearer laws in most states than those that govern guardianship, and an individual is able to more easily revoke or modify the power of attorney.⁹⁶
- **Health Care Surrogate** – A health care surrogate is granted decision-making only over health care decisions. Most states have clearer laws than under guardianship on when a person has capacity to appoint a health care surrogate, and make it easier for individuals to revoke a health care surrogate’s authority if they choose.⁹⁷
- **Social Security Representative Payee (Rep Payee)** – A rep payee receives the benefits for a beneficiary who has been determined unable to manage their Social Security benefits. A rep payee offers a narrow scope of authority only over benefits from the SSA.⁹⁸

Restoration of Rights

According to the NCD, there are several circumstances that warrant a review as to whether an individual’s rights should be restored:

- When it is found that an individual did not meet the legal standard of incapacity and was unnecessarily placed under guardianship;
- When an individual did not meet the legal standard of incapacity, but a less restrictive alternative would have allowed appropriate assistance; or

- When an individual regains the capacity to make and implement decisions on their own behalf.⁹⁹

Every state has a process for the restoration of the rights under guardianship, although these processes are rarely used.¹⁰⁰ Most commonly, processes allow for the individual under guardianship to request that the court restore some or all of the rights that were removed when the guardianship was established. In most states, the court will then convene a hearing regarding the restoration of rights and make a ruling on whether to restore some, all, or none of the individual's rights. A study published this year by the ABA found that "an unknown number of adults languish under guardianship" when they no longer need it, or never did. The authors wrote that guardianship is generally "permanent, leaving no way out— 'until death do us part.'"¹⁰¹ Individuals under guardianship are not always guaranteed independent counsel from their guardian, and if their guardian is truly abusing their position, the lack of representation can make it much more difficult to end the guardianship. The Area Agency on Aging of Westmoreland County, Pennsylvania, recommends, "visitation by an outside individual trained to determine the appropriateness of the guardianship...to avoid the phenomenon of once under a guardianship, always under a guardianship."¹⁰²

Barriers to Less Restrictive Alternatives and Restoration of Rights

Most often, guardians are given their authority for an indefinite amount of time, regardless of whether the situation that prompted the need for a guardian has passed, as in cases where an individual who has recovered from a temporary incapacitating injury, or an individual with a disability who develops the skills necessary to make certain decisions.¹⁰³ One reason courts may favor full guardianships is because of the burden additional hearings to limit the scope of a guardianship arrangement can have on a court.¹⁰⁴ This is particularly common for family guardians, where courts often assume they will act in the best interest of the individual.¹⁰⁵ A review of guardianship filings in some Indiana courts from 2008 found that limited guardianships were granted in less than one percent of the cases.¹⁰⁶ According to testimony by Professor Nina Kohn before the Senate Aging Committee in April 2018, "While all states' laws now recognize limited guardianship, petitioning for a limited guardianship is typically harder than petitioning for a full one."¹⁰⁷

Although every state provides a process to partially or fully terminate a guardianship, there are limited data surrounding the frequency of restoration of rights for individuals under guardianship. The lack of adequate data makes it extremely difficult to even understand how many guardianship cases are terminated before an individual passes away, not to mention the number of individuals who are unnecessarily under guardianship or who are attempting to have the scope of their guardianship reduced or entirely removed.

Apart from a lack of data, there is a lack of awareness by those under guardianship that they may be able to seek a restoration of their rights.¹⁰⁸ Even if an individual is aware of this right, he or she may lack access to the court or the state official that could officially review their guardianship and begin the restoration of rights process. Periodic court reviews of individual guardianship arrangements are sporadic or nonexistent in most states and, therefore, provide limited options for individuals to contest their guardianship or highlight concerns about the

relationship without the consent of the guardian.¹⁰⁹ The role of the lawyer is not always clearly defined. Some guidelines and laws leave open the possibility for a lawyer representing an individual seeking a restoration of their rights to independently decide that the individual still requires a guardian and argue as such in court.¹¹⁰

There is also a lack of clear standards around the burden of proof when requesting the restoration of rights. Many states do not clearly define when restoration should be pursued, leaving little guidance for individuals under guardianship. Further, the responsibility to cover the costs of restoration usually lies with the person seeking restoration, which can be a significant financial barrier. Guardians are allowed significant power over individuals under their care, and when a guardian opposes the restoration of rights, regardless of the reason behind their opposition, the individual under guardianship faces a tremendous burden in mounting a successful case.¹¹¹

Reform Efforts

National Efforts

The recently adopted UGCOPAA devotes an entire article to “Other Protective Arrangements” in an effort to promote their use.¹¹² The ULC noted in the preface to the Act that, in addition to reducing the need for protection of the individual’s liberties, these arrangements are also more efficient from a time and cost perspective.¹¹³ The UGCOPAA is intended to offer protection for individuals subject to guardianship, and provides a number of key provisions to support their rights under guardianship, including:

- Clarifying decision-making standards for guardians;
- Making it easier to petition for a limited guardianship;
- Encouraging person-centered planning by requiring guardians to develop an individualized plan for the individual subject to guardianship;
- Stipulating that courts may not impose a guardianship if a less restrictive alternative, such as supported decision-making, would provide adequate protection; and
- Making restoration of rights a real possibility when an individual no longer requires a guardian, or no longer requires as extensive a guardianship.¹¹⁴

Among other provisions, the UGCOPAA also provides guidance for adult guardianship petition forms, which are filed by prospective guardians in local court. The National Academy of Elder Law Attorneys pointed out that revisions to these forms are necessary because “several jurisdictions lack forms for limited guardianships.”¹¹⁵

State Efforts

While efforts to promote enactment of the least restrictive alternative standard and push for greater restorations of rights across the nation continue, some states have taken significant steps on their own. Notably, Texas expanded and protected an individual’s right to pursue restoration, and became the first state to enact a least-restrictive alternative statute with the Supported Decision-Making Agreement Act.¹¹⁶ Texas has also made it easier for individuals to seek a restoration of their rights,¹¹⁷ and made it easier to end a guardianship of the estate by placing all

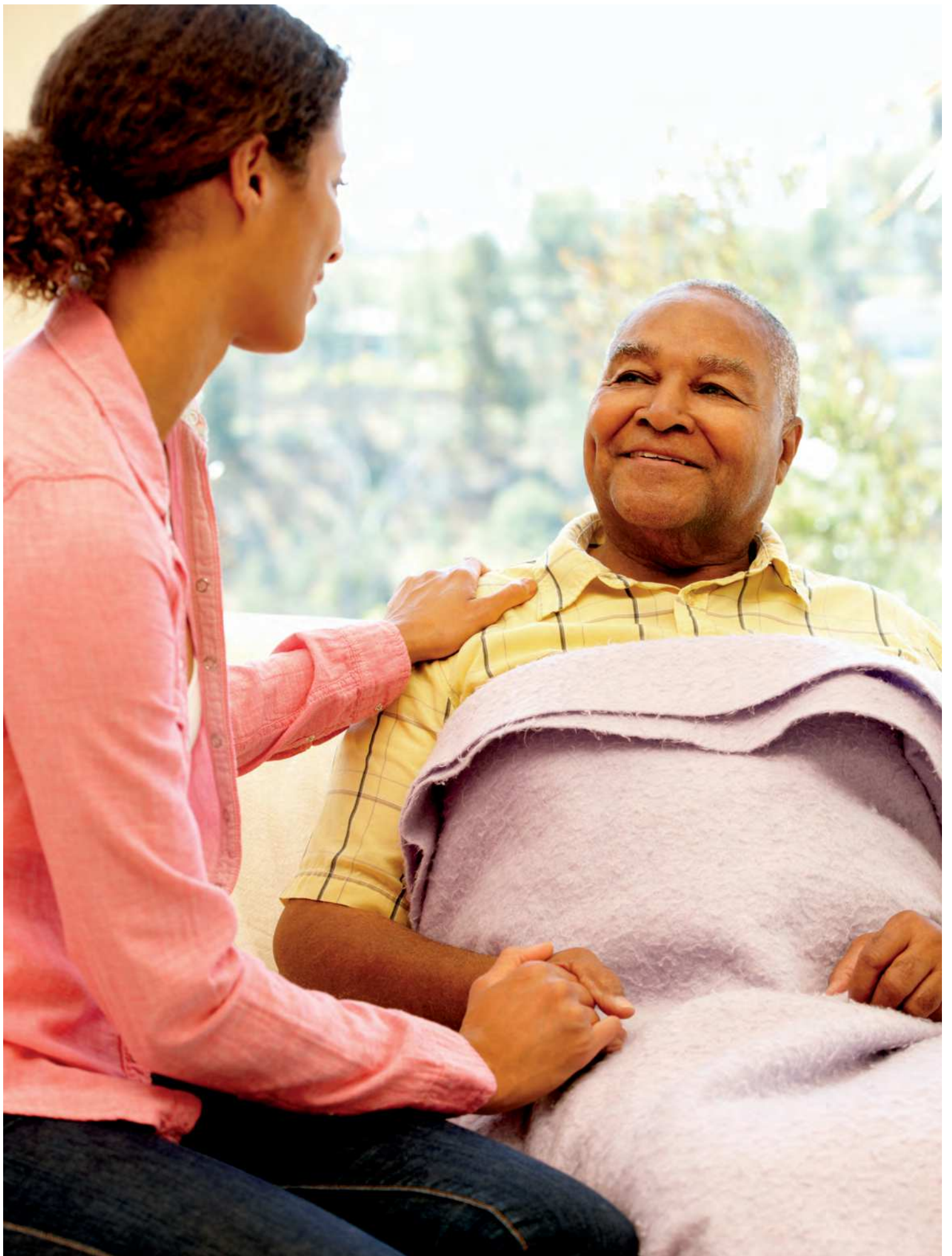
assets in an ABLE (Achieving a Better Life Experience) account.¹¹⁸ ABLE accounts make it possible for people with disabilities and their families to create tax-exempt savings accounts that can fund a variety of essential disability-related expenses for the disabled person while not risking the loss of their state and federal benefits. In Maine, Legal Services for the Elderly provides legal assistance to those looking to modify or terminate guardianship cases – services they believe should be made available to all individuals, regardless of their financial status.

Nevada has also emerged as a leader in this area, enacting a series of guardianship reforms which established a bill of rights for individuals subject to guardianship to guarantee the right to ask the court to review the need for a guardianship. In 2017, South Carolina also enacted legislation that lays out specific duties of the guardian, including investigating less restrictive alternatives and planning for steps that can be taken to restore the individual's decision-making ability."¹¹⁹ Courts in Maine are required by statute to "make appointive and other orders only to the extent necessitated [by the incapacitated person's condition],"¹²⁰ and court orders will specify whether the guardian has "full" or "limited" powers and, if limited, describe the limitations on the guardian's authority.¹²¹

Recommendations

Commenters who responded to the Committee's request provided a number of recommendations for encouraging the use of less restrictive alternatives and restoring rights when appropriate. The Committee endorses the following recommendations:

- ***Promotion of Alternatives to Guardianship*** – States should encourage courts to utilize alternatives to guardianship through state statutes and public awareness campaigns. Such efforts would officially promote less restrictive alternatives such as limited guardianships and supported decision-making.
- ***Increased Training and Education*** – Required comprehensive training for judicial officials, attorneys, and guardians would increase understanding and appreciation of less restrictive alternatives to guardianship and the availability of opportunities for restoration of rights, when and if it becomes appropriate.
- ***Strengthened Protections for Individuals under Guardianship*** – State laws need to be strengthened to ensure individuals seeking a restoration of rights are guaranteed unbiased legal representation and access to resources for a timely consideration by the courts.
- ***Nationwide Adoption of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act*** – State guardianship laws need greater uniformity to ensure better protections and control for individuals being considered for guardianship and those pursuing a restoration of their rights.



Chapter 3: The Need for Better Data

There is general consensus among stakeholders and advocates that data on the guardianship system at both the state and national level are severely lacking. While states have oversight over the guardianship system, most do not keep extensive records regarding guardianship. Few states appear able to track the total number of individuals subject to guardianship, let alone record demographic information, the types of guardianship being utilized, or the extent of a guardian's authority.¹²² The lack of broad state and national data makes it very difficult to identify trends in guardianship, leaving advocates and policymakers in the dark when trying to enact reform.¹²³

Even understanding if guardianship arrangements are on the rise is challenging. A 2009 survey from the NCSC provides some data on this question.¹²⁴ The survey collected data from state courts and found that, over a three-year period, 58 percent of respondents—consisting of judges/judicial officials, court managers, and court clerks/registrars—said that the number of guardianship filing petitions had stayed the same, and 37 percent saw an increase in filings. Only five percent of respondents saw a decrease in petitions. This survey suggests the number of guardianship cases are either staying the same or increasing.¹²⁵

Collecting data to assess the guardianship landscape is a significant challenge. For example, the results of the previously mentioned 2009 NCSC survey were not from a nationally representative sample because the NCSC was only able to collect information from 187 respondents in 36 states/territories.¹²⁶ Even the often-cited national estimates of 1.3 million adults and \$50 billion of assets under guardianship are based on information from selected states with the most reliable data.¹²⁷ Testimony before the Committee and comments received from advocates, state agencies, and nonprofits, among others, pointed out the need for accurate and detailed data to inform comprehensive reform of the guardianship system. As the NGA highlights in its comments to the Committee, reliable national data would help in “guiding reform efforts...and [be] used for developing national performance measures for guardianship cases.”¹²⁸ Further, the Center for Advocacy for the Rights and Interests for the Elderly (CARIE), a state-based advocacy organization that represents older Pennsylvanians, points out that as the system is currently set up, “we often use conjecture rather than research to determine what the issues are.”¹²⁹

Barriers to Data Collection

Differences in systems for overseeing guardians across states and territories make compiling accurate and comprehensive national data difficult. At the request of the Senate Aging Committee, the U.S. Government Accountability Office (GAO) conducted an investigation and reported in 2016 that “the extent of elder abuse by guardians nationally is unknown due to limited data...such as the numbers of guardians serving older adults, older adults in guardianships, and cases of elder abuse by a guardian.”¹³⁰ GAO spoke to court officials from six states and found that various limitations in each state, such as inadequate funding and unclear guidance on what information to collect, prevented the collection of reliable data.¹³¹ Similarly, a 2015 press article reported that guardianship systems can vary by counties within a state as well as by state, with inconsistent record-keeping systems, making precise national data unavailable.¹³²

Many organizations that provided comments to the Committee recommended centralizing statewide data collection. However, recommendations varied on which entities are best suited to collect that data. The National Academy of Elder Law Attorneys, an organization created to assist and educate attorneys working in elder law, asserts “the entities in the best position to track this data would be the state courts.”¹³³ State organizations such as the Tennessee Council on Developmental Disabilities echoed confidence in the ability of the state court system to collect data and recommended that states should “require county courts to publish for the public information about the number of annual guardianship petitions and guardianship orders.”¹³⁴ The Montana Adult Protective Services Bureau commented that “each court could be responsible for collecting relevant information... [since] the Clerk of District Court[s] already has on file all Guardianship/Conservatorship data/records.”¹³⁵ The Georgia Department of Human Services recommended that “each statewide registry, [be] maintained through a state entity or agency specialized in data reporting, management, and security.”¹³⁶

A key part of data collection is ensuring that the information collected is maintained and housed in an easily accessible database. The value of data collection is diminished if it cannot be easily accessed and shared with those who need it to inform regulatory, legislative, and other policy decisions. The value of collected data also depends on standardizing the means and type of information to be collected. The Pennsylvania Supreme Court Office of Elder Justice made clear that “national standards should be developed for the types of data to be collected... [because] only with national standards and support to the state court systems to meet these standards will we be able to develop the robust information needed to understand guardianship.”¹³⁷

Moving to such a system, with states collecting data in accordance with national standards, would overcome many of the barriers to collection of detailed and reliable data for informed planning and policy decisions. The NGA stated that a database “would provide empirical data by which caseloads could be more carefully forecasted and processed. If the number of wards is known, then necessary funding would provide for sufficient staff, and the cost of training and enforcement.”¹³⁸

Similar to the calls for statewide databases are calls for some form of a national registry or database for guardianship information. Some commenters called for a limited database, such as “a National registry...that allows law enforcement, attorneys, and other courts to validate someone’s claim that they have a guardianship/conservatorship in another state.”¹³⁹ In order to maximize data collection on abusive guardians, others called for “collaboration and data sharing with National Adult Protective Services Association (NAPSA) who collects statistics on abuse, neglect and exploitation of vulnerable adults from state-based Adult Protective Services (APS) programs.”¹⁴⁰

National Reform Efforts

Despite recognition of the need, coordinating a national response among states to collect more detailed data on guardianship arrangements has proved difficult. In 2007, the NGA and the NCSC initiated a guardianship data project to facilitate research and data collection. However, the project was set aside due to a lack of resources.¹⁴¹ There have since been increased calls for more federal support and guidance on data collection. The Pennsylvania Supreme Court’s Office

of Elder Justice in the Courts commented that “assistance is needed to support state courts in efforts to improve...data collection regarding guardianships” and that “states should be offered incentives and technical assistance in developing electronic filing and reporting systems that collect basic guardianship information.”¹⁴²

In recent years, the federal government has taken steps to improve communication and cooperation between states and increase public understanding of guardianship by facilitating data collection on guardianship. As previously discussed in this report, HHS launched NAMRS in 2013 with the goal of providing consistent and accurate national data on the exploitation and abuse of older Americans, including abuse that may occur under guardianship.¹⁴³ NAMRS collects state APS data on elder adults and adults with disabilities. In the first year of being active, 54 state and territorial APS programs volunteered to submit data, allowing NAMRS to begin collecting national data in 2017.¹⁴⁴ HHS also administers the National Center on Elder Abuse, which collects information on the research, training, and resources available regarding elder abuse.¹⁴⁵

State and Local Reform Efforts

Some states have taken steps to collect detailed guardianship data. Among the states that have taken a lead in guardianship data collection, Minnesota is often viewed at the forefront. Minnesota developed an online accounting system called Conservator Account Monitoring Preparation and Electronic Reporting (CAMPER), which tracks all transactions made by guardians of the estate.¹⁴⁶ In 2016, the then Manager of the Conservator Account Auditing Program for the Minnesota Judicial Branch, Cate Boyko, testified before the Committee on the implementation of this system.¹⁴⁷ While its central purpose is to monitor and audit financial activities, the system also allows the state to collect uniform data from each county and provide detailed statewide trends in guardianship.

In testimony to the Senate Aging Committee in April 2018, David Slayton, the Administrative Director of the Texas Office of Court Administration, discussed Texas’ new law requiring all guardians to be registered in a central database.¹⁴⁸ This will not only help with oversight, but will provide much needed data in one of the largest states in the country. In Nevada, the newly created Guardianship Compliance Office will also implement a guardianship case management system to allow statewide tracking of guardianship data.¹⁴⁹ Pennsylvania is also in the process of implementing a statewide Guardianship Tracking System, “which will allow a centralized place for accessing information about guardianship arrangements.”¹⁵⁰

There are also efforts being led and implemented on the county level. In June 2018, the Clerk & Comptroller’s Office of Palm Beach County Florida began implementing the Guardianship Inventory Reports & Accountings for Florida (GIRAFF) program, a web-based system to help evaluate and track guardianships in Palm Beach County.¹⁵¹ GIRAFF has been designed to eventually grow and collect data for every county in Florida.¹⁵² In Indiana, a 2014 four-county pilot program has expanded to a 60-county guardianship registry which collects basic information on new guardianships with plans to eventually expand to every county in the state.¹⁵³

Recommendations

Commenters who responded to the Committee's request provided a number of recommendations to improve the data that is collected and available regarding guardianship. The Committee endorses the following recommendations:

- ***Statewide Data Registries*** – Such registries would create a single location to collect and disseminate data, allowing for more cohesive collection of data.
- ***Increased Federal Support and Guidance to States***– Support to state court systems or other state entities would help create cohesive collection efforts, improving the ability to share information and collect national data.
- ***Increased Data Collection by Federal Agencies*** – Additional resources aimed at data collection from federal agencies would help states design, test, and improve data collection systems, complement increased federal guidance, and further help create a more consistent national data collection effort.
- ***Creation of a National Resource Center*** – A national resource center on guardianship would collect and publish information for the benefit of courts, policy makers, individuals subject to guardianship, guardians, community organizations, and other stakeholders. Information collected and published by the resource center may include statistics related to guardianship, information on laws and regulations, published research, and training materials.



Conclusion

Guardianship is an important and necessary tool used to support and protect individuals who are unable to make important decisions about their finances and well-being. However, it also creates an opportunity for abuse and exploitation by unscrupulous individuals. This report continues the United States Senate Special Committee on Aging's long-standing effort to protect older Americans and people with disabilities from abuse, neglect, and exploitation by calling attention to issues that prevent guardianships from fulfilling their valuable and intended purpose.

In April 2018, following reports of guardians using legal process to strip individuals of their rights, homes, savings, and, ultimately, their dignity, the Committee held a hearing to examine the current state of the guardianship system and reform efforts underway. One witness who testified divided guardians into two groups: "[t]he protectors, the good guardians, the good agents under powers of attorney, the good representative payees, and all the good friends, families, and agencies acting in this capacity... [who] protect the individuals for whom they are responsible and confront those who try to take advantage of them," and "[g]uardians who act as intentional predators, ...[and] exploit vulnerable persons without mercy."¹⁵⁴

In the course of our investigation, the Committee identified a number of issues that leave individuals subject to guardianship exposed to risk of exploitation, neglect, and abuse. To gain greater insight, the Committee officially requested recommendations on guardianship reform from stakeholders throughout the country. Among the issues identified by those who responded, the need for better data collection, improved oversight of guardians, and greater use of alternatives to guardianship were common themes.

- ***Oversight of Guardians and Guardianship Arrangements*** – Judges may lack sufficient information when considering guardianship petitions, and courts often struggle to conduct oversight of guardians and guardianship cases.
- ***Alternatives to Guardianship and Restoration of Rights*** – Courts often fail to consider less-restrictive alternatives to guardianship, and it is difficult for individuals who regain capacity or were placed in inappropriate arrangements to have their rights restored.
- ***Data Collection*** – The lack of reliable, consistent data – at the local, state, and national level – hinders the ability of policy makers to identify structural deficiencies and trends that would support targeted reforms.

In addition to these themes, commenters also called for enhanced protections for the individual subject to guardianship's due process rights, as well as improved training for guardians, judges, court staff, community organizations, and all parties with interests in the guardianship system. This report contains many of the comments received by the Committee, but readers can access all of the comments by contacting the U.S. Senate Special Committee on Aging at (202) 224-5364.

Looking Ahead

As America's population continues to age, guardianship will continue to be an important and necessary tool used to protect and support individuals whom courts have determined lack sufficient capacity to make certain decisions on their own. However, as this report has demonstrated, there are many opportunities for improving and reforming the guardianship system. Following its year-long investigation, the Committee recommends several actions to that will strengthen these arrangements and improve the well-being of those subject to guardianship:

- To improve oversight of guardians and guardianship arrangements, the Committee recommends:
 - ***Enhanced Monitoring*** – State courts should engage in more thorough and frequent reviews of guardianship arrangements, and should work with financial monitoring companies to identify suspicious transactions and notify the court and guardian of potential risks.
 - ***Background Checks*** – Courts should conduct criminal background checks on all prospective guardians.
 - ***Improved Collaboration*** – Coordination and communication should occur between the court and federal agencies, including the SSA and VA, and between the court and community organizations.
 - ***Volunteer Visitor Programs*** – Support for individuals who help to inform the court about the status of the respondent before a guardian is appointed and periodically throughout the guardianship should be increased.
 - ***Training*** – All parties related to the guardianship, including the guardian, court staff, and family members, should be trained on guardian responsibilities and on the signs of abuse.
- To encourage the use of less-restrictive alternatives and promote restoration of rights, when appropriate, the Committee recommends:
 - ***Promotion of Alternatives to Guardianship*** – States should encourage courts to utilize alternatives to guardianship through state statutes and public awareness campaigns. Such efforts would officially promote less restrictive alternatives such as limited guardianships and supported decision-making.
 - ***Increased Training and Education*** – Required comprehensive training for judicial officials, attorneys, and guardians would increase understanding and appreciation of less restrictive alternatives to guardianship and the availability of opportunities for restoration of rights, when and if it becomes appropriate.
 - ***Strengthened Protections for Individuals under Guardianship*** – State laws need to be strengthened to ensure individuals seeking a restoration of rights are guaranteed unbiased legal representation and access to resources for a timely consideration by the courts.
 - ***Nationwide Adoption of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act*** – State guardianship laws need greater uniformity to ensure better protections and control for individuals being considered for guardianship and those pursuing a restoration of their rights.

- To provide policy makers and other stakeholders with improved data regarding guardianship arrangements, the Committee recommends:
 - ***Statewide Data Registries*** – Such registries would create a single location to collect and disseminate data, allowing for more cohesive collection of data.
 - ***Increased Federal Support and Guidance to States***– Support to state court systems or other state entities would help create cohesive collection efforts, improving the ability to share information and collect national data.
 - ***Increased Data Collection by Federal Agencies*** – Additional resources aimed at data collection from federal agencies would help states design, test, and improve data collection systems, complement increased federal guidance, and further help create a more consistent national data collection effort.
 - ***Creation of a National Resource Center*** – A national resource center on guardianship would collect and publish information for the benefit of courts, policy makers, individuals subject to guardianship, guardians, community organizations, and other stakeholders. Information collected and published by the resource center may include statistics related to guardianship, information on laws and regulations, published research, and training materials.

This report continues the U.S. Senate Special Committee on Aging’s commitment to examining issues of importance to older Americans, and serves as a foundation for developing these and other policies that will improve the lives of seniors today and for generations to come.



Endnotes

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THE UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

- A Summary -

History. The first uniform law on guardianship was released in 1969 as Article V of the Uniform Probate Code. A few years later, it was re-published as the Uniform Guardianship and Protective Proceedings Act for states that preferred to enact only the UPC's guardianship provisions.

Guardianship law has advanced dramatically since 1969 to better protect the rights and interests of persons legally determined to need help caring for themselves. The Uniform Law Commission has encouraged the trend toward greater independence for persons under guardianship by revising its guardianship act three times in 1982, 1997, and most recently with the approval of the newly renamed Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) in 2017. Some version of the uniform guardianship law has been adopted in nineteen states.

The modernization of guardianship law. In 2011, the National Guardianship Network organized the Third National Guardianship Summit. Held at the University of Utah, the summit brought together representatives from twenty national organizations concerned with issues of aging, intellectual impairments, mental illness, and the effective practice of guardianship law.

The summit produced a set of 70 recommendations and standards approved by the participants and published the following year in the *Utah Law Review*. The Uniform Law Commission formed a study committee to determine which of these recommendations and standards could be codified into a statute, and in 2014 approved a drafting committee to update the existing uniform law. The drafting committee was joined by participants from most of the same national organizations that attended the 2011 summit. UGCOPAA is the result of their two-year drafting effort.

A note about terminology. Throughout UGCOPAA, the term “guardian” refers to a person appointed by a court to make decisions about the care and well-being of another person. The term “conservator” refers to a person appointed by a court to manage the property of another person. Some states use other terms, and the act can be adapted to conform to local practices.

UGCOPAA introduces the term “protective arrangement instead of guardianship or conservatorship” to describe a less-restrictive alternative to guardianship or conservatorship. Instead of imposing a guardianship or conservatorship for a person who would otherwise need one, a court can instead enter a limited order to address a specific need. The aim is to preserve an individual's legal autonomy to the greatest extent possible.

Structure. UGCOPAA is organized into seven articles. Article 1 contains definitions and general provisions applicable to all types of court proceedings involving the protection of an individual. Article 2 addresses the guardianship of minors who do not have a parent able to provide care. Article 3 addresses the guardianship of adults who are unable to make decisions for themselves. Article 4 applies to conservatorships for both minors and adults who have money or property and are unable to manage it. Article 5 is entirely new and authorizes courts to enter single orders for less restrictive protective arrangements as an alternative to guardianship or conservatorship. Article 6 contains a set of optional forms intended to help a petitioner for a guardianship or conservatorship conduct a thorough assessment of an individual's capabilities and needs, which will in turn help courts craft appropriate orders for each individual. The act also provides a sample notice for someone who is the

subject of a guardianship or conservatorship proceeding. Article 7 is a set of miscellaneous provisions to help with implementation and interpretation of the uniform act.

Innovations.

- ***Person-centered planning.*** Under UGCOPAA, each guardianship and conservatorship will have an individualized plan that considers the person's preferences and values. Courts will monitor guardians and conservators to ensure compliance and approve updates to the plan in response to changing circumstances.
- ***Express decision-making standard.*** UGCOPAA clarifies that a guardian/conservator is a fiduciary and must always act for the benefit of the person subject to guardianship or conservatorship. A guardian for an adult must make decisions the guardian reasonably believes the adult would make if able, unless doing so would cause harm to the adult. To the extent feasible, a guardian for an adult must promote the adult's self-determination, encourage the adult's participation in decisions, and take into account the values and preferences of the adult.
- ***Enhanced notice.*** UGCOPAA enhances protection for individuals subject to guardianship or conservatorship without greatly increasing the costs of monitoring by allowing the court to identify other persons to receive notice of certain suspect actions, and who can therefore serve as extra sets of eyes and ears for the court.
- ***Guaranteed visitation and communication.*** Without a court order, a guardian under UGCOPAA may not restrict a person under guardianship from receiving visits or communications from family and friends for more than seven days, or from anyone for more than sixty days. Unless the court orders otherwise, close family members must be notified of any change in residence.
- ***Less-restrictive alternatives.*** UGCOPAA prohibits courts from issuing guardianship or conservatorship orders when a less-restrictive alternative is available, such as supported decision-making, technological assistance or an order authorizing a single transaction.
- ***Enhanced procedural rights.*** UGCOPAA requires notice of key rights to individuals subject to guardianship or conservatorship, including the right to independent legal representation. The act allows any interested party to petition a court for reconsideration of an appointment and places limits on a guardian or conservator's ability to charge fees for opposing the efforts to alter the terms of appointment.
- ***Updated terminology.*** The terms "ward," "incapacitated person," and "disabled person" are increasingly viewed as demeaning and offensive. UGCOPAA uses neutral terms such as "respondent" for the subject of a guardianship hearing, and "individual subject to guardianship" once a court order has been issued.

Conclusion. UGCOPAA modernizes the law and protects the rights of individuals who are subject to guardianship and conservatorship. It encourages courts to impose the least-restrictive orders possible to adequately protect vulnerable minors and adults, and to monitor the protective arrangement to continuously adapt to an individual's changing capabilities and needs. It imposes clear duties upon guardians and conservators charged with protecting others and requires regular monitoring to ensure compliance. It allows courts to address specific problems with limited orders and preserve individual rights when possible. UGCOPAA is a guardianship statute suitable for the twenty-first century and should be considered for enactment in every state as soon as possible.

For further information about the UGCOPAA, please contact ULC Chief Counsel Benjamin Orzeske at (312) 450-6621 or borzeske@uniformlaws.org.



A Few Facts about
**THE UNIFORM GUARDIANSHIP, CONSERVATORSHIP,
AND OTHER PROTECTIVE ARRANGEMENTS ACT**

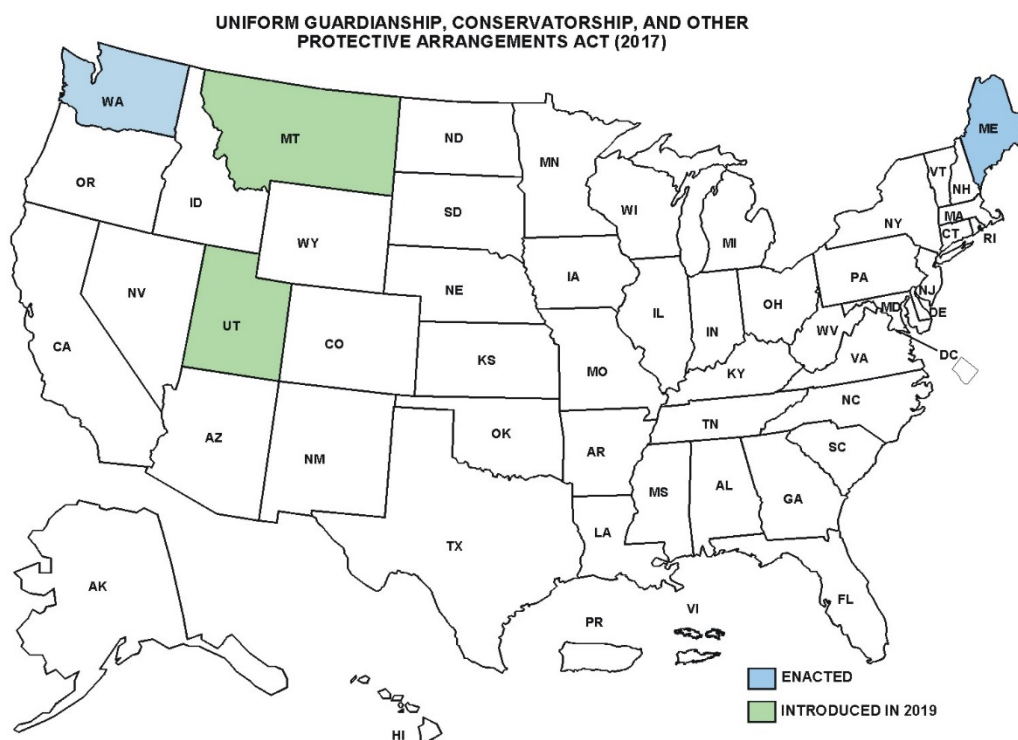
PURPOSE: The Uniform Guardianship, Conservatorship, and other Protective Arrangements Act (UGCOPAA) is a comprehensive guardianship statute for the twenty-first century. It was drafted with extensive input from experienced guardianship judges and organizations that advocate for guardianship reform. UGCOPAA promotes person-centered planning to incorporate an individual's preferences and values into a guardianship order, and requires courts to order the least-restrictive means necessary for protection of persons who are unable to fully care for themselves.

ORIGIN: Completed by the Uniform Law Commission in 2017.

ENDORSED BY: National Guardianship Association

APPROVED BY: American Bar Association

ENACTED BY:



For further information about the UGCOPAA, please contact ULC Chief Counsel Benjamin Orzeske at 312-450-6621 or borzeske@uniformlaws.org.



WHY YOUR STATE SHOULD ADOPT THE UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) is a guardianship law suitable for the twenty-first century. It should be adopted in every state because:

- ***UGCOPAA encourages person-centered planning.*** Under UGCOPAA, a guardian or conservator must develop an individualized plan for each person's protection. Family and friends will receive copies of the plan and courts monitor the guardian or conservator for compliance.
- ***UGCOPAA promotes independence.*** UGCOPAA does not allow a court to impose a guardianship or conservatorship if less restrictive alternative, such as supported decision-making, would provide adequate protection. UGCOPAA also creates a mechanism for a court to order a protective arrangement instead of guardianship or conservatorship where a person's needs could be met with this less restrictive option.
- ***UGCOPAA helps leverage court resources.*** Courts can require notice of certain suspect actions to be sent to family members or friends of a person subject to guardianship, who act as the court's eyes and ears to prevent abuse.
- ***UGCOPAA protects legal rights.*** Persons subject to a guardianship or conservatorship order must be given notice of certain key rights, including the right to receive independent legal counsel and the right to have the order modified or terminated when appropriate. Guardians and conservators are limited in their ability to charge fees to oppose the alteration or termination of orders.
- ***UGCOPAA provides clear guidance to guardians and conservators.*** UGCOPAA includes a list of applicable fiduciary duties and provides clear standards for making decisions.
- ***UGCOPAA helps prevent isolation.*** A guardian may not restrict family members and friends from visiting or communicating with the person subject to guardianship for more than one week without a court order. Unless the court orders otherwise, the guardian is required under UGCOPAA to notify interested persons of any change in residence or significant change in health status.
- ***UGCOPAA was created by guardianship experts.*** Organizations involved in the drafting process include AARP, the Alzheimer's Association, the National Guardianship Association, the National Center for State Courts, the National College of Probate Judges, the ARC, the ABA Commission on Law and Aging, the National Academy of Elder Law Attorneys, and the National Disability Rights Network.

For further information about UGCOPAA, please contact ULC Chief Counsel Benjamin Orzeske at (312) 450-6621 or borzeske@uniformlaws.org.



HOW THE UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT COMBATS ELDER ABUSE

The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA), which was approved in July 2017 is a comprehensive revision of previous uniform laws on guardianship. A major objective of the Act is to better protect adults under guardianship from possible abuse and exploitation, including abuse or exploitation by those entrusted as their guardians. Consistent with this objective, the UGCOPA provides for stronger and more effective forms of oversight and enforcement than exist under current law in most states.

UGCOPAA includes reforms in the following areas:

- **Notice.** UGCOPAA expands the list of persons who must be notified of a petition for appointment of a guardian or conservator. UGCOPAA requires that the court, when appointing a guardian, specify the persons who must receive notice of key events or conditions that could affect the well-being of the person under guardianship or conservatorship. Unless the court specifically orders otherwise, the spouse and adult children of an adult subject to guardianship or conservatorship are entitled to this notice. The individuals receiving this notice can act as extra sets of eyes and ears for the court and bring any problems to the court's attention at an early stage.
- **Guardianship Plan.** UGCOPAA requires that guardians and conservators file within sixty days after appointment a comprehensive plan with the court on how they plan to meet the needs of the person subject to guardianship or conservatorship. Plans must be updated at least annually. In writing the plan, the guardian and conservator must consider both the individual's needs as well as the individual's preferences, values, and prior directions. These plans establish a set of legally enforceable expectations to which guardians and conservators can be held accountable.
- **Duties and Standard for Decision-Making.** Under UGCOPAA, guardians and conservators must promote the self-determination of the individual and encourage the individual to participate in decisions to the fullest extent possible. When making decisions, a guardian or conservator must make the decision that the adult would make if able unless doing so would cause the adult harm. This includes decisions about the adult's residence and association with other persons.
- **Appointment Procedures.** A petition for appointment for a guardian or conservator under UGCOPAA must state in detail the reasons why guardianship or conservatorship is needed and why a less-restrictive alternative is insufficient. UGCOPAA includes sample forms that ensure that a complete needs analysis is done.

- **Limited Powers.** Under UGCOPAA, court approval is required for a guardian or conservator to restrict visitation with a family member or friend for more than seven days, to sell the primary residence of a person subject to guardianship, or to make changes to the individual's estate plan.
- **Less-Restrictive Alternatives.** Article 5 of UGCOPAA includes a non-exhaustive list of less-restrictive alternatives that the court may order instead of guardianship or conservatorship. Use of a less restrictive alternative will often satisfy the individual's need for assistance without taking away the individual's legal rights. Alternatives that the court might order include approval of a contract for admission to a facility, the purchase of an annuity, an application for government benefits, or establishment of an appropriate trust. These alternative arrangements can also reduce the time and cost associated with a full guardianship or conservatorship because long-term monitoring and reporting will generally be unnecessary.
- **Restrictions on Fees.** UGCOPAA seeks to reign in unnecessary and unreasonable fees. It provides clear guidance to courts on what factors should be considered in determining the reasonableness of fees sought by a guardian or conservator, requires disclosure of anticipated fees in the guardian's or conservator's plan, and restricts the ability of guardians and conservators to charge fees for opposing removal, or opposing modification or termination of the guardianship or conservatorship.

UGCOPAA was drafted to implement recommendations from the Third National Guardian Summit, a 2011 conference that brought together many organizations concerned about guardianship and guardianship abuse. The committee that drafted the UGCOPAA worked in close consultation with a broad range of participants representing various constituencies, including many of those involved in the Summit. National organizations providing significant input included AARP, the American Bar Association, The ARC, the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys, the National Association to Stop Guardianship Abuse, the National College of Probate Judges, the National Center for State Courts, the National Disability Rights Network, and the National Guardianship Association.

The widespread enactment of UGCOPAA by the states will help to bring about the reforms necessary to curb guardianship abuse.

For further information about UGCOPAA, please contact ULC Chief Counsel Benjamin Orzeske at 312-450-6621 or borzeske@uniformlaws.org.

Kathryn Holt, is a Senior Court Research Analyst at the National Center for State Courts. Her work focuses on improving oversight for conservatorships and guardianships through the use of technology and data collection. Since joining the NCSC in 2011, her projects have incorporated the collection and analysis of qualitative and quantitative data to inform and improve court administration practices. Ms. Holt also assists on the Court Statistics Project, judicial workload assessments, and international and state governance assessment projects. Prior to NCSC, Ms. Holt worked at the Mason School of Business at the College of William & Mary conducting behavioral finance research. Ms. Holt holds an M.A. in Experimental Psychology from the College of William & Mary and a B.A. in Psychology from Wittenberg University.



Finding the Right Fit

Decision-Making Supports and Guardianship



Finding the Right Fit: Decision-Making Supports and Guardianship

Description

The National Center for State Courts, with the assistance of the American Bar Association Commission on Law and Aging, and with funding from the Department of Justice, Elder Justice Initiative, have created Finding the Right Fit: Decision-Making Supports and Guardianship, a training designed to assist individuals in exploring ways to help someone who may need assistance in making decisions with informal supports, legal options, and/or adult guardianship.

Finding the Right Fit provides a broad overview of decision-making supports and guardianship that is not specific to state laws or rules. The goal of the training is to provide information and guidance on finding the right kind of supports for someone's needs, including:

- Supporting someone in making their own choices about health, money, and lifestyle.
- Discovering ways to exercise independence.
- Deciding whether to become a guardian or conservator, and how to support a person's self-determination and decision-making as a guardian or conservator.
- Preventing and addressing the risk of abuse, neglect and exploitation that is present with any of the above options.

NOTE: Consult the FAQ page for helpful instructions prior to starting this training.

Please be aware that this training is not a substitute for legal advice from a licensed attorney.

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**THE HONORABLE GERALD I. FISHER
ASSOCIATE JUDGE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**

Judge Gerald I. Fisher was appointed to the Superior Court of the District of Columbia in 2001 by President William Jefferson Clinton. Judge Fisher was born and raised in Newport News, Virginia. He attended the College of William & Mary, where he received a Bachelor of Arts in history in 1972. After graduation from William & Mary, Judge Fisher lived in Israel for one year, playing and coaching basketball. For three years after returning to the United States, he worked for the Arlington County, Virginia government and applied to law school during that time. He received his law degree in 1977 from the Columbus School of Law at Catholic University, where he was an editor of the law review.

After graduation, Judge Fisher served as a law clerk for then-Associate Judge J. Walter Yeagley of the District of Columbia Court of Appeals. He then served for five years as a supervising attorney in the Criminal Division of the D.C. Law Students in Court Program. In 1984, Judge Fisher co-founded the law firm of Fisher, Morin & Kagan-Kans, where he specialized in complex criminal and civil litigation. He remained with the firm, which eventually became Fisher & Hansen, until his appointment to the bench.

Beginning in 1984, Judge Fisher has been an adjunct professor of law at the Georgetown University Law Center and has taught courses in civil and criminal trial practice, capital punishment jurisprudence, and evidence. He has also been a frequent lecturer and panelist at continuing legal education seminars, and he has served on the faculty of the Harvard Law School's Trial Advocacy Workshop, the Santa Clara University Law School's Death Penalty College, and California Western Law School's Institute for Criminal Defense Advocacy.

Since joining the Superior Court, Judge Fisher has served in the Criminal, Civil, and Probate, Tax and Domestic Violence Divisions. He was the Deputy Presiding Judge of the Probate & Tax Divisions from January 2015 through December 2016 and the Presiding Judge from January 2017 through December 2018. He is currently the Presiding Judge of the Mental Health Community Court. Judge Fisher has served on the Superior Court Rules Committee and the District of Columbia Jury Instructions Committee and as Chairman of the Superior Court Continuing Legal Education Subcommittee and currently serves on the Probate Rules Committee and chairs the Probate Compensation Committee Task Force. He has also been active in providing training to judges and attorneys on the topics of evidence, criminal law and procedure, and civil law and procedure.

*HEARSAY EXCEPTIONS IN
PROBATE
&
ESTATE PROCEEDINGS*

Judge Gerald I. Fisher
NCPJ Spring Conference
New Orleans, LA
May 16, 2019

HEARSAY EXCEPTIONS – IN GENERAL

Hearsay – an out-of-court statement being introduced for the truth of what is asserted in the statement – is deemed by the law to be less reliable because:

- not under oath
- cannot see demeanor of declarant at time of statement
- cannot cross-examine declarant

Generally these factors are designed to test the declarant's memory, sincerity and credibility or the “trustworthiness” of the statement.

The common law and FRE exceptions to hearsay generally are based on historical judgments that some statements are sufficiently trustworthy that the jury should be allowed to consider them.

FRE codify 28 exceptions under Rules 803, 804, and 807, most of which, but not all, were recognized by the common law.

Before reviewing the exceptions there are some general principles to remember:

Preliminary Notes

1. There must be a demonstration of **personal knowledge** at two levels:
 - a. The witness testifying to the hearsay statement must have heard or read the hearsay statement personally.
 - b. The declarant must make the statement based upon personal knowledge.
2. In making a determination of personal knowledge, the declarant's statements concerning personal knowledge are accepted as true for all the exceptions, except business records (FRE 803(6)), public records (FRE 803(8)), declarations against penal interest (FRE 804(b)(3)), and the catchall (FRE 807).

3. Merely because evidence fits within an exception to the hearsay rules does not mean that it is automatically admissible. You must also ask:
- a. Is it relevant?
 - b. Have procedures for examining witnesses been complied with (FRE 611–14)?
 - c. Is it otherwise excluded as a matter of substance (FRE 404–12)?
 - d. Is it excluded because its unfair prejudice substantially outweighs its probative value (FRE 403)?

4. If a statement meets an exception, this means (a) it is an assertion, and (b) the statement is offered for the truth of the matter asserted.

- In other words, the statement is hearsay but meets an exception.
- If the statement meets an exception, and it is otherwise admissible, the factfinder (judge/jury) can consider it as substantive evidence.

Hypothetical #1

In an heirship proceeding regarding an intestate estate, Oldest Son takes the stand and begins his testimony by stating, “I am the oldest son of Decedent,” at which point counsel for one of the other potential heirs loudly objects, “I object. This is rank hearsay!” In response, counsel for Oldest Son (rolling her eyes in exasperation) responds: “If that’s hearsay, opposing counsel is the Queen of Sheba.” Is the statement (1) Admissible (not hearsay)? (2) Inadmissible (hearsay)? (3) Admissible in part?

Categories of Hearsay Exceptions

- ▶ Where the hearsay statement is admissible only upon a showing that declarant is “**unavailable**” to testify – *See* FRE 804.
- ▶ Where the declarant’s **availability to testify** is immaterial – *See* FRE 803.

HEARSAY EXCEPTIONS

A. When Declarant Unavailable

“Unavailability” Defined:

1. Privilege, FRE 804(a)(1).
2. Contemptuous refusal, FRE 804(a)(2).
3. Lack of memory as to the subject matter, FRE 804(a)(3).
4. Death or infirmity, FRE 804(a)(4).

5. Absence from hearing and proponent has been unable to procure witness' attendance, FRE 804(a)(5).

- If the proponent is seeking to introduce a **dying declaration, statement against interest, or statement of personal or family history**, the proponent must show more than simply that the witness failed to respond to a properly served subpoena.

HEARSAY EXCEPTIONS

A. When Declarant Unavailable

1. **Former Testimony**, FRE 804(b)(1) – Proponent must show:

- Testimony (under oath) at another trial, hearing or deposition;
- The party had an opportunity to examine the witness at the earlier proceeding; and
- There was a similar motive to question the witness;
- In a **criminal case**, the party against whom the testimony is being offered must have been a party in the earlier proceeding; and
- In a **civil case**, it must be the same party or that party's predecessor in interest.

HEARSAY EXCEPTIONS

A. When Declarant Unavailable

2. **Dying Declarations, FRE 804(b)(2) – Elements are:** statement:

- is offered in a homicide or civil case;
- was made while declarant believed death was imminent;
and
- concerns the cause or circumstances of what the declarant believed to be impending death.

Note: Not limited to dead declarants

HEARSAY EXCEPTIONS

A. When Declarant Unavailable

3. Declarations Against Interest (pecuniary, proprietary, penal), FRE 804(b)(3):

- Reasonable person would not have made the statement unless it was true because it was contrary to declarant's pecuniary or proprietary interest or "so contrary" to or "had so great a tendency to" subject declarant to civil or criminal liability.
- Declarant must be aware statement is against interest at the time of its making.
- If statement against penal interest is offered in a criminal case, must demonstrate corroborating circumstances that clearly indicate its trustworthiness.

Hypothetical #2

Creditor sues the PR for payment of a promissory note Decedent had entered into and which became due five years before his estate was opened. PR asserts a defense of the three-year statute of limitations. Creditor is prepared to testify that when the note became due, Decedent acknowledged he owed the money and, in exchange for creditor's agreement not to foreclose on the loan, orally extended the due date to fall within one year of the date he died, thereby avoiding the statute of limitations. PR objects on hearsay grounds. Is the statement (1) Admissible? (2) Inadmissible? (3) Admissible in part?

HEARSAY EXCEPTIONS

A. When Declarant Unavailable

4. Statements of Personal or Family History, FRE 804(b)(4):

- Statements about one's own personal or family history, or the personal or family history of another if the declarant is closely related or intimately related to that person/family.
 - Implicit recognition that declarant has no means of obtaining personal knowledge
 - Statements need not be *ante litem motam* – made before the controversy giving rise to the litigation.
 - Exception overlaps with FRE 803(19) – Reputation Concerning Personal or Family History

Hypothetical #3

Decedent died without a will and had no wife or any direct relatives. At trial, a supposed first cousin (Smith) offers an affidavit by Decedent's Aunt that states that Decedent referred to Smith as his "closest relative" and "first cousin." A second cousin (Doe), who will inherit part of the estate if Smith is not a first cousin, objects to the contents of the affidavit as being hearsay. Is the statement (1) Admissible? (2) Inadmissible? (3) Admissible in part?

HEARSAY EXCEPTIONS

A. When Declarant Unavailable

5. Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability, FRE 804(b)(6):

- Must show that the party against whom the evidence is offered “intended to . . . procure the unavailability of the declarant *as a witness*.” See Giles v. California, 554 U.S. 353 (2008) (must be for purpose of preventing witness from testifying at current trial)
- Any relevant hearsay statement may be introduced if the showing required by the rule is made.

Hypothetical #4

Decedent Mother was murdered, leaving a will dividing her estate equally between her two sons. Son #1 is charged with the murder, but he still seeks a share of Mother's estate. Son #2 contends that Mother changed her will to disinherit Son #1 and Son #1 murdered her and destroyed the new will. At the estate trial, which proceeds before Son #1's criminal trial, Son #2 wishes to present Aunt (Mother's sister) as a witness to testify that a few days before Mother's death, Mother told her that she disinherited Son #1.

Counsel for Son #1 objects. Counsel for Son #2 responds, "The statement is admissible under the forfeiture by wrongdoing exception to the bar against hearsay." (1) Admissible? (2) Inadmissible? (3) Admissible in part?

HEARSAY EXCEPTIONS

B. When Availability Immaterial

1. **Present Sense Impression:** (a) a statement (b) describing or explaining an event or condition, (c) made while the declarant was perceiving the event or condition, or immediately thereafter, FRE 803(1).

HEARSAY EXCEPTIONS

B. When Availability Immaterial

2. Excited Utterance, FRE 803(2): Proponent must show:

- Startling event;
- Statement made while declarant still under the stress of excitement – does not have to be contemporaneous with the event that caused the stress;
- Statement relates to the event; and
- Based on personal knowledge.

- The fact that declarant made the statement in response to a question does not necessarily preclude the statement from being an excited utterance.
- The critical factor is whether circumstances reasonably justify the conclusion that the remarks were spontaneous and not made under the impetus of reflection.

Hypothetical #5

Estate sues Defendant Driver for causing an accident in which Decedent, a pedestrian, was struck by another (blue) car and died. Estate seeks to have Police Officer testify about a statement a visibly upset woman made to him as he arrived on the scene five minutes after the accident: “Oh, my God, I just saw that red car (other evidence shows the red car was driven by Defendant Driver) run the red light and the blue car swerved to avoid it and struck the woman in the cross-walk!” Counsel for Defendant Driver objects on hearsay grounds, noting the lack of a demonstration of unavailability, firsthand knowledge, and the witness’ identity, and the passage of time between the event and the statement. Counsel for the Estate responds that firsthand knowledge has been shown, that no further showings need be made, and that the statement is admissible as both an excited utterance and a present sense impression. (1) Admissible? (2) Inadmissible? (3) Admissible in part?

HEARSAY EXCEPTIONS

B. When Availability Immaterial

3. **Then-Existing Mental, Emotional, or Physical Condition,**
A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

- **Direct Statement of State of Mind**
 - *E.g.*, decedent's statement, "I don't like my son."
 - This is to be distinguished from non-hearsay state-of-mind evidence, which is not admitted for its truth, but as circumstantial evidence of the declarant's state of mind – *e.g.*, decedent's statement, "My son never comes by to see me," used to show decedent had less affection for son.
 - The declarant's state of mind must be a relevant issue. Relevant states of mind may include intention, motive, belief, affection, malice or fear.

◦ Present State of Mind To Do a Future Act

- Another type of statement admissible under the state-of-mind exception conveys the intent of the declarant to perform an act in the future, where there is an issue as to whether in fact the act was performed. Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892).
- Statements of memory (backward-looking) or of belief do not fall within the exception. Shepard v. U.S., 290 U.S. 96 (1933).
- Such statements may only be offered to prove that the declarant did a particular act, and cannot be introduced to prove that a third person did an act. U.S. v. Pheaster, 544 F.2d 353 (9th Cir. 1976).

- **Statement of Physical Condition**

- Statements of the declarant's present bodily condition and related feelings;
- Limited to descriptions of current conditions or feelings;
- Can be made to anyone.

- **Statement Regarding Wills**

- This is essentially an exception to Rule 803(3)'s prohibition regarding statements of memory or belief, and permits such statements – most often from the supposed testator – when they relate to the validity or terms of a will. *See, e.g., Primerica Life Ins. Co. v. Watson*, 207 S.W.3d 443, 447–48 (Ark. 2004) (statement of decedent regarding his belief that he had changed the beneficiary of his life insurance policy from his ex-wife to his new wife admissible under FRE 803(3) where state law equates designation of beneficiaries to terms of a will)
- Arguably, this exception should apply to will substitutes, such as trusts and designation of property passing outside the will at the time of death.

Hypothetical #6

Same facts as Hypothetical #4. Son #2 also wishes to have Aunt testify to the following: A month before Mother's death, Mother told her that (i) she was very afraid of Son #1; (ii) that Son #1 had threatened to kill her; and (iii) that she was going to disinherit Son #1. As a result of this conversation, Aunt went to Son #2 and (iv) told him she was very afraid for Mother's safety.

Counsel for Son #1 objects. Counsel for Son #2 responds, "The statements are all admissible under the state of mind exception to the bar against hearsay." (1) Admissible? (2) Inadmissible? (3) Admissible in part?

Hypothetical #7

In a probate proceeding, there is a dispute as to whether an expensive necklace is part of the estate and inherited by Decedent's daughter or was gifted to a niece. The niece seeks to call her mother (Decedent's sister) as witness to testify as to the below statements made by Decedent. The attorney for Decedent's daughter's objects to each of the statements on hearsay grounds.

- “I am going to give my favorite necklace to my niece.”

(1) Admissible? (2) Inadmissible? (3) Admissible in part?

Hypothetical #8

Same facts. Decedent says to her sister/niece's mother:

- “I gave my necklace to my niece, as I said I would.”

(1) Admissible? (2) Inadmissible? (3) Admissible in part?

Hypothetical #9

Same facts. Decedent says to her sister/niece's mother:

- “I love my niece and I love my daughter but I do not like my daughter because of how she behaves.

(1) Admissible? (2) Inadmissible? (3) Admissible in part?

Hypothetical #10

Same facts. Decedent says to her sister/niece's mother:

- “My daughter is very disrespectful to me.”

(1) Admissible? (2) Inadmissible? (3) Admissible in part?

HEARSAY EXCEPTIONS

B. When Availability Immaterial

4. **Statement for Purposes of Medical Diagnosis or Treatment:** Statements made by a patient for purposes of obtaining medical diagnosis or treatment, FRE 803(4).
- Permits statements from persons other than the patient, if for the purpose of obtaining treatment for the patient.
 - Permits statements to experts.
 - May describe medical history or past or present symptoms.
 - Precludes statements of fault.
 - However, statements identifying the perpetrator (fault) may be admissible where the injury is psychological or emotional, or where treatment may require separation from the perpetrator – *e.g.*, child abuse/child sex abuse cases.

HEARSAY EXCEPTIONS

B. When Availability Immaterial

5. Recorded Recollection, FRE 803(5): A record that

- (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
- (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
- (C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

- Must first try to refresh the witness' recollection.
- One can adopt the statement of another, but must occur when the adopter's memory was fresh, and not on witness stand.
- In some cases, this exception has been held to encompass videotaped statements, and grand jury testimony, but those interpretations appear to be at odds with the rule's requirements.

HEARSAY EXCEPTIONS

B. When Availability Immaterial

6. Business Records and Absence Thereof, FRE 803(6) & (7). Document admissible if:

- kept in the regular course of business and it was the regular course of the business to keep such records at or near the time of the transaction;
- the maker of the record had personal knowledge of the event reflected in the record or had a business obligation to make an accurate recording of information provided by someone with personal knowledge.
- Normally, need a record custodian to authenticate the records, but FRE 902(11)–(14) allows certification by the custodian to authenticate domestic and foreign business records, including electronic records.

HEARSAY EXCEPTIONS

B. When Availability Immaterial

- Although law enforcement records generally are inadmissible against defendants in criminal cases, such records are admissible in civil cases.

- **Medical Records as Business Records**
 - FRE 803(6) provides for admissibility of diagnoses and opinions contained in medical records.
- **Trustworthiness/Anticipation of Litigation**
 - In general, records created in anticipation of litigation are not considered admissible as business records. Palmer v. Hoffman, 318 U.S. 109 (1943)

- **Business Records & Multiple Hearsay**

- FRE 805. Hearsay Within Hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Hypothetical #1 1

Estate sues City and Police Officers for civil rights violations and use of excessive force after Decedent was arrested by the Officers for shoplifting and a struggle ensued, which resulted in Decedent being taken to the hospital, where he remained for a few days, but then died from his injuries. The parties stipulate to the authenticity of the Hospital's records, but reserve the right to object to admissibility on other grounds. Plaintiff Estate wishes to introduce two entries in the records: (1) "Upon admission, Decedent's wife said Decedent told her he was repeatedly struck on his head with a billyclub" and (2) the treating physician's diagnosis of "Significant internal cranial injury consistent with blunt force trauma and excessive force." Defendant objects to both entries as hearsay.

(1) Admissible? (2) Inadmissible? (3) Admissible in part?

HEARSAY EXCEPTIONS

B. When Availability Immaterial

7. Governmental Records and Absence Thereof, FRE 803(8) & (10): Records which set forth:

- activities of an agency;
- matters observed under a duty imposed by law to report, except in criminal cases observations by law enforcement officials; and
- in a civil action and on behalf of a defendant/against the government in a criminal case, factual findings resulting from an investigation conducted pursuant to lawful authority, unless there is a lack of trustworthiness.

- Many jurisdictions have their own statutes or rules that address the admissibility of governmental records and may impose lesser or greater requirements for admissibility. *See, e.g.,* Sup. Ct. Crim. Pro. R 27(a); Sup. Ct. Civ. Pro. R. 44(a)

HEARSAY EXCEPTIONS

B. When Availability Immaterial

8. **Residual Exception, FRE 807:** A statement not specifically covered under other hearsay exceptions but “having equivalent guarantees of trustworthiness” may be admitted if (1) more probative than other available evidence and (2) admission will serve interests of justice.

Dead Person Statutes

Most jurisdictions have statutes barring or limiting testimony regarding communications or transactions with decedents in civil suits prosecuted or defended by the decedent's executor/personal representative/administrator.

- The majority of the states permit the survivor to testify, but bar recovery unless the testimony is corroborated by other evidence. *See, e.g., Bldg. Servs. Unlimited v. Riley*, 238 F. Supp. 2d 255, 257 (D.D.C. 2002)
- These statutes may be of particular importance in diversity cases

OTHER HEARSAY EXCEPTIONS THAT MAY ARISE IN PROBATE & ESTATE PROCEEDINGS

Public Records of Vital Statistics. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty. FRE 803(9).

Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization. FRE 803(11).

Certificates of Marriage, Baptism, and Similar Ceremonies.

A statement of fact contained in a certificate:

- (A) made by a person who is authorized by a religious organization or by law to perform the act certified;
- (B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and
- (C) purporting to have been issued at the time of the act or within a reasonable time after it.

FRE 803(12).

Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker. FRE 803(13).

Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history. FRE 803(19).

Records of Documents That Affect an Interest in Property.

The record of a document that purports to establish or affect an interest in property if:

- (A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;
- (B) the record is kept in a public office; and
- (C) a statute authorizes recording documents of that kind in that office.

FRE 803(14).

Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document. FRE 803(15).

Reputation Concerning Boundaries or General History. A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation. FRE 803(20).

Statements in Ancient Documents. A statement in a document that was prepared before January 1, 1998, and whose authenticity is established. FRE 803(16).

Judgments Involving Personal, Family, or General History or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

FRE 803(23).

Hypothetical #12

In an estate dispute between two cousins of Decedent, Cousin #1 wishes to introduce the following evidence to prove she is the first cousin of Decedent – if so, she will prevail in the lawsuit – to which Cousin #2 objects on hearsay grounds:

- A newspaper obituary from 25 years ago written by family members that lists Cousin #1's mother as the sister of Decedent's father (thereby making Cousin #1 and Decedent first cousins).

(1) Admissible? (2) Inadmissible? (3) Admissible in part?

Hypothetical #13

Same facts.

- Testimony by other family members that they understood Cousin #1 to be the first cousin of Decedent.

(1) Admissible? (2) Inadmissible? (3) Admissible in part?

Hypothetical #14

Same facts.

- A 50-year-old social security card application from someone claiming to be Cousin #1 (before she married) that states that the person is the daughter of Decedent's aunt and uncle (thereby making Cousin #1 Decedent's first cousin).

(1) Admissible? (2) Inadmissible? (3) Admissible in part?

Hypothetical #15

Same facts.

- An application for a replacement social security card using Cousin #1's married name and the same social security number as the earlier application.

(1) Admissible? (2) Inadmissible? (3) Admissible in part?

Hypothetical #16

Same facts.

- Census records from seventy and sixty years ago reporting that Decedent's aunt and uncle had children including Cousin #1, whose listed age was consistent with Cousin #1's birth date.

(1) Admissible? (2) Inadmissible? (3) Admissible in part?

Hypothetical #17

In an estate action, purported Heir #1 maintains that his mother had been married to Decedent's brother. Purported Heir #2 asserts that no such marriage took place and that Heir #1 is an illegitimate child. Heir #1 seeks to admit a baptismal record made by a clergyman regarding Heir #1's birth that states that his birth was "lawful" and that his mother was the "wife" of Decedent's brother. Heir #2 objects.

(1) Admissible? (2) Inadmissible? (3) Admissible in part?



Mark R. Caldwell

Shareholder

Mark R. Caldwell was born on June 29, 1979 at Beaufort Naval Hospital in Beaufort, South Carolina where his father flew F-4 Phantoms at the nearby Marine Corps air station (although his mother had the more difficult job of raising three children). After having lived in South Carolina, North Carolina, Hawaii, and California he returned to North Texas and attended Eastfield Community College before transferring to Southern Methodist University, where he earned a full academic scholarship. One year later, he attended the London School of Economics as a General Course Student. Mark earned his law degree from New England School of Law in Boston, Massachusetts in 2005. He routinely represents executors, guardians, and beneficiaries in complex estate, trust, and guardianship litigation. He has also represented fiduciaries in all phases of estate, trust, and guardianship administration. Mark is passionate about holding those who exploit others accountable and defending those who have been wrongfully accused of doing so. Mark enjoys the investigatory aspects of estate and trust litigation, including reviewing and analyzing medical, financial, and suspicious property records and transactions. Mark is committed to developing and maintaining strong, personal relationships with his clients. He endeavors to offer smart, pragmatic and cost-effective legal advice. Mark believes that the strongest winning position is one that is simple, direct, and understandable. While he strives to advocate strong, aggressive positions for clients, Mark also strives to resolve disputes in an ethical, reasonable, and cost-effective manner.

Certifications, Awards and Recognition

- Board Certified Estate Planning and Probate Law - Texas Board of Legal Specialization
- Named Rising Star by Texas Super Lawyers (2014, 2015, 2016, 2017, 2018, and 2019)
- Selected Rising Stars Top 100 Up & Coming Attorneys in Texas

Education

- General Course, The London School of Economics, London, England (2001-2002)
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A ROAD INCREASINGLY TRAVELED: MULTI-STATE PROBATE ISSUES¹

I. INTRODUCTION²

Multistate probate issues are complex. Although it is increasingly common for a decedent to own property in more than one state, there is no overriding authority to determine jurisdiction when estate assets are located in several states. Each state may assert jurisdiction over property located within its boundaries. This can and does result in inconsistent state court judgments.

Additionally, several interrelated concepts are usually simultaneously at play. For example, a decedent's domicile plays a significant role in choice of law issues, as well as determining the situs of intangible assets. Real property, on the other hand, has its situs in the state in which it is located. These situs determinations usually affect a probate court's in rem jurisdiction. In turn, the concept of in rem jurisdiction plays a significant role in analyzing full faith and credit issues.

This article summarizes some of the key legal principles which are often applicable when analyzing multi-state probate issues.

II. ANALYSIS FOR PROBATE ASSETS

The will of a decedent will normally be admitted to probate in a state: (1) where the decedent was domiciled on death; (2) where there are assets of the estate on death. Restatement (Second) Conflicts of Laws § 314.

A. Domicile

Domicile “means the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined.” *Williamson v. Osenton*, 232 U.S. 619, 625 (1914). Domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there. *Texas v. Florida*, 306 U.S. 398, 424 (1939).

Courts have held that when a person is adjudged incompetent, his or her domicile is the last county in which he or she resided while competent. *Thomas v. Price*, 534 S.W.2d 730, 733 (Tex. Civ. App.—Waco 1976, no writ) (“It is undisputed that the deceased was domiciled in Ellis County in 1933 when he was adjudged insane. There is no evidence he was ever restored. Thus, his domicile continued in Ellis County.”). Other courts have held that someone can change an incompetent person's domicile if it is done to serve the incompetent person's best interest. *Acridge v. Evangelical Lutheran Good Samaritan Soc.*, 334 F.3d 444, 453 (5th Cir. 2003) (wrongful death case dismissed for lack of diversity jurisdiction).

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² This paper and accompanying presentation is intended for informational and educational purposes only and cannot be relied upon for legal advice. Any assumptions or examples used in this paper are for illustrative purposes only. This paper and accompanying presentation creates no attorney-client relationship.

1. Domicile as it Relates to Jurisdiction and Situs

In a probate proceeding, the domicile of a decedent is a jurisdictional fact. Domicile may be determined in the courts of the state in which the decedent is alleged to be domiciled. *Riley v. New York Trust Co.*, 315 U.S. 343 (1942); *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, (1917). As explained below, the situs of certain assets for in rem jurisdiction purposes is based on the decedent's domicile.

2. Domicile as it Relates to Choice of Law

The law of a person's domicile also impacts which law may apply to a particular issue (e.g. intestacy, the validity and/or effect of a will). For all these reasons, domicile is frequently litigated in cases involving multi-state probate issues.

B. In Rem Jurisdiction

Most probate proceedings are actions in rem. The basis of in rem jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum state. *Hanson v. Denckla*, 357 U.S. 235, 246 (1958). When analyzing multi-state probate issues, courts routinely rely on several key United States Supreme Court cases: *Rose v. Himely*, 8 U.S. (4 Cranch) 241, (1808); *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Overby v. Gordon*, 177 U.S. 214 (1900); *Baker v. Baker, Eccles & Co.*, 242 U.S. 394 (1917); *State of Iowa v. Slimmer*, 248 U.S. 115 (1918); *Riley v. New York Tr. Co.*, 315 U.S. 343, (1942); and *Hanson v. Denckla*, 357 U.S. 235 (1958).

This case law provides key principles:

- A judgment in rem affects the interests of all persons in designated property. *Shaffer v. Heitner*, 433 U.S. 186, 199 n. 17 (1977). Judgments in rem are typically binding “on the whole world.” Restatement, Judgments § 32, comment a (1942).
- In rem judgments bind persons to the extent of their interest in the property whether or not they were parties to the proceedings. 50 C.J.S. Judgments § 1054 (2005).
- Service on the property owner relates only to notice and opportunity to be heard, not to the court's jurisdiction. 21 C.J.S. Courts § 37 (citing *Miccosukee Tribe of Indians of Florida v. Dep't of Env'tl. Prot. ex rel. Bd. of Trustees of Internal Imp. Tr. Fund*, 78 So. 3d 31, 33 (Fla. Dist. Ct. App. 2011) (“Because a proceeding in rem is an action against the property itself, the court is not required to acquire in personam jurisdiction over the landowner as a prerequisite to a valid court action. Instead, “the purpose of service of the summons and complaint upon the landowner is only to provide notice and an opportunity to be heard.”) (internal citations omitted)).
- Personal jurisdiction is irrelevant and not required in an in rem proceeding. *Id.* However, the effect of a judgment in rem action is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner. *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977).

- Consequently, a judgment rendered in rem or quasi-in-rem will exhaust itself in the forum state and cannot be enforced against the defendant or his property in other jurisdictions under the Full Faith and Credit Clause. 4A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1070 (4th ed.).
- The mere contention that a decedent died in a domiciliary state or that the state's control over its affairs give it jurisdiction to adjudicate foreign situated property will not suffice. Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 [B] (2009 ed.) (internal citations omitted).

Because will contests affect both the property and the personal rights of the beneficiaries to participate in the distribution of estate assets, they are generally viewed as examples of quasi in rem jurisdiction. In a contested probate proceeding, the careful practitioner should consider obtaining in personam jurisdiction on every interested party for which personal liability is sought or such party's personal rights are affected.

1. Common Situs Rules Based on Physical Location

Jurisdictional situs rules are generally based on: (1) physical location; or (2) domicile. The situs of real property is the state where it is located. Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). The situs of tangible personal property for purposes of administration is in the state where it is located. *Lancaster & Wallace v. Sexton*, 245 S.W. 958, 959 (Tex. Civ. App.—Texarkana 1922, writ ref'd). For example, the situs of a negotiable instrument is the place where it is located. Restatement (Second) of Conflict of Laws § 326.

When it comes to intangible property, it can be difficult to fix the precise situs of assets when they are intangible in nature. The “situs” of an intangible asset is essentially the place at which it is reasonable to collect and administer the intangible. Pinpointing the exact location of an intangible asset for jurisdictional purposes is sometimes a cumbersome task though. Justice Cardozo famously said:

The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found. At the root of the selection is generally a common-sense appraisal of the requirements of justice and convenience in particular conditions. *Dickstein v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 685 A.2d 943, 947–48 (App. Div. 1996) (quoting *Severnose Securities Corp. v. London & Lancashire Inc. Co.*, 255 N.Y. 120, 123–124, 174 N.E. 299, 300 (1931) (internal citations omitted)).

Life insurance policies have been found to have a situs at any one of the following locations: (1) the location of the policy document; (2) the place where the insurer does business; or (3) any state in which the insurer can be made subject to the court's jurisdiction. Jeffrey Schoenblum,

Multistate and Multinational Estate Planning, § 16.07[C] (2009 ed.). The situs of a chose in action is the place where the debtor resides. *Lancaster & Wallace v. Sexton*, 245 S.W. 958, 959 (Tex. Civ. App.—Texarkana 1922, writ ref’d) (ancillary administration in Texas was proper to pursue wrongful death claim against Texas resident on behalf of Louisiana Decedent who died in Louisiana). “A valid claim for damages, based upon transactions of this character, is a chose in action; it is a debt resting upon an obligation which the law imposes on a wrongdoer to pay adequate compensation to an injured party, or to his representative. Like other debts not evidenced by some form of writing, it follows the person of the debtor, and its payment may be enforced in any forum where the debtor may be found.” *Id.*

2. Common Situs Rules Based on Domicile

The situs of a bank deposit is the domicile of the asset’s owner. *In Re Estate of Coleman* 98 N.W.2d 784 (N.D. 1959) (holding that a certificate of deposit in a loan company, which was the only property claimed to be located in North Dakota, was an intangible and had its situs at the domicile of the testatrix, which in this case was Montana, and that therefore the will of that testatrix could not be probated in North Dakota since she did not leave property within that state sufficient to give the court jurisdiction).

The situs of a claim to trust income is the domicile of the trust beneficiary. *In re Howard Marshall Charitable Remainder Annuity Tr.*, 709 So. 2d 662, 665 (La. 1998) (situs of non-resident’s right to undisbursed income from Louisiana trusts was the domicile of non-resident—not the situs of the trusts; trial court lacked jurisdiction to open estate administration). The *Marshall* Court relied heavily on the concept of *mobilia sequuntur personam, immobilia sita* (“movables follow the person, immovables their locality”).

The situs of corporate stock for purposes of administration is the: (1) domicile of the owner of the stock; (2) place of incorporation; or (3) place where the certificates are kept at the time of the owner’s death, which will normally be his domicile. Eugene F. Scoles & Peter Hay, *Conflicts of Laws*, §22.12 (3rd ed. 2000).

C. Common Choice of Law Rules

1. Choice of Law Rules Based on Situs

With respect to immovable property, the law of the situs: (1) determines distribution in the event of intestacy; (2) determines the validity of a will; and (3) determines the construction of a will. The Restatement (Second) Conflict of Laws §§ 236, 239, 240.

2. Choice of Law Rules Based on Domicile

With respect to movable property, the law of a person's domicile: (1) determines distribution in the event of intestacy; (2) determines the validity of a will; and (3) determines the construction of a will. The Restatement (Second) Conflict of Laws §§ 236, 263, 264.

III. ANALYSIS FOR NON-PROBATE ASSETS

When it comes to multi-state probate issues, much of the historical legal analysis may be of diminishing importance due to the non-probate revolution. “The law of wills and the rules of descent no longer govern succession to most of the property of most decedents. This is because the bulk of modern wealth takes the form of contract rights rather than rights in rem – promises rather than things . . . promissory instruments – stocks, bonds, mutual funds, bank deposits, and pension and insurance rights – are the dominant component of today’s wealth.” John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1119 (1984).

In analyzing non-probate assets, the devil is in the details. Many account agreements will contain: (1) forced heirship clauses, which may differ from the applicable state’s intestacy scheme; (2) choice of law provisions; and (3) forum selection clauses. Therefore, these account agreements must be carefully analyzed to determine the effect of any such clauses in a particular case.

A. Choice of Law

A federal court recently considered a choice of law provision in the context of a life insurance policy. *Lincoln Ben. Life Co. v. Manglona*, 2014 WL 3608893, at *1 (S.D. Tex. 2014). A wife obtained an insurance policy in Guam. The wife designated her husband as her primary beneficiary and her children as secondary beneficiaries. The policy contained a choice of law stating that the policy was “subject to the laws of the state where the app[lication] was signed.” *Id.* Later, the wife divorced her husband. The divorce agreement failed to mention policy. The wife died. The wife’s children argued Texas law applied and the designation in favor of husband was void. (Guam’s law was unfavorable to the children). The court ultimately upheld the choice of law clause and found that Guam, not Texas, law applied to the beneficiary designation.

B. Forum Selection

Forum selection clauses are contractual arrangements whereby parties agree in advance to submit their disputes for resolution within a particular jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n. 14 (1985). The enforcement of valid forum selection clause protects the parties’ “legitimate expectations” and furthers “the vital interests of the justice system,” such as sparing litigants the time and expense of pretrial motions to determine the proper forum for disputes. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring).

When construing a forum selection clause, the court’s first function is to determine whether a clause is mandatory or merely permissive. A mandatory forum selection clause requires that all litigation be conducted in a specified forum. *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 219 (5th Cir. 2009); *LeBlanc v. C.R. England, Inc.*, 961 F.Supp.2d 819, 828 (N.D. Tex. 2013). For a forum selection clause to be considered mandatory or exclusive, the clause “must go beyond establishing that a particular forum will have jurisdiction and must clearly demonstrate the parties’ intent to make that jurisdiction exclusive.” *City of New Orleans*

v. Mun. Admin. Servs., Inc., 376 F.3d 501, 504 (5th Cir. 2004). Where the agreement contains clear language showing that jurisdiction is appropriate only in a designated forum, the clause is mandatory. *Von Graffenreid v. Craig*, 246 F. Supp. 2d 553, 560 (N.D. Tex. 1997).

The second function of the court is to determine whether the claims in question fall within the scope of the mandatory forum-selection clause. *See Deep Water Slender Wells, Ltd. v. Shell Int'l Expl. & Prod., Inc.*, 234 S.W.3d 679, 687–88 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (“When a party seeks to enforce a mandatory forum-selection clause, a court must determine whether the claims in question fall within the scope of that clause.”). “The court bases this determination on the language of the clause and the nature of the claims that are allegedly subject to the clause.” *Id.* If the claims fall within the scope of the clause, the court must determine whether to enforce the clause. *Id.* “[A] litigant who sues based on a contract subjects him or herself to the contract’s terms.” *In re FirstMerit Bank*, 52 S.W.3d 749, 755 (Tex. 2001) (holding that non-signatory to contract was subject to arbitration provision in contract because they brought breach of contract and breach of warranty claims arising out of the contract).

IV. FULL FAITH AND CREDIT

Every state must give the public acts, records, and proceedings of other states full faith and credit. U.S. Const. art. IV, § 1. Full faith and credit requires a state to give effect to another state’s judgment when the parties fully and fairly litigated the cause in the first state. *See Durfee v. Duke*, 375 U.S. 106, 111 (1963). However, as one scholar notes, “Even if jurisdiction [can] be obtained so as to effect the rights of nonresident parties, there is no assurance that full faith and credit [will] have to be given to any probate judgment of one state by another state.” Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 [D](2009 ed.); *see Fall v. Eastin*, 215 U.S. 1 (1907). Indeed, “Constitutional jurisprudence does not appear to require any state to abide by a judgment or order of another state with respect to property within the first state’s territorial boundaries.” *Id.*

The United States Supreme Court has held that the full faith and credit clause does not require recognition of a finding of domicile when that finding is challenged in a second state by one who was not personally subject to the jurisdiction of the court in the state of rendition. Restatement (Second) of Conflict of Laws § 317 (1971); *Riley v. New York Trust Co.*, 315 U.S. 343 (1942); *Baker v. Baker, Eccles & Co.*, 242 U.S. 394 (1917); *Overby v. Gordon*, 177 U.S. 214 (1900)

When courts with jurisdiction over property located within their territorial boundaries decide to recognize foreign judgments affecting such property, they usually do so on comity principles, not constitutional imperative. Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 [D](2009 ed.). Federal courts have explained the limits of the full faith and credit clause in the context of multi-state probate proceedings:

Full faith and credit means that a judgment in one state must in the other state be given the full effect it is given by the law and usage in the state of its origin. . . . There is, however, no authority for the claim . . . that property of a decedent situated in one state can be required by any court to be administered by a court of another state, or that a federal court can interfere in a conflict resulting from

irreconcilable findings of the two jurisdictions . . . **Each state court can stand upon its findings as to domicile and apply its probate laws to the estate property situated within it. Having no jurisdiction over property outside its borders, its orders as to such property imposed no duty upon another state to recognize them on the doctrine of full faith and credit.** *Nelson v. Miller*, 201 F.2d 277, 280 (9th Cir. 1952).

In *Baker v. Baker, Eccles & Co.*, 242 U.S. 394 (1917), a widow obtained letters of administration in Tennessee. The widow secured a finding that the decedent was domiciled in Tennessee. The proceeding was ex parte. The decedent owned stock in a Kentucky Corp (the stock was viewed as claim against corporation – since the situs is the domicile of the debtor). If the stock was distributable according to the laws of Tennessee, it would go entirely to the widow. If the stock was distributable according to the laws of Kentucky, it would go one half to the widow, the other half to the mother. The widow obtained an order in the Tennessee estate administration that the stock belonged to her. The widow sued the decedent's mother (a nonresident of Tennessee) in Tennessee seeking a declaration that the widow was the sole distributee. The mother was served by publication, defaulted, and a judgment unfavorable to mother was entered. Meanwhile, the mother obtained letters of administration in Kentucky and filed suit seeking to establish her right to the stock by establishing the decedent was a resident of Kentucky. The widow responded by filing suit in Kentucky, essentially seeking to enforce her Tennessee judgment against the Kentucky company. The issues on appeal were: (1) was the Tennessee proceedings entitled to recognition in the courts of Kentucky as adversely adjudicating the mother's asserted right to share in the personal property situated in Kentucky? (2) did the Tennessee proceedings conclusively determine the decedent's domicile as affecting that right, when the Tennessee courts failed to acquire jurisdiction over the mother's person or over the Kentucky corporation?

The U.S. Supreme Court said no to both questions. In their view, “. . . the Tennessee judgments had no effect in rem upon the Kentucky assets now in controversy. [The widow] invokes the aid of those judgments as judgments in personam. But it is now too well settled to be open to further dispute that the ‘full faith and credit’ clause and the act of Congress passed pursuant to it do not entitle a judgment in personam to extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound.” *Id.*

V. RES JUDICATA & COLLATERAL ESTOPPEL

Commonly, a party will want to enforce a probate decree in a domiciliary state with respect to persons and assets outside the jurisdiction of the domiciliary state. If a judgment or decree was entered in the first state without notice to all indispensable parties, then there is a risk that res judicata and collateral estoppel will not bar an action in another state by parties over which the first state did not obtain personal jurisdiction. Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 [E] (2009 ed.). There are a few potential solutions, none of which offer certainty, and which include, but are not limited to:

- Personally serve all non-residents and see if they appear. Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.02 [E][2] (2009 ed.) (“Having been notified as to an in rem proceeding, they may be concerned that they will be

bound by the outcome of this in rem proceeding with respect to property under control of the forum. They may also be concerned that any determination as to the validity of the will or the status of persons as heirs may be used in other jurisdictions and be persuasive, especially since they had a notice and could have challenged any determination.”).

- Personally serve all non-residents any time they can be located in state. *Id.* § 16.02[E][3] (citing *Burnham v. Superior Court*, 495 U.S. 604 (1990)).
- Attempt to establish personal jurisdiction based on purposeful availment. *Id.* § 16.02 [E][4](explaining it is idea to have regular contact initiated by the non-resident).
- Assert jurisdiction based on the situs of the property in dispute. *Id.* § 16.02 [E][5]; see *Shaffer v. Heitner*, 433 U.S. 186, 187 (1977) (“The presence of property in a State may bear upon the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation, as for example, when claims to the property itself are the source of the underlying controversy between the plaintiff and defendant, where it would be unusual for the State where the property is located not to have jurisdiction.”); *Id.* at 207-208 (“For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest.”).

In Re Estate of Tolson provides a good illustration of the relationship between domicile and collateral estoppel – particularly, the effect of a judgment in a probate proceeding against one who, although a party to that proceeding, attempts to raise the question of domicile in another jurisdiction. *In Re Tolson*, 947 P.2d 1242 (1997). In that case, a Washington court found a decedent was domiciled in Washington on death. The decedent died leaving a holographic will (which was not valid under Washington law). However, a California court had already found the decedent was domiciled in California. The decedent’s son had notice and appeared through attorney. The California determination would make the decedent’s will valid in Washington as a foreign will. The will favored the decedent’s daughter and granddaughter. The daughters wanted the California determination to control over decedent’s son’s attempt to establish an intestacy in Washington.

The Washington Court of Appeals held that the son was collaterally estopped from challenging the California court’s judgment. The court found all the elements of collateral estoppel were met. The issue decided in California was identical to issue decided in Washington (domicile). There was a final judgment in first court (California). The son was represented in California proceeding and had notice and opportunity to be heard. An injustice did not arise as a result of the son’s refusal to participate in California proceeding. The Court cited *Riley v. New York Trust Co.*, 315 U.S. 343 (1942) and recognized: “A judgment in administration

proceedings by a competent court of any state will be held conclusive in other states as to the issues determined upon all persons who were subject to the jurisdiction of the original court if the judgment is conclusive upon such persons in the state of rendition.” *Id.* at 1249.

VI. SOURCE OF LAW & RESEARCH RESOURCES

There are several excellent authoritative treatises to consult when facing multi-state probate issues:

- Jeffrey Schoenblum, *Multistate and Multinational Estate Planning*, § 16.01 (2009 ed.).
- RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).
- RESTATEMENT (SECOND) OF JUDGMENTS (1982).
- 121 A.L.R. 1200 (Originally Published in 1939) (Diverse adjudications, actual or potential, by courts of different states, as to domicile of decedent as regards taxation, administration, or distribution of estates).
- 131 A.L.R. 1023 (Originally Published in 1941) (Decree of court of domicil respecting validity or construction of will, or admitting it or denying its admission to probate, as conclusive as regards real estate in another state devised by will).
- John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 Wash. L. Rev. 631, 632 (2017).

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Asset Protection Trusts

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Asset Protection Trusts: What Are They?

- ▶ Multiplicity of Meanings
- ▶ Broad Sense of the Term
 - ▶ Trusts that in a functional sense protect a beneficiary's assets from his creditors, although not necessarily intended for that purpose
 - ▶ May include trusts with discretionary distribution provisions
 - ▶ May include trusts with spendthrift provisions
- ▶ Narrow Sense of the Term
 - ▶ Trusts created for the purpose of shielding a beneficiary's assets from seizure by creditors
 - ▶ Foreign and Domestic Asset Protection Trusts (APT)
 - ▶ May include spendthrift trusts as well

Asset Protection Trusts: General Trust Law

- ▶ General Trust Law
 - ▶ “...the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary’s interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means.” UTC § 501.
 - ▶ Creditors can reach “the beneficiary’s interest,” not the trust property.
- ▶ Exceptions
 - ▶ Traditional
 - ▶ Non-Traditional

Asset Protection Trusts: The Varieties

- ▶ I. Trusts with Discretionary Distribution
- ▶ II. Spendthrift Trusts
- ▶ III. Self-Settled Trusts
 - ▶ A. In General
 - ▶ B. Asset Protection Trusts (SSAPT)
 - ▶ C. Foreign
 - ▶ D. Domestic (DAPT)

Asset Protection Trusts: Discretionary Trusts

- ▶ General Law: Discretionary distribution trusts may grant flexibility to a trustee as to when, to whom, and how often to make distributions to a beneficiary

“[W]he ther or not trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, even if: (1) the discretion is expressed in the form of a standard of distribution; or (2) the trustee has abused the discretion.” UTC § 504(b).
- ▶ Rationale: If the beneficiary couldn’t compel a distribution that was subject to the trustee’s discretion, neither could his creditors standing in his shoes. See, e.g., Restatement (Second) of Trusts § 155 cmt (b).
- ▶ Exceptions:
 - ▶ Alimony and child support creditors may maintain a suit against trustee for an award or an “amount that is equitable” to the extent that trustee has “abused a discretion.” UTC § 504(c).
 - ▶ “[A] creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal..., if the trustee has not made the distribution within a reasonable time after the designated distribution date.” UTC § 506(b).

Asset Protection Trusts: Discretionary Trusts

- ▶ Variations on the UTC Rules on Discretionary Trusts
 - ▶ (1) Some states that have enacted the UTC have omitted § 504 entirely. See, e.g., DC, Kansas, and Oregon
 - ▶ Common law rules apply
 - ▶ Discretionary v. Support Trusts
 - ▶ (2) Some states that have enacted the UTC have omitted alimony creditors from subsection (c) of § 504, resulting in child support creditors as the only exception to the general rule. See, e.g., Arizona, North Carolina, South Carolina, and Virginia.
 - ▶ (3) Some states that have enacted the UTC have omitted subsection (c) of § 504, resulting in discretionary trusts being immune from all creditors. See, e.g., Arkansas, Florida, Maine, Missouri, Tennessee, and Wyoming.

Asset Protection Trusts: Spendthrift Trusts

- ▶ Definition: A trust that prevents a beneficiary from voluntarily or involuntarily alienating his equitable interest in the trust. UTC § 501; Restatement (Third) of Trusts § 58; but see Ohio Rev. Code § 5805.1(A).
- ▶ History:
 - ▶ England: Did not exist at common law; Still not allowable in England
 - ▶ United States
 - ▶ Born in the United States in *Broadway Nat. Bank v. Adams*, 133 Mass. 170 (1882).
 - ▶ But see John Chipman Gray, *Restraints on Alienation of Property* § 262 (1883).
 - ▶ Now recognized in UTC § 501; Restatement (Third) of Trusts § 58.
- ▶ How to Effectuate: No “magic words”; “Spendthrift” or words “of similar import.” But see Del. Code Ann. tit. 12, § 3536(a); N.Y. Est. Powers & Trust Law § 7-1.5 (income).
- ▶ Purpose:
 - ▶ Adherence to and a result of the settlor's dominion over the trust property

Asset Protection Trusts: Spendthrift Trusts

- ▶ Limitations on Protection Afforded by Spendthrift Trusts
 - ▶ Distributions made to Beneficiaries - UTC § 503(c)
 - ▶ Common exceptions
 - ▶ Alimony and child support creditors. UTC § 503; Restatement (Third) of Trusts § 59(a).
 - ▶ Creditors of services for protection of beneficiary's interest (e.g., lawyer). UTC § 503(b)(2)
 - ▶ State and Federal Government (e.g., Tax liability) UTC § 503(b)(3).

Asset Protection Trusts: Spendthrift Trusts

- ▶ Limitations on Protection Afforded by Spendthrift Trusts
 - ▶ ...
 - ▶ Less Common Exceptions
 - ▶ Necessities Supplied to Beneficiaries, Restatement (Third) of Trusts § 59(b).
 - ▶ Station-in-Life Exception: N.Y. Est. Powers & Trust Law § 7-3.4
 - ▶ Some Tort Creditors, Restatement (Third) of Trusts § 59 cmt (a)(2).
 - ▶ Georgia: Ga. Code Ann. § 53-12-80(d)(3)
 - ▶ Mississippi: *Sligh v. First Nat. Bank*, 704 So. 2d 1020 (Miss. 1997), legislatively overruled
 - ▶ Louisiana: La. Rev. Stat. Ann. 9:2005 (legislatively repealed)

Asset Protection Trusts: Spendthrift Trusts

- ▶ Limitations on Protection Afforded by Spendthrift Trusts
 - ▶ ...
 - ▶ Outlier Jurisdictions
 - ▶ Under prior law, North Carolina did not recognize “spendthrift” trusts. As of 2006, North Carolina adopted the UTC and now recognizes spendthrift trusts, which “represents a major change in North Carolina law.” See N.C. Gen. Stat. Ann. § 36C-5-502 North Carolina cmt.
 - ▶ Arkansas, Kansas, Maine, Minnesota and Alaska: No exceptions for any creditors! See, e.g., Me Rev. Stat. Ann. tit 18-B, 503
- ▶ N.B.: Spendthrift trusts ARE excluded from the debtor’s bankruptcy estate. 11 U.S.C. § 541(c)(2).

Asset Protection Trusts: Self-Settled Trusts

- ▶ What is it?
 - ▶ A trust created by the settlor of which the settlor is a beneficiary
 - ▶ A trust that insulates the assets of settlor/beneficiary from creditors
- ▶ Traditional law
 - ▶ Revocable Trusts
 - ▶ “During the life time of the settlor, the property of a revocable trust is subject to claims of the settlor’s creditors.” UTC § 505(a)(1).
 - ▶ “After the death of a settlor, ... the property of a trust that was revocable at the settlor’s death is subject to claims of the settlor’s creditors...” UTC § 505(a)(3).
 - ▶ Irrevocable Trusts
 - ▶ “[A] creditor of the settlor may reach the maximum amount that can be distributed to or for the settlor’s benefit.” UTC § 505(a)(2).

Asset Protection Trusts: Self-Settled Asset Protection Trusts

- ▶ Modern Developments
 - ▶ A significant minority of trusts jurisdictions, foreign and domestic, have begun to abrogate the general rule allowing a creditor to seize the interest of a beneficiary who is also the settlor of the trust.
 - ▶ Fraudulent Transfers
 - ▶ Abrogate traditional law
 - ▶ Liberalize existing laws

Asset Protection Trusts: Foreign Self-Settled Asset Protection Trusts

- ▶ Popular Jurisdictions
 - ▶ Bahamas, Barbados, Bermuda, Cayman Islands, Cook Islands, Gibraltar, Guernsey, Isle of Man, Jersey, Nevis, Turks & Caicos, etc.
- ▶ Some Common Characteristics
 - ▶ Apply only to non-resident settlors
 - ▶ Very liberal laws as to fraudulent transfers combined with short statute of limitation periods
 - ▶ Foreign judgments are unenforceable
- ▶ Some Cases
 - ▶ *In re Brooks*, 217 B.R. 98 (Bankr. D. Conn. 1998)
 - ▶ *FTC v. Affordable Media, LLC*, 179 F.3d 1228 (9th Cir. 1999)
 - ▶ *In re Olson*, 2018 WL2059648 (C.D. Cal. 2018)
 - ▶ *Smagin v. Yegiazaryan*, 2017 WL6551106 (W.D. Cal. 2017)

Asset Protection Trusts: Domestic Self-Settled Asset Protection Trusts

- ▶ Origin: Alaska in 1997
- ▶ Currently: 17 States
 - ▶ Alaska; Delaware; Hawaii; Michigan; Mississippi; Missouri; Nevada; Oklahoma; Ohio; Rhode Island; South Dakota; Tennessee; Utah; Virginia; West Virginia; Wyoming
 - ▶ Most recent additions: Mississippi (2014); West Virginia (2016); Michigan (2017)
 - ▶ Legislation has been proposed in Florida and Georgia (vetoed by Governor in 2018)
- ▶ Although DAPT tend not to be a protective as foreign APT, they are usually cheaper and have few political issues than foreign APTs

Asset Protection Trusts: Domestic Self-Settled Asset Protection Trusts

- ▶ Typical Requirements:
 - ▶ Trust must be administered in relevant state by an in-state trustee
 - ▶ Transfer into the trust cannot be fraudulent, but most states have liberalized existing law and impose a “clear and convincing” standard of proof
 - ▶ Few, if any, exception creditors
 - ▶ Child Support and/or Alimony are the most common
 - ▶ Pre-existing Tort Creditors is the next most common
 - ▶ Some states have no exception creditors. See, e.g., Nevada, Utah, and W. Virginia

Asset Protection Trusts: Domestic Self-Settled Asset Protection Trusts

- ▶ Outstanding Questions
 - ▶ Conflicts of Law Issues:
 - ▶ Whose law applies? Forum state or the law specified in the trust?
 - ▶ Validity based upon public policy Issues
 - ▶ Fraudulent Transfer Issues
 - ▶ Jurisdictional Issues
 - ▶ Trust Property
 - ▶ Trustee
 - ▶ Settlor
 - ▶ Federal Bankruptcy Law

Asset Protection Trusts: Domestic Self-Settled Asset Protection Trusts

► Cases Applying DAPT Statutes

- *Battle v. Mortensen*, 2011 WL 5025288 (Bankr. D. C. Alaska 2011)
- *In re Reuter*, 499 B.R. 655 (Bankr. W.D. Mo. 2013)
- *Huber v. Huber*, 493 B.R. 798 (Bankr. W.D. Wash. 2013)
- *TrustCo Bank v. Matthews*, 2015 WL 295373 (Del. Ch. 2015)
- *Dahl v. Dahl*, 2015 WL 5098249 (Utah 2015)
- *Klabacka v. Nelson*, 133 Nev. Adv. Op. 24 (May 25, 2017)
- *Toni 1 Trust v. Wacker*, 2018 WL 1125033 (Alaska 2018)

Helpful Sources

- Kevin D. Millard, *Rights of a Trust Beneficiary's Creditors Under the Uniform Trust Code*, 34 AC TEC Journal 58 (2008).
- Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 Cornell L. Rev. 1035 (2000).
- Alan Newman, *The Rights of Creditors of Beneficiaries under the Uniform Trust Code: An Examination of the Compromise*, 69 Tenn. L. Rev. 771 (2002).
- Eleventh Annual AC TEC Comparison of the Domestic Asset Protection Trust Statutes 2017 (ed. David G. Shaftel).
- Steve Oshins, 10th Annual Domestic Asset Protection Trust State Rankings Chart (2019).
- Bogert, *Trusts and Trustees* § 222, §§ 1123-1140
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At Oppenheimer, as part of The Palumbo Group, he provides customized financial strategies to clients striving to optimize professional wealth management and estate planning for wealth transfer between generations.

Peter graduated from Saint Louis University High School (SLUH), then Marquette University with a double major in marketing and organizational management. He holds the General Securities Representatives License (Series 7) and Uniform Investment Adviser Law Examination (Series 65). An active member of his community, he feels it is important to give back. Both in St. Louis and Chicago, he has participated in charitable drives by alumni and religious organizations as well as Jesuit retreats. Peter is a mentor and Friend of Loyola Academy of Saint Louis. He is also an enthusiastic golfer and active follower of his favorite teams – the St. Louis Cardinals, Chicago Bears and Marquette University Basketball.

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Special Needs Trust VS ABLE Accounts

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The Introduction of the ABLE Act

- When ABLE Accounts were first proposed, some thought it would be the end for Special Needs Trusts
 - ABLE accounts can actually supplement and enhance Special Needs Trusts
 - This presentation will review the basics of both ABLE Accounts and Special Needs Trusts and the advantages and disadvantages of both vehicles to help protect individuals who require “needs-based” public assistance
- 

Public Assistance Programs

- “Needs–Based” programs require the beneficiary:
 - To have low income and few assets (Available resources) and
 - Be Sufficiently blind, old or disabled

- “Non–Need Based” programs only require the beneficiary:
 - Be sufficiently blind, old or disabled (does not require beneficiary to have low assets or income)
 - May have other requirements

Common “Need-Based” Programs

- Supplemental Security Income (SSI) Disability Program
 - Has Income + Resource requirements to be eligible in addition to being disabled
 - Provides income benefits to persons with qualified disabilities and the elderly *

- Medicaid
 - Federal welfare programs that each state has its own statutes and regulations
 - Many states base their Medicaid eligibility on SSI qualifications *

* be sure to check your state

Common “Need-Based” Programs

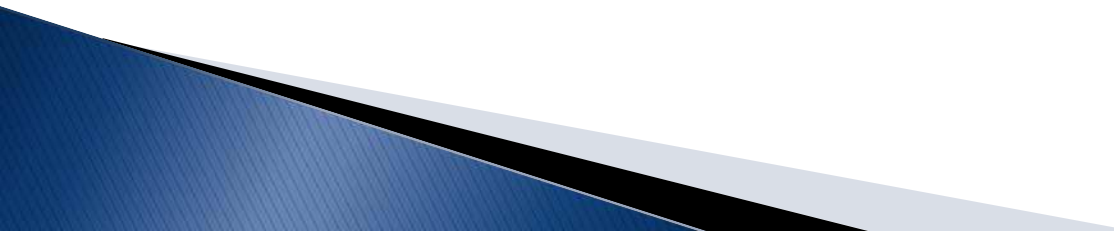
- Veteran’s Pension Benefits
 - May qualify for assistance from the Veterans administration if the veteran meets certain financial criteria
 - In addition, a qualifying spouse of an eligible veteran may also be eligible for benefits

- Subsidized Housing
 - An individual who is sufficiently blind, old or disabled and has low income and assets may be eligible to receive benefits from several different assisted housing programs

Only “Needs-Based” Benefits Require Protecting of Assets

- Planning to reduce a person’s “available resources” is only needed if the person is receiving “need-based” public assistance or if the person may become eligible for assistance in the future
- Two main reasons a person who has special needs is not eligible for “needs-based” assistance is:
 - The individual has too much income, or
 - The individual has too many resources

Why use a Special Needs Trust?

- To reduce resources (for persons with disabilities) as not available so as to retain needs-based benefits
 - To help improve the quality of life
- 

Special Needs Trusts Requirements

- Written
- Distributions discretionary by the trustee
- Beneficiary not entitled to receive income or principal automatically
- Trustee prohibited from making any distributions that would jeopardize beneficiary's eligibility for benefits
- Disabled individual usually is the sole beneficiary of the trust during their lifetime
- Irrevocable

Different Types of SNT

➤ Self-Settled Special Needs Trusts

- (d)(4)(A) Self-Settled Special Needs Trusts
- (d)(4)(C) Pooled Special Needs Trusts

➤ Third Party Special Needs Trusts

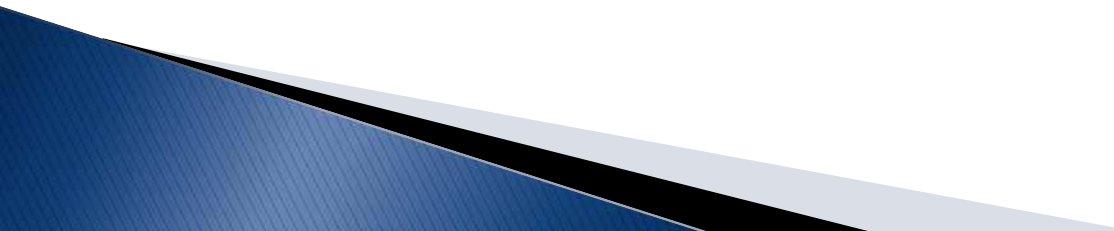
Special Needs Trusts

Trust Type	(d)(4)(A) Self-Settled	(d)(4)(C) Pooled	Third-party SNT
Established by	Individual, parent, grandparent, guardian or court	Individual, parent, grandparent, guardian or court	Other than trust beneficiary
Assets funding	Disabled person	Disabled person	Third person (can be a parent)
Beneficiary	Disabled person only	Disabled person	Anyone
Grantor trustee	No	No	Yes
Distributions	To third parties	To third parties	To third parties
Payback	Yes	Yes	No
Disability	SSA Definition	SSA Definition	SSA Definition
Gift tax exclusion	Can't use	Can't use	Can use
Testamentary	No	No	Yes
Age limit	Funded by 65	No (check state)	None
Frequent use for	Personal Injury or Inheritance	Same but lesser	Any use

First Party vs Third Party Trusts

- Whose assets are going to fund the Trust?
 - First Party: Individual with disabilities/
beneficiary's own assets
(Personal injury settlement, worker's compensation
award, direct gift or inheritance)
 - Third Party: family members or other
individual's assets

First Party Special Needs Trust

- Trust must be funded with assets of sole beneficiary
 - Beneficiary must be under age 65 when the trust is established and funded
 - At present, a first party SNT can be established by an individual, court, parent, grandparent or guardian
 - Trust must include a Medicaid payback provision
 - Trust must be irrevocable
- 

The Self-Settled SNT

42 U.S.C. §1396p(d)(4)(A)

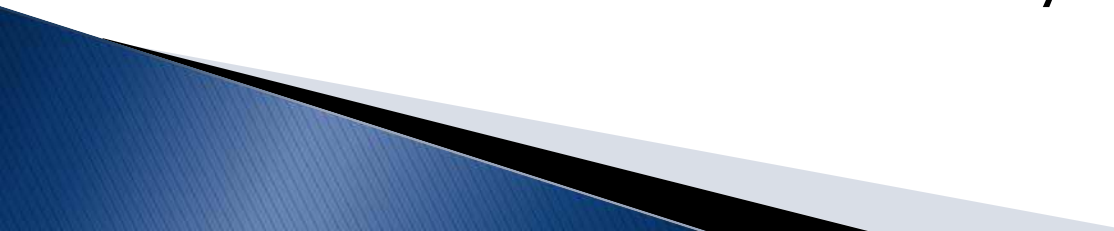
- Self-Settled Special Needs Trust
- Created for the sole benefit of an individual with disabilities; under age 65, established by the individual, a parent, a grandparent, guardian or court
- Created during the lifetime
- Irrevocable
- Medicaid Reimbursement at death of the trust beneficiary to all states that have provided medical assistance
- Must be funded before the beneficiary reaches the age of 65 with trust beneficiary's own funds

The Self-Settled SNT


42 U.S.C. §1396p(d)(4)(C)

- Pooled SNT
- Created and administered by a non-profit organization that holds the resources of many beneficiaries but maintains each individual's assets in a separate account
- Irrevocable
- No age limit for beneficiary in the Federal statute
 - Some states impose age limit of 65
- Non-profit organization can retain a portion of the trust fund at death of beneficiary
 - Up to 100% of Trust Corpus

Third Party Special Needs Trust

- Trust must be funded with assets that do not belong and are not controlled by the beneficiary
 - No payback provision is required
 - Trust can be drafted to benefit more than one beneficiary
 - Trust can be created by will or during life
- 

Advantages of Special Needs Trusts

- Allows assets to be held for the benefit of a person with special needs so that the beneficiary's life is enhanced by the special needs trust and the assets in the trust are not deemed “available” and “countable” resources
 - Allows large sums of money and other assets to be held for the benefit of the beneficiary without disqualifying the beneficiary from “needs-based” benefits
 - Assets are managed by a trustee, rather than the beneficiary
- 

Managing SNT Assets with the PRUDENT INVESTOR RULE

- Total Portfolio Evaluation
- Risk
- Process
- Diversification
- Monitoring
- Delegation
- Documentation
- Modern Portfolio Theory

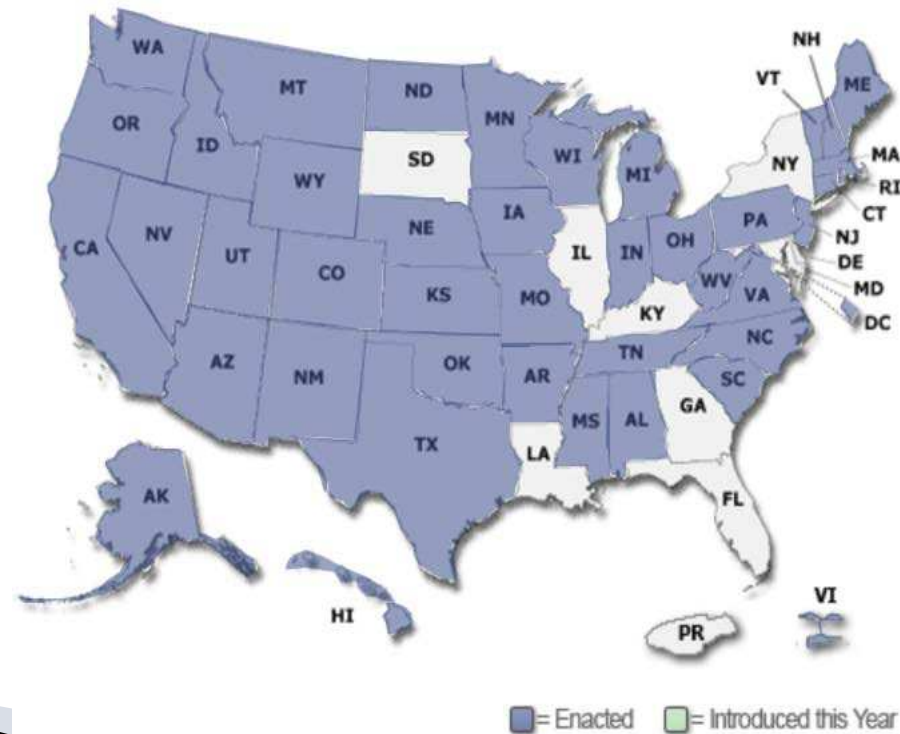
Source: Uniform Prudent Investor Act of 1992

“The prudent investor rule is a test of conduct and not of resulting performance.”

(760 ILCS 5/5) (from Ch. 17, par. 1675)

Uniform Prudent Investors Act of 1994

- 43 States have adopted the Uniform Prudent Investor Act of 1994



Ethical Decision Making

- Responsibility vs. Liability
 - Fiduciary responsibilities can be shared but not abdicated.
 - Fiduciary liability exposures exist where there are unfulfilled responsibilities.
 - Fiduciaries can reduce liability by identifying and filling gaps in their practices.

Fiduciary Code of Ethics

1. Employ and provide the client information on the Prudent Practices when serving as an investment fiduciary.
2. Act with honesty and integrity and avoid conflicts of interest, real or perceived.
3. Ensure the timely and understandable disclosure of relevant information that is accurate, complete and objective.
4. Be responsible when determining the value of services and form of compensation.

Fiduciary Code of Ethics...continued

5. Know the limits of expertise, and refer clients to colleagues and/or other professionals in connection with issues that go beyond the scope of knowledge and skill set.
6. Respect the confidentiality of information acquired in the course of work, and not disclose such information to others, except when authorized or otherwise legally obligated to do so. Do not use confidential information acquired in the course of work for personal advantage.
7. Not exploit any relationship or responsibility that has been entrusted.

As Conservators you are always responsible for the following:

- Confirm investment goals and objectives
- Approve appropriate asset allocation strategy
- Establish or approve an explicit, written IPS/Investment Proposal
- Prudently select service providers
- Incur only reasonable expenses
- Monitor the activities of the overall investment program, including service providers
- Avoid conflicts of interest
- Documentation

8 Questions to ask your Financial Advisor

1. Will the Advisor act as a fiduciary in all scenarios when managing portfolio assets?
2. How long has the Financial Advisor been acting in this fiduciary capacity? Describe your experience acting as a fiduciary advisor.
3. What fiduciary training has the Financial Advisor received? Any designations focused on fiduciary best practices?

Questions to Ask...continued

4. Provide at least three references of clients who are using your services in your capacity as a fiduciary advisor.
5. Please disclose and describe any potential conflicts of interest.
6. What safeguards and procedures do you have in place for blocked or restricted accounts?
7. Describe your total compensation or fees received for your proposed services.
8. What services are provided to help clients meet their fiduciary obligations?

National Guardianship Association *Defines Fiduciary As...*

“Any person that has the responsibility to invest and manage the assets of another person is a fiduciary.”

Source: National Guardianship Association

This is not a legal definition nor an indication of the stature of Oppenheimer & Co. Inc. or any of its associates. This is provided for informational and education purposes only.

The ABLE Act

Achieving Better Life Experience Act

- Designed to be a less complicated and less expensive alternative to a special needs trust
 - Like a SNT
 - Assets held in an ABLE Account will be exempt for SSI/Medicaid eligibility
- No Attorney involvement necessary
- Designed as a tax-advantaged investment

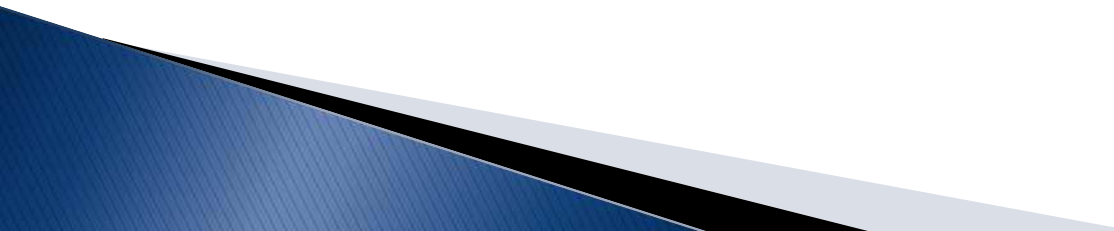
What is an ABLE account?

- An ABLE account is like a 529 plan but designed for an individual with disabilities
- A limited amount of money can be contributed to an ABLE account without disqualifying the beneficiary from need based public assistance
- The ABLE account can grow tax free
 - Income generated by the principal in the ABLE account isn't taxable

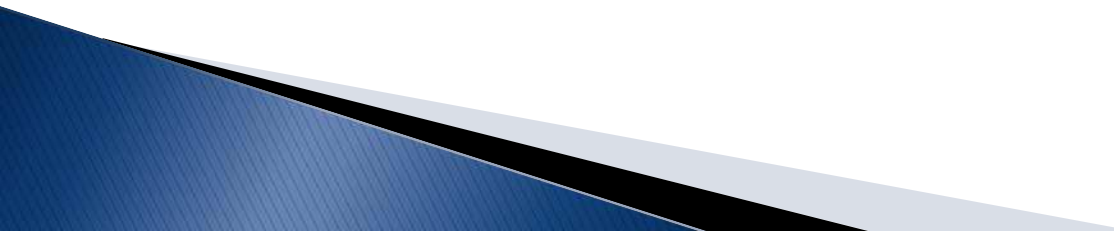
ABLE account facts

- Money in the ABLE account isn't an available resource for needs-based public benefit program
- But the person has to qualify for the ABLE account and there are restrictions on how money in an ABLE account can be used without adverse consequences

Purpose of an ABLÉ account

- Encourage individuals and families to save money to support disabled individuals while maintaining eligibility for Social Security and Medicaid benefits
 - Cheaper to establish than a special needs trust
- 

Who qualifies for an ABLE account?

- Disabled or blind before age of 26 and receiving a social security disability insurance (SSDI) or a supplemental security income (SSI)
 - Have a satisfactory disability certification
- 

Disability Certification

- Signed certification by the account holder that a signed physician's diagnosis of disability exists occurred before the age of 26 and can be provided upon request
- Regulations regarding specific form and frequency of the disability certification are still in development

ABLE account limits

- One ABLE account per disabled individual
- All contributions must be in cash
- Annual contributions can't exceed \$15,000 (current year)
 - Same as gift tax exemption will increase when gift tax increase
- Must remain under \$100,000 total to receive SSI
- Account can be up to \$325,000 to maintain Medicaid eligibility

Uses for ABLE accounts

➤ Qualified disability expenses

Education	Housing	Transportation	Employment, training and support
Assistive technology and personal support services	Expenses for oversight and monitoring	Prevention and wellness	Financial managements and administrative services
Legal fees	Health	Funeral and burial expenses	Other approved expenses

Penalties on “Unqualified” Distributions

- Unqualified disability expenses
 - Distribution is taxable income to the account beneficiary
 - 10% penalty may apply
- No penalty if distribution is made after death of designated beneficiary

Penalties on Distributions

- Account holder no longer disable
 - ABLE account can continue
 - Any distribution is taxable income to account beneficiary
 - No longer any qualified expenses
- No more contributions to ABLE account
- Can reinstate ABLE account if disability returns

Medicaid Payback

- At death of account owner
- Medicaid only paid back
- Payback limited to time period in which ABLE account existed
- Helpful in 1st party SNT situations

Benefits of ABLE account

- SSI recipients can have housing cost paid by an ABLE account without incurring an In-kind Support and Maintenance (ISM) reduction to their monthly benefits
 - Unlike a special needs trust
- ABLE accounts can be savings accounts without affecting benefits
- Limit in Medicaid payback
- Third party contributions to an ABLE account can be made by a trustee of a special needs trust because trust beneficiary has a beneficial interest in the trust not a legal interest
 - See POMS ST 01130 TN 74, Issued March 8, 2018

Benefits of ABLE account

- Quick, easy depository for moneys over the \$2,000 Medicaid resource limit
- No “sole-benefit” rules for SSI recipients
- At death of account beneficiary can pay funeral expenses prior to satisfaction of Medicaid payback claim
 - Unlike a special needs trust

Changes under the tax cuts and jobs act

- ABLE account owners now have more options to fund money into ABLE accounts:
 - If the ABLE account owner works a portion or all of their earnings can be contributed to their account
 - Additional contribution is limited based on the poverty line for a single person household
 - In 2018 this limit is \$12,140 in the US
 - The account owner isn't eligible for this option if his or her employer makes contributions to a workplace retirement plan

Changes under the tax cuts and jobs act

- Saver's credit now available to ABLE account owner after 2018
 - Allows ABLE account owner to qualify for a Saver's Credit
 - Based upon contributions made by the ABLE account owner to his/her ABLE account
 - Credit is given on up to \$2,000 of contributions made in a given year
 - Saver's Credit is a special credit given to low and moderate income workers


Changes under the tax cuts and jobs act

- Credit will be claimed on form 8880, credit for qualified retirement savings combinations and will reduce the participant's taxes or increase their tax refund
- Rollover from 529 plans are allowed into ABLE accounts
- Can be rolled over from the ABLE account owner's 529 plan or from a 529 plan from certain family members

Challenges with ABLE accounts

- Medicaid payback provision for third-party money
 - Unlike third-party special needs trusts
- Not eligible for qualified disability trust favorable tax treatment
- May need a guardianship to establish if no parent is available account beneficiary unable to execute a Durable Power Attorney

Challenges with ABLE accounts

- Age restriction of 26 before onset of disability
 - Can't establish an ABLE account by SNT trustee with SNT corpus unless authority in trust document
 - New POMS permits a special needs trust to fund an ABLE account
- 

ABLE Accounts vs Special Needs Trust

Questions	ABLE accounts	Third Party SNT	Self-Settled D4A	SNT D4C (Pooled)
Whose assets in account or trust?	Third party's or beneficiary's	Not the beneficiary's	Beneficiary's	Beneficiary's
Limitations	Disability must begin before age 26 only \$15,000 current year can be distributed	None other than beneficiary's assets can't be added	Beneficiary must be under age 65	May have transfer penalty if beneficiary puts assets in after 65
Who establishes?	Beneficiary, beneficiary guardian, parent or DPOA agent	Not the beneficiary	Beneficiary, parent, grandparent, guardian or court	Beneficiary, parent, grandparent, guardian or court
Who controls the account or trust?	Beneficiary or someone acting on beneficiary's behalf	Any person (other than the beneficiary) or corporation	Any person (other than the beneficiary) or corporation	Only non-profit organization that established the master trust

Questions	ABLE accounts	Third Party SNT	Self-Settled D4A	SNT D4C (Pooled)
Who can benefit?	Only the beneficiary	Beneficiary and others chosen by settlor	Only the beneficiary	Only the beneficiary
Is there a separate written agreement?	No custom drafted must enroll with ABLE program offered by the state	Yes, custom drafted trust agreement	Yes, custom drafted trust agreement	Not custom drafted join a master trust created by a non-profit organization as trustee
When to use?	When someone wants to gift the beneficiary or beneficiary has too many assets	When someone wants to give (or leave at death) assets to benefit someone else	When beneficiary receives settlement gift or inheritance or has accumulated assets prior to disability or when turning 18	When beneficiary receives settlement gift or inheritance or has accumulated assets prior to disability or when turning 18
Repay Medicaid upon death?	Yes, but only Medicaid received after ABLE accounts starts	No	Yes, all Medicaid beneficiary received during life	Depends on what pooled trust negotiated with state but usually all remaining assets paid to either Medicaid or retained by trustee

Questions	ABLE accounts	Third Party SNT	Self-Settled D4A	SNT D4C (Pooled)
Number of accounts	1 per beneficiary	Unlimited	Unlimited	Unlimited
Fees	Financial institution fees	Attorney and trustee fees	Attorney and trustee fees	Attorney and trustee fees
Investment Options	Investment strategies may be changed twice annually	No restrictions	No restrictions	No restrictions
Valid distributions	Broadly defined “disability expenses” including basic living expenses	Any expense for sole benefit of beneficiary with certain implication for distributions for food and / or shelter	Any expense for sole benefit of beneficiary with certain implication for distributions for food and / or shelter	Any expense for sole benefit of beneficiary with certain implication for distributions for food and / or shelter

ABLE accounts and the POMS

➤ POMS SI 01120.740

- Third party contributions are contributions made by persons other than the designated beneficiary
- Third party contributions belongs to the designated beneficiary
- An ABLE contribution by a third party is treated as a complete gift
- A transfer of funds from a SNT of which the designated beneficiary is the beneficiary and which isn't considered a resource to him or her, to the designated beneficiary's ABLE account generally will be considered a third party contribution for ABLE purposes

Helpful Websites

- http://www.ablenrc.org/state_compare
- <http://specialneedsanswer.com/able-accounts>
- <http://time.com/money/4618317/529-able-savings-account-states/>

Using an ABLE Account with a Special Needs Trust

ABLE Accounts

- Qualified disability expenses (QDEs) are expenses related to the blindness or disability of the designated beneficiary* and for the benefit of the designated beneficiary. In general, a QDE includes but isn't limited to and expense for:

*The designated beneficiary is the individual who owns the ABLE account and who was an eligible individual when the account was established or who succeeded the former designated beneficiary in that capacity. To be an eligible individual, he or she must: be eligible for Supplemental Security Income (SSI) based on disability or blindness that began before age 26; be entitled to disability insurance benefits (DIB), childhood disability benefits (CDB), or disabled widow's or widower's benefits (DWB) based on disability or blindness that began before age 26; or certify (or an agent under a power of attorney or, if none, a parent or guardian must certify) that the individual: has a medically determinable impairment meeting statutorily specified criteria or is blind; and, the disability or blindness occurred before age 26.

Education	
Financial management and administrative services	
Housing	
Legal fees	
Transportation	
Expenses for ABLE account oversight, monitoring	
Employment training and support;	
Funeral and burial	
Assistive technology and related services	
Basic living expenses	
Personal support services	
Health	
Prevention and wellness	

Housing Expenses

- Housing expenses for purposes of an ABLE account are similar to household cost for in-kind support and maintenance purposes, with the exception of food. Housing expenses include expenses for:

Housing Expenses

Mortgage	
Real property taxes	
Rent	
Heating fuel	
Gas	
Electricity	
Water	
Sewer	
Garbage removal	

3rd Party Special Needs Trust

- Tying these two tools together can allow the trustee of the special needs trust to “feed” the ABLE account as needed to:
 - allow the beneficiary more latitude in making purchases
 - more control over spending, as well as
 - being able to use the funds for food and shelter and minimize the ISM reduction.

POMS SI 01120.21

- Social Security Administration's new rules about ABLE accounts – March 2018
- Officially blesses the use of pre-paid cards such as True Link
- Reiterates long time ruling that gift card not permissible
- The owner of the pre-paid card must be third person includes trustees of special needs trust

ABLE Accounts

- POMS SI 01120.200C1c
- ABLE accounts are not trusts
- Any contributions to ABLE accounts is not income

Using an ABLE Account with a Special Needs Trust

Example

SNT to ABLE for Rent

- Linda has been disabled from birth, and receives \$750 a month in SSI.
- She's a beneficiary of a self settled special needs trust.
- She would like to move to a nicer apartment that would cost \$1,000 a month.
- She will need some assistance in order to make the move.



Example

- Kevin her trustee were to give her \$1,000 a month directly it would be counted as unearned income and eliminate her SSI completely.
- If Kevin were to pay the landlord directly the payments would count as ISM and her benefits would be reduced.
- If instead Kevin were to contribute \$1,000 a month to her ABLE account, and in turn the funds from the account were used to pay the landlord, then there would be no reduction of SSI.

3rd Party Special Needs Trust

- One huge advantage of a 3rd party special needs trust is that it isn't subject to a lien upon the death of the beneficiary.
- In addition, a 3rd party special needs trust can also be a great tax planning device, especially when it conforms to the Qualified Disability Trust rules.

3rd Party Special Needs Trust

- Tying these two tools together can allow the trustee of the special needs trust to “feed” the ABLE account as needed to:
 - allow the beneficiary more latitude in making purchases
 - more control over spending, as well as
 - being able to use the funds for food and shelter and minimize the ISM reduction.

Evaluate the Clients Needs

- Time Horizon
- Age & Health Evaluation
- Total Investable Assets
- Income Sources
- Annual Expenses
- What is the short fall, if any?
- Anticipated large withdrawals? i.e. education
- Additional income from other sources?
- Limitations or restrictions on Investments?

“Delegation. For a fiduciary without substantial investment expertise, it is both a good plan and protective against liability, to select an investment advisor”

Source: National Guardianship Association

“The prudent investor rule is a test of conduct and not of resulting performance.”

(760 ILCS 5/5) (from Ch. 17, para. 1675)

“The Prudent Investor Rule” (the Rule) is intended to give fiduciaries guidance on how to invest assets under their control and management.

- ***Fiduciaries...***
may use the Rule as a defense if challenged by the ward, families, courts and others.
- ***Wards...***
may use the Rule to protect from guardian mismanagement.

Source: National Guardianship Association

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NCPJ CONFERENCE CURRICULA SUMMARY

2018 FALL CONFERENCE **HILTON HEAD, SOUTH** **CAROLINA**

Mental Health Evaluations and how they impact Commitments, Guardianships and Conservatorships
Dr. William Mulbry
South Carolina Forensic Psychiatry, Charleston, SC

Representing Clients in Estate Planning who may be incapacitated – Ethical and Legal Dilemmas
J. Ashley Twombly, Attorney,
Beaufort, SC

Crisis Intervention Training
Fred Riddle, National Alliance on Mental Illness

Episcopal Church Trust Litigation, Update on the Estate/Trust of James Brown Litigation
Professor Alan Medlin, University of South Carolina School of Law

Deceit, Disappearance and Death on Hilton Head Island John and Elizabeth Calvert who disappeared in 2008
Authors: Charlie Ryan and Pamela Martin Ovens

Without Warning: Taking over for a missing couple
Speaker: Michael King

Opioid Use Disorders and Criminal Justice Populations and Best Practices
Chanda F. Brown, Ph.D., LMSW,
Director, Charleston Center

Heirs. Property and Preservation
Joshua F. Walden, Director of Legal Services
Dr. Jennie L. Stephens, Executive Director
Center for Heirs Property Preservation

The Mediation of Probate Matters – A Different Kind of Conflict (Resolution)
Attorney and Mediator, Eric Englehardt, Greenville, SC

2018 SPRING CONFERENCE **SAN DIEGO, CALIFORNIA**

The Untapped Power of Assisted Outpatient Treatment Laws
Hon. James T. Walther, Lorain County (OH) Probate Court
Speakers: Hon. Elinore Marsh Stormer, Summit County (OH) Probate Court
Brian Stettin, Policy Director, Treatment Advocacy Center, Arlington, VA

Update on issues in dementia and Alzheimer's disease relevant to probate
Mark Mapstone, PhD,
Professor, Department of Neurology Institute for Memory Impairments and Neurological Disorders,
University of California, Irvine

To "Reply All" or Not to "Reply All" - That May Be an Ethics Question
John T. Rogers, Jr., ACTEC Member, Los Angeles, California

Prudent Investor Rule Ethics
Peter C. Palumbo, AIF®,
Director – Investments, The Palumbo Group of Oppenheimer & Co. Inc.
Darryl Lynch, AIF®, Executive Director – Investments

Copyright and Estate Issues
Seth A. Miller, King, Holmes, Paterno & Soriano, LLP, Los Angeles, CA

Spotlight in the Courtroom - Celebrity and the Probate Court

Jeryll S. Cohen, Partner,
Freeman, Freeman & Smiley, Los Angeles,
California
Geraldine A. Wyle, Partner,
Freeman, Freeman & Smiley, Los Angeles, California

2017 FALL CONFERENCE **PONTE VEDRA, FLORIDA**

Seven Deadly Claims
Steven Mignogna, Esq.

Legislative Trends Affecting Probate Courts: Balancing the Need for and Impact of "Right to Association" Legislation for the Protection of Vulnerable Persons
Terry Hammond

Melissa's Project & the 7Cs: Successful Treatment for People Living with Mental Illness
Dominic J. Campisi, Evans, Latham and Campisi, San Francisco, CA

Access and Justice for All: Making Your Courts Elder-Friendly
Rebecca C. Morgan, Co-Director, Center for Excellence in Elder Law, Stetson University College of Law

Bringing Fiduciary Guides to Your State
Diana Noel, Senior Legislative Representative, AARP
Hon. Christine Butts, Harris County Probate Court 4, Houston
Bob Jackson, State Director, AARP Texas

Hot Topics in Probate

2017 SPRING CONFERENCE
SANTA FE, NEW MEXICO

Order in the Court! Navigating Conflict OUT of the Courtroom
Hon. Michelle Morley, 5th Circuit,
Sumter County, FL
Linda Fieldstone, M.Ed, Miami, FL

New Mexico's Experience with Anti-Guardianship Voices and the Revised Uniform Probate Code
Gregory W. MacKenzie, Esq.,
Hurley Toevs Styles Hamblin & Panter PA, Albuquerque, NM
The Crime of the 21st Century: Elder Abuse and Exploitation
Hon. Brenda Hull Thompson,
Presiding Judge, Dallas County Probate Court, Texas; Julie Krawczyk, Executive Director, Elder Financial Safety Center, Dallas, Texas; Stephanie Martin, Assistant District Attorney

Post-Mortem Estate Planning: Disclaimers, Elections, and other Tax Considerations in Estate Administration
Vickie Wilcox, Esq., Wilcox Law Firm, P.C., Certified Estate Planning, Trust, and Probate Law Specialist, Albuquerque, NM

Mindfulness for Judges
Prof. Nathalie Martin, University of New Mexico Law School, Frederick M. Hart Chair in Consumer and Clinical Law

Estate Planning for People with Disabilities and What Judges would need to Know; Community Property Law and Estate in New Mexico
Nell Graham Sale, Esq.,
Pregenzner, Baysinger, Wildeman & Sale, Albuquerque, NM

2016 FALL CONFERENCE
CHARLESTON, SOUTH CAROLINA

Wills, Trusts Conflict and Competing Issues in the James Brown Estate – Part 1
Hon. Albert P. Shahid, Jr., Esq of Shaiud Law Firm, Charleston, SC
Albert P. Shahid, Jr., Esq of Slotchiver & Slotchiver, LLP, Charleston, SC

Wills, Trusts Conflict and Competing Issues in the James Brown Estate – Part 2
Alan Medlin, Professor, University of South Carolina Law School
Robert N. Rosen, Esq., Rosen Law Firm, LLC Charleston, SC

Trust Issues
Ginny Meeks, Professor,
Charleston School of Law

Mother Emanuel - the Untold Story
Deborah Shogry Blalock Director, Charleston Dorchester Metal Health Center
Wilbur E. Johnson, Esq., Young Clement Rivers, LLP, Charleston, SC
Joseph P. Riley, Former Mayor City of Charleston, SC

Mass Tragedies and the Probate Process
Laura Johnson, Evans, Smith, Moore and Leatherwood LLC
Rea H. Wooten, RN, BSN, F-ABMDI, Charleston County Coroner

National Update and Charleston Monitoring/Visitor Program
Michelle Mensore Condon, Esq., Charleston School of Law
Lenna Kirchner, Associate Probate Judge, Charleston, SC
Erica Wood, ABA Commission on Law and Aging

Trends in State Adult Guardianship Laws
Diana Noel, Legislative Representative, AARP
Coretta Bedsole, Associate State Director, AARP SC
Coretta Bedsole, Associate State Director for Advocacy, AARP Georgia

National Overview of CFPB Guides on Managing Fiduciary Funds
Naomi Karp, Senior Policy Advisor, Consumer Financial Protection Bureau, Office of Older Americans
Cope or Quit—A Strategy That's Never Worked
Robert M. Etheridge, Esq., Carlock Copeland & Stair, LLP

2016 SPRING CONFERENCE
POINT CLEAR, ALABAMA

Judges and Litigants Address Elder Abuse in Probate Courts: Trends and Reporting Obligations
Julia Meister, Partner, Taft Stettinius & Hollister, LLP, Cincinnati, OH

Varying Levels of Capacity and the Doctor's Evaluation
Edward Poa, MD, Assistant Professor, Baylor College of Medicine and Director of Admissions, The Menninger Clinic, Houston, TX

Ethical Considerations Involving Trusts, Estates and Guardianships
Matthew Triggs, Proskauer LLP, Boca Raton, FL

Learning from the Litigants: What 37 Years on the Bench Have Taught Me about Being a Good Probate Judge
Hon. James Mitchell, Kennebec County Probate Court, Augusta, ME

*When Charity Goes Wrong:
Restricted Gifts and Charitable
Trusts in the Courts*
Nancy McLaughlin, Robert W.
Swenson, Professor of Law,
University of Utah College of Law,
Salt Lake City, UT

*Obergefell v. Hodges and the
Rule of Law*
Hon. Sherri Friday, Probate
Judge, Jefferson County Probate
Court, Birmingham, AL
John Eidsmoe, Foundation for
Moral Law, Montgomery, AL

2015 FALL CONFERENCE
ALEXANDRIA, VIRGINIA

*Trust: Modification, Reformation
and Termination*
Kathleen Sherby, Partner, Bryan
Cave LLP, St. Louis, MO
Stephanie Price, Winstead, PC,
Houston, TX

*Probate Issues Concerning the
Definition of Hearsay*
Hon. Gerald Fisher, D.C. Superior
Court, Washington, DC

Seven Deadly Sins
Steven K. Mignogna, Partner,
Archer & Greiner, PC,
Haddonfield, NJ

Prudent Investor Rule
Hon. Franklin Burgess,
D.C. Superior Court,
Washington, DC

*Aging, Dementia and Societal
Implications*
Dr. Howard J. Federoff, MD, PhD,
Vice Chancellor and Dean, Health
Affairs, University of California,
Irvine, CA

*How to Use Technology and
Investigative Methods to Protect
the Assets of Vulnerable Adults*
Sharon R. Bock, Esq.,
Clerk & Comptroller,
Palm Beach County, Florida

Brenda K. Uekert, PhD, Principal
Court Research Consultant,
National Center for State Courts,
Williamsburg, VA

Hot Topics in Probate
Hon. Christine Butts, Harris
County Probate Court 4,
Houston, TX
Hon. C. Jean Stewart, Of
Counsel, Holland and Hart,
Denver, CO
Hon. Brenda Hull Thompson,
Probate Court of Dallas County,
Texas

2015 SPRING CONFERENCE
NEWPORT, RHODE ISLAND

*WINGS – Working
Interdisciplinary Network of
Guardianship Stakeholders*
Hon. Dixie Park, Stark County
Probate Court, Canton, OH
Mary Joy Quinn, Director (ret.),
Probate Court, San Francisco
Superior Court
Fred B. Steele, MPH, JD, Legal
Services Developer, Oregon
Department of Human Services

*The Phantom of Fifth Avenue:
The Mysterious Life and
Scandalous Death of Heiress
Huguette Clark*
Meryl Gordon, Author

*The Future of Estate Planning
and New Biology-Posthumously
conceived children and other tax
and non-tax issues*
Jonathan Blattmachr, Principal,
Pioneer Wealth Partners
Management

*Trust, Taxes and Common
Mistakes in Wills*
Richard H. Greenberg, Greenberg
& Schulman, Attorneys at Law,
Woodbridge, New Jersey

*Prosecuting Elder Fraud and
Abuse*
Martha Crippen, Elder Abuse
Investigator, Rhode Island
Department of Attorney General
Roger R. Demers, Esq., Chief,
Elder Abuse Prosecution Unit,
Rhode Island Department of
Attorney General

2014 FALL CONFERENCE
NAPLES, FLORIDA

*Special Needs Trusts and the Sole
Benefit Rule*
John Staunton, Center for Special
Needs Trust Administration,
Clearwater, FL.

Writings Intended as Wills
Anthony R. La Ratta, Esq., Archer
& Greiner P. C. Haddonfield, NJ

Digital Assets
Sharon B. Rivenson Mark, Esq.,
Jersey City, NJ, Shirley B.
Whitenack, Esq., Schenck, Price,
Smith & King, LLP, Florham Park,
NJ

*Standards vs. Practices: Results
from a National Survey on Adult
Guardianships*
Brenda K. Uekert, PhD, Principal
Court Research Consultant,
National Center for State Courts

*Active Shooter: Awareness and
Preparedness*
Charles R. Epstein, Court Planner,
State of Connecticut Judicial
Marshal Services

Firearms, Courts and Fiduciaries
Hon. Fred J. Anthony,
Connecticut Probate Court, Hon.
Matthew Jalowiec, Connecticut
Probate Court, Hon. Amy W.
McCulloch, Richland County
Probate Court, Columbia, SC

2014 SPRING CONFERENCE
VAIL, COLORADO

Dementia from a Medical Perspective

Dr. Maureen C. Nash, MD,
Geriatric, Psychiatrist, Tuality
Psychiatric Outpatient Clinic,
Forest Grove, OR

*Undue Influence, lack of capacity
and the Mickey Rooney case*

Bruce S. Ross, partner, Holland
and Knight, LLP, Tampa, FL

*"The Uniform Law Commission –
Past, Present and Future*

Stanley C. Kent, P.
Colorado Springs, CO.

Pre-mortem Probate

Spencer Crona, Brown and
Hulbert, LLC, Denver, CO
Martha L. Ridgway PC, Louisville,
CO, Keith Lapuyade, Wade Ash
Woods hill & Farley, Denver, CO

*'Hot Topics': An Open Discussion
of What's New in Probate Issues*

Judge Rita Cobb, Judge Ponda
Caldwell, Judges Fred Anthony,
Jean Stewart, Colleen
Cavanaugh, Mike Wood

2013 FALL CONFERENCE
NASHVILLE, TENNESSEE

*Potpourri of Cross Border Issues
regarding Wills and Estates*

Prof. Jeffrey A. Schoenblum
Vanderbilt Law School, Nashville

*Innovative, research-based
programming in an Alzheimer's
residence*

Andrew Sandler, Executive
Director, Abe's Garden, Nashville

*Impact of Affordable Care Act on
SNT*

David Lillesand, Lillesand &
Wolasky, Clearwater, FL

*Media Interest in Probate Court
Proceedings*

Andra J. Hedrick, Gullett,
Sanford, Robinson and Martin,
PLLC, Nashville, TN

*Balancing Privacy in an Internet
World*

Travis Swearingen, Butler, Snow,
O'Mara Stevens & Canada, PPLC,
Nashville, TN

*Update on Relationship between
State Probate Courts and the VA*

David R. McLenachen, Director,
Pension and Fiduciary Services,
U.S. Veterans' Administration

Bonding Issues

Jackie Layfield, Bond Services,
LLC

The History of Anatomical Gifts

Arthur F. Dalley, Ph.D., Professor,
Cell & Development Biology
Vanderbilt University School of
Medicine

2013 SPRING CONFERENCE
SAN ANTONIO, TEXAS

*Recent Developments in Estate
and Income Tax for Probate
Judges-What Have They Done to
us Now?*

Prof. Stanley Johanson,
University of Texas School of Law

*Evidence Issues in Probate
Litigation*

Gerald Powell, Baylor Law School

*Current Developments in Trust
Litigation*

Frank Ikard, Ikard Golden Jones
PC

Raising a Special Needs Child

Hon. Polly Jackson Spencer,
San Antonio

*The Elder Fraud Unit – If You
Build It, They Will Come*

Joanne Woodruff, Bexar County
Elder Fraud Unit

*Interstate Transfer of
Guardianships – UAGPPJA and
Beyond*

Steven D. Fields, Tarrant County
Probate Court No. 2, Fort Worth,
Terry Hammond, Terry W.
Hammond & Associates

*Guardians Ad Litem in
Guardianship Proceedings and
the Settlement of Lawsuits*

James Patrick Smith, Attorney at
Law, Houston, TX.

2012 FALL CONFERENCE
NAPA, CALIFORNIA

*Relationship Between State
Probate Courts and the Veterans
Administration Fiduciary Services:*

*Does it Always Work the Way It
Should? How Can We Improve?*

David McLenachen, Director of
Pension and Fiduciary Services,
U.S. Department of Veterans'
Affairs

*Relationship Between State
Probate Courts and the Social
Security Administration: Does It
Always Work the Way It Should?
How Can We Improve?*

Dagmara H. Wycoff, Social
Security Administration, Napa,
California

*Revised National Probate Court
Standards: Presentation and
Discussion*

Richard Van Duizend, National
Center for State Courts

*New Developments in Same Sex
Relationships and Reproductive
Science and the Potential Impact
on Probate Courts*

Prof. Kris Knaplund, Pepperdine
University School of Law; Vice
Chair, ABA

Hot Topics in Trust and Estate Litigation

Robert N. Sacks, Sacks, Glazier, Franklin & Lodise, LLP, Los Angeles, CA

Jessica Uzcategui, Sacks, Glazier, Franklin & Lodise, LLP, Los Angeles, CA

What Biases (known and unknown) Do You Have as a Judge that may be Impacting Your Decisions?

Kimberly Papillon, National Training Team on Implicit Bias (National Center for State Courts); member of the Cognitive Neuroscience Society Elder Law, Disability Planning and Bioethics Group

Dealing with the Press Whether Friendly or Hostile: Strategies for Dealing with Local Press Issues

Judge Pat Ferchill

Judge Irvin Condon

Rick Nothwehr, Presiding

Commissioner, Maricopa County

2012 SPRING CONFERENCE
Tucson, Arizona

The Arizona Experience: How the Legislature and the Courts Responded to Public Criticism of Probate Courts

Hon. Ann A. Scott Timmer,

Judge, Arizona Court of Appeals

Hon. Rosa Mroz, Presiding Judge,

Maricopa County Superior Court's

Probate and Mental Health

Department

Connecting with the Community to Improve Oversight of Guardianships

and Conservatorships

Hon. David Cunanan,

Commissioner, Maricopa County

Superior Court, Probate and

Mental Health Department

Phillip Knox, General Jurisdiction

Court Administrator, Maricopa

County, Superior Court

Star Felty, Guardian Review

Program Volunteer Coordinator,

Maricopa County Superior Court

Texas Medical Futility Act

Thomas W. Mayo, Associate

Professor, Southern Methodist

University Dedman School of Law

Judging in a Paper-On-Demand Court

Jeff Barlow, Justice Systems

Consultant, ImageSoft, Inc.

Taming the Toxic Trickle: Moving Towards Wellness On and Off the Probate Bench

Alisa Gray, Tiffany & Bosco, P.A., Phoenix, Arizona

Jim Fassold, Tiffany & Bosco, P.A., Phoenix, Arizona

A High Profile Case Study (From the Bench and the Bar)

Hon. Mike Wood, Probate Judge,

Harris County (Houston) Probate

Court

Rusty Hardin, Rusty Hardin &

Associates, Houston, Texas

2011 FALL CONFERENCE
JEKYLL ISLAND, GEORGIA

Financial Action Task Force and the Good Practices Guidance

Cari N. Stinebower, Wiley Rein LLP, Washington, DC

Duncan E. Osborne, Osborne,

Helman, Knebel & Deleery, LLP,

Austin, TX

The Changing Structure of Probate Courts and Advocacy for the Future of Your Court

Fred J. Anthony, Judge, Probate Court, Shelton, CT

Vincent Russo, Manager of

Communications and

Intergovernmental Relations,

Office of the Connecticut Probate

Court Administrator

Peter Smith, Managing Partner,

Rome Smith & Lutz, Government

Relations

Trusts in Today's World: An Overview of Current Trust Law and Its Practical Application
Prof. Mary Radford, Georgia State University of Law

Elder Abuse Issues

Prof. Bobbi Flowers

Innovative Concepts in Guardianship Monitoring

Steve M. King, Judge, Tarrant

County Probate Court One Ft.

Worth, Texas

Mary E. O'Keefe, RN, PhD., J.D., Associate Professor, UTMB School of Nursing

Auditing Returns & Accountings 101

William Self, Judge, Probate

Court of Bibb County, Macon,

Georgia

2011 SPRING CONFERENCE
NEW ORLEANS, LOUISIANA

Louisiana's Napoleonic Code: Provisions of Curatorship (Guardianship) and Power of Attorney

Jane Thomas, Attorney, Baton

Rouge, Louisiana

*National Center for State Courts'
Steering Committee on Elder
Abuse/Judicial Training*

John Conery, Judge, 16th Judicial
District Court, Franklin, Louisiana
Mary Joy Quinn, Director, Probate
Court, San Francisco Superior
Court

*Courts Recovering from
Catastrophes*

David Gorbaty, Judge (retired),
4th Circuit Court of Appeals, New
Orleans
Aaron Davis, IT Director, 4th
Circuit Court of Appeals
Dennis Hinrichs, Systems
Analyst/Programmer, 4th Circuit
Court of Appeals

*The Third National Guardianship
Summit: Standards of Excellence*

Irv Condon, Judge, Charleston
County Probate Court
Terry Hammond, Terry W.
Hammond Consulting, El Paso,
Texas
Erica Wood, American Bar
Association, Commission on Law
and Aging

Civility in the Courts

Ed Smith, Smith & Stephens,
Dallas, Texas

Update on Tax Law

Jean Stewart, Judge, Denver
Probate Court

New Probate Court Standards

Richard Van Duizend, Principal
Court Management Consultant,
National Center for State Courts

NCPJ's New Website

William Self, Judge, Bibb County
Probate Court, Macon, Georgia

**2010 FALL CONFERENCE
CHARLESTON, SOUTH
CAROLINA**

The Astor Case

Meryl Gordon, Author
Philip Marshall, Professor of
Historic Preservation, Roger
Williams University
Elizabeth Loewy, Prosecutor
Alexander Forger, Probate
Attorney

*The Estate Tax and Related Will
Construction Issues*

F. Landon Boyle, Professor,
University of South Carolina
School of Law

*Judicial Ethics and Electronic
Communication*

Barbara Seymour, Deputy
Disciplinary Counsel, Supreme
Court of South Carolina

*The Advantages of Qualified
Settlement Funds*

Pi-Yi Mayo, Certified Elder Law
Attorney

*The James Brown Case and
Probate Case Update*

S. Alan Medlin, University of
South Carolina School of Law

**2010 SPRING CONFERENCE
PORTLAND, OREGON**

*Court Focused Elder Abuse
Initiatives*

Lori Steigel, Senior Attorney,
American Bar Association

*The Implications of an Aging
Population for the State Courts*

Richard Van Duizend, Principal
Court Management Consultant,
National Center for State Courts

*The Center for Elders and the
Courts*

Brenda Uekert, Sr. Research
Associate, National Center for
State Courts

Uniform Power of Attorney Act
Lori Steigel, Senior Attorney,
American Bar Association
Linda Whitton, Professor,
Valparaiso University School of
Law

Oregon Death with Dignity Act
Katrina Hedberg, Office of
Disease Prevention and
Epidemiology, Oregon Public
Health Division

*Physician Orders for Life-
Sustaining Treatment*

Margaret Carley, BSN, JD,
Attorney

*Probate Judges and Adult
Protective Services*

Kathleen Quinn, Executive
Director, National Adult Protective
Services Association Foundation

*Where in the Internet Can a
Probate Judge Go?*

William Self, Judge, Bibb County
Probate Court

**2009 Fall Conference
Rockport, Maine**

Loss Prevention for Judges

James Bowie, Thompson &
Bowie, LLP
Paul Chaiken, Rudman & Winchell

Judicial Immunity

Thomas Gaffey, Chief Counsel,
Connecticut Probate Court
Administration Office

*Ethical Issues and Probate Court
Opinion Writing*

Nancy Wanderer, Director, Legal
Research and Writing Program,
University of Maine School of Law

Right to Die

Prof. Rebecca Morgan, Stetson
University College of Law

Evidence

Timothy S. Fisher, McCarter & English, LLP
Vanessa Roberts, McCarter & English, LLP

Guardians & Mental Health Issues

Michael Mackniak, Executive Director, Guardian Ad Litem Services, Inc.

2009 Spring Conference

Coeur d'Alene, Idaho

Involuntary Treatment for the 21st Century

Hon. Milton Mack, Wayne County Probate Court

Mediation and Alternative Dispute Resolution

Prof. Larry Weiser, Gonzaga Law School

Court Security

Steven Steadman, Court Security Specialist, Colorado AOC

How the VA and Courts Can Work Together to Serve Veterans

Martin Sendek, Attorney, Dept. of Veterans Affairs

Emerging Issues in Trust

Litigation and the Importance of Notice to Fiduciaries

Kevin Millard, Chorney and Millard, Denver, CO

Judicial Ethics and Professionalism

Prof. Roberta Flowers, Stetson University College of Law

2008 Fall Conference

Savannah, GA

Judicial Immunity in Civil Rights Litigation or "An Hour of Sex"

William Clifton, III, Constangy Brooks & Smith LLC, Georgia

What Probate Judges Need to Know about the Crisis Intervention Team

Ronald Honberg, National Director for Policy and Legal Affairs, National Alliance for the Mentally Ill, Maryland

Probate and Related Issues

Surrounding Frozen Sperm, Embryos and Zygotes, Including any Seminal Cases

Prof. Mary Radford, Georgia State University of Law

Now That I am a Judge, How Do I Act Like One

Steve Jones, Judge, Superior Courts, Georgia

Case Law Update: Recent

Significant Decisions in Probate and Guardianship Across the U.S.

Prof. S. Alan Medlin, University of South Carolina School of Law

Suggested Best Practices and Helpful Forms From Among Our Own

Mary Joy Quinn, Hon. Nikki Deshazo, Hon. James Herb, Hon. Susan Tate, Hon. Jean Stewart

2008 Spring Conference

ST. LOUIS, MO

The Missouri Plan: A Selection System Under Attack

Chip Robertson, Former Chief Justice, Missouri Supreme Court

Political Attacks on the Fairness of America's Judiciary

Jesse Rutledge, Deputy Executive Director, Justice at Stake

Guarding the Guardians: Promising Practice for Court Monitoring

Erica Wood, American Bar Association, Commission on Law and Aging

Guardianship Accounting—A Model

Shirley Accardo Weigelt, Decedents' Estates Auditor
Debra Slaughter, Guardianship Estates Auditor
McDonald Worley, former Staff Attorney, Harris County Probate Court No. 2, Houston, Texas

Improving Care at the End of Life: What Probate Judges Need to Know about Brain Injuries,

CPR, ANH and Palliative Care

Robert L. Fine, MD, FACP, Director, Office of Clinical Ethics, Baylor University Health Care System, Dallas, Texas

Improving Care at the End of Life (continued)

Robert L. Fine, MD, FACP

2007 Fall Conference

SAN DIEGO, CALIFORNIA

California Conservatorships After the L.A. Times Articles

Judge William H. Kronberger, Jr., County of San Diego Probate Court, California Probate Conservatorship Task Force

Judicial Wellness

Adam Fisher, Jr., Esq., Greenville, South Carolina

Virtual Internship Program

Prof. Rebecca C. Morgan, Stetson University College of Law

Evidence

Judge Bill Meyer (retired), Judicial Arbiter Group, Inc.

Elder Justice Courts/Prosecuting Elder Abuse

Judge Julie Conger, Alameda County Superior Court; Paul Greenwood, County of San Diego District Attorney

Alternative Dispute Resolution for Probate Courts

Judge Arnold Gold (retired), Studio City, California; Judge William L. Howard, Sr. (retired), Charleston, South Carolina; Judge John R. Maher (retired), Portsmouth, New Hampshire; Judge Bill Meyer (retired), Denver, Colorado

2007 Spring Conference
WILLIAMSBURG, VIRGINIA

Schiavo—Dealing with the Media/Speakers Bureau

George C. Greer, Judge, Sixth Judicial Circuit, State of Florida
Michelle Mensore Condon, Esq., Charleston School of Law, NCSC Communications Contractor

Schiavo—Evolving Medical, Legal and Ethical Issues

George C. Greer, Judge, Sixth Judicial Circuit, State of Florida
Andrew H. Hook, Esq. - Advance Directives, Oast & Hook, Attorneys
Jerome E. Kurent, MD, MPH - Medical Perspective, Medical University of South Carolina
Prof. Don Tortorice, Senior Lecturer in Law, William and Mary School of Law

Elder Abuse: Trends and Cutting Edge Issues

Lori A. Stiegel, JD, ABA Commission on Law and Aging

Cross-Border Guardianships—Help on the Way

David English, NCCUSL; Terry Hammond, NGA; Sally Hurme, AARP

E-Filing

Courtroom 21 at William & Mary Law School
Tom Clarke, Vice President, Research & CIO, National Center for State Courts; Dick Van Duizend, Principal Court Management Consultant, National Center for State Courts

Demonstration of Courtroom 21
Courtroom 21 at William & Mary Law School

Prof. Fredric Lederer, Chancellor Professor of Law and Director, Courtroom 21 Project

2006 Fall Conference
ANCHORAGE, ALASKA

Effects of Aging Population on Probate Courts

Prof. Rebecca Morgan, Stetson University College of Law

Probate Paralegals: How to Make Your Life Easier Without Breaking the Bank

Victoria Newman, PACE Registered Paralegal, Livingston, Stone & McGowan, San Francisco, CA

Anna Nicole Smith and the Probate Court Exception to Federal Jurisdiction

Adam Streisand, Loeb and Loeb
Prof. Theresa J. Pulley Radwan, Stetson University College of Law

Planned Giving and the NCPJ Legacy Society

John Maher, Rockingham County (NH) Probate Court; Robert C. Brink, Attorney, Anchorage; David Hillemeier, CLU, Anchorage

Private Guardianship Certification

Terry Hammond, Esq., Executive Director, NGA; Sally Hurme, Esq., Board of Trustees, NGF; Betty Stanley, President, National Guardianship Association

Tribal Justice Alaskan Style

David Case, Esq., Anchorage
Alicemary Closuit, Probate Master, Fairbanks; Wilson Justin, Board member, Alaska Native Justice Center, Anchorage; Diane Payne, Children's Justice Specialist, Tribal Law and Policy Institute, Anchorage

2006 Spring Conference
ORLANDO, FLORIDA

Judicial Determination of Capacity of Older Adults in Guardianship Proceedings – A Practical Model and Case Management Tools

Daniel Marson, J.D., Ph.D.; Jennifer Moye, Ph.D.; Erica Wood, ABA Commission on Law & Aging

Judicial Determination of Capacity of Older Adults in Guardianship Proceedings – Applying the Model to Your Court

Daniel Marson, J.D., Ph.D.; Jennifer Moye, Ph.D.; Erica Wood, ABA Commission on Law & Aging

Judicial Determination of Capacity of Older Adults in Guardianship Proceedings – Case Studies in Capacity Assessment

Daniel Marson, J.D., Ph.D.; Jennifer Moye, Ph.D.; Erica Wood, ABA Commission on Law & Aging

Evidentiary/Ethical Considerations in Capacity Cases
Ken Wingate, Esq.

Special Needs Trusts/Structural Settlements and the Probate Court

Keith Klovee-Smith, Wells Fargo

2005 Fall Conference
SAN FRANCISCO,
CALIFORNIA

Same-Gender Unions: Probate Court Implications (Part II)

Hon. Francis M. Simon, Beaufort County Probate Court, Beaufort, SC; Garry Grossman, Ph.D.; Lois Shawver, Ph.D.

Seeking the Lost: How Forensic Genealogists Can Assist the Judiciary & Litigants in Today's Probate Court

Michael Heath, Search International, Inc.; David Turpin, Attorney, Santa Barbara, California

Overview of a Trustee's Duties to Beneficiaries, and the 10 Most Common Breaches of Trust

Sebastian V. Grassi, Jr., Esq., Grassi & Toering, PLC, Troy, MI

Teaching Your Old Investment Advisor New Tricks: Compliance with the Prudent Investor Rule
Lee H. Anke, President, Prudent Investors Network, Inc.; Jamie Smith, Investment Advisor Associate

Protecting the Rights of the Minor Child

Jack Garamella, Esq., Collins, Hannafin, Garamella, Jaber & Tuozzolo, Danbury, CT

Court Performance Measurement for Probate Courts

Richard Van Duizend, Principal Court Management Consultant, National Center for State Courts

2005 Spring Conference
AMELIA ISLAND, FLORIDA

E-filing in Probate Court: The Denver Experience

Hon. Jean Stewart; Jeff McGhee, LexisNexis

The Roses of Court Technology and E-Filing: How to Avoid the Thorns and the Brambles

James E. McMillan, National Center for State Courts; Hon. Joe Egan; Hon. Steve King; Hon. Jack Puffenberger

Electronic Revolution in the Federal Courts

Hon. William J. Martini, John T. O'Brien, U.S. District Court

Courts Meeting Fiduciary Standards Using AIF's and Technology

Thomas D. Begley, Jr., Esq.

Uniform Trust Code

S. Alan Medlin, University of South Carolina

HIPAA—Health Insurance Portability and Accountability Act of 1996

Edward V. Smith, III, Esq.

2004 Fall Conference
COLORADO SPRINGS,
COLORADO

State of Guardianship Law: Where We are and How We got Here

Sally Hurme & Erica Wood

Government Accountability Office Guardianship Report: National Issues and Recommendations

Ben Pfeiffer & Alicia Cackley, Government Accountability Office

Guardian Certification: What, Why and How

Hon. John Maher; Hon. Clark Munge, Cherie Mollison & Rhonda Williams, National Guardianship Foundation

Roundtable on Problem Solving IN Guardianship

Richard Van Duizend, NCSC; Hon. Nikki DeShazo; James Wade; Prof. Pamela Teaster, University of Kentucky; Francine Saccio, National Guardianship Association; Denise Buchan & Paul Conley, Tarrant County (TX) Probate Court

The Forgetting: Alzheimer's, Portrait of an Epidemic

David Shenk

From Curzan to Schiavo: What Have We Learned?

William Colby

Fiduciary Liability & Litigation

Allan Bogutz; Hon. Raymond Eubanks; Bruce Ross

Judges Corner

Hon. Patrick Ferchill; Hon. Lawrence Belskis; Hon. Irvin Condon; Hon. Isabella Horton Grant; Hon. Clark Munger; Hon. Wallace Kent

2004 Spring Conference
SANTA FE, NEW MEXICO

"Uniform Trust Code" Thorny Issues, et. al.

Raymond Young, Attorney

"Uniform Trust Code" Thorny Issues, et. al., Part II

Thomas W. Latham, Attorney
Dominic Campisi, Attorney

Dementia: Kinds, Causes and Limits

Dr. Fay Farrell

How to be an effective Probate Judge in the Legislature

Hon. Bobby M. Junkins
Robert L. McCurley, Jr., Attorney

Indian Child Welfare Act

Toby Grossman, Senior Staff
Attorney, American Indian Law
Center

*If my court had unlimited
resources, where would I spend
it and why*

Hon. John Kirkendall; Hon. Larry
Belskis; Hon. William Bate; Hon.
Irvin Condon; Hon. Grace
Connolly; Hon. Joseph Egan;
Hon. Raymond Eubanks; Hon.
Steve King; Hon. John Voorhees

2003 Fall Conference
HILTON HEAD, SOUTH
CAROLINA

*Assessment Tools for Probate
Judges*

Leo M. Cooley, M.D., Yale
University School of Medicine

*Mental Health Courts in South
Carolina*

Hon. Tamara Curry; Alison
Atwood; Amy Harrell; Jennifer
Shealy; Debbie DiNovo; Patrick
Harvey

Undoing Undue Influence

Mary Joy Quinn and John Rogers
Mental Health Commitments
Judith H.W. Crossett, M.D.,
Ph.D., Director, Geriatric
Psychiatry, University of Iowa
Hospitals and Clinics

*Same-Gender 'Unions': Probate
Court Implications*

Hon. Francis M. Simon

*Deposit & Investment of Minor's
Funds*

Hon. W. Robert Hentges

2003 Spring Conference
GALVESTON, TEXAS

*Modeling a Successful Volunteer
Guardianship Program*
Colleen Colton, CEO,
Guardianship Services, Inc.

*Top Ten Myths & Truths About
Texas Probate*

Jerry Frank Jones, Of Counsel,
Ikard & Golden

Community Property Systems
Tom Featherston, Baylor
University School of Law

*What Psychiatrists Wish Every
Probate Judge Knew*

Dr. Edward Luke, Director,
Geriatric Psychiatry, North Texas
State Hospital

*NCPJ – "Where we are and where
we are going"...National Survey
of Probate Jurisdiction – Present
and Future Issues*

Hon. Larry Belskis; Hon. John
Kirkendall; Hon. Raymond
Eubanks; Hon. Steve King; Hon.
John Maher

*Rightsizing Probate Reforms:
How to Adapt and Adopt
Improvements to Your Court –
No Matter What the Size*
Hon. Gladys Burwell

2002 Fall Conference
TUCSON, ARIZONA

*Development of a Probate Court:
Time Study, Workflow Review,
Document Imaging and Website
Application*
Christopher T. Ryan, National
Center for State Courts

*A Systems Approach to
Guardianship Management*
Hon. Patrick Ferchill; Paula
Conley; Arlene Byrd Shorter;
Denise Inman; Martha Tracy

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Hon. Dorothy Carson, Arizona

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Uniform Probate Code
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