

**UNIFORM GUARDIANSHIP AND PROTECTIVE
PROCEEDINGS ACT (1997/1998)**

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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PROCEEDINGS ACT (1997/1998)**

**The Committee that acted for the National Conference of Commissioners on
Uniform State Laws in preparing the Uniform Guardianship and Protective Proceedings
Act (1997) was as follows:**

THOMAS L. JONES, University of Alabama, School of Law, P.O. Box 5557,
University Station, Tuscaloosa, AL 35486, *Chair*
RHODA B. BILLINGS, Wake Forest University, School of Law, P.O. Box 7206,
Winston-Salem, NC 27109
CLARKE A. GRAVEL, P.O. Box 369, 76 St. Paul Street, Burlington, VT 05402
MERRILL MOORES, 244 N. College Avenue, Indianapolis, IN 46202
ELWAINE F. POMEROY, 1415 S.W. Topeka Boulevard, Topeka, KS 66612
ROBERT C. ROBINSON, P.O. Box 568, Portland, ME 04112-0568
RICHARD V. WELLMAN, University of Georgia, School of Law, Athens, GA 30602
REBECCA C. MORGAN, Stetson University, College of Law, 1401 61st Street South,
St. Petersburg, FL 33707, *Reporter*

EX OFFICIO

BION M. GREGORY, Office of Legislative Counsel, State Capitol, Suite 3021,
Sacramento, CA 95814-4996, *President*
W. JACKSON WILLOUGHBY, Placer County Municipal Court, 11546 B Avenue,
Auburn, CA 95603, *Chair, Division B*

EXECUTIVE DIRECTOR

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road,
Norman, OK 73019, *Executive Director*
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director
Emeritus*

Copies of this Act may be obtained from:

UNIFORM LAW COMMISSION
111 N. Wabash, Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

**UNIFORM GUARDIANSHIP AND PROTECTIVE
PROCEEDINGS ACT (1997/1998)**

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UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT (1997/1998)

Prefatory Note

The Uniform Guardianship and Protective Proceedings Act (1997/1998) replaces the previous Act of the same name, which was approved by the National Conference of Commissioners on Uniform State Laws in 1982. The 1997 Act may be enacted either as a free-standing Act or as part of the Uniform Probate Code (UPC). States that wish to enact the Act as part of the UPC should consult Article V, Parts 1-4 of the UPC for the official text of the Act as conformed to the Code's definitions and general provisions.

The topics covered in this Act include minors' guardianships, adults' guardianships, and conservatorships of both minors and adults. The Act is divided into five articles. Article 1 contains definitions and general provisions applicable to both guardianships and conservatorships, including provisions that relate to the office of guardian and conservator and to the jurisdiction of the courts, many of which were previously scattered in different sections of the prior Act. Article 2 contains provisions on guardianships for minors, whether by the court or the parent. Article 3 contains provisions for guardianships for incapacitated persons, who will most often be adults, but who may also be minors whose need for guardianship is unrelated to their age. Article 4 covers conservatorships and other protective arrangements for both minors and adults, including the procedures for appointment of conservators and the process for implementing a protective arrangement. Article 5 contains boilerplate provisions common to Uniform Acts.

The revisions to the Uniform Guardianship and Protective Proceedings Act were precipitated by a two year study by the A.B.A. Senior Lawyers Division Task Force on Guardianship Reform. The Task Force consisted of representatives not only of the Senior Lawyers Division, but also of other A.B.A. entities, including the Real Property Probate and Trust Law Section and the Commissions on Legal Problems of the Elderly and Mental and Physical Disability Law, as well as a variety of other groups interested in guardianship, such as AARP and the National Senior Citizens Law Center. The Task Force generated a report that served as the starting point for the redrafting of the Uniform Guardianship and Protective Proceedings Act. The drafting committee of the Uniform Law Commissioners began the drafting of the revision in 1995. The revised Act was approved at the 1997 Annual Meeting of the National Conference of Commissioners on Uniform State Laws, with amendments to the provisions on appointment of counsel approved at the 1998 Annual Meeting of the National Conference of Commissioners on Uniform State Laws, and subsequently approved by the A.B.A. House of Delegates at its 1998 annual meeting. The National Conference, at its 1998 Annual Meeting, also approved the 1997 act for integration into the UPC.

Significant developments in the areas of guardianship and conservatorship occurred in the late 1980s and early 1990s, as states revised their guardianship and conservatorship statutes. The 1982 UGPPA, with its emphasis on limited guardianship and conservatorship, was groundbreaking in its support of autonomy. The 1997 revision builds on this and on developments occurring in the states, by providing that guardianship and conservatorship should

be viewed as a last resort, that limited guardianships or conservatorships should be used whenever possible, and that the guardian or conservator should consult with the ward or protected person, to the extent feasible, when making decisions.

The 1997 revision makes other substantial changes. The following discussion summarizes those of most significance.

The 1997 revision bases the definition of incapacitated person on functional abilities, recognizing that a person may have the capacity to do some things while needing help with others. Before a guardian may be appointed for an adult or a minor for reasons other than age, the individual must be determined to be incapacitated, that is, the individual must be “unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.” (Section 102(5)). If assistive technology is available that may enable the individual to receive and evaluate information or to make or communicate decisions, then the individual may not be an “incapacitated person.”

A parent or spouse may appoint a guardian to take office immediately upon the need. Articles 2 and 3 contain provisions for a parental or spousal appointment of a “standby” guardian: by a parent for a minor child under Article 2 and by a parent for an adult disabled child or by a spouse for an incapacitated spouse under Article 3. The addition of these provisions was spurred by the increasing number of single-parent families in the United States as well as by the recognition that adults are living longer and may need assistance in their later lives. The standby provisions are available in a wide variety of situations where there is a need for a guardian to step in immediately upon the occurrence of an event, without seeking prior court approval. The appointment may be used by all parents of minor children as well as for the spouse of an incapacitated adult or the parent of an adult disabled child.

A guardian or a conservator should be appointed only if there are no other lesser restrictive alternatives that will meet the respondent’s needs. The Act encourages the use of alternatives to guardianship or conservatorship and views the appointment of a guardian or a conservator as a last resort. The court may not appoint a guardian for an incapacitated person unless the court makes a finding that the respondent’s needs cannot be met by any less restrictive means. (Section 311(a)(1)(B)). The visitor appointed by the court to investigate the appropriateness of the guardianship or conservatorship requested for an adult, must investigate whether alternatives are available and report this to the court. (Sections 305(e), 406(e)).

Additionally, procedural steps are specified which must be met before a guardian for an incapacitated person or conservator may be appointed or a protective order entered. Specific information is required in the petition (Sections 304, 403), the respondent must be personally served with the notice of the hearing and the petition at least 14 days in advance of the hearing and others must receive copies (Sections 113, 309, 404), and the court must appoint a visitor (Sections 305, 406). Enacting jurisdictions must choose between requiring counsel if requested by the respondent, recommended by the visitor, or if the court otherwise orders (Alternative A to Sections 305(b) and 406(b)), or requiring counsel for the respondent in all cases (Alternative B to Sections 305(b) and 406(b)). In guardianships, the court must order a professional evaluation of

the respondent if the respondent requests one or the court determines one to be appropriate (Section 306), while in a conservatorship proceeding, the court may order a professional evaluation. (Section 406(f)). The respondent and proposed guardian or conservator must attend the hearing unless excused by the court for good cause. (Sections 308(a), 408(a)).

The committee which drafted UGPPA (1997/1998) preferred Alternative A to Sections 305(b) and 5-406(b). Under the committee's preferred process, a visitor is appointed in every proceeding for appointment of a guardian under Article 3, with counsel appointed on the respondent's request, the visitor's recommendation, or the court's determination that a counsel is needed. See Section 305. Concomitantly, in Article 4, a visitor is appointed in every case where a petition for appointment of conservator is filed and may be appointed when a protective arrangement is sought and the respondent is not already represented by counsel. See Section 406.

Alternative B for Sections 305(b) and 406(b) was included at the request of the American Bar Association (A.B.A.) Commission on Legal Problems of the Elderly.

Emphasized throughout the Act are the concepts of limited guardianship and limited conservatorship. Only when no alternative to guardianship or conservatorship is available should the court create a guardianship or conservatorship. Courts are directed to tailor the guardianship or conservatorship to fit the needs of the incapacitated person and only remove those rights that the incapacitated person no longer can exercise or manage. (Sections 311(b), 409(b)). If an unlimited guardianship or conservatorship is requested, the petition must state why a limited guardianship or conservatorship is not being sought. (Sections 304(b)(8), 403(c)(3)). The guardian or conservator must take the views of the ward or protected person into account when making decisions. The guardian must maintain sufficient contact with the ward so that the guardian knows of the capabilities, limitations, needs and opportunities of the ward (Sections 207(b)(1), 314(b)(1)). The guardian or conservator must encourage the ward or protected person to participate in decisions, to act on his or her own behalf, and to develop or regain capacity to manage personal or financial affairs. (Sections 314(a), 418(b)). The guardian must consider the ward's expressed desires and personal values when making decisions (Section 314(a)), while the conservator, in making decisions with respect to the protected person's estate plan, or the court, in deciding on a protective arrangement, must rely, when possible, on the decision the protected person would have made. (Sections 411(c), 412(b)).

The position of the drafting committee is that appointment of counsel should not be mandated in every guardianship under Article 3 or every conservatorship under Article 4. Alternative provisions are instead provided. Sections 305(b) and 406(b). The enacting jurisdiction must choose between requiring counsel only when requested by the respondent, recommended by the visitor, or otherwise ordered by the court, or requiring counsel for the respondent in all cases. The appointment of counsel is in addition to the requirement that a visitor be appointed, a requirement in all proceedings where a guardian for an incapacitated person is requested or where the appointment of a conservator is sought. Sections 305(a) and 406(a).

The burden of proof in establishing a guardianship or conservatorship is clear and convincing evidence, (see Sections 311, 401) while the burden of proof for terminating a guardianship or conservatorship is prima facie evidence. (See Sections 318(c), 431(d)). This distinction was made in recognition that a guardianship or conservatorship, as vehicles that take away from individuals their rights, should require a higher burden of proof (and thus more protections) to establish than should be required to restore rights to an individual.

Monitoring of guardianships and conservatorships is critical. Guardians must present a written report to the court within 30 days of appointment and annually thereafter (Section 317), while the conservator is required to file a plan and an inventory with the court within 60 days of appointment and annual reports thereafter. (Sections 418(c), 419, 420). Both the guardian and the conservator, in their reports, make recommendations as to whether the guardianship or conservatorship should be continued or modified. The court is required to establish a monitoring system. (Sections 317(c), 420(d)). The court may use visitors as part of the monitoring system. (Sections 317(b), 420(c)). Suggestions on what an effective monitoring system should contain can be found in Sally Balch Hurme, *Steps to Enhance Guardianship Monitoring* (A.B.A. 1991)

**UNIFORM GUARDIANSHIP AND
PROTECTIVE PROCEEDINGS ACT (1997/1998)**

**ARTICLE 1
GENERAL PROVISIONS**

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Guardianship and Protective Proceedings Act.

SECTION 102. DEFINITIONS. In this [act]:

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

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

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

(4) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or spouse, or by the court. The term includes a limited, emergency, and temporary substitute guardian but not a guardian ad litem.

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

(6) "Legal representative" includes the lawyer for the respondent, a representative payee, a guardian or conservator acting for a respondent in this state or elsewhere, a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary, and an agent

designated under a power of attorney, whether for health care or property, in which the respondent is identified as the principal.

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

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

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

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

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

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

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

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

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

Comment

The concepts of limited guardian and limited conservator, embraced in this Act, are reflected in the definitions of "guardian" (see paragraph (4)) and "conservator" (see paragraph (2)).

While the Act authorizes the appointment of a conservator with limited powers, no provision is made in the Act for the appointment of an emergency or temporary conservator, a type of conservatorship usually denoting an appointment of limited duration. In situations where

other statutes might permit the appointment of a temporary, emergency or special conservator, Article 4 instead allows the court to appoint a “master.” See Sections 405(a), 406(g) and 412(c). This is a departure from the 1982 UGPPA, which provided for the appointment of special conservators, but not of temporary or emergency conservators. See, e.g., UPC Section 5-408(c) (1982).

Like the 1982 UGPPA, the 1997 revision allows the appointment of a guardian by a parent or spouse by will or other signed writing, but subjects the appointment to significantly different requirements. See Sections 202 and 302. The definition of guardian (see paragraph (4)) includes a limited guardian, an emergency guardian, or a temporary substitute guardian. See Sections 204, 311, 312, and 313. There is a distinction between an emergency guardian and a temporary substitute guardian. Compare Sections 312 and 313. Guardian ad litem is specifically excluded from the definition of guardian, as a guardian ad litem is generally viewed as having a separate and limited role in the proceedings.

A finding that a person is an “incapacitated person” is required before a guardian may be appointed for reasons other than that the respondent is a minor. The definition of “incapacitated person” (see paragraph (5)) requires that the respondent have an inability to receive and evaluate information or to make or communicate decisions to the point that the person’s ability to care for his or her health, safety or self is compromised. This definition emphasizes the importance of functional assessment and recognizes that the more appropriate measure of a person’s incapacity is a measurement of the person’s abilities. Like other areas of the law where the concept of capacity is used, the required incapacity for the appointment of a guardian is no longer considered an all or nothing proposition but instead it is recognized as having varying degrees. This definition is designed to work with the concepts of least restrictive alternative and limited guardianship or conservatorship-only removing those rights that the incapacitated person cannot exercise, and not establishing a guardianship or conservatorship if a lesser restrictive alternative exists. See Sections 311 and 409 for examples. These concepts are carried throughout the Act.

The definition of incapacitated person differs significantly from the definition in the 1982 UGPPA. The requirement that the person be unable to make “responsible” decisions is deleted, as is the requirement that the person have an impairment by reason of a specified disability or other cause, a requirement which may have led the trier of fact to focus unduly on the type of the respondent’s disabling condition, as opposed to the respondent’s actual ability to function. The revised definition is based on recommendations of the 1988 Wingspread conference on guardianship reform, the report of which should be referred to for additional background. See *Guardianship: An Agenda For Reform* 15 (A.B.A. 1989). See also Stephen J. Anderer, *Determining Competency in Guardianship Proceedings* (A.B.A. 1990). Courts seeking guidance on particular factors to consider should also consult the California Due Process in Competency Determination Act, California Probate Code Section 811.

The definition of “legal representative” (see paragraph [6]) expands beyond the traditional lawyer to include as well those who act in a legally recognized representative capacity, such as a representative payee, trustee, custodian, and agent, as well as those who hold court appointments, such as the traditional guardian and conservator. This definition serves to identify those persons who must receive notice of both guardianship and protective proceedings,

the lawyer, if any, as well as those others holding nominated positions. See Sections 304, 403.

The definition of “minor” (paragraph (8)) excludes a minor who has been emancipated. The effect of this definition is to preclude the appointment of either a guardian or conservator for an emancipated minor unless the appointment is made for reasons other than the minor’s age. A guardianship or conservatorship for a minor also terminates upon the minor’s emancipation. See Sections 210, 431. Under the 1982 UGPPA, the appointment of a guardian terminated upon the minor’s marriage but not other emancipation, and the appointment of a conservator could continue until the minor attained age 21, without regard to marriage or other emancipating event.

The drafters of the 1997 revision intentionally chose not to define parent (other than as those whose parental rights have not been terminated), instead leaving the definition up to the enacting state’s probate code. Thus, the definition of “parent” (see paragraph (9)) may or may not include a step-parent. 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. Because such a parent has been found to be unfit, the parent is denied a continued role in determining the child’s custody, including the appointment of a guardian, whether by parental or court appointment. See Sections 202, 204, 205 and 403.

The person who is the subject of a proceeding is referred to as the “respondent.” See paragraph (12). Once a guardianship is established, the incapacitated person or minor is referred to as the “ward.” See paragraph (15). Once the conservatorship is established or other protective order entered, the respondent who was the subject of the proceeding is referred to as the “protected person.” See paragraph (11). A person for whom a guardian and a conservator has been appointed or other protective order made is both a ward and a protected person.

For states that enact the UGPPA, paragraph (14) gives the enacting state a process for a state court to certify questions to, and answer questions from, a tribal court, but this paragraph does not authorize a tribal court to certify or answer questions which are determined by tribal law. If a tribe wishes to enact this Act, references to “this state” would be replaced by “this tribe.” The definition of “tribe” in this paragraph is broad and is intended to include Native American tribes as well as other Native American governmental units that perform functions similar to a tribe.

SECTION 103. SUPPLEMENTAL GENERAL PRINCIPLES OF LAW

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

Comment

If this Act is enacted as a stand-alone act, this section will be needed. If this Act is enacted by a state as part of its version of the UPC, this section will not be needed. In that case, to preserve the numbering system, the enacting state should place the section number in brackets,

[SECTION 103. RESERVED].

The source of this section is Section 1-103 of the 1982 UGPPA.

SECTION 104. FACILITY OF TRANSFER.

(a) Unless a person required to transfer money or personal property to a minor knows that a conservator has been appointed or that a proceeding for appointment of a conservator of the estate of the minor is pending, the person may do so, as to an amount or value not exceeding [\$10,000] a year, by transferring it to:

(1) a person who has the care and custody of the minor and with whom the minor resides;

(2) a guardian of the minor;

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

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

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

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

Comment

When a minor annually receives from a specific payer property or cash of [\$10,000] or less, in all likelihood it will be expended for the ward's support within the year and it would be cumbersome and unnecessarily expensive to require the establishment of a conservatorship to handle the payments. This section allows the person required to transfer the property to do so in a more expeditious way.

The person required to transfer the property has the option of making 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 (1983/1986) or the custodial trustee under the Uniform Custodial Trust Act (1987), or to a financial institution where an interest-bearing account or certificate in only the minor's name is located.

The protections of this section do 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. A guardian of a minor may receive payments but has no power to compel payment from a third person. See Section 208. 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 instrument. This section also does not override the provisions of other statutes in the enacting jurisdiction such as the Uniform Transfers to Minors Act (1983/1986), which allow payment by alternative means based on the size of the minor's estate, as opposed to this section, which allows payment based on the annual payment obligation of the person making the payment.

The section 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 is not applicable 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, would be liable for breach of trust.

The person receiving the monies may consider, in appropriate cases, 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 Section 412 for approval of the purchase as a protective arrangement.

This section is derived from the UGPPA (1982) Section 1-106 (UPC Section 5-101 (1982)).

2010 Amendment: The amount that can be paid annually was increased from \$5,000 to \$10,000 to account for inflation and to conform this section to Section 3-915 of the Uniform Probate Code, which addresses distribution from decedent's estates to persons under disability.

SECTION 105. DELEGATION OF POWER BY PARENT OR GUARDIAN. A

parent or a guardian of a minor or incapacitated person, by a power of attorney, may delegate to another person, for a period not exceeding six months, any power regarding care, custody, or property of the minor or ward, except the power to consent to marriage or adoption.

Comment

This section provides for a temporary delegation of powers by the parent or guardian. This section does *not* create a guardianship or grant a parent powers not previously possessed-it merely allows delegation of the powers that the individual *already* has. Thus, the ability to make a delegation under this section may be quite limited for a divorced parent without day-to-day custody of a child and, depending on the state's other laws, may not exist at all for a parent of an adult child. But this section could be useful, for example, in other types of situations when a parent or a guardian becomes ill or has to be away from home for less than six months. The parent or guardian under this section could execute a power of attorney delegating to another some or all of the powers of the parent or guardian. For example, a single parent in the military who has to go on a tour of duty that will not exceed six months could use this section to grant a power of attorney relating to the care of the parent's minor children. Should the tour of duty exceed six months, the parent would then need to renew the power. Also, this section may be used when consent to emergency treatment is needed.

This section does not supersede the rights of persons, prior to their incapacity, to delegate powers relating to their own financial or health-care decisions. This section only authorizes the delegation of powers that are held by other persons, and then only powers held by parents or guardians.

In appropriate circumstances, a parent may wish to use a delegation under this section in lieu of a standby appointment of a guardian under Sections 202 and 302. Because no preconditions are imposed, a delegation under this section is easier to accomplish, although a

renewal every six months will be required. A parent with a potential personal incapacity may conclude that it is better to secure the more permanent appointment of a guardian under Articles 2 or 3 rather than to rely on a temporary delegation to an agent under this section.

Although this section refers to a delegation of power over property, the application of this section to management of property is in fact quite limited. Articles 2 and 3 of the Act grant a guardian only limited powers over a ward's property, and the powers of a parent are similarly restricted. Should it become necessary to secure powers over a minor's or ward's property, the appropriate step is to petition the court for appointment of a conservator. In particular, this section does not grant a guardian appointed in the enacting jurisdiction authority to manage the property of a ward located in another state. A conservator would have such authority, however. See Sections 425(b)(1) and 433.

This provision is based on UGPPA (1982) Section 1-107 (UPC Section 5-102 (1982)).

SECTION 106. SUBJECT-MATTER JURISDICTION.

(a) Except to the extent the guardianship is subject to the [insert citation to Uniform Child Custody Jurisdiction and Enforcement Act], the court of this state has jurisdiction over guardianship for minors domiciled or present in this state. The court of this state has jurisdiction over protective proceedings for minors domiciled in or having property located in this state.

(b) The court of this state has jurisdiction over guardianship and protective proceedings for an adult individual as provided in the [insert citation to Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act].

Comment

Prior to a 2010 amendment, which rewrote this section, this section provided in its entirety that:

“This [act] applies to, and the court has jurisdiction over guardianship and related proceedings for individuals domiciled or present in this state, protective proceedings for individuals domiciled in or having property located in this state, and property coming into the control of a guardian or conservator who is subject to the laws of this state.”

This very broad grant of jurisdiction frequently resulted in simultaneous jurisdiction by courts in more than one state. A guardian could be appointed both by the court in the state where the individual was domiciled and, if different, the state where the individual was present, even if

temporarily. A conservator could be appointed both by the court in the state where the individual was domiciled, and, if different, the state where any of the individual's property was located.

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), which was approved in 2007 and which is codified at Article 5A of the Uniform Probate Code, addresses the rules on jurisdiction over adult proceedings with greater specificity than did the previous version of this section. Due to the widespread enactment of UAGPPJA, this section was amended in 2010 to provide in subsection (b) that the court has jurisdiction over an adult proceeding as provided in the UAGPPJA.

With respect to minors' proceedings, the broad jurisdiction granted under the prior version of this section was pre-empted in substantial part by the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A. Despite its name, the PKPA is a comprehensive federal statute affecting all types of interstate custody issues for minors, including judicial appointment of guardians. The Uniform Child Custody Jurisdiction and Enforcement Act (1997) (UCCJEA) codifies the principles of PKPA at the state level. To recognize that jurisdiction over appointment of guardians for minors is largely controlled by the UCCJEA and not by this Act, subsection (a) of this section was amended in 2010 to clarify that this section applies to a minors' guardianship only to the extent the proceeding is not subject to the UCCJEA. Neither PKPA or UCCJEA, however, applies to proceedings involving a minor's property. Consequently, this section will continue to apply to a protective proceeding over a minor's property. For a discussion of the impact of PKPA and related legislation on minors' guardianships, see David M. English, *Minors' Guardianship in an Age of Multiple Marriage*, 29 Inst. on Est. Plan. ¶ 500 *et seq.* (1995).

SECTION 107. TRANSFER OF JURISDICTION.

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

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

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

protected person.

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

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

Comment

Article 3 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), approved in 2007, contains a detailed procedure for transferring an adult proceeding to another state. Due to the widespread enactment of UAGPPJA, subsection (b) of this section was added in 2010 to clarify that the UAGPPJA and not this section control to the extent an adult proceeding is subject to the UAGPPJA. The UAGPPJA will control transfers of an adult proceeding to another state. This section will continue to apply with respect to transfer

of an adult proceeding to another county. This section also will continue to apply to transfers of a minor's proceeding, whether to another state or county.

The following is the text of the comment to this section prior to the 2010 amendment: "This section is based on South Dakota Codified Laws, Sections 29A-5-109 and 29A-5-114. This section sets out the process for transferring cases to another county, state, or foreign country and the procedures by which a case transferred in from another state or foreign country is to be received. In the case of a guardianship for a minor under Article 2, the Uniform Child Custody Jurisdiction and Enforcement Act 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 108, which addresses the appropriate venue for the appointment of a guardian or conservator, are designed to limit forum shopping in which some guardians and conservators have engaged and also 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 ward or protected person 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 ward or protected person.

"The use of a best interest of the ward or protected person standard may be differentiated for adults and minors. When dealing with an adult, the personal values and current and past expressed desires of the ward or protected person should be considered. To the extent that these personal values and expressed desires are unknown, the guardian or conservator should make an effort to learn the ward's or protected person's values and ask about the ward's or protected person's desires. Considering the personal values and expressed desires of the ward or protected person is also a priority consideration under this Act for decision making by guardians and conservators in general. See Sections 314(a), 411(c), and 418(b).

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

"In the case of intra-state transfer of proceedings, transfers should be made only when the best interest of the ward or protected person will be advanced, and care should be used by the court to determine that this is not an attempt to secure more favorable venue for other reasons. Under subsection (a), courts should be particularly cognizant in minors' guardianships of attempts to use such transfers to circumvent school district assignments or tuition payment rules.

"When a guardianship or protective proceeding is started in one state and a guardianship or conservatorship already exists in another state, the courts from those two states should communicate with each other. For purposes of subsection (b), the original court is the court where the petition is first filed, not necessarily where the appointment was first made. The second court, only after consultation with the first court, should take or decline jurisdiction only if doing so is in the best interest of the ward or protected person. The burden is on the second court to contact the original court because the second court would be informed of the existence of the guardianship or conservatorship as well as the contents of the petition and have access to

other information of which the original court most likely would be unaware. In making this determination, the second court would ordinarily grant deference to the determination of the original court, but the granting of such deference is not specifically required by this section nor should such deference be given when the determination of the original court is clearly contrary to the current best interest of the ward or protected person.

“Should a transfer of jurisdiction be appropriate, subsection (c) provides a simplified procedure for transferring the case. The subsection assumes that the appointment in the prior jurisdiction is appropriate and that there is consequently no need to duplicate the documentation and evaluations required in the original proceeding. The establishment of the new guardianship or protective proceeding is not automatic, however. In addition to the authority to decide that jurisdiction should not be transferred, the court may also determine that the appointment is no longer in the best interest of the ward or protected person. The procedure made available in subsection (c) will most often be used for the appointment of a guardian when both the guardian and ward no longer reside in the state of the original appointment. The procedure will also prove useful when the appointment of an ancillary conservator is needed to administer property located in a state other than the state of the protected person’s domicile. The appointment of a guardian in the second state would be ineffective in such circumstances because a guardian does not have general authority to manage the ward’s property. Should a guardian discover that the ward has property located in another state, the guardian should explore the possibility of being appointed conservator in that state.”

SECTION 108. VENUE.

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

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

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

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

Comment

This section consolidates but otherwise generally follows the venue provisions of the 1982 UGPPA except that it allows for the appointment of a permanent guardian for an incapacitated person only in the place where the incapacitated person resides. A court in the place where the incapacitated person is currently located but not a resident is not prohibited from taking action, however, such action is limited to the appointment of an emergency or temporary substitute guardian. This revision was made in direct response to the growing number of cases where older individuals have been moved across state lines and a guardianship then used to confirm custody rights in the new state. The drafters concluded that while it is always appropriate for a court on the scene to issue temporary orders to protect the person's welfare, only the court in the place where the person has the most significant contacts should be allowed to make what could turn out to be a permanent custody order. This requirement that only a court in the place where the respondent resides may appoint a permanent guardian applies not only to proceedings brought in different states, but also to multiple proceedings brought in different counties within a particular state. Subsection (d) provides that when there is more than one proceeding brought within a state, the first court decides where venue is appropriate. The first court does not automatically proceed; it should decide where proper venue lies and enter an order accordingly.

While the venue provisions are generally consolidated in this section, there is one exception. The venue provisions for the appointment of a guardian by a parent or spouse without prior court approval are contained in Sections 202 and 303. However, the subsequent petition to the court to confirm the parental or spousal appointment is subject to the venue requirements of this section.

SECTION 109. PRACTICE IN COURT.

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

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

Comment

This section incorporates the enacting states' rules of procedure. It is critical when separate petitions for guardianship and conservatorship are filed that the separate proceedings be consolidated into the same proceeding in order to protect the respondent's rights and to provide continuity and consistency.

The source of this section is Sections 1-302(d) and 1-304 of the 1982 UGPPA.

SECTION 110. LETTERS OF OFFICE. Upon the guardian's filing of an acceptance of office, the court shall issue appropriate letters of guardianship. Upon the conservator's filing of an acceptance of office and any required bond, the court shall issue appropriate letters of conservatorship. Letters of guardianship must indicate whether the guardian was appointed by the court, a parent, or the spouse. Any limitation on the powers of a guardian or conservator or of the assets subject to a conservatorship must be endorsed on the guardian's or conservator's letters.

Comment

A guardian must file an acceptance of office while a conservator must file an acceptance of office as well as any required bond. Any limits on the powers of the guardian or conservator must be stated in the letters. This requirement helps to secure the recognition and honoring of limited guardianships and conservatorships. Under Section 424(a), third persons are charged with knowledge of the restrictions endorsed on the letters of office and are subject to possible liability for failing to act in accordance with those restrictions. Either a certified or authenticated copy of the letters may serve as proof of authority by appointment.

SECTION 111. EFFECT OF ACCEPTANCE OF APPOINTMENT. By accepting appointment, a guardian or conservator submits personally to the jurisdiction of the court in any proceeding relating to the guardianship or conservatorship. The petitioner shall send or deliver notice of any proceeding to the guardian or conservator at the guardian's or conservator's address shown in the court records and at any other address then known to the petitioner.

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 Sections 201 and 301. For purposes of giving notice of proceedings to a guardian or conservator, petitioners may use the address of the guardian or conservator that is in the court file, any other address known to the petitioner, or any other procedure available under the enacting state's rules of civil procedure. It is incumbent on the guardian and the conservator to keep their current addresses in the court file.

SECTION 112. TERMINATION OF OR CHANGE IN GUARDIAN'S OR CONSERVATOR'S APPOINTMENT.

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

(b) A ward, protected person, or person interested in the welfare of a ward or protected person may petition for removal of a guardian or conservator on the ground that removal would be in the best interest of the ward or protected person or for other good cause. A guardian or conservator may petition for permission to resign. A petition for removal or permission to resign may include a request for appointment of a successor guardian or conservator.

(c) The court may appoint an additional guardian or conservator at any time, to serve immediately or upon some other designated event, and may appoint a successor guardian

or conservator in the event of a vacancy or make the appointment in contemplation of a vacancy, to serve if a vacancy occurs. An additional or successor guardian or conservator may file an acceptance of appointment at any time after the appointment, but not later than 30 days after the occurrence of the vacancy or other designated event. The additional or successor guardian or conservator becomes eligible to act on the occurrence of the vacancy or designated event, or the filing of the acceptance of appointment, whichever last occurs. A successor guardian or conservator succeeds to the predecessor's powers, and a successor conservator succeeds to the predecessor's title to the protected person's assets.

Comment

Although a guardian or conservator may submit a resignation at any time, the resignation is not effective until the court has approved it. A guardian or conservator, regardless of how the appointment ended, is still liable for previous acts as well as the duty to account for the money and assets of the ward or protected person. In the event of a termination of appointment due to the guardian's or conservator's death, the duty to account is normally performed by the personal representative of the guardian or conservator. In the event of the removal of a guardian or conservator due to the guardian's or conservator's own incapacity, the duty to account will normally be performed by the guardian's or conservator's own guardian, conservator or other legal representative.

Those who may petition for removal of the guardian or conservator are the incapacitated person, the protected person or a person interested in the welfare of the incapacitated or protected person. Under subsection (b), the ground for removal is the best interest of the ward or the protected person. In determining whether it is in the best interest of the ward or protected person for the guardian or conservator to be removed, the use of a best interest of the ward or protected person standard in relation to an adult may be differentiated from that used in reference to minors. When dealing with an adult, every effort should be made to determine the wishes of the ward or protected person regarding the removal of the guardian or conservator. In determining the best interest of the adult ward or protected person, the ward's or protected person's personal values and expressed desires, past or present, should be considered. Considering the personal values and expressed desires of the ward or protected person is also a priority consideration for decision making by guardians and conservators in general. See Sections 314(a), 411(c) and 418(b).

While the section adopts a best interest of the ward or protected person standard, courts seeking more precisely stated reasons for removal may wish to consult their state's law on removal of a trustee. For a statutory list of reasons directed specifically at removal of guardians or conservators, see South Dakota Codified Laws Section 29A-5-504. Among the reasons

justifying removal under the South Dakota statute are: (1) securing of the letters by material misrepresentation or mistake; (2) incapacity or illness, including substance abuse, affecting fitness for office; (3) conviction of a crime reflecting on fitness; (4) wasting or mismanagement of the estate; (5) neglecting the care and custody of the ward, protected person or legal dependents; (6) having an adverse interest that poses a substantial risk that the guardian or conservator will fail to properly perform duties; (7) failure to timely file a required account or report or otherwise comply with a court order; and (8) avoidance of service of process or notice.

Under subsection (c), the court can appoint an additional guardian or conservator, effective either upon appointment or upon a future contingency. A court can also appoint a successor guardian or conservator to fill an existing or potential vacancy. In either case, eligibility to act occurs on the last to occur of the vacancy, the occurrence of the contingency or the filing of the acceptance of appointment. The ability to appoint a guardian or conservator to act upon some specified future event will usually be used to preplan the filling of a vacancy in office. This provision, in the states that have enacted it, has proven useful in situations involving adults with developmental disabilities. The initial guardian or conservator appointed will usually be a parent of the ward or protected person, but the child's need for guardianship or conservatorship is likely to be lifelong. The ability to appoint a successor guardian or conservator at the time of the initial appointment therefore provides the parent with assurance of mind that upon the parent's death someone will be available to step in and assure continuity of care.

The ability to appoint a successor or additional guardian to take office in the future is different from the type of standby appointments authorized in Sections 202 and 302. Those types of appointments permit a guardian to be appointed to take office in the future even though no guardian is currently in office. Under this section, only the appointment of a successor or additional guardian or conservator is allowed.

SECTION 113. NOTICE.

(a) Except as otherwise ordered by the court for good cause, if notice of a hearing on a petition is required, other than a notice for which specific requirements are otherwise provided, the petitioner shall give notice of the time and place of the hearing to the person to be notified. Notice must be given in compliance with [insert the applicable rule of civil procedure], at least 14 days before the hearing.

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

(c) A notice under this [act] must be given in plain language.

Comment

Notice may be provided by mail as well as by private courier or delivery service. If the adopting state's rules allow, a faxed copy of the notice may be an appropriate method of providing notice. This section does not supersede specific notice requirements provided elsewhere in the Act. Special notice requirements apply to a petition for the appointment of an emergency guardian and to service on the respondent of a petition for the appointment of a guardian or conservator or other protective order. See Sections 309, 312, and 404. The requirement of at least 14 days' prior notice is copied from the 1982 UGPPA. A 14 day prior notice provision has also been part of the Uniform Probate Code, including its provisions on guardianships and protective proceedings, since the inception of the Code. Under this section, notice should be given using the method of notice provided in the enacting jurisdiction's applicable rule of civil procedure. However, the time limit for notice contained in subsection (a) should be applied, even if different from that in the state's applicable rule.

Subsection (c) provides that the notice be in plain language. The requirement that all notices be given in plain language is based on a recommendation of the Wingspread conference on guardianship reform. See *Guardianship: An Agenda for Reform 9* (A.B.A. 1989). Although this section does not require it, if English is not the respondent's primary language, best practice and due process would direct that a copy of the notice be provided in the respondent's primary language.

SECTION 114. WAIVER OF NOTICE. A person may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding. However, a respondent, ward, or protected person may not waive notice.

Comment

Waivers in this section include both specific and general waivers. Under no circumstances may the respondent, ward, or protected person waive notice. The protection provided by this section applies to all petitions brought under this Act but is particularly pertinent to original petitions for appointment of a guardian or conservator or other protective order. See Sections 309 and 404. 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 filing of the petition and the hearing whenever notice to a respondent, ward, or protected person is required. The source of this section is UGPPA (1982) Section 1-402.

SECTION 115. GUARDIAN AD LITEM. At any stage of a proceeding, a court may appoint a guardian ad litem if the court determines that representation of the interest otherwise would be inadequate. If not precluded by a conflict of interest, a guardian ad litem may be

appointed to represent several individuals or interests. The court shall state on the record the duties of the guardian ad litem and its reasons for the appointment.

Comment

Appointments under this section will be infrequent. If the respondent is currently represented, the attorney representing the respondent should not be appointed as the guardian ad litem because of the conflict of interest, since there is a distinct difference between the role of the attorney as an advocate and as a guardian ad litem. 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 the giving of such advice by requiring that the court record the duties of the guardian ad litem and its reasons for the appointment. The source of this section is UGPPA (1982) Section 1-403. (UPC Section 1-403(4)(1982)).

SECTION 116. REQUEST FOR NOTICE; INTERESTED PERSONS. An interested person not otherwise entitled to notice who desires to be notified before any order is made in a guardianship proceeding, including a proceeding after the appointment of a guardian, or in a protective proceeding, may file a request for notice with the clerk of the court in which the proceeding is pending. The clerk shall send or deliver a copy of the request to the guardian and to the conservator if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and the address of that person or a lawyer to whom notice is to be given. The request is effective only as to proceedings conducted after its filing. A governmental agency paying or planning to pay benefits to the respondent or protected person is an interested person in a protective proceeding.

Comment

This section allows an interested person not otherwise entitled to notice to file a request for special notice with the guardian or conservator. For purposes of this section, an interested person in a protective proceeding includes a creditor, secured or otherwise. The section also specifically provides that an interested person in a protective proceeding includes a governmental agency that is or will be paying benefits to the respondent or protected person. Whether a creditor, governmental agency or other person is an interested person as the term is used elsewhere in the Act must be determined according to the particular issue involved. For example, under certain circumstances an interested person could include a member of the media

or a “watch-dog” agency. For a request for special notice to be effective, a statement of the person’s interest must be contained in the request.

This section is based on UGPPA (1982) Section 1-404 (UPC Section 5-104 (1982)).

SECTION 117. MULTIPLE APPOINTMENTS OR NOMINATIONS. If a respondent or other person makes more than one written appointment or nomination of a guardian or a conservator, the most recent controls.

Comment

The most recent appointment or nomination would be the one with the most recent date during the period when the respondent had capacity to make the appointment or nomination. If the most recent appointment is determined invalid due to the respondent’s lack of capacity, the prior appointment would control.

ARTICLE 2
GUARDIANSHIP OF MINOR

SECTION 201. APPOINTMENT AND STATUS OF GUARDIAN. A person becomes a guardian of a minor by parental appointment or upon appointment by the court. The guardianship status continues until terminated, without regard to the location of the guardian or minor ward.

Comment

This Article provides for the creation and administration of guardianship over minors. 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 also 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).

This section recognizes the creation of a guardianship by parental appointment under Section 202 as well as those created by the court under Section 205. A guardian or the ward can move from the jurisdiction in which the court is located, yet the guardianship will continue until terminated and remains under the court's jurisdiction. See Section 107 regarding transfers of jurisdiction and Section 111 regarding the effect of acceptance of appointment.

This section is the same as UGPPA (1982) Section 2-101 (UPC Section 5-201 (1982)).

SECTION 202. PARENTAL APPOINTMENT OF GUARDIAN.

(a) A guardian may be appointed by will or other signed writing by a parent for any minor child the parent has or may have in the future. The appointment may specify the desired limitations on the powers to be given to the guardian. The appointing parent may revoke or amend the appointment before confirmation by the court.

(b) Upon petition of an appointing parent and a finding that the appointing parent will likely become unable to care for the child within [two] years, and after notice as provided in Section 205(a), the court, before the appointment becomes effective, may confirm the parent's

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

(c) Subject to Section 203, the appointment of a guardian becomes effective upon the appointing parent's death, an adjudication that the parent is an incapacitated person, or a written determination by a physician who has examined the parent that the parent is no longer able to care for the child, whichever first occurs.

(d) The guardian becomes eligible to act upon the filing of an acceptance of appointment, which must be filed within 30 days after the guardian's appointment becomes effective. The guardian shall:

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

(2) give written notice of the acceptance of appointment to the appointing parent, if living, the minor, if the minor has attained 14 years of age, and a person other than the parent having care and custody of the minor.

(e) Unless the appointment was previously confirmed by the court, the notice given under subsection (d)(2) must include a statement of the right of those notified to terminate the appointment by filing a written objection in the court as provided in Section 203.

(f) Unless the appointment was previously confirmed by the court, within 30 days after filing the notice and the appointing instrument, a guardian shall petition the court for confirmation of the appointment, giving notice in the manner provided in Section 205(a).

(g) The appointment of a guardian by a parent does not supersede the parental rights of either parent. If both parents are dead or have been adjudged incapacitated persons, an

appointment by the last parent who died or was adjudged incapacitated has priority. An appointment by a parent which is effected by filing the guardian's acceptance under a will probated in the state of the testator's domicile is effective in this state.

(h) The powers of a guardian who timely complies with the requirements of subsections (d) and (f) relate back to give acts by the guardian which are of benefit to the minor and occurred on or after the date the appointment became effective the same effect as those that occurred after the filing of the acceptance of the appointment.

(i) The authority of a guardian appointed under this section terminates upon the first to occur of the appointment of a guardian by the court or the giving of written notice to the guardian of the filing of an objection pursuant to Section 203.

Comment

This section enables a parent to make an advance appointment of a "standby" guardian whose powers become effective upon the occurrence of certain specified contingencies. The standby appointment procedure under this section is available to all parents, but is particularly beneficial for parents with pending incapacities which will likely render them unable to care for their children at some point prior to their deaths. The section, like UGPPA (1982) Section 2-102 and UPC Section 5-202 (1982), allows for the appointment of a guardian effective upon a parent's death or adjudication of incapacity. Additionally, following the lead of a growing number of free-standing standby guardianship statutes enacted in the states, it allows for an appointment to become effective upon a determination that the parent is no longer able to provide care. For analysis of these state statutes, see Joshua S. Rubenstein, *Standby Guardianship Legislation: Preparing Before the Tidal Wave Hits*, 22 ACTEC Notes 60 (1996). The parent can make either type of appointment in a will or other signed writing, including a power of attorney, a trust or a document executed for the sole purpose of appointing the guardian.

Under subsection (c), the contingencies upon which the authority of the standby guardian will become effective are the parent's death, adjudication of incapacity or written determination by a physician who has examined the parent that the parent is no longer able to care for a minor child. The physician making the written determination should be the parent's treating physician whenever possible, to avoid the possibility of the other parent manipulating this process in a custody battle.

In the case of a parent who has disappeared, the appointment of an emergency guardian should be sought under Section 204(e). Under that section, preference will be given to the

nominated guardian absent a showing that it is not in the best interest of the minor child for that person to be appointed.

Subsection (a) recognizes that the appointing parent may have additional children after making the appointment, so the provision allows a parent to appoint a guardian for children who may later be born, adopted or whose custody may be given to the appointing parent, without the need to re-execute the nomination.

The appointment of a person as guardian under this section creates a rebuttable presumption that the appointed person should be appointed as guardian and that the court should not disregard the appointment without good cause. A person who chooses not to accept the appointment is not liable for failing to act.

Under subsection (b), the appointing parent may petition the court prior to the triggering event for advance confirmation of the appointment. Advance court confirmation terminates both the right of others to object, including an objection by the child's other parent, and the right of the appointing parent to revoke the appointment. Subsection (b) provides that a petition for advance court confirmation may be made at anytime within the recommended two years from the date of the likely need, but this time limit is placed in brackets to indicate that the enacting jurisdiction is free to select a different time period. Depending on the length of time set by the enacting states, courts may need to show flexibility regarding the time limit. It may be difficult for the appointing parent to prove with absolute certainty that the appointing parent will become unable to care for the child within the specified period of time. Courts should liberally construe this provision in favor of the appointing parent. For this reason, subsection (b) does not require absolute certainty, and instead uses the standard that it is "likely" that the guardian will be needed within the time period. If the court confirms the guardian in advance and the stated deadline (e.g., two years) has passed without the guardian's filing the acceptance of appointment required under subsection (d), the court should hold a hearing to determine the appointing parent's status and whether the advance confirmation should continue.

While this section allows the court to confirm an appointment in advance, more typically the guardian will assume duties based solely on the parent's written appointment. A guardian so appointed must then seek court confirmation, thereby turning the standby appointment into a regular guardianship. Allowing the guardian's appointment to become effective immediately upon the triggering event avoids gaps in the care and custody of the child. The purpose of the confirmation of appointment process contained in subsections (d)-(f) is to convert a nominated guardianship into a regular guardianship as soon as possible. The court should develop procedures to monitor the conversions.

The section does not specifically enumerate the contents of the petition for confirmation of appointment to be filed by the guardian. In order for the court to make an informed review, the petition should include the name and address of the minor; the identity and whereabouts of all persons having parental rights or serving as guardian; the petitioner's name and address, relationship to the parent and child, interest in the appointment, and a statement of the petitioner's willingness to serve; information about any custody orders; any limitations the appointing parent has placed on the powers of the appointed guardian, the powers to be given the

guardian, and if an unlimited guardianship, a statement why a limited guardianship would not work; and reasons why the appointment should be confirmed. The petition should be accompanied by a death certificate, an order of adjudication of incapacity or a written statement by the physician who has examined the appointing parent that the appointing parent is no longer able to care for the minor child. In this last case, the written statement should include the prognosis and diagnosis of the parent's condition, as well as the date of the doctor's examination of the parent. The petition should be accompanied by a copy of the appointing instrument, as well as any other relevant documents, such as a custody order or an order terminating parental rights. If the selection as guardian was previously confirmed pursuant to subsection (b), a copy of the order of confirmation should accompany the required notice.

Under subsection (g), the appointment of a guardian by a parent does not supersede the parental rights of either parent. Until the appointment is confirmed by the court, the rights of the parent and the rights of the guardian coexist. While parental rights are not terminated, at least in theory, the guardian will often supersede the parental rights in fact. The parent making the appointment will no longer be able to provide care for the child, even though not yet legally incapacitated, and the other parent may be uninterested or unable to provide care for the child. To provide more certainty to the situation, the appointee should seek court confirmation of the parental appointment as soon as possible.

At the hearing on the petition for confirmation, if the court finds that the appointing parent will not regain the ability to care for the minor child, the court should enter an order confirming the appointment, absent evidence rebutting the presumption that the appointment is in the child's best interest. If the court finds that the parent may regain ability to care for the minor child, the court should enter an order confirming the appointment for a period of time deemed appropriate by the court. An order of confirmation cuts off the right to object of the minor, the other parent, or a person other than a parent having care and custody of the minor. The confirmation also supersedes the rights of the non-appointing parent.

Until the parental appointment is confirmed by the court, the minor, the other parent or the person other than the parent having care and custody of the minor may file an objection to the appointment under Section 203. See subsections (c) and (e). If an objection is filed, the appointed guardian has no authority to act and instead must petition the court for appointment as guardian under Section 205.

Subsection (h) provides that the timely performance of the requirements for the guardian's acceptance of office relate back to give any acts performed between the appointment becoming effective and the guardian's filing of the notice of acceptance the same effect as those occurring after the filing of the notice of acceptance, as long as the prior acts are beneficial to the minor. In the event of a dispute regarding whether a guardian's prior act should be validated, the court first determines whether the act was beneficial to the minor, and if the court determines the act was beneficial, then subsection (h) will apply.

Unless stated to the contrary in this section, the other provisions of this Act relating to guardians apply to a guardian appointed under this section, including the provisions relating to the duties and powers of guardians.

SECTION 203. OBJECTION BY MINOR OR OTHERS TO PARENTAL

APPOINTMENT. Until the court has confirmed an appointee under Section 202, a minor who is the subject of an appointment by a parent and who has attained 14 years of age, the other parent, or a person other than a parent or guardian having care or custody of the minor may prevent or terminate the appointment at any time by filing a written objection in the court in which the appointing instrument is filed and giving notice of the objection to the guardian and any other persons entitled to notice of the acceptance of the appointment. An objection may be withdrawn, and if withdrawn is of no effect. The objection does not preclude judicial appointment of the person selected by the parent. The court may treat the filing of an objection as a petition for the appointment of an emergency or a temporary guardian under Section 204, and proceed accordingly.

Comment

This section provides a mechanism for a listed group of individuals to object to a parental appointment made under Section 202 and to turn the appointment into a contested proceeding. The individuals who may object include the minor, if at least 14 years old, as well as the other parent or a person other than a parent or guardian who has care or custody of the minor. The objection must be in writing and can be filed at any time prior to the court's confirmation of the appointment.

If an objection is filed, the appointee has no authority to act and instead must file a petition for appointment as guardian under Section 205. Although the minor, the other parent, or the person who has care or custody of the minor may object to the appointment, the court still may appoint the person selected by the parent over the objection. An objection that is not timely filed will not prevent the appointment.

When an objection is filed, the court may choose to treat the objection as a petition for the appointment of an emergency (or in appropriate cases, temporary) guardian under Section 204, and use the expedited process contained therein.

This section is based on UGPPA (1982) Section 2-103 (UPC Section 5-203 (1982)).

SECTION 204. JUDICIAL APPOINTMENT OF GUARDIAN: CONDITIONS FOR APPOINTMENT.

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

(b) The court may appoint a guardian for a minor if the court finds the appointment is in the minor's best interest, and:

(1) the parents consent;

(2) all parental rights have been terminated; or

(3) the parents are unwilling or unable to exercise their parental rights.

(c) If a guardian is appointed by a parent pursuant to Section 202 and the appointment has not been prevented or terminated under Section 203, that appointee has priority for appointment. However, the court may proceed with another appointment upon a finding that the appointee under Section 202 has failed to accept the appointment within 30 days after notice of the guardianship proceeding.

(d) If necessary and on petition or motion and whether or not the conditions of subsection (b) have been established, the court may appoint a temporary guardian for a minor upon a showing that an immediate need exists and that the appointment would be in the best interest of the minor. Notice in the manner provided in Section 113 must be given to the parents and to a minor who has attained 14 years of age. Except as otherwise ordered by the court, the temporary guardian has the authority of an unlimited guardian, but the duration of the temporary guardianship may not exceed six months. Within five days after the appointment, the temporary guardian shall send or deliver a copy of the order to all individuals who would be entitled to notice of hearing under Section 205.

(e) If the court finds that following the procedures of this [article] will likely result in substantial harm to a minor's health or safety and that no other person appears to have authority to act in the circumstances, the court, on appropriate petition, may appoint an emergency guardian for the minor. The duration of the guardian's authority may not exceed [30] days and the guardian may exercise only the powers specified in the order. Reasonable notice of the time and place of a hearing on the petition for appointment of an emergency guardian must be given to the minor, if the minor has attained 14 years of age, to each living parent of the minor, and a person having care or custody of the minor, if other than a parent. The court may dispense with the notice if it finds from affidavit or testimony that the minor will be substantially harmed before a hearing can be held on the petition. If the guardian is appointed without notice, notice of the appointment must be given within 48 hours after the appointment and a hearing on the appropriateness of the appointment held within [five] days after the appointment.

Comment

The court, in order to make an informed decision on a petition for appointment, must have as much information as possible. The court should require that the following specific information be contained in a petition filed under subsection (a): the name, age and address of the minor; the name and address of the petitioner and the petitioner's relationship to the minor; the name and address of the proposed guardian, the proposed guardian's relationship to the minor and the proposed guardian's qualifications to serve as guardian; whether the minor's school district would change if a guardian is appointed; and information about the parents of the minor, their whereabouts, and if missing or absent, the circumstances surrounding their absence and whether any court has entered any order regarding their parental rights. The petition should also include information about the minor's property and, if the guardian is appointed, where the minor would live, as well as any other information that the court would deem relevant. The court should examine the petition to make sure this information has been supplied as fully as possible and should reject any petitions that provide insufficient information.

Subsection (a) allows a petition to be filed either by the minor or by any person interested in the minor's welfare. A person interested in the minor's welfare is any person with a serious interest or concern for the minor's welfare, including both relatives and non-relatives having knowledge of the circumstances, as well as public officials from relevant agencies. Should the court determine that the petitioner's concerns stem from interests other than the welfare and best interest of the minor, the court may dismiss the petition.

Under this section, the appointment can be made in one of three situations: when the parents consent, when all parental rights have been terminated or when the parents are unable or unwilling to exercise their parental rights. In the last situation, the court must decide whether a parent is unwilling or unable to act. See David M. English, *Minors' Guardianship in an Age of Multiple Marriage*, 29 Inst. on Est. Plan. ¶¶ 500, 503 (1995), for a discussion of criteria applied in determining unwillingness or unfitness of a parent to care for a minor child. This section is not to be used to resolve custody disputes between parents that are more appropriately resolved in a family law proceeding. See comments to UGPPA (1982) Section 2-104 and to UPC Section 5-204 (1982).

If the parent has made an appointment pursuant to Section 202, this section provides the parental appointee with priority for appointment if a petition for appointment of guardian of the minor is subsequently filed. Where, however, the appointee failed to timely accept the appointment as required in Section 202, the court can appoint another to serve as the guardian. The parental appointee has priority for appointment by the court even over the nominee of a minor age 14 or older.

On occasion, parents have established a guardianship for their minor child in order to change the child's school district. Allowing for such use of guardianship is inconsistent with the intent of this section. For that reason, the recommended information to be contained in the petition includes a statement as to whether the child's school district will change. This information puts the court on notice that the parents may be attempting to use a guardianship to manipulate a school assignment. The court should inquire whether there will be a change in the minor's school assignment if a guardian is appointed. Even when a change of school districts is not mentioned, the court should inquire whether there will be a change in the minor's school district if a guardian is appointed.

Subsection (d) provides for the appointment of a temporary guardian on appropriate petition or motion, when the court finds that an immediate need exists and it is in the minor's best interest for a temporary guardian to be appointed. The temporary guardianship provision is based on South Dakota Codified Laws Section 29A-5-210. Notice is required as provided in Section 113. The temporary guardian has the same authority as an unlimited guardian, but the guardianship may not last for more than six months. If the need for a guardian continues beyond six months, then the temporary guardian should file a petition under Section 205 to be appointed as unlimited guardian.

All individuals listed in Section 205(a) are required to receive notice in a temporary guardianship proceeding under subsection (d). The six month limitation on the temporary guardianship does not prevent the renewal or extension of the guardianship by court order at the expiration of the six months. However, if the duration needs to be extended, the court should examine whether a regular guardianship of the minor would be more appropriate.

Under subsection (e), in emergencies, where following the procedures specified in Section 205 would result in serious harm to the minor's health or safety and where there is no one with authority or who is willing to act, the court, on petition, may appoint an emergency guardian for up to 30 days. Prior notice is required 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. A court should have a process established to provide notice on an emergency basis. Proceedings without prior notice should be the *rare exception* rather than the rule. However, subsection (e) recognizes that occasionally there will be situations where giving prior notice on an emergency guardianship petition is simply not feasible. Thus, when an emergency guardianship is established without notice, notice has to 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 choose to enact a time limit other than five days, to adequately protect the minor the time chosen should be relatively short. The procedures under this subsection are similar to that for emergency appointments for adults, found in Section 312.

For both temporary and emergency guardianships, it is possible that one or both parents may have authority to act but are absent, refusing to act or unable to act. The emergency provision may be used when the minor is having a health care crisis and the parents are absent or dead. In cases where the parents are missing and presumed dead, a temporary guardianship might be used, although this is a situation where the conditions for a permanent appointment of a guardian would likely be met. Use of a temporary or emergency appointment may also be appropriate where the parents are absent for a set period of time. In some jurisdictions, it may be more appropriate to get an order of custody through the juvenile court rather than establishing a temporary guardianship.

SECTION 205. JUDICIAL APPOINTMENT OF GUARDIAN: PROCEDURE.

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

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

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

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

(4) any person nominated as guardian by the minor if the minor has

attained 14 years of age;

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

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

(b) The court, upon hearing, shall make the appointment if it finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the conditions of Section 204(b) have been met, and the best interest of the minor will be served by the appointment. In other cases, the court may dismiss the proceeding or make any other disposition of the matter that will serve the best interest of the minor.

(c) If the court determines at any stage of the proceeding, before or after appointment, that the interests of the minor are or may be inadequately represented, it may appoint a lawyer to represent the minor, giving consideration to the choice of the minor if the minor has attained 14 years of age.

Comment

If the conditions for appointment set out in subsection (b) have not been met, or if the appointment is not in the minor's best interest, the court should dismiss the petition or make any other order that serves the minor's best interest, including, where appropriate, treating the petition as one for the appointment of a conservator or other protective order under Article 4.

Under subsection (a)(3), if both parents are dead, notice and a copy of the petition must be given to the adult nearest in kinship. Where there is more than one adult in the same class, notice to one is sufficient.

The court may, at any stage of the proceeding, appoint a lawyer to represent the minor if the conditions in subsection (c) are met. If the minor is at least 14 years old, the minor's preference for a lawyer must be considered by the court in appointing counsel.

This section is based on UGPPA (1982) Section 2-106 (UPC Section 5-206 (1982)).

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

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

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

Comment

Absent a parental appointment, the only person having preference for appointment as guardian under this section is the person nominated by a minor age 14 or older, as long as that person's appointment would be in the minor's best interest. The priority granted under this section does not override the preference given to the parental appointee under Section 204(c). Regardless of the preference granted, the standard used by the court in determining whom to appoint as guardian is the minor's best interest.

Subsection (b) applies the concept of limited guardianship to minors. A court, whenever possible, should only grant to the guardian those powers actually needed. 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 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. Subsection (b) can be used by the court to either expand or limit the guardian's powers. Although the court can grant additional powers, the court can not grant powers beyond those provided in Article 2.

Subsection (a) is based on UGPPA (1982) Section 2-107 (UPC Section 5-207 (1982)). Subsection (b) is based on UGPPA (1982) Section 2-109(e) (UPC Section 5-209(e) (1982)).

SECTION 207. DUTIES OF GUARDIAN.

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

(b) A guardian shall:

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

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

(3) expend money of the ward which has been received by the guardian for the ward's current needs for support, care, education, health, and welfare;

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

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

(6) inform the court of any change in the ward's custodial dwelling or address.

Comment

A guardian of a minor is basically a substitute parent, but without the personal financial responsibility for the minor's support. The standard of care for the guardian is contained in subsection (a). 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, and welfare. A guardian also has certain fiduciary responsibilities. A guardian must at all times act in the minor's best interest and exercise reasonable care, diligence, and prudence. Subsection (b) of this section, and Sections 208 and 209 are in substantial part expansions on these underlying responsibilities, specifying subsidiary duties and the powers and immunities necessary to properly implement this role.

A guardian is more than a caretaker. To properly perform the office of guardian, it is essential that the guardian, as required by subsection (b)(1), become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the capacities, limitations, needs, opportunities, and physical and mental health of the ward. Such contact is also essential if the guardian is to act in the best interest of the ward.

The development of the self-reliance of the ward is one of the major themes of the Act, as demonstrated by the emphasis on limited guardianship, both for minors and adults. See Section 206(b). To develop the self-reliance of the minor, whether the guardianship for the minor ward is limited or unlimited, it is essential that the minor be involved in decision making, that the guardian ascertain the minor's views and that the guardian, whenever appropriate, make decisions in line with the minor's expressed preferences. In line with this philosophy, Section 208(b)(6) permits the guardian, if reasonable under all of the circumstances, to delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

A guardian's powers with respect to the property of the ward are very limited. If the ward has significant property that requires 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 ward's funds, including government benefits received for the ward, for the ward's support, care, education, health, and welfare. The guardian must conserve any excess funds not expended for the ward'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 ward'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).

Subsection (b)(6), which is new to the Act, requires that the court be informed whenever there is a change in the custodial dwelling or address of the ward. 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 3.3.14 "Reports by the Guardian" (1993). Keeping the court informed of the minor ward's location will enable the court to exercise appropriate oversight of the guardianship. If the ward 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 208(b)(2), which requires the permission of the court before the ward may be relocated to another state.

This section is based on UGPPA (1982) Section 2-109(a)-(b) (UPC Section 5-209(a)-(b) (1982)).

SECTION 208. POWERS OF GUARDIAN.

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

(b) A guardian may:

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

(2) if otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling, but may only establish or move the ward's custodial dwelling outside the state upon express authorization of the court;

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

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

(5) consent to the marriage of the ward; and

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

(c) The court may specifically authorize the guardian to consent to the adoption of the ward.

Comment

This section should be read with Section 207. Section 207 sets out the duties of the guardian: those responsibilities which a guardian may not ignore. This section 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 207.

Section 207(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, and welfare of the ward. Subsection (b) 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 ward. For these duties, see subsections (b)(2)-(5) of Section 207. The powers of the guardian over the minor ward's property are quite limited, recognizing that a conservator should be appointed or other protective order sought for the minor in appropriate circumstances. The guardian is authorized under subsection (b)(1) to apply for government benefits to which the ward is entitled. Under Section 207(b)(3), the guardian must use those benefits for the ward's support, care, education, health, and welfare. Upon appointment, a guardian should also investigate whether proper application has been made for all governmental benefits to which the ward 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 ward. While a guardian generally has a right to take custody of the ward, 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 move would be in the best interest of the minor ward. 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. Under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, the courts of the former state will generally lose jurisdiction over custody of a minor six months following the minor's removal from the state. 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 the medical or other care, treatment or service for the ward. The guardian may ordinarily make health-care decisions for the ward 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 ward, 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 ward 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 ward. 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 ward on the grounds of the minor ward's religious beliefs.

Under subsection (c), the court may specifically authorize the guardian to consent to the ward's adoption. This section conforms to the requirements of the Uniform Adoption Act (1994) that the guardian be given specific authority from a court in order to consent to the minor ward's adoption. The applicable section of the Uniform Adoption Act (1994), Section 2-101 provides:

(a) The only persons who may place a minor for adoption are:

(2) a guardian expressly authorized by the court to place the minor for adoption.....,

which the comment to that section of the Uniform Adoption Act (1994) then notes is intended to refer to the court supervising the guardianship. This court is chosen because under UGPPA Section 210 the adoption of the ward will have the effect of terminating the guardianship. If the enacting jurisdiction has not enacted the Uniform Adoption Act (1994), the state should verify that subsection (c) is in harmony with the state's existing adoption laws.

Like the adoption of the minor ward, a guardianship also terminates upon the marriage of the ward. But unlike an adoption, the guardian's consent and the court's approval is not necessarily required. Whether such consent is required will depend on the state's laws on the requirements of marriage. But to the extent that the guardian's consent may be necessary, subsection (b)(5) does allow a guardian to consent to the marriage of the ward.

This section is based on UGPPA (1982) Section 2-109(c) (UPC Section 5-209(c) (1982)).

SECTION 209. RIGHTS AND IMMUNITIES OF GUARDIAN.

(a) A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board, and clothing provided by the guardian to the ward, but only as approved by the court. If a conservator, other than the guardian or a person who is affiliated with the guardian, has been appointed for the estate of the ward, reasonable

compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court.

(b) A guardian need not use the guardian's personal funds for the ward's expenses. A guardian is not liable to a third person for acts of the ward solely by reason of the guardianship. A guardian is not liable for injury to the ward resulting from the negligence or act of a third person providing medical or other care, treatment, or service for the ward except to the extent that a parent would be liable under the circumstances.

Comment

Subsection (a) recognizes that a guardian has a right to reasonable compensation. The amount determined to be reasonable may vary from state to state and from one geographical area to another within a state. In addition, factors to be considered by the court in setting compensation will vary. See the comments to Section 417 for a thorough discussion on the factors to be considered by the court in determining compensation.

If there is a conservator appointed, the conservator, without the necessity of prior court approval, may pay the guardian reasonable compensation as well as reimburse the guardian for room, board and clothing the guardian has provided to the ward. However, if the court determines that the compensation paid to the guardian is excessive or the expenses reimbursed were inappropriate, the court may order the guardian to repay the excessive or inappropriate amount to the estate. See Section 417.

Under subsection (b), the guardian has no duty to use the guardian's personal funds for the ward. Nor is a guardian liable for the acts of a third person, including negligent medical care, treatment or service provided to the ward except if a parent would be liable in the same circumstances. The guardian is not liable, just by reason of being the guardian, if the ward harms a third person. The guardian is liable only if personally at fault.

This section is based on subsections (a) and (d) of the 1982 UGPPA Section 2-109 (subsections (a) and (d) of UPC Section 5-209 (1982)).

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

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

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

Comment

Subsection (a) lists the traditional grounds for terminating a guardianship for a minor created by reasons of the minor's age. Guardianships created because the minor is also an incapacitated person are governed by Article 3 and may last into adulthood. While a guardianship terminates upon emancipation of a minor, the grounds of emancipation are left to the state's law on the subject, but in many states a minor is emancipated by marriage, military service, or order of emancipation. Even though the guardianship is terminated, the guardian is still liable for previous acts and the obligation to account for the funds of the ward within the guardian's possession or control. See Section 112.

Subsection (b) can be used to seek termination of the guardianship or to expand or restrict the guardian's powers, in furthering the ward's self-reliance. See Section 206.

Subsection (a) is based on UGPPA (1982) Section 2-210 (UPC Section 5-210 (1982)), but has been broadened to allow termination by any act of emancipation, not merely marriage. Subsection (b) is based on UPC Section 5-212 (1982).

ARTICLE 3
GUARDIANSHIP OF INCAPACITATED PERSON

SECTION 301. APPOINTMENT AND STATUS OF GUARDIAN. A person becomes a guardian of an incapacitated person by a parental or spousal appointment or upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or ward.

Comment

This Article provides for the creation and administration of guardianships for incapacitated persons. The definition of incapacitated person is found in Section 102(5). While an incapacitated person will typically be an adult, appointment can be made for a minor under this Article if the reason for the appointment is an incapacity other than the minor's age. If an appointment is made under this Article for a minor, there is no need to petition for a new guardianship upon the minor's attainment of majority.

This section is new, although it has a counterpart in Section 201. This section recognizes the ability of the spouse or parent of an adult individual who meets the definition of incapacitated person to appoint a guardian by spousal or parental appointment under Section 302, as well as that of the court to appoint a guardian under Section 311. A guardian or the ward can move from the jurisdiction in which the court is located, yet the guardianship will continue until terminated and remains under the court's jurisdiction. See Section 107 regarding transfers of jurisdiction and Section 112 regarding termination of appointments.

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

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

(b) An individual, by will or other signed writing, may appoint a guardian for the individual's spouse who the appointing spouse believes is an incapacitated person, specify

desired limitations on the powers to be given to the guardian, and revoke or amend the appointment before confirmation by the court.

(c) The incapacitated person, the person having care or custody of the incapacitated person if other than the appointing parent or spouse, or the adult nearest in kinship to the incapacitated person may file a written objection to an appointment, unless the court has confirmed the appointment under subsection (d). The filing of the written objection terminates the appointment. An objection may be withdrawn and, if withdrawn, is of no effect. The objection does not preclude judicial appointment of the person selected by the parent or spouse. Notice of the objection must be given to the guardian and any other person entitled to notice of the acceptance of the appointment. The court may treat the filing of an objection as a petition for the appointment of an emergency guardian under Section 312 or for the appointment of a limited or unlimited guardian under Section 304 and proceed accordingly.

(d) Upon petition of the appointing parent or spouse, and a finding that the appointing parent or spouse will likely become unable to care for the incapacitated person within [two] years, and after notice as provided in this section, the court, before the appointment becomes effective, may confirm the appointing parent's or spouse's selection of a guardian and terminate the rights of others to object.

Comment

This section enables a parent or spouse to make an advance appointment of a “standby” guardian whose powers become effective upon the occurrence of certain specified contingencies. The appointment can be made by will or other instrument, which can include a durable power of attorney, a trust instrument or a specific document for the spousal or parental appointment of the guardian. The appointment is temporary. Section 303(e) requires that a guardian appointed under this section seek court confirmation no more than 30 days following the filing of notice of acceptance of office.

Sections 302 and 303 together are comparable to the standby guardianship provisions for minors in Section 202. The provisions for incapacitated persons are more tentative, since adults,

unlike minors, are presumed to have the legal capacity to make their own decisions. For this reason, an appointment under this section is easily terminable. See subsection (c). Also, an appointment under this section is not a determination of the person's incapacity. See Section 303(g).

Despite these limitations, this section is very useful, especially for parents of developmentally disabled children. For such parents, the need for a guardian for the developmentally disabled child often arises only on the parent's death or other event that necessitates that care be transferred to another. This section, by allowing a guardian of the parent's selection to step in immediately upon the necessitating event, can provide the parents with assurance of mind that care of their children will not be neglected. This section is also useful for a spouse of an individual stricken by Alzheimer's disease, when the spouse no longer is able to care for the Alzheimer's victim.

A parent of an adult unmarried child whom the parent believes is incapacitated may make an appointment under this section as may a spouse for the other spouse whom the appointing spouse believes to be incapacitated. Under subsection (c), the adult disabled child or the incapacitated spouse as well as the person having care or custody of the child or spouse or the adult nearest in kinship have the right to object to the guardian's appointment. If an objection is filed, the guardian's authority terminates, and the guardian must file a petition for appointment of guardian by the court under Section 304. If an objection is withdrawn, it has no effect. An objection does not prohibit the court from appointing the parental or spousal appointee as the guardian.

The appointing spouse or parent may petition the court prior to the triggering event for advance confirmation of the appointment. Advance court confirmation terminates the right to object and the right of the appointing spouse or parent to revoke the appointment. Advance court confirmation is available in situations where the appointment is needed due to the pending incapacity of the appointing spouse or parent. This process provides appointing spouses and parents with peace of mind, knowing that the court has confirmed their selection of guardian.

A petition for advance court confirmation may be made at any time within a recommended two years from the date of likely need, but this time limit is placed in brackets to indicate that the enacting jurisdiction is free to select a different period. Depending on the length of time set by the enacting states, courts may need to show flexibility regarding the time limit. It may be difficult for the appointing spouse or parent to prove with absolute certainty that the appointing spouse or parent will likely become unable to care for the incapacitated spouse or the adult disabled child within the stated period of time. Courts should liberally construe this provision in favor of the appointing spouse or parent. For this reason, subsection (d) does not require absolute certainty, only that the need for a guardian within the specified time frame is "likely." If the court confirms the guardian in advance and the stated deadline (two years) has passed without the guardian's filing the acceptance of appointment required under Section 303(b), the court should hold a hearing to determine the status of the appointing spouse or parent and whether the advance confirmation should continue.

Unless otherwise specified in this section, the other provisions of this Act, including the provisions relating to the duties and powers of guardians, apply to a guardian appointed by a will

or other writing.

This section is based on UGPPA (1982) Section 2-201 (UPC Section 5-301 (1982)). However, the 1982 UGPPA did not require court confirmation of the appointment.

SECTION 303. APPOINTMENT OF GUARDIAN BY WILL OR OTHER WRITING: EFFECTIVENESS; ACCEPTANCE; CONFIRMATION.

(a) The appointment of a guardian under Section 302 becomes effective upon the death of the appointing parent or spouse, the adjudication of incapacity of the appointing parent or spouse, or a written determination by a physician who has examined the appointing parent or spouse that the appointing parent or spouse is no longer able to care for the incapacitated person, whichever first occurs.

(b) A guardian appointed under Section 302 becomes eligible to act upon the filing of an acceptance of appointment, which must be filed within 30 days after the guardian's appointment becomes effective. The guardian shall:

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

(2) give written notice of the acceptance of appointment to the appointing parent or spouse if living, the incapacitated person, a person having care or custody of the incapacitated person other than the appointing parent or spouse, and the adult nearest in kinship.

(c) Unless the appointment was previously confirmed by the court, the notice given under subsection (b)(2) must include a statement of the right of those notified to terminate the appointment by filing a written objection as provided in Section 302.

(d) An appointment effected by filing the guardian's acceptance under a will probated in the state of the testator's domicile is effective in this state.

(e) Unless the appointment was previously confirmed by the court, within 30 days after filing the notice and the appointing instrument, a guardian appointed under Section 302 shall file a petition in the court for confirmation of the appointment. Notice of the filing must be given in the manner provided in Section 309.

(f) The authority of a guardian appointed under Section 302 terminates upon the appointment of a guardian by the court or the giving of written notice to the guardian of the filing of an objection pursuant to Section 302, whichever first occurs.

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

(h) The powers of a guardian who timely complies with the requirements of subsections (b) and (e) relate back to give acts by the guardian which are of benefit to the incapacitated person and occurred on or after the date the appointment became effective the same effect as those that occurred after the filing of the acceptance of appointment.

Comment

The appointment of a guardian for an incapacitated person by will or other writing becomes effective on the first to occur of: the death of the appointing parent or spouse; adjudication of incapacity of that parent or spouse; or a written determination by a doctor who has examined the appointing parent or spouse that the appointing parent or spouse can no longer care for the adult disabled child or the incapacitated spouse.

The guardian's authority terminates upon the timely filing of an objection or upon the appointing parent or spouse regaining the ability to care for the incapacitated person, or if a guardian is appointed for the incapacitated person.

Within 30 days of the contingency giving rise to the guardianship, the guardian must file a notice of acceptance of appointment along with the appointing instrument. If the appointment was not previously confirmed by the court, the guardian also must give written notice of the acceptance and of the right to file an objection to the appointing parent or spouse, if living, the

incapacitated person for whom the appointment was made, the person having care or custody of the incapacitated person, if other than the appointing parent or spouse, and to an adult nearest in kinship.

Subsection (e) requires that the guardian file for confirmation of the appointment no more than 30 days following the filing of the notice of acceptance. Also, because an appointment under Sections 302 and 303 is based on a belief as to the person's incapacity, in seeking confirmation of the appointment by the court, the regular procedures for the appointment of a guardian will apply. See Sections 304 through 310.

The petition for confirmation of appointment to be filed by a guardian must comply with the requirements of Section 304 but should be tailored to reflect the special circumstances of the prior parental or spousal appointment. The petition should include: the name and address of the incapacitated spouse or the adult disabled child, the identity and whereabouts of the adult children of the incapacitated spouse, if any, or if none, then the living parents of the incapacitated spouse, if any, or if none, then the living siblings of the incapacitated spouse; the living parents, if any, or if none, the living siblings of the adult disabled child; all persons serving as guardian; the petitioner's name and address, relationship to the married couple or to the parent and the adult disabled child, interest in the appointment, and a statement of the petitioner's willingness to serve; any limitations placed by the appointing spouse or parent on the powers of the appointed guardian; information about the petitioner; and reasons why the appointment should be confirmed.

The petition should also indicate any limitations placed on the appointed guardian and the powers to be given to the guardian, and if an unlimited guardianship, why a limited guardianship would not work. The petition should be accompanied by a death certificate, an order of adjudication of incapacity or a written statement by the physician who has examined the appointing spouse or parent that the appointing spouse or parent is no longer able to care for the incapacitated spouse or the adult disabled child. The written statement should be made by the treating physician of the appointing parent or spouse and the statement should include the prognosis and diagnosis for the spouse or parent as well as the date of the physician's examination of the appointing parent or spouse. The petition should be accompanied by a copy of the appointing instrument, as well as any other relevant documents. If the selection as guardian was previously confirmed pursuant to Section 302(d), a copy of the order of confirmation should accompany the required notice.

In the hearing on the petition for confirmation, if the court finds that the appointing spouse or parent will not regain the ability to care for the incapacitated spouse or adult disabled child, the court should enter an order confirming the appointment, absent evidence rebutting the presumption of appointment. If the court finds that the appointing spouse or parent may regain ability to care for the incapacitated spouse or adult disabled child, the court should enter an order confirming the appointment for a period of time deemed appropriate by the court. An order of confirmation cuts off the rights of others, including the incapacitated adult or the adult disabled child, to object.

The determination of whether the parental or spousal appointment should be converted

into a regular guardianship should be made as soon as possible. The court should develop procedures for monitoring the conversions.

Subsection (h) provides that the timely performance of the requirements for the guardian's acceptance of office relate back to give any acts performed between the appointment becoming effective and the guardian's filing of the notice of acceptance the same effect as those occurring after the filing of the notice of acceptance, as long as those prior acts are beneficial to the incapacitated person. In the event of a dispute regarding whether a guardian's prior act should be validated, the court first determines whether the act was beneficial to the incapacitated person, and if the court determines that the act was beneficial, then subsection (h) will apply.

SECTION 304. JUDICIAL APPOINTMENT OF GUARDIAN: PETITION.

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

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

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

(2) the name and address of the respondent's:

(A) spouse, or if the respondent has none, an adult with whom the respondent has resided for more than six months before the filing of the petition; and

(B) adult children or, if the respondent has none, the respondent's parents and adult brothers and sisters, or if the respondent has none, at least one of the adults nearest in kinship to the respondent who can be found;

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

the respondent;

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

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

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

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

(8) if an unlimited guardianship is requested, the reason why limited guardianship is inappropriate and, if a limited guardianship is requested, the powers to be granted to the limited guardian; and

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

Comment

This section lists the information that must be contained in the petition for appointment of a guardian. Although the section allows a prospective ward to petition for appointment of a guardian, the court should scrutinize such a petition closely to confirm that the petition is truly voluntary, and that the petitioner has the requisite capacity to file a petition. Normally, in such a case it would be better for the individual to execute a durable power of attorney.

Specifying the required contents of the petition is in accordance with the recommendations of both the Wingspread conference on guardianship reform and the Commission on National Probate Court Standards. See *Guardianship: An Agenda For Reform* 9 (A.B.A. 1989); National Probate Court Standards, Standard 3.3.1, "Petition" (1993)

Subsections (b)(2)-(6) require the listing in the petition of family members and others who may have information useful to the court and to whom notice of the proceeding must be given under Section 309(b). 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 spouse or, if none, then an adult with whom the respondent has resided for more than six months before the petition is filed. Included among the persons with whom the respondent may have resided are domestic partners and companions. Note that there is no requirement that the respondent have resided for more than six months *immediately prior* to the filing of the petition, just that the requirement have been met at some point in time before the petition was filed. In applying this provision, the court should focus on the purpose of this provision—*i.e.*, to obtain a list of persons who likely have a significant interest in the respondent’s welfare. Courts should use a reasonableness standard so that the petitioner does not have to give the name of every person with whom the respondent has resided in the respondent’s entire life and whose current interest in the respondent’s welfare may be quite remote. Also, in interpreting what is meant by “resided,” the closeness of the relationship to the respondent should be taken into account—for example, the on-site manager of a 50-apartment complex whose contact with the respondent was limited to collecting the rent should not be considered as fitting within the definition. However, for a nursing home resident, the term might include her best friend who resides on the next floor.

Courts should consider whether they wish to exclude persons providing care for a fee from the class of persons with whom it is considered that the respondent resided. This would limit the application of subsection (b)(2)(A) to individuals with whom the respondent has a close personal relationship, a relative, or to a domestic partner or companion, and would eliminate a professional relationship such as that of a housekeeper, landlord, or owner of a board and care facility. The committee that drafted the Act originally used the language “domestic partner or companion,” and intended to limit the application of this section to the spouse, domestic partner or companion, but at the 1997 Annual Meeting of the Uniform Law Commissioners, where this Act was approved, this phrase was replaced by the phrase “with whom the respondent has resided for more than six months.” The intent behind this amendment was not to substantially broaden the concept but only to expand it to include other individuals who have had an enduring relationship with the respondent for at least a six-month period and who, because of this relationship, should be given notice.

Subsection (b)(2)(B) 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, a relative of the nearest degree in which a relation can be found. However, if 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.

Under subsection (b)(4), if the respondent has a legal representative, the representative’s name and address must be included in the petition. A “legal representative” is defined in Section 102(6). Notice to such representative, as required by Section 309(b), is especially critical for ascertaining whether a guardianship is really necessary. For example, the court may conclude that there is no need to appoint a guardian if a guardian has already been appointed elsewhere or the respondent has executed a durable power of attorney with authority in the agent to make health and personal care decisions.

Subsection (b)(8) emphasizes the importance of limited guardianship, the encouragement of which is a major theme of the Act. The petitioner, when requesting an unlimited

guardianship, must state in the petition why a limited guardianship would not work. If a limited guardianship is requested, the petition must set out the recommended powers to be 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 as detailed as possible to enable the visitor to expeditiously complete the required report, see Section 305, and to enable the court to determine whether a protective order will be needed. See Section 311.

**SECTION 305. JUDICIAL APPOINTMENT OF GUARDIAN: PRELIMINARIES
TO HEARING.**

(a) Upon receipt of a petition to establish a guardianship, the court shall set a date and time for hearing the petition and appoint a [visitor]. The duties and reporting requirements of the [visitor] are limited to the relief requested in the petition. The [visitor] must be an individual having training or experience in the type of incapacity alleged.

ALTERNATE PROVISIONS ON APPOINTMENT OF A LAWYER

Alternative A

[(b) The court shall appoint a lawyer to represent the respondent in the proceeding if:

- (1) requested by the respondent;
- (2) recommended by the [visitor]; or
- (3) the court determines that the respondent needs representation.]

Alternative B

[(b) Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to represent the respondent in the proceeding.]

End of Alternatives

(c) The [visitor] shall interview the respondent in person and, to the extent that the respondent is 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, and the general powers and duties of a guardian;

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

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

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, will be paid from the respondent's estate.

(d) In addition to the duties imposed by subsection (c), the [visitor] shall:

(1) interview the petitioner and the proposed guardian;

(2) visit the respondent's present dwelling and any dwelling in which the respondent will live if the appointment is made;

(3) obtain 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

(4) make any other investigation the court directs.

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

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

(2) a summary of daily functions the respondent can manage without

assistance, could manage with the assistance of supportive services or benefits, including use of appropriate technological assistance, and cannot manage;

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

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

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

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

(7) any other matters the court directs.

Legislative Note: *Those states that enact Alternative B of subsection (b) which requires appointment of counsel for the respondent in all proceedings for appointment of a guardian should not enact subsection (e)(1).*

Comment

Alternative provisions are offered for subsection (b). Alternative A was favored by the drafting committee. Alternative A relies on an expanded role for the “visitor,” who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues. Appointment of a lawyer, 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 B is derived from UGPPA (1982) Section 2-203 (UPC Section 5-303). It is expected that in states enacting Alternative A of subsection (b), counsel will be appointed in virtually all of the cases. However, the A.B.A. Commission on Legal Problems of the Elderly attached great significance to expressly making appointment of counsel “mandatory.” Therefore, for states which wish to provide for “mandatory appointment” of counsel, Alternative B should be enacted.

In Alternative A for subsection (b), then, appointment of counsel for an unrepresented respondent is mandated when requested by the respondent, when recommended by the visitor, or when the court determines the respondent needs representation. This requirement is in accord with the National Probate Court Standards. National Probate Court Standards, Standard 3.3.5 “Appointment of Counsel” (1993), 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.

Alternative A of subsection (b) follows the National Probate Court Standards, Standard 3.3.5(a)(1) through (a)(3). Alternative B perhaps may be said to be in accord with the National Probate Court Standards, Standard 3.3.5(a)(4).

The drafting committee for this Act debated at length whether to mandate appointment of counsel or to expand the role of the visitor. The drafting committee concluded that as between the two, the visitor may be more helpful to the court in providing information on a wider variety of issues and concerns, by acting as the eyes and ears of the court as well as determining the respondent’s wishes and conveying them to the court. The committee was concerned that including mandatory appointment of counsel would cause many to view this Act as a “lawyer’s bill” and thus severely handicap the Act’s acceptance and adoption. It is the intent of the committee that counsel for respondent be appointed in all but the most clear cases, such as when the respondent is clearly incapacitated.

For jurisdictions enacting Alternative A under subsection (b), the visitor needs to be especially sensitive to the fact that if the respondent is incapacitated, then the respondent may not have sufficient capacity to intelligently and knowingly waive appointment of counsel. A court should err on the side of protecting the respondent’s rights and appoint counsel in most cases.

Appointment of a visitor is mandatory (subsection (a)), regardless of which alternative is enacted under subsection (b). The visitor serves as the information gathering arm of the court. The visitor can be a physician, psychologist, or other individual qualified to evaluate the alleged impairment, such as a nurse, social worker, or individual with pertinent expertise. It is imperative that the visitor have training or experience in the type of incapacity alleged. The visitor must individually meet with the respondent, the petitioner and the proposed guardian. The visitor’s report must contain information and recommendations to the court regarding the appropriateness of the guardianship, whether lesser restrictive alternatives might meet the respondent’s needs, recommendations about further evaluations, powers to be given the guardian, and the appointment of counsel. If the petition is withdrawn prior to the appointment of the visitor, no appointment of the visitor is necessary.

NATIONAL PROBATE COURT STANDARDS, Standard 3.3.4 “Court Visitor” (1993) provides:

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

The visitor must visit the respondent in person and explain a number of items to the respondent to the extent the respondent can understand. If the respondent does not have a good command of the English language, then the visitor should be accompanied by an interpreter. The drafters did not mandate that the visitor be able to speak the respondent’s primary language, but good practice and due process protections dictate the use of interpreters when needed for the respondent to understand. The phrase “to the extent that the respondent is able to understand” is a recognition that some respondents may be so impaired that they are unable to understand. If assistive devices are needed in order for the visitor to explain to the respondent in a manner necessary so that the respondent can understand, then the visitor should use those assistive devices. The visitor is also charged with confirming compliance with the Americans With Disabilities Act when visiting the respondent’s dwelling and the proposed dwelling in which it is expected that the respondent will reside.

Subsection (c)(4) puts the respondent on notice that if the respondent has an estate, costs and expenses are paid from the estate, including attorney’s fees and visitor’s fees. If there is an estate, those entitled to compensation would be paid from the estate. If there is no estate, those entitled to compensation will ordinarily be compensated by whatever process the enacting state has for indigent proceedings, such as from the county general fund, unless the enacting jurisdiction has made other arrangements. If a conservatorship exists, payment is made pursuant to the procedures provided in Section 417, otherwise the guardian must file a fee petition. See Section 316.

The visitor must talk with the 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 making a determination of whether to grant the petition, since a professional evaluation will no longer be required in every case. See Section 306. If the doctor refuses to talk to the visitor, the visitor may need to seek from the appointing court an order authorizing the release of the information.

The visitor’s report must be in writing and include a list of recommendations or statements. For states enacting Alternative A to subsection (b), if the visitor does not recommend that a lawyer be appointed, the visitor should include in the report the reasons why a lawyer should not be appointed. States enacting this Act should consider developing a checklist for the items enumerated in subsection (e).

“Visitor” is bracketed in recognition that states use and may wish to substitute different words to refer to this position.

SECTION 306. JUDICIAL APPOINTMENT OF GUARDIAN: PROFESSIONAL EVALUATION. At or before a hearing under this [article], the court may order a professional evaluation of the respondent and shall order the evaluation if the respondent so demands. If the court orders the evaluation, the respondent must be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment. The examiner shall promptly file a written report with the court. Unless otherwise directed by the court, the report must contain:

- (1) a description of the nature, type, and extent of the respondent's specific cognitive and functional limitations;
- (2) an evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;
- (3) a prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and
- (4) the date of any assessment or examination upon which the report is based.

Comment

Under the 1982 UGPPA, a professional evaluation was mandatory. See UGPPA (1982) Section 2-203(b) (UPC Section 5-303(b) (1982)). This section is a major departure. The court *may* order a professional evaluation but *shall* order the evaluation *only* if the respondent demands it. If an evaluation is ordered, then it must be performed by a professional who is qualified to evaluate the alleged impairment of the respondent. When counsel is appointed, 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. The court still has the ability to order a professional evaluation either on the visitor's recommendation or on its own motion. Although a reading of this section may leave the impression that a professional evaluation will be ordered sparingly, the converse is true. A court should order a professional evaluation any time it is not absolutely clear, based on its own assessment or on the visitor's report, that the respondent is incapacitated. Further, by providing the court with an expert evaluation of the respondent's abilities and limitations, the professional evaluation will be crucial to the court in establishing a limited guardianship.

The evaluation of the respondent's physical and mental condition referred to in paragraph

(2) should include a summary of the consultation with the respondent's treating physician. Even though the visitor's report required by Section 305 may contain information from the treating physician, it is crucial for the accuracy of the evaluation that the professional evaluator consult about the respondent's treatment, and include in the evaluation a summary of the information received and relied upon and the date of the consultation.

SECTION 307. CONFIDENTIALITY OF RECORDS. The written report of a [visitor] and any professional evaluation are confidential and must be sealed upon filing, but are available to:

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

Comment

This section is new, although a number of states have a comparable provision. This section is designed to protect the respondent's privacy, but still make records accessible when needed, to any of the involved parties or to others on a showing of good cause. The drafting committee recognized that the media and "watch-dog" groups perform essential functions of deterring abuse and facilitating reform, and in drafting this provision balanced the need to protect the respondent's privacy with the need to access to the information.

SECTION 308. JUDICIAL APPOINTMENT OF GUARDIAN: PRESENCE AND RIGHTS AT HEARING.

(a) Unless excused by the court for good cause, the proposed guardian shall attend the hearing. The respondent shall attend and participate in the hearing, unless excused by the court for good cause. The respondent may present evidence and subpoena witnesses and documents; examine witnesses, including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the [visitor]; and otherwise

participate in the hearing. The hearing may be held in a location convenient to the respondent and may be closed upon the request of the respondent and a showing of good cause.

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

Comment

The proposed guardian is required to attend the hearing, although the court may excuse the proposed guardian's attendance on a showing of good cause. This provision is based on a recommendation from National Probate Court Standards, Standard 3.3.8(c), "Hearing" (1993). The guardian's presence at the hearing gives the court the opportunity to determine the guardian's appropriateness for appointment and to make any other inquiry of the guardian that the court deems to be appropriate as well as to emphasize to the guardian the gravity of the guardian's responsibilities.

Also new is the requirement that the respondent must attend the hearing unless excused by the court on a showing of good cause. The respondent has the right to take an active role in the hearing. There may be instances where circumstances dictate that the court hold the hearing where the respondent is located.

The respondent can request that the hearing be closed, but good cause must again be shown for this to occur. 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 should indicate the extent to which participation will be allowed.

This section contains elements of subsections (c) and (d) of UGPPA (1982) Section 2-303 (subsections (c) and (d) of UPC Section 5-303 (1982)).

SECTION 309. NOTICE.

(a) A copy of a petition for guardianship and notice of the hearing on the petition must be served personally on the respondent. The notice must include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and include a description of the nature, purpose, and consequences of an appointment. A failure to serve the respondent with a notice substantially

complying with this subsection precludes the court from granting the petition.

(b) In a proceeding to establish a guardianship, notice of the hearing must be given to the persons listed in the petition. Failure to give notice under this subsection does not preclude the appointment of a guardian or the making of a protective order.

(c) Notice of the hearing on a petition for an order after appointment of a guardian, together with a copy of the petition, must be given to the ward, the guardian, and any other person the court directs.

(d) A guardian shall give notice of the filing of the guardian's report, together with a copy of the report, to the ward and any other person the court directs. The notice must be delivered or sent within 14 days after the filing of the report.

Comment

Personal service of the petition and notice of hearing on the respondent is required. A failure to personally serve the respondent is jurisdictional, as is a notice that does not substantially comply with the requirements of subsection (a). Notice of hearing must be given to the persons who are listed in the petition but failing to give notice to those listed (other than the respondent) is not jurisdictional.

Subsection (c) addresses the notice requirements on hearings on petitions for orders subsequent to the appointment of a guardian-the ward and the guardian, as well as anyone else the court directs, must be given copies of any notice of hearing and a copy of any petition. This provision, along with subsection (d), requiring that the ward receive a copy of the guardian's report and a copy of the notice of filing of the report, ensures that the ward is kept informed of developments in the guardianship.

The National Probate Court Standards, Standard 3.3.7 "Notice" (1993), provides that the respondent should receive timely notice prior to the hearing and that written notice should be in both plain language and in large type, indicating, at a minimum, the place and time of the hearing, the nature and possible consequences of the hearing, and the respondent's rights. Similar recommendations are contained in the report of the Wingspread conference on guardianship reform, which also recommends, in line with Section 113 of this Act, that the respondent be given at least 14 days notice of hearing on a petition for the appointment of a guardian. See *Guardianship: An Agenda for Reform 9-12* (A.B.A. 1989).

This section is based on UGPPA (1982) Section 2-204 (UPC Section 5-304 (1982)).

SECTION 310. WHO MAY BE GUARDIAN: PRIORITIES.

(a) Subject to subsection (c), the court in appointing a guardian shall consider persons otherwise qualified in the following order of priority:

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

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

(3) an agent appointed by the respondent under [a durable power of attorney for health care] [the Uniform Health-Care Decisions Act (1993)];

(4) the spouse of the respondent or an individual nominated by will or other signed writing of a deceased spouse;

(5) an adult child of the respondent;

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

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

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

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

Comment

This section gives top priority for appointment as guardian to existing guardians appointed elsewhere, to the respondent's nominee for the position, and to the respondent's agent, in that order. Existing guardians are granted a first priority for two reasons. First, many of these 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 the right to the 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 (b) permits the court to pass over the existing guardian and appoint another with or without priority. While an existing guardian is generally granted a first priority for appointment, a temporary substitute and an emergency guardian are excluded from priority because of the short-term nature of their involvement.

A guardian or individual nominated by the respondent or the agent named in the respondent's health care power of attorney has priority for appointment over the respondent's relatives. The nomination may include anyone nominated orally at the hearing, if the respondent has sufficient capacity at the time 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 durable power of attorney, the section grants such an agent a preference even in the absence of a specific nomination. The agent is granted a preference 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, Sections 304(b)(4) and 309(b) require that the agent receive notice of the proceeding. Also, until the court has acted to approve the revocation of that authority, Section 316(c) provides that the authority of an agent for health-care decisions takes precedence over that of the guardian.

Subsection (a)(7) gives a seventh-level preference to a domestic partner or companion or an individual who has a close, personal relationship with the respondent. Note that there is no requirement that the respondent had resided with the adult for more than six months *immediately prior* to the filing of the petition, just that the requisite residency have occurred at some point in time before the petition is filed. Courts should use a reasonableness standard in applying this subsection so that priority is given to someone with whom the respondent has had a close, enduring relationship. For factors to consider in making this determination, see the comment to Section 304, which discusses the interpretation of the phrase "an adult with whom the respondent has resided for more than six months before the filing of the petition" within the context of the persons required to be listed in the petition for appointment. Note that although the phrase can be interpreted quite broadly, it is intended to be descriptive of those individuals who have had an enduring relationship with the respondent for at least a six month period and who, because of this relationship, should be given a priority for consideration as guardian.

Subsection (c) prohibits anyone affiliated with a long-term care institution at which the respondent is receiving care from being appointed as guardian absent a blood, marital or

adoptive relationship. Strict application of this subsection is crucial to avoid a conflict of interest and to protect the ward. Each state enacting the Act needs to insert the particular term or terms used in the state for those facilities considered to be long-term care institutions.

A professional guardian, including a public agency or nonprofit corporation, was specifically not given priority for appointment as guardian because those given priority are limited to individuals with whom the ward has a close relationship. The committee which drafted the Act recognized the valuable service that a professional guardian, a public agency or nonprofit corporation provides. A professional guardian can still be appointed guardian if no one else with priority is available and willing to serve or if the court, acting in the respondent's best interest, declines to appoint a person having priority. A public agency or nonprofit corporation is eligible to be appointed guardian as long as it can provide an active and suitable guardianship program and is not otherwise providing substantial services or assistance to the respondent, but is not entitled to statutory priority in appointment as guardian.

This section is based on UGPPA (1982) Section 2-205 (UPC Section 5-305 (1982)).

SECTION 311. FINDINGS; ORDER OF APPOINTMENT.

(a) The court may:

(1) appoint a limited or unlimited guardian for a respondent only if it finds

by clear and convincing evidence that:

(A) the respondent is an incapacitated person; and

(B) the respondent's identified needs cannot be met by less

restrictive means, including use of appropriate technological assistance; or

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

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

(c) Within 14 days after an appointment, a guardian shall send or deliver to the

ward and to all other persons given notice of the hearing on the petition a copy of the order of appointment, together with a notice of the right to request termination or modification.

Comment

A guardian may be appointed only when no less restrictive alternative will meet the respondent's identified needs. The clear and convincing evidence standard for the appointment of a guardian is new to the Act, but mandated by the Constitution and strongly recommended by many commentators on guardianship. See, e.g., *Sabrosky v. Denver Dep't Social Services*, 781 P.2d 106 (Colo. Ct. App. 1989); *In re Guardianship of Reyes*, 731 P.2d 130 (Ariz. Ct App. 1986); *In re Estate of Boyer*, 636 P.2d 1085 (Utah 1981), all three of which involve the interpretation of the predecessor version of this Act. See also *Guardianship: An Agenda for Reform 16* (A.B.A. 1989).

The use of limited guardianship is emphasized in this section. If a guardian is to be appointed, the guardian shall be given only those powers needed to meet the ward's needs and limitations. The court must specify the powers granted to the guardian and the limits on the incapacitated person's rights. The Act'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 those powers as are necessary. The concept of limited guardianship is also emphasized in the National Probate Court Standards, Standard 3.3.10, "Less Intrusive Alternatives" (1993), requiring a finding of no less intrusive alternative before appointing a guardian and mandating the consideration and utilization of limited guardianships.

If appropriate technological assistance is available to meet the respondent's needs, then the respondent is not an "incapacitated person" within the meaning of Section 102(5) and no guardianship may be established. The drafting committee discussed whether to put any modification or limitation on the technological assistance, such as that which is reasonably available or a limitation on availability based on cost. Given the importance of the respondent's rights, the committee decided to reject any modification or limitation whatsoever on required consideration of technological assistance. Therefore, if appropriate technological assistance exists that can meet the respondent's needs, regardless of the cost, then that assistance must be treated by the court as meeting the respondent's identified needs by a less restrictive means, and the guardianship petition must be denied.

Subsection (a)(2) allows the court to consider the petition as a petition for a protective order and either proceed appropriately under Article 4 or dismiss the Article 3 proceeding. To guarantee the respondent the maximum possible personal liberty, the court should proceed under this subsection whenever it concludes that 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 freedom.

In keeping with the concept of limited guardianship, subsection (c) requires the guardian to provide the ward and all those persons given notice of the hearing a copy of the order of

appointment along with a notice of the right to request a termination or a modification of the guardianship. The reason for requiring notice to persons other than the ward is to make certain that those who were originally notified of the petition will also be notified of the results because they are the ones most likely to have a continuing interest in the ward's welfare. The modification contemplated by this subsection only applies to reduction of the guardian's powers from those originally granted, not their enlargement.

SECTION 312. EMERGENCY GUARDIAN.

(a) If the court finds that compliance with the procedures of this [article] will likely result in substantial harm to the respondent's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the respondent's welfare, may appoint an emergency guardian whose authority may not exceed [60] days and who may exercise only the powers specified in the order. Immediately upon receipt of the petition for an emergency guardianship, the court shall appoint a lawyer to represent the respondent in the proceeding. Except as otherwise provided in subsection (b), reasonable notice of the time and place of a hearing on the petition must be given to the respondent and any other persons as the court directs.

(b) An emergency guardian may be appointed without notice to the respondent and the respondent's lawyer only if the court finds from affidavit or testimony that the respondent will be substantially harmed before a hearing on the appointment can be held. If the court appoints an emergency guardian without notice to the respondent, the respondent must be given notice of the appointment within 48 hours after the appointment. The court shall hold a hearing on the appropriateness of the appointment within [five] days after the appointment.

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

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

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

Comment

There are limited circumstances where there is no one else willing or able to act when following the normal process for appointment of a guardian would, due to the time involved to follow the procedures, likely lead to substantial harm to the respondent's health, safety or welfare. The classic example of when an emergency guardianship is needed is when the respondent needs a medical procedure, lacks capacity to consent, has no health care power of attorney, and no one else is willing or in a position to make the health-care decision. This section of the Act requires appointment of counsel for the respondent.

An emergency guardian may only be appointed without prior notice when there is testimony that the respondent would be immediately and substantially harmed before the hearing on the appointment. In such case, notice must be given within 48 hours and a hearing held within five days. (Section 113 provides the procedures for giving notice.)

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 section or whether to impose different time limits. Five days seems 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.

The NATIONAL PROBATE COURT STANDARDS, Standard 3.3.6 "Emergency Appointment of a Temporary Guardian" (1993), provides:

- (a) Ex parte appointment of a temporary guardian by the probate court should occur only:
 - (1) upon the showing of an emergency;
 - (2) in connection with the filing of a petition for a permanent guardianship;
 - (3) where the petition is set for hearing on the proposed permanent guardianship on an expedited basis; and
 - (4) when notice of the temporary appointment is promptly provided to the respondent.

This Act deviates from the above standard by permitting an emergency guardian to be appointed without the need of filing a petition for a permanent appointment. The drafting committee was concerned that requiring the filing of a petition for a permanent appointment would lend an air of inevitability that a permanent guardian should be appointed. Frequently, the need for an emergency guardian is temporary only and the respondent's long-term needs can be met by mechanisms other than guardianship. Consistent with this, subsection (c) provides that the appointment of an emergency guardian is in no way a finding of incapacity. For purposes of appointing a regular guardian, the same quantum of proof is required whether or not an emergency guardian has been appointed.

Unless stated to the contrary in this section, other sections of this Act apply to an emergency guardian appointed under this section, including the provisions relating to the duties of guardians.

SECTION 313. TEMPORARY SUBSTITUTE GUARDIAN.

(a) If the court finds that a guardian is not effectively performing the guardian's duties and that the welfare of the ward requires immediate action, it may appoint a temporary substitute guardian for the ward for a specified period not exceeding six months. Except as otherwise ordered by the court, a temporary substitute guardian so appointed has the powers set forth in the previous order of appointment. The authority of any unlimited or limited guardian previously appointed by the court is suspended as long as a temporary substitute guardian has authority. If an appointment is made without previous notice to the ward or the affected guardian, the court, within five days after the appointment, shall inform the ward or guardian of the appointment.

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

Comment

This section differs from Section 312 since this section is used when there is a guardian, but the guardian is not discharging the functions of office. The role of the temporary substitute guardian, as the name implies, is to literally fill in for the regular guardian, whose powers are suspended for the duration of the appointment. This section also differs from Section 204(d). A temporary guardian for a minor is appointed under Section 204(d) in situations where there is no guardian, whereas under this section, the temporary substitute guardian is temporarily substituted for another non-performing guardian.

The standard for appointment under this section is that the ward's welfare requires immediate action and that the appointed guardian is not effectively performing the duties of office. This is not the same as the best interest standard applied in the selection of the original guardian. The standard instead invokes the sense of urgency usually involved in these cases, most of which involve possible abuse by the regularly-appointed guardian.

If, at the end of the six months, the ward still needs a guardian, the court should appoint a permanent guardian rather than granting an extension to the temporary substitute guardian. A temporary substitute guardian does not automatically have preference to be appointed as guardian in such cases.

In some cases, circumstances may dictate the appointment of the temporary substitute guardian without notice being given to the ward or current guardian. If that occurs, within five days of the appointment of the temporary substitute guardian, the court must inform either the ward or the guardian. Since the authority of the regularly-appointed guardian is suspended by the appointment of the temporary substitute guardian, the court should make every effort to inform the guardian of the appointment. In keeping with the concept of limited guardianship and empowerment of the ward, the court should also notify the ward of the appointment of the temporary substitute guardian if the ward has the ability to understand.

States adopting this Act 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.

This section is based on UGPPA (1982) Section 2-208(b) (UPC Section 5-308(b) (1982)).

SECTION 314. DUTIES OF GUARDIAN.

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

(b) A guardian shall:

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

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

(3) expend money of the ward that has been received by the guardian for the ward's current needs for support, care, education, health, and welfare;

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

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

(6) inform the court of any change in the ward's custodial dwelling or address.

Comment

Under Section 2-209 of the 1982 UGPPA (UPC Section 5-309 (1982)), the guardian of an incapacitated person was simply granted the powers of guardian of a minor. . As a result of the 1997 revision, this and the sections which follow now list the guardian's powers and duties in detail instead of referring to the provisions on minor's guardianship. The general duty of the guardian of an incapacitated person, as expressed in subsection (a), also differs significantly from that for a guardian of a minor.

Subsection (a) sets out the guardian's reasonable standard of care. Subsection (b), and Sections 315 and 316 are in substantial part expansions on the fundamental responsibilities stated in subsection (a), specifying subsidiary duties and the powers and immunities necessary to properly implement this role. For a discussion of the duties listed in subsection (b), see the comment to Section 207.

Subsection (a) emphasizes the importance of the concept of limited guardianship by directing that the guardian only exercise the authority needed due to the ward's limitations. In the 1982 UGPPA, the phrase "encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's mental and adaptive limitations" was used as a standard to encourage the use of limited guardianships. That phrase may still be useful for courts in tailoring a guardianship to the needs of the incapacitated person. The guardian is admonished to encourage the ward's participation in decisions and in developing or regaining capacity to act without a guardian. The ward's personal values and expressed desires, whether past or present, are to be considered when making decisions. Although the guardian only need consider the

ward's desires and values "to the extent known to the guardian," that phrase should not be read as an escape or excuse for the guardian. Instead, the guardian needs to make an effort to learn the ward's personal values and ask the ward about the ward's desires before the guardian makes a decision. Subsection (a) requires the guardian to act in the ward's best interest. In determining the best interest of the ward, the guardian should again consider the ward's personal values and expressed desires.

In furtherance of the limited guardianship and least restrictive alternative concepts, subsection (b)(5) requires the guardian to immediately notify the court if the ward's condition has improved, so that the ward may have rights restored. The guardian is *not* to wait until the next reporting period.

SECTION 315. POWERS OF GUARDIAN.

(a) Except as otherwise limited by the court, a guardian may:

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

(2) if otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling, but may only establish or move the ward's place of dwelling outside this state upon express authorization of the court;

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

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

(5) consent to the marriage[or divorce] of the ward; and

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

(b) The court may specifically authorize the guardian to consent to the adoption of the ward.

Comment

Subsection (a)(1) authorizes the guardian to apply for or receive the ward's government benefits. Subsection (a)(2) prohibits the guardian from moving the ward out of state without the court's prior express authorization. This provision should be strictly applied for the protection of the ward and to prevent forum shopping.

Although subsection (a)(4) gives the guardian the power to consent to medical treatment, the guardian must ascertain whether a health care directive is in effect. If there is a valid health-care power of attorney, 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 on court order. See Section 316(c). If the health-care directive does not appoint an agent, the guardian may proceed to make a health-care decision but must follow the ward's wishes as expressed in the directive.

Additionally, statutes in many states prohibit a guardian from consenting to certain procedures without prior court order or without first complying with detailed statutory requirements, especially procedures which implicate the incapacitated person's constitutional rights. For example, a guardian may not commit a ward to a mental health-care institution without following the state's statute on civil commitment. See Section 316(d). There may be similar requirements regarding a guardian's consent to electroconvulsive therapy (ECT) or other shock treatment, experimental treatment, sterilization, forced medication with psychotropic drugs, or abortion.

The phrase "or divorce" in subsection (a)(5) is placed in brackets in recognition of the split among the jurisdictions over whether a guardian has power to initiate a divorce for the ward. Jurisdictions that do not allow the guardian to initiate a divorce generally base that policy on the very personal nature of marriage. Enacting states that have not yet addressed this issue should decide whether to give the guardian the power. Statutes dealing with the dissolution of marriage should be reviewed to determine whether this issue is addressed.

Consistent with the Act's encouragement of limited guardianship, subsection (a)(6) gives the guardian the power, if reasonable under the circumstances, to delegate certain decision making responsibility to the ward.

Subsection (b) provides the guardian with the authority to consent to the ward's adoption only on express authorization of the court. There may be circumstances when it would be appropriate for the ward, even though an adult, to be adopted by another.

SECTION 316. RIGHTS AND IMMUNITIES OF GUARDIAN; LIMITATIONS.

(a) A guardian is entitled to reasonable compensation for services as guardian

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

(b) A guardian need not use the guardian's personal funds for the ward's expenses. A guardian is not liable to a third person for acts of the ward solely by reason of the relationship. A guardian who exercises reasonable care in choosing a third person providing medical or other care, treatment, or service for the ward is not liable for injury to the ward resulting from the wrongful conduct of the third party.

(c) A guardian, without authorization of the court, may not revoke a power of attorney for health care [made pursuant to the Uniform Health-Care Decisions Act (1993)] of which the ward is the principal. If a power of attorney for health care [made pursuant to the Uniform Health-Care Decisions Act (1993)] is in effect, absent an order of the court to the contrary, a health-care decision of the agent takes precedence over that of a guardian.

(d) A guardian may not initiate the commitment of a ward to a [mental health-care] institution except in accordance with the state's procedure for involuntary civil commitment.

Comment

Subsection (a) recognizes that a guardian has a right to reasonable compensation. The amount determined to be reasonable may vary from state to state and from one geographical area to another within a state. In addition, factors to be considered by the court in setting compensation will vary. See the comments to Section 417 for a thorough discussion on the factors to be considered by the court in determining compensation.

If there is a conservator appointed, the conservator, without the necessity of prior court approval, may pay the guardian reasonable compensation as well as reimburse the guardian for

room, board and clothing the guardian has provided to the ward. However, if the court determines that the compensation paid to the guardian is excessive or the expenses reimbursed were inappropriate, the court may order the guardian to repay the excessive or inappropriate amount to the estate. See Section 417. If there is no conservator, the guardian must file a fee petition.

Under subsection (b), the guardian has no duty to use the guardian's personal funds for the ward. Nor is a guardian liable for the acts of a third person, including negligent medical care, treatment or service provided to the ward except if a parent would be liable in the same circumstances. The guardian is not liable, just by reason of being guardian, if the ward harms a third person. The guardian is liable only if personally at fault.

If the ward had made a power of attorney for health care, the guardian cannot revoke it without court order. Further, the agent's decision takes priority over that of the guardian unless the power of attorney has been revoked. For states which have enacted the Uniform Health-Care Decisions Act (1993), a "mental health-care institution" includes those institutions or treatment facilities defined in the state's version of that Act. Commitment by a guardian to a mental health-care institution may not occur without following the state's procedures for civil commitment. Although a guardian may not commit a ward to a mental health-care institution, 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.

SECTION 317. REPORTS; MONITORING OF GUARDIANSHIP.

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

- (1) the current mental, physical, and social condition of the ward;
- (2) the living arrangements for all addresses of the ward during the reporting period;
- (3) the medical, educational, vocational, and other services provided to the ward and the guardian's opinion as to the adequacy of the ward's care;
- (4) a summary of the guardian's visits with the ward and activities on the ward's behalf and the extent to which the ward has participated in decision-making;

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

(6) plans for future care; and

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

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

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

Comment

Under subsection (a), the report must contain the current mental, physical and social condition of the ward. Letters from the treating physician should accompany the report. Emphasizing the importance of limited guardianship, even if no limited guardian was appointed, subsections (a)(4), (6), and (7) require the guardian to report information regarding the ward's participation in decisions, future care plans and the need for continuing the guardianship. Compliance with subsection (a)(7) should not be read as relieving the guardian of the duty under Section 314(b)(5) to immediately notify the court that the ward's condition has changed.

Each state enacting the Act should establish a system for monitoring guardianships, which would include, but not be limited to, mechanisms for assuring that annual reports are timely filed and reviewed. An independent monitoring system is crucial for a court to adequately safeguard against abuses in the guardianship cases. Monitors can be paid court personnel, court appointees or volunteers. For a comprehensive discussion of the various methods for monitoring guardianships, see Sally Balch Hurme, *Steps to Enhance Guardianship Monitoring* (A.B.A.1991).

The National Probate Court Standards also provide for the filing of reports and procedures for monitoring guardianships. See National Probate Court Standards, Standards 3.3.14 "Reports by the Guardian," and 3.3.15 "Monitoring of the Guardian" (1993). The National Probate Court Standards additionally contain recommendations relating to the need for periodic review of guardianships and sanctions for failures of guardians to comply with reporting requirements. See National Probate Court Standards, Standards 3.3.16 "Reevaluation of Necessity for Guardianship," and 3.3.17 "Enforcement."

SECTION 318. TERMINATION OR MODIFICATION OF GUARDIANSHIP.

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

(b) On petition of a ward, a guardian, or another person interested in the ward's welfare, the court may terminate a guardianship if the ward no longer needs the assistance or protection of a guardian. The court may modify the type of appointment or powers granted to the guardian if the extent of protection or assistance previously granted is currently excessive or insufficient or the ward's capacity to provide for support, care, education, health, and welfare has so changed as to warrant that action.

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

Comment

If the ward's condition changes so that the guardian believes that the ward is capable of exercising some or all of the rights that were previously removed, Section 314(b)(5) requires the guardian to immediately notify the court and not wait until the due date of the next report to be filed under Section 317.

Subsection (b) can be used by the court not only to terminate a guardianship but also to remove powers or add powers granted to the guardian.

Subsection (c) requires the court in terminating a guardianship to follow the same procedures to safeguard the ward's rights as apply to a petition for appointment of a guardian. This includes the appointment of a visitor and, in appropriate circumstances, counsel.

Although clear and convincing evidence is required to establish a guardianship, the petitioner need only present a prima facie case for termination. Once the petitioner has made out a prima facie case, the burden then shifts to the party opposing the petition to establish by clear and convincing evidence that continuation of the guardianship is in the best interest of the ward.

Given the constriction on rights involved in a guardianship, the burden of establishing a guardianship should be greater than that for restoring rights. In determining whether it is in the ward's best interest for the guardianship to continue, every effort should be made to determine the ward's wishes and expressed preferences regarding the termination of the guardianship. In determining the best interest of the ward, the ward's personal values and expressed desires should be considered.

To initiate proceedings under this section, the ward or person interested in the ward's welfare need not present a formal document prepared with legal assistance. A request to the court may always be made informally.

Unlike the 1982 UGPPA, this Act does not limit the frequency with which petitions for termination may be made to the court, preferring instead to leave that issue up to general statutes and rules addressing court management in general. Compare UPC Section 5-311(b) (1982).

Termination of the guardianship does not relieve the guardian of liability for prior acts. See Section 112.

ARTICLE 4
PROTECTION OF PROPERTY OF PROTECTED PERSON

SECTION 401. PROTECTIVE PROCEEDING. Upon petition and after notice and hearing, the court may appoint a limited or unlimited conservator or make any other protective order provided in this [article] in relation to the estate and affairs of:

(1) a minor, if the court determines that the minor owns money or property requiring management or protection that cannot otherwise be provided or has or may have business affairs that may be put at risk or prevented because of the minor's age, or that money is needed for support and education and that protection is necessary or desirable to obtain or provide money; or

(2) any individual, including a minor, if the court determines that, for reasons other than age:

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

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

Comment

This section sets out the basic standard for appointment of a conservator or entry of another protective order. Paragraph (1) states the standard for minors for orders entered by reason of the minor's age. Paragraph (2), while principally focused on the standard for adults, also applies to a protective order entered for a minor for reasons other than the minor's age. A

conservatorship created for a minor for reasons other than age need not terminate at age eighteen. See Section 431(a).

This section continues the emphasis on limiting assistance expressed in Article 3 by providing that conservatorship includes both limited and unlimited conservatorships. This Article, like Article 3, encourages the court to appoint a limited conservator whenever possible.

Note the differing evidentiary standards contained in subparagraphs (A) and (B) of paragraph (2). Paragraph (2) establishes a two-part test for the entry of a protective order for an adult, or for a minor for reasons other than age. First, unless it is alleged that the respondent is missing or is an absentee or detainee, the petitioner must show by clear and convincing evidence that the respondent has an impairment and that as a result of the impairment, the respondent is unable to manage the respondent's property and business affairs even with appropriate technological assistance. In addition, the petitioner must show, by a preponderance of evidence, that the respondent's property will be dissipated or wasted without management, or that money is needed to care for the respondent or those entitled to the respondent's support and that protection is needed to provide or receive the money. Under paragraph (2), the requisite impairment for the appointment of a conservator or entry of another protective order is similar to the test for the appointment of a guardian, which relies on the definition of "incapacitated person." See Section 102(5).

Under paragraph (2)(A), if appropriate technological assistance is available to meet the respondent's needs, then no conservatorship may be established or other protective order entered. The drafting committee discussed whether to put any modification or limitation on the technological assistance, such as that which is reasonably available or a limitation on availability based on cost. Given the importance of the respondent's rights, the committee decided to reject any modification or limitation whatsoever on the required consideration of technological assistance. Therefore, if appropriate technological assistance exists that can meet the respondent's needs, regardless of the cost, then that assistance must be treated by the court as meeting the respondent's identified needs by a less restrictive means, and the petition for a protective proceeding must be denied.

This section is based on UGPPA (1982) Section 2-301 (UPC Section 5-401 (1982)).

SECTION 402. JURISDICTION OVER BUSINESS AFFAIRS OF PROTECTED

PERSON. After the service of notice in a proceeding seeking a conservatorship or other protective order and until termination of the proceeding, the court in which the petition is filed has:

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

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

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

Comment

While a majority of all proceedings involving a conservatorship will be held in the court supervising the conservatorship, third parties may bring suit against the conservator or protected person in other courts to determine the validity of claims and questions of title concerning estate assets. For the procedures for filing claims against a conservatorship, see Section 429.

The source of this section is UGPPA (1982) Section 2-302 (UPC Section 5-402 (1982)) with slight changes.

SECTION 403. ORIGINAL PETITION FOR APPOINTMENT OR PROTECTIVE ORDER.

(a) The following may petition for the appointment of a conservator or for any other appropriate protective order:

(1) the person to be protected;

(2) an individual interested in the estate, affairs, or welfare of the person to be protected, including a parent, guardian, or custodian; or

(3) a person who would be adversely affected by lack of effective management of the property and business affairs of the person to be protected.

(b) A petition under subsection (a) must set forth the petitioner's name, residence, current address if different, relationship to the respondent, and interest in the appointment or other protective order, and, to the extent known, state or contain the following with respect to the

respondent and the relief requested:

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

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

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

(4) the name and address of the respondent's:

(A) spouse or, if the respondent has none, an adult with whom the respondent has resided for more than six months before the filing of the petition; and

(B) adult children or, if the respondent has none, the respondent's parents and adult brothers and sisters or, if the respondent has none, at least one of the adults nearest in kinship to the respondent who can be found;

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

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

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

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

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

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

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

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

Comment

This section lists the information that must be contained in the petition for appointment of a conservator or other protective order. Although subsection (a) allows a petition for appointment to be filed by the person to be protected, the court should scrutinize such a petition closely to confirm that the petition is truly voluntary and that the petitioner has the requisite capacity to file a petition. Normally in such a case it would be better for the individual to execute a durable power of attorney instead of utilizing the more invasive conservatorship.

Subsection (a) specifically provides that a petition for appointment of a conservator or other protective order may be filed by the respondent's guardian. The process for appointing a guardian is more detailed than the appointment of a conservator because of the rights involved and because other mechanisms are available to protect the respondent's property besides a conservatorship. However, in many cases a conservatorship may also be necessary, and so it is incumbent on a guardian to determine whether there is a need for a conservatorship, and if so, petition for an appointment.

Subsections (b)(4)-(6) 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 404(b). These persons will likely also have the greatest interest in protecting the respondent and in making certain that the proposed conservatorship is appropriate.

Subsection (b)(4)(A) requires that the petition contain the name and address of the spouse or, if none, then an adult with whom the respondent has resided for more than six months before the petition was filed. Included among the persons with whom the respondent may have resided are a domestic partner and companions. Note that there is no requirement that the respondent have resided with the other person for more than six months *immediately prior* to the filing of the petition, just that the requirement has been met at some point in time before the petition was filed. In applying this provision, the court should keep the purpose of this provision in mind—to obtain a list of person who likely have a significant interest in the respondent’s welfare. Courts should use a reasonableness standard so that the petitioner does not have to give the name of every person the respondent has resided with in the respondent’s entire life and whose current interest in the respondent may be quite remote. Also, in interpreting what is meant by “resided,” the closeness of the relationship to the respondent should be taken into account.

Courts should consider whether they wish to exclude persons providing care for a fee from the class of persons with whom it is considered that the respondent resided. This would limit the application of subsection (b)(4)(A) to individuals with whom the respondent has a close personal relationship, a relative, or to a domestic partner or companion, and would eliminate a professional relationship such as that of a housekeeper, landlord, or owner of a board and care facility.

The drafters originally used the language “domestic partner or companion,” and intended to limit the application of subsection (b)(4)(A) to the spouse, domestic partner or companion, but at the 1997 Annual Meeting of the Uniform Law Commissioners where this Act was finalized, this phrase was replaced by the phrase “adult with whom the respondent has resided for more than six months.” The intent behind this amendment was not to substantially broaden the concept but only to expand it to include other individuals who have had an enduring relationship with the respondent for at least a six-month period and who, because of this relationship, should be given notice.

Subsection (b)(4)(B) requires the names and addresses of the respondent’s adult children or, if none, parent and adult brothers and sisters or, if none, a relative of the nearest degree in which a relation can be found. However, if there are several adults of equal degree of kinship to the respondent, the name and address of one is all that is required, rather than the names and addresses of the members of the entire class.

Under subsection (b)(6), if the respondent has a legal representative, the representative’s name and address must be included in the petition. A “legal representative” is defined in Section 102(6). Notice to such a representative, as required by Section 404(b), is especially critical for ascertaining whether a conservatorship or other protective order is really necessary. For example, should a conservator have already been appointed elsewhere or the respondent have executed a durable power of attorney with authority in the agent to make financial decisions, the court may conclude that there may be no need for it to appoint a conservator.

Subsection (b)(7) requires the petitioner to make 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 as detailed as possible to enable the visitor to better complete the report required by Section 406, and to enable the court to

determine whether a protective order is really needed.

Subsection (c)(3) emphasizes the importance of limited conservatorship, the encouragement of which is a major theme of the Act. The petitioner must state in the petition why a limited conservatorship is not sufficient when requesting an unlimited conservatorship. If a limited conservatorship is requested, the petition must set out the property requested to be placed under the conservator's control.

This section differs slightly from the National Probate Court Standards, Standard 3.4.1, "Petition" (1993), which also requires that a petition for conservatorship include a description of the respondent's functional limitations and a statement that less intrusive alternatives have been considered.

This section is based on UGPPA (1982) Section 2-304 (UPC Section 5-404 (1982)).

SECTION 404. NOTICE.

(a) A copy of the petition and the notice of hearing on a petition for conservatorship or other protective order must be served personally on the respondent, but if the respondent's whereabouts is unknown or personal service cannot be made, service on the respondent must be made by [substituted service] [or] [publication]. The notice must include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and, if the appointment of a conservator is requested, include a description of the nature, purpose, and consequences of an appointment. A failure to serve the respondent with a notice substantially complying with this subsection precludes the court from granting the petition.

(b) In a proceeding to establish a conservatorship or for another protective order, notice of the hearing must be given to the persons listed in the petition. Failure to give notice under this subsection does not preclude the appointment of a conservator or the making of another protective order.

(c) Notice of the hearing on a petition for an order after appointment of a

conservator or making of another protective order, together with a copy of the petition, must be given to the protected person, if the protected person has attained 14 years of age and is not missing, detained, or unable to return to the United States, any conservator of the protected person's estate, and any other person as ordered by the court.

(d) A conservator shall give notice of the filing of the conservator's inventory, report, or plan of conservatorship, together with a copy of the inventory, report, or plan of conservatorship to the protected person and any other person the court directs. The notice must be delivered or sent within 14 days after the filing of the inventory, report, or plan of conservatorship.

Comment

Personal service of the petition and notice of hearing on the respondent is required, 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 a notice that does not substantially comply with the requirements of subsection (a). Where appropriate, the court should hold the hearing where the respondent is located. If the respondent's presence is impossible because the respondent is missing or absent, then the court should excuse the respondent's presence.

Subsection (b) requires that notice of hearing be given to the people listed in the petition but failing to give notice to those listed (other than the respondent) is not jurisdictional.

Subsection (c) addresses the notice requirements for hearings on petitions for orders after the establishment of the conservatorship. The protected person and the conservator as well as anyone else the court directs, must be given copies of the notice of hearing and a copy of any petition. This provision, along with subsection (d), requiring that the protected person be given a copy of the conservator's plan, report, and inventory and a copy of the notice of filing, ensures that the protected person is kept informed of developments.

This section should be read in conjunction with Section 113, which requires that notice be given at least 14 days prior to the hearing unless the court or other provisions of UGPPA establish a different time period.

National Probate Court Standards, Standard 3.4.7, "Notice" (1993), provides that the respondent must receive timely notice prior to the hearing on the conservatorship and that written notice should be in both plain language and in large type. The notice, at a minimum, must indicate the place and time of the hearing, the nature and consequences of the hearing as well as

the respondent's rights.

This section is based on UGPPA (1982) Section 2-305 (UPC Section 5-405 (1982)).

SECTION 405. ORIGINAL PETITION: MINORS; PRELIMINARIES TO HEARING.

(a) Upon the filing of a petition to establish a conservatorship or for another protective order for the reason that the respondent is a minor, the court shall set a date for hearing. If the court determines at any stage of the proceeding that the interests of the minor are or may be inadequately represented, it may appoint a lawyer to represent the minor, giving consideration to the choice of the minor if the minor has attained 14 years of age.

(b) While a petition to establish a conservatorship or for another protective order is pending, after preliminary hearing and without notice to others, the court may make orders to preserve and apply the property of the minor as may be required for the support of the minor or individuals who are in fact dependent upon the minor. The court may appoint a [master] to assist in that task.

Comment

Subsection (a) gives the court the authority to appoint counsel for the minor at any stage of the proceeding. Subsection (b) allows the court to appoint a master to assist the court in preserving and appropriately applying the minor's property pending the hearing on the petition. The Act provides for the appointment of "masters" instead of either "emergency" or "special" conservators. The role of the master is to carry out only those tasks that are specifically ordered by the court. The terms "emergency" or "special conservator" seemed to be inappropriate because those terms imply that the person appointed would have all of the powers and duties of a conservator, which is a characterization that is too broad for the limited role contemplated. The word "master" is bracketed, recognizing that different states use different words to refer to the same position. The enacting state that uses a different word should substitute its own term.

This section is based on UGPPA (1982) Sections 2-306(a) and 2-307(b)(1) (UPC Sections 5-406(a) and 5-407(b)(1) (1982)).

SECTION 406. ORIGINAL PETITION: PRELIMINARIES TO HEARING.

(a) Upon the filing of a petition for a conservatorship or other protective order for a respondent for reasons other than being a minor, the court shall set a date for hearing. The court shall appoint a [visitor] unless the petition does not request the appointment of a conservator and the respondent is represented by a lawyer. The duties and reporting requirements of the [visitor] are limited to the relief requested in the petition. The [visitor] must be an individual having training or experience in the type of incapacity alleged.

Alternative A

(b) The court shall appoint a lawyer to represent the respondent in the proceeding if:

- (1) requested by the respondent;
- (2) recommended by the [visitor]; or
- (3) the court determines that the respondent needs representation.

Alternative B

(b) Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to represent the respondent in the proceeding, regardless of the respondent's ability to pay.

End of Alternatives

(c) The [visitor] shall interview the respondent in person and, to the extent that the respondent is able to understand:

- (1) explain to the respondent the substance of the petition and the nature, purpose, and effect of the proceeding;
- (2) if the appointment of a conservator is requested, inform the respondent

of the general powers and duties of a conservator and determine the respondent's views regarding the proposed conservator, the proposed conservator's powers and duties, and the scope and duration of the proposed conservatorship;

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

(4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, will be paid from the respondent's estate.

(d) In addition to the duties imposed by subsection (c), the [visitor] shall:

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

(2) make any other investigation the court directs.

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

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

(2) recommendations regarding the appropriateness of a conservatorship, including whether less restrictive means of intervention are available, the type of conservatorship, and, if a limited conservatorship, the powers and duties to be granted the limited conservator, and the assets over which the conservator should be granted authority;

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

(4) a recommendation as to whether a professional evaluation or further

evaluation is necessary; and

(5) any other matters the court directs.

(f) The court may also appoint a physician, psychologist, or other individual qualified to evaluate the alleged impairment to conduct an examination of the respondent.

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

Legislative Note: *Those states that enact Alternative B of subsection (b) which requires appointment of counsel for the respondent in all protective proceedings should not enact subsection (e)(1).*

Comment

Alternative provisions are offered for subsection (b). Alternative A is the drafting committee's position. Alternative A relies on an expanded role for the "visitor," who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues. Appointment of a lawyer, 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 B is derived from UGPPA (1982) Section 2-306 (UPC Section 5-406 (1982)). It is expected that in states enacting Alternative A of subsection (b), counsel will be appointed in most of the cases. However, the A.B.A. Commission on Legal Problems of the Elderly attached great significance to expressly making appointment of counsel "mandatory." Therefore, for states which wish to provide for "mandatory appointment" of counsel, Alternative B should be enacted.

In Alternative A for subsection (b), then, appointment of counsel for an unrepresented respondent is mandated when requested by the respondent, when recommended by the visitor, or when the court determines the respondent needs representation. This requirement is in accord with the National Probate Court Standards. National Probate Court Standards, Standard 3.4.5 "Appointment of Counsel" (1993), like subsection (b) of this section, provides for appointment of counsel in a conservatorship proceeding when the unrepresented respondent requests it, the visitor recommends it, the law otherwise requires it, or the court determines that the respondent needs representation.

The drafting committee for this Act debated at length whether to mandate appointment of counsel or to expand the role of the visitor. The drafting committee concluded that as between the two, the visitor may be more helpful to the court in providing information on a wider variety of issues and concerns, by acting as the eyes and ears of the court as well as determining the respondent's wishes and conveying them to the court. The committee was concerned that including mandatory appointment of counsel would cause many to view this Act as a "lawyer's bill" and thus severely handicap the Act's acceptance and adoption. It is the intent of the committee that counsel for respondent be appointed in all but the most clear cases, where all are in agreement regarding the need for a conservatorship or protective order as well as the proposed conservator. For jurisdictions enacting Alternative A under subsection (b), the visitor needs to be especially sensitive to the fact that if the respondent is incapacitated, then the respondent may not have sufficient capacity to intelligently and knowingly waive appointment of counsel. A court should err on the side of protecting the respondent's rights and appoint counsel in most cases

Appointment of a visitor is mandatory when a conservatorship is sought for reasons other than minority even if the respondent is represented by a lawyer (subsection (a)), and regardless of which alternative is enacted under subsection (b). Only when the respondent is represented by counsel and the petitioner is seeking a protective order other than the appointment of a conservator is the appointment of a visitor waived. Although a lawyer, if qualified, may be appointed as a visitor, the attorney's role is that of a visitor and not that of an attorney for the respondent. The visitor serves as the information gathering arm of the court. The role of the attorney is to act as the respondent's advocate. See National Probate Court Standards, Standard 3.4.5(b) "Appointment of Counsel" (1993).

The role of a visitor in a conservatorship proceeding is addressed in NATIONAL PROBATE COURT STANDARD 3.4.4 "Court Visitor" (1993):

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

The visitor may be any qualified individual with "training or experience in the type of incapacity alleged." Under subsection (c), the visitor must visit the respondent in person and explain to the respondent a number of items, to the extent the respondent can understand. If the respondent does not have a good command of the English language, then the visitor should be accompanied by an interpreter. The drafters did not mandate that the visitor be able to speak the respondent's primary language, but good practice and due process protections dictate the use of interpreters where needed for the respondent to understand. The phrase "to the extent that the respondent is able to understand" is a recognition that some respondents may be so impaired that they are unable to understand. If assistive devices are needed in order for the visitor to explain to the respondent in a manner necessary so that the respondent can understand, then the visitor should use those assistive devices.

Subsection (c)(4) puts the respondent on notice that if the respondent has an estate, costs and expenses are paid from the estate, including attorney's fees and visitor's fees. If there is an estate, those entitled to compensation would be paid from the estate. If there is no estate, those entitled to compensation will ordinarily be compensated by whatever process the enacting state has for indigent proceedings, such as from the county general fund, unless the enacting jurisdiction has made other arrangements. Payment is made pursuant to the procedures provided in Section 417.

If the relief sought is a protective order other than the appointment of a conservator, the visitor's powers and duties relate only to the relief sought in the protective order. When the relief sought is a conservatorship, the visitor has an expanded list of duties. The visitor's report 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, and the appointment of counsel. The visitor's recommendation about the assets over which the conservator should be granted authority should also include a recommendation of the amount of the bond that should be required of the conservator. For states enacting Alternative A under subsection (b), if the visitor does not recommend that a lawyer be appointed, the reasons for this conclusion should be explained in the visitor's report.

States enacting this Act should consider developing a checklist for the items enumerated in subsection (e).

Subsection (f) authorizes the court to order a professional evaluation of the respondent when recommended by the visitor, requested by counsel, or the court otherwise believes it to be necessary. Subsection (g) authorizes the court to use a master to help in the preservation and application of the respondent's property while a petition for appointment of a conservator or other protective order is pending. For an explanation of why a "master" is appointed instead of a temporary conservator, see the comment to Section 405.

"Visitor" is bracketed in recognition that states use different words to refer to this position. States enacting this Act should insert the term used in their states.

If there is an estate, the visitor would be paid from it. If there is no estate, the visitor will ordinarily be compensated from the county general fund unless the enacting jurisdiction has made other arrangements. Payment is made pursuant to the procedures provided in Section 417.

This section is based on UGPPA (1982) Section 2-306 (UPC Section 5-406 (1982)).

SECTION 407. CONFIDENTIALITY OF RECORDS. The written report of a [visitor] and any professional evaluation are confidential and must be sealed upon filing, but are available to:

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

Comment

This section is new, although a number of states have a comparable provision. This section is designed to protect the respondent's privacy, but still make the records accessible when needed to any of the involved parties or to others on a showing of good cause. The drafting committee recognized that "watch-dog" groups, the media, and others can perform essential functions of deterring abuse and facilitating reform, and in drafting this provision balanced the need to protect the respondent's privacy with the need of others to access this information.

SECTION 408. ORIGINAL PETITION: PROCEDURE AT HEARING.

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

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

Comment

The provision requiring the conservator to attend the hearing is new, although based on a recommendation from National Probate Court Standards, Standard 3.4.8(c) "Hearing" (1993).

While the court may waive the proposed conservator's attendance for good cause, in all but the most unusual of circumstances the proposed conservator should be required to attend to give the court the opportunity to assess the conservator's qualifications for appointment and to make any other inquiry of the conservator that the court determines necessary. Additionally, the respondent's attendance is required unless excused for good cause or the respondent's attendance is impossible. The respondent has the right to take an active role in the proceeding.

There may be occasions when the court needs to hold the hearing at a location other than the court, if convenient to the respondent. The respondent may request that the hearing be closed, and if the respondent shows good cause, the court will close the hearing. Others may make a request to participate, which may 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 should indicate the extent participation will be allowed.

This section is based on subsections (d) and (e) of UGPPA (1982) Section 2-306 (subsections (d) and (e) of UPC Section 5-406 (1982)).

SECTION 409. ORIGINAL PETITION: ORDERS.

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

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

(c) Within 14 days after an appointment, the conservator shall deliver or send a copy of the order of appointment, together with a statement of the right to seek termination or modification, to the protected person, if the protected person has attained 14 years of age and is

not missing, detained, or unable to return to the United States, and to all other persons given notice of the petition.

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

Comment

This section emphasizes the related concepts of least restrictive alternative and limited conservatorship, both of which accord with the philosophy of the Act that a conservator should be appointed only when necessary, and then with only those powers that are necessitated by the respondent's actual limitations. The court, in ordering the creation of the conservatorship, shall, in its order, grant the conservator only those powers that are absolutely essential for the conservator to exercise. The court, in its order, must also ensure that the protected person's self-reliance and independence are maximized.

In keeping with the concept of limited conservatorship, subsection (c) requires the guardian to provide the ward and all those persons given notice of the hearing a copy of the order of appointment along with a notice of the right to request a termination or a modification of the guardianship. This makes certain that those who were originally notified of the petition will also be notified of the results because they are the ones most likely to have a continuing interest in the protected person's welfare.

Per subsection (d), the fact that a conservator is appointed or another protective order is entered is not a determination of the protected person's incapacity under Article 3 for any other purpose.

This section is based on UGPPA (1982) Sections 2-306(f) and 2-307(a) and (d) (UPC Sections 5-406(f) and 5-407(a) and (d) (1982)).

SECTION 410. POWERS OF COURT.

(a) After hearing and upon determining that a basis for a conservatorship or other protective order exists, the court has the following powers, which may be exercised directly or through a conservator:

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

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

(b) Subject to Section 110 requiring endorsement of limitations on the letters of office, the court may limit at any time the powers of a conservator otherwise conferred and may remove or modify any limitation.

Comment

Subsection (a) gives the court supervising a conservatorship all of the powers the protected person would have been able to exercise directly were the protected person of full capacity and the conservatorship or other protective order not in effect. While these powers may be exercised directly by the court, the powers will most often be exercised by a conservator without prior court approval. Sections 425 and 427 list distributive and administrative powers that a conservator may exercise without prior court approval. Section 411 lists powers, nearly all related to estate planning, that may be exercised only with prior court approval.

Subsection (a)(1) gives the court the power to protect the assets of a minor by withholding distribution from the minor on attainment of majority when continued supervision of the assets is needed. Before ordering such a continuation, however, the court must be convinced, for reasons other than the minor's age, that a basis exists under Section 401(2) for the appointment of a conservator or other protective order.

Subsection (b) authorizes the court at any time to limit the powers of the conservator, subject to any limitations contained in the letters of conservatorship. Formal procedures for enlarging or restricting the powers of a conservator are provided in Section 414. Such formal procedures *must* be utilized in order to grant a conservator additional powers. Such procedures *may* be utilized to limit the powers of a conservator previously granted, or the court may elect instead to proceed under this section. Per Section 110, any restrictions on the conservator's powers must be endorsed on the letters of conservatorship. Under Section 424(a), third persons are charged with knowledge of and subject to possible liability for failing to act in accordance with restrictions endorsed on the letters of office.

This section is based on UGPPA (1982) Sections 2-307(b) and 2-325 (UPC Sections 5-407(b) and 5-425 (1982)).

SECTION 411. REQUIRED COURT APPROVAL.

(a) After notice to interested persons and upon express authorization of the court, a conservator may:

(1) make gifts, except as otherwise provided in Section 427(b);

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

(3) exercise or release a power of appointment;

(4) create a revocable or irrevocable trust of property of the estate, whether or not the trust extends beyond the duration of the conservatorship, or revoke or amend a trust revocable by the protected person;

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

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

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

(b) A conservator, in making, amending, or revoking the protected person's will, shall comply with [the state's statute for executing wills].

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

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

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

Comment

This section lists actions for which a conservator must obtain prior court approval. The actions for which court approval is required all relate to the protected person's estate plan. Except for the power to make, amend, or revoke the protect person's will, this section duplicates the list of transactions found at UGPPA (1982) Section 2-307(b)(3) (UPC Section 5-407(b)(3)(1982)). The section should be read together with Section 418(d), which authorizes the conservator to examine the protected person's estate planning documents.

The power to make, amend, or revoke the protected person's will is taken from the California and South Dakota statutes. See Cal. Prob. Code Sections 2580, 6100.5(c), 6110(c); S. D. Codified Laws Ann. Section 29A-2-520. In subsection (b), the enacting jurisdiction should insert the citation for its statute on the execution requirements for ordinary attested wills. Subsection (b) follows the approach taken by the South Dakota statute. 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 (c), decisions by the conservator under this section must be based

primarily on the decision that the protected person would have made, if of full capacity. The protected person's personal values and expressed desires, past and present, are to be considered when making decisions. Carrying out the protected person's intent or probable intent is a major theme of this Act. In this regard, the Act probably confirms what is already the law. Even in the absence of a statute, the conservator should consider the protected person's probable wishes, particularly with respect to gifts and other estate planning related transactions. For an overview of the history of this judicially-created doctrine and a sampling of representative cases, see Restatement (Third) of the Law of Trusts, § 11, reporter's note to cmt. f (Tentative Draft No. 1, 1996). The authority of a court to authorize a conservator to engage in estate planning related transactions is also expressly confirmed by statute in a majority of states.

While not so limited, the authority confirmed by this section will most 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, with 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 can be corrected.

This section can also be used for non-tax transactions. Transfers may be made to qualify the protected person for governmental programs, or the court may continue the protected person's prior pattern or giving to charities and others. Per Section 427(b), court approval is required for gifts exceeding 20% of the estate's annual income.

Under subsection (d), prior court approval is required before a conservator may revoke or amend the protected person's durable power of attorney. Also, 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. The purpose of this provision is to make certain that the court has been made aware of the durable power of attorney and has determined that the power should be revoked. For this reason, the petition for the appointment of a conservator must state whether the respondent has executed a power of attorney and list the name and address of the agent, if known. Also, the agent must be given notice of the proceeding. See Sections 403(b)(6) and 404(b).

The persons who must be given notice of hearing on a petition under this section are as determined under Section 404(c), 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 protected person, if the protected person has attained 14 years of age and is not missing, detained, or unable to return to the United States, any conservator of the protected person's estate, and any other person as ordered by the court.

Both California and South Dakota have enacted more specific notice requirements with respect to their statutes authorizing conservators, with court approval, to engage in a variety of estate planning related transactions. California requires that notice be given to the conservator, the conservatee, the conservatee's spouse, any person who has made a request for special notice, any other persons required to be named in a petition for the appointment of a conservator, and, so far as known to the petitioner, the conservatee's heirs and beneficiaries under any purported

wills. Cal. Prob. Code Sections 1460, 2581. South Dakota requires notice to the protected person, to the beneficiaries of the protected person's estate plan, to the protected person's presumptive heirs and, if known, to any attorney or financial advisor who advised the protected person within the previous five years. Should the petition request amendment or revocation of a trust or the protected person's will, notice must also be given to the trustee and the nominated executor. See S.D. Codified Laws Section 29A-5-420.

Subsection (a) of this section is based on UGPPA (1982) Section 2-307(b) (UPC Section 5-407(b) (1982)). Subsections (b)-(d) are new.

**SECTION 412. PROTECTIVE ARRANGEMENTS AND SINGLE
TRANSACTIONS.**

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

(1) authorize, direct, or ratify any transaction necessary or desirable to achieve any arrangement for security, service, or care meeting the foreseeable needs of the protected person, including:

(A) payment, delivery, deposit, or retention of funds or property;

(B) sale, mortgage, lease, or other transfer of property;

(C) purchase of an annuity;

(D) making a contract for life care, deposit contract, or contract for training and education; or

(E) addition to or establishment of a suitable trust[, including a trust created under the Uniform Custodial Trust Act (1987)]; and

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

(b) In deciding whether to approve a protective arrangement or other transaction

under this section, the court shall consider the factors described in Section 411(c).

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

Comment

Consistent with the philosophy of the Act that a conservator be appointed only as a last resort, this section authorizes the court, in lieu of appointing a conservator, to order a variety of less intrusive “protective arrangements.” A protective arrangement typically involves a single transaction such as a sale of land or the entry of a contract for care. The procedure for obtaining a protective arrangement is similar to that required for the appointment of a conservator. A petition must be filed (Section 403), notice must be given to those listed in the petition (Section 404), the court must appoint a visitor unless the respondent is represented by counsel and the relief sought is a protective proceeding (Section 406(a)), and the court must appoint a lawyer for the respondent if requested by the respondent, if recommended by the visitor, or if the court determines that the respondent needs representation (Alternative A of Section 406(b)), or if otherwise required by statute (Alternative B of Section 406(b)). The procedure to be followed at the hearing is also identical. Sections 408 and 409. At the hearing, the court, applying the standards of Section 401, must determine that a basis for the protective order exists. Finally, the protective arrangement ordered must be consistent with the least restrictive order consistent with the court’s findings. Section 409(b).

While the guardianship and conservatorship statutes of many states do not specifically authorize protective arrangements, such arrangements are often ordered, usually under the guise of a temporary or emergency conservatorship. This Act deliberately avoids the use of emergency conservatorships and allows the appointment of a temporary conservator only as a replacement for a conservator who holds a regular appointment. See Section 414(a)(4). The act instead prefers the less intrusive and more precisely defined protective arrangement. But to effectuate a protective arrangement under this section, the temporary appointment by the court of someone to implement the protective arrangement will often be required. To avoid the implication that such appointee is a type of conservator, the Act provides for the appointment of “masters” instead of either “emergency” or “special” conservators. The role of the master is to carry out only those tasks that are specifically ordered by the court. The drafting committee concluded that the terms “emergency” or “special” conservator were inappropriate because they imply that the person appointed would have all of the powers and duties of a conservator, which is much too broad a characterization of the limited role contemplated. The word “master” is bracketed, recognizing that different states use different words to refer to the same position. The enacting state that uses a different word should substitute its own term.

Under subsection (a)(2), the settlement of a claim includes the settlement of a personal

injury lawsuit brought on behalf of the minor. One of the more important protective arrangements listed in subsection (a)(1), and also in the 1982 UGPPA, is the authority to enter into a contract for life care.

This section is based on UGPPA (1982) Section 2-308 (UPC Section 5-408 (1982)).

SECTION 413. WHO MAY BE CONSERVATOR: PRIORITIES.

(a) Except as otherwise provided in subsection (d), the court, in appointing a conservator, shall consider persons otherwise qualified in the following order of priority:

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

(2) a person nominated as conservator by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if the respondent has attained 14 years of age and at the time of the nomination had sufficient capacity to express a preference;

(3) an agent appointed by the respondent to manage the respondent's property under a durable power of attorney;

(4) the spouse of the respondent;

(5) an adult child of the respondent;

(6) a parent of the respondent; and

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

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

(c) With respect to persons having equal priority, the court shall select the one it

considers best qualified. The court, acting in the best interest of the protected person, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

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

Comment

This section gives top priority for appointment to existing conservators appointed elsewhere, to the respondent's nominee for the position, and to the respondent's agent, in that order. Existing conservators are granted a first priority for two reasons. First, many of these cases will involve transfers of a conservatorship from another state. To assure a smooth transition, the currently appointed conservator appointed in this state or another should have the right to the appointment at the new location. Second, many cases may involve situations where a conservatorship appointment is sought despite the appointment in another place. Granting the existing conservator priority will deter such forum shopping. Should the existing conservator be inappropriate for some reason, subsection (c) permits the court to skip over the existing conservator and appoint someone with lower priority or even no priority.

A conservator or individual nominated by the respondent or the agent named in the respondent's durable power of attorney has priority for appointment over the respondent's relatives. The nomination may include anyone nominated orally at the hearing, if the respondent has sufficient capacity at the time to express a preference. The nomination may also be made by separate document. While it is generally good practice for an individual to nominate as conservator the agent named in a durable power of attorney, the section grants such an agent a preference in the absence of a specific nomination. The agent is granted preference 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 conservatorship to thwart the agent's authority. To assure that the agent will be in a position to assert his priority, Section 404 (b) requires that the agent receive notice of the proceeding. Also, until the court has acted to approve the revocation of that authority, Section 411(d) provides that the authority of an agent takes precedence over that of the conservator.

Subsection (a)(7) gives a seventh-level preference to a domestic partner or companion or an individual who has a close, personal relationship with the respondent. Note there is no requirement that the respondent have resided with the other person for more than six months *immediately prior* to the filing of the petition, just that the requisite residency have occurred at some point in time before the petition is filed. Courts should use a reasonableness standard in applying this subsection so that priority is given to someone with whom the respondent has had a close, enduring relationship. For factors to consider in making this determination, see the

detailed comment to Section 403.

While this section substantially overlaps with Section 310, the comparable provision on selection of guardians, there are some differences. For example, Section 310 denies a priority to an emergency or temporary guardian, but this section does not expressly deny a priority for appointment to an emergency or temporary conservator appointed in another state. But the failure in subsection (a)(1) to expressly exclude these categories of conservator does not mean that they enjoy a priority for appointment. Unlike the case with guardians, emergency or temporary conservators are not included within the definition of “conservator” found in Section 102(2).

Subsection (d) prohibits anyone affiliated with a long-term care facility at which the respondent is receiving care from being appointed as conservator absent a blood, marital or adoptive arrangement. Strict application of this subsection is crucial to avoid a conflict of interest and to protect the protected person from potential financial exploitation. Each state enacting this Act needs to insert the particular term or terms used in the state for facilities considered to be long-term care institutions.

National Probate Court Standards, Standard 3.4.11 “Qualifications and Appointments of Conservators” (1993), recognizes that the court should appoint as conservator one who is both willing and suitable to manage the respondent’s finances and property, based on the nature of the respondent’s estate and the respondent’s incapacity. The standard provides a preference in appointment to one known by, related to, or requested by the respondent.

This section is based on UGPPA (1982) Section 2-309 (UPC Section 5-409 (1982)).

SECTION 414. PETITION FOR ORDER SUBSEQUENT TO APPOINTMENT.

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

- (1) requiring bond or collateral or additional bond or collateral, or reducing bond;
- (2) requiring an accounting for the administration of the protected person’s estate;
- (3) directing distribution;
- (4) removing the conservator and appointing a temporary or successor conservator;

(5) modifying the type of appointment or powers granted to the conservator if the extent of protection or management previously granted is currently excessive or insufficient or the protected person's ability to manage the estate and business affairs has so changed as to warrant the action; or

(6) granting other appropriate relief.

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

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

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 lists the most common types of petitions. Subsection (a)(6) allows for petitions for "other appropriate relief" to be brought.

It is essential that the protected person have the right to petition for appropriate relief. While such a petition was not forbidden under the 1982 UGPPA, neither was it expressly authorized. The lead-in language to subsection (a) has been revised to clarify that a petition may be filed by the protected person.

While a limited conservatorship should be ordered, whenever feasible, at the time of the original appointment, such appointments may also be made at a later date. Perhaps the possibility of a limited conservatorship was not even considered, or perhaps the protected person's situation has improved to the point that a limited conservatorship is now realistic. Also, even 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. Subsection (a)(5), which is new, authorizes petitions to increase or decrease the powers granted to the conservator or property subject to the conservatorship. Should a request for increased powers require additional proof of the protected person's impairment, such impairment must be proved by clear and convincing evidence. See Section 401(2)(A).

This section is based on UGPPA (1982) Section 2-315 (UPC Section 5-415 (1982)).

SECTION 415. BOND. The court may require a conservator to furnish a bond

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

Comment

Bond for a conservator is required under this Act only if ordered by the court. The bond may be set pursuant to an order entered on the court's own motion or a petition by the protected person or an individual interested in the protected person's welfare. The bond should be in an amount adequate to guard against financial exploitation of the protected person's assets by the conservator. The statute assumes the amount will normally equal the value of the estate plus one year's estimated income. The court is free, however, to set either a lesser or greater amount. The bond should be adequate in all cases, even in cases where the well-meaning relative or friend is appointed as conservator.

Bond may be ordered either at the time of the original appointment or at any later time. The bond requirements for conservators in this section are somewhat more strict than those for personal representatives under Article III, Part 6 of the UPC. Under the UPC, a personal representative usually need file a bond only if an interested person makes a demand.

While this section does not specify factors for the court to consider in deciding whether to require bond, some of the states have enacted such lists. For example, the South Dakota statute requires the court to consider the following factors in determining the necessity for or amount of a conservator's bond: (1) the value of the personal estate and annual gross income and other receipts with the conservator's control; (2) the extent to which the estate has been deposited under an arrangement requiring an order of court for its removal; (3) whether an order has been entered waiving the requirement that accountings be filed and presented or permitting accountings to be filed less frequently than annually; (4) the extent to which the income and receipts are payable directly to a facility responsible for or which has assumed responsibility for the care or custody of the minor or protected person; (5) whether a guardian has been appointed, and if so, whether the guardian has presented reports as required; and (6) whether the conservator was appointed pursuant to a nomination which requested that bond be waived. See S.D. Codified Laws Section 29A-5-111.

This section is based on UGPPA (1982) Section 2-310 (UPC Section 5-410 (1982)).

SECTION 416. TERMS AND REQUIREMENTS OF BOND.

(a) The following rules apply to any bond required:

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

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

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

(4) The bond of the conservator may be proceeded against until liability under the bond is exhausted.

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

Comment

This section specifies various technical requirements that apply when bond is required. The cost of the bond is payable from the protected person's estate.

This section is based on UGPPA (1982) Section 2-311 (UPC Section 5-411 (1982)).

SECTION 417. COMPENSATION AND EXPENSES. If not otherwise compensated for services rendered, a guardian, conservator, lawyer for the respondent, lawyer whose services

resulted in a protective order or in an order beneficial to a protected person's estate, or any other person appointed by the court is entitled to reasonable compensation from the estate.

Compensation may be paid and expenses reimbursed without court order. If the court determines that the compensation is excessive or the expenses are inappropriate, the excessive or inappropriate amount must be repaid to the estate.

Comment

This section establishes a standard of reasonable compensation for both guardians and conservators as well as for the respondent's lawyer and any one else appointed by the court in a guardianship or protective proceeding. Factors to be considered by the court in setting compensation will vary depending on the professional or fiduciary role filled by the person making the request. Rates of compensation may also vary from state to state and at different locales within particular states.

This section is derived from UGPPA (1982) Section 2-313 (UPC Section 5-413 (1982)), but a number of matters left open in the prior version now have been addressed. First, guardians are expressly added to the list of those who are entitled to compensation from the estate. Previously, the guardian's right to compensation was mentioned only in Articles 2 and 3. See Sections 209(a), 316(a). Second, the section sets out more clearly which lawyers are entitled to compensation. The respondent's lawyer, as well as the lawyer whose services resulted in a protective order or any other order of benefit to the estate are entitled to compensation and reimbursement for costs advanced. For example, a lawyer whose services resulted in the removal of an abusive conservator might be entitled to compensation under this provision. Third, while compensation may be paid from the estate without court order, excessive or inappropriate payments must be repaid to the estate.

While the size of the estate is an important factor in setting compensation, in many cases there will be no estate or the estate will not be sufficient to pay the costs of the initial proceeding. In that event the court, without appointing a conservator, may simply divide the estate among those entitled to compensation or reimbursement. Sections 305 and 406 require a visitor to inform the respondent that attorney's fees and other expenses of the proceeding will be paid from the respondent's estate. If the respondent is found to be indigent, compensation and expenses authorized by this section typically will be paid from the general fund of the county, or from whatever funding exists in the enacting state for indigent representation, such as legal aid, with the compensation most likely at a fixed rate.

For a list of factors relevant in determining a conservator's compensation, see Restatement (Third) of Trusts § 38 cmt. c (Tentative Draft No. 2, 1999). Among the factors listed are skill, experience and time devoted to duties; the amount and character of the property; the degree of difficulty; responsibility and risk assumed; the nature and cost of services rendered by others; and the quality of the performance. See also Restatement (Second) of Trusts § 242

(1959). In setting compensation, the services actually performed and responsibilities assumed by the conservator should be closely examined. For example, an adjustment in compensation may be appropriate if the conservator had delegated significant duties. On the other hand, a conservator with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. See Restatement (Third) of Trusts § 38 cmt. f (Tentative Draft No. 2, 1999).

The standard of reasonable compensation also applies if the estate has multiple conservators. The mere fact that the estate has more than one conservator does not mean that the conservators together are entitled to more compensation than had either one acted alone. Nor does the appointment of multiple conservators mean that the conservators are eligible to receive the compensation in equal shares. The total amount of the compensation to be paid and how it should be divided depend on the totality of the circumstances. Factors to be considered include the court's reasons for appointing multiple conservators and the level of responsibility assumed and exact services performed by each.

This section authorizes the payment of compensation from the respondent's estate even if no guardian or conservator is appointed or other protective order entered. Those entitled to compensation in that case are persons appointed by the court in connection with the proceeding, including the visitor, the respondent's lawyer, and the doctor or other professional appointed to perform an evaluation. However, other law in the enacting jurisdiction may grant the respondent a right to reimbursement should the petition be totally without merit.

A guardian or conservator acting as a representative payee of the ward's or protected person's Social Security benefits may not be paid a fee from Social Security funds. Both Titles II and XVI of the Social Security Act limit the use of the funds to basic necessities. The only time that a fee may be taken is if the guardian or conservator is an "organizational payee" approved by the Social Security Administration.

SECTION 418. GENERAL DUTIES OF CONSERVATOR; PLAN.

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

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

(c) Within 60 days after appointment, a conservator shall file with the appointing

court a plan for protecting, managing, expending, and distributing the assets of the protected person's estate. The plan must be based on the actual needs of the person and take into consideration the best interest of the person. The conservator shall include in the plan steps to develop or restore the person's ability to manage the person's property, an estimate of the duration of the conservatorship, and projections of expenses and resources.

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

Comment

This section reflects the dual role of a conservator. On the one hand, a conservator is a fiduciary charged with management of another's property. Consequently, subsection (a) requires a conservator to observe the standard of care applicable to trustees. On the other hand, a conservator, like a guardian, also owes obligations directly to the protected person, obligations emphasized in subsection (b). Subsection (b) emphasizes the concept of limited conservatorship by limiting the exercise of the conservator's authority and requiring the participation of the protected person in decision making. The conservator must encourage the participation of the protected person in decisions as well as encourage the protected person to develop or regain the capacity to act without a conservator. Before making a decision, the conservator should also make an effort to learn the personal values of the protected person and ask the protected person about the protected person's desires. The conservator should be particularly cognizant of the views expressed by the protected person prior to the conservator's appointment.

Under subsection (c), the conservator must file a plan with the court within 60 days after appointment. In addition to plans for expenditures, investments, and distributions, the plan must list the steps that will be taken to develop or restore the protected person's ability to manage the person's property and an estimate of the length of the conservatorship. The filing of a plan will help the conservator perform more effectively and reduce the need to take action to recover improper expenditures. While a conservator need not request a hearing on the plan, Section 404(d) does require that the conservator, within 14 days after its filing, give notice of the filing of the plan to the protected person and any other person the court directs. Should those notified have concerns about the plan, a hearing on the plan may be requested pursuant to Section 414.

Subsection (c) of this section, and many of the sections in Article 4 which follow, are in

substantial part specific applications of the fundamental responsibilities stated in subsections (a) and (b), specifying subsidiary duties and the powers and immunities necessary to properly implement the conservator's role. Subsection (c) is derived from National Probate Court Standards, Standard 3.4.15 "Reports by the Conservator" (1993).

Subsection (d), contrary to at least some case law, allows a conservator access to and the right to examine the protected person's will and other documents comprising the protected person's estate plan. Such access is essential for the conservator to carry out the obligation, as stated in subsection (b), to consider the protected person's views 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 protected person's estate plan as authorized by Section 411.

Subsection (a) is based on UGPPA (1982) Section 2-316 (UPC Section 5-416 (1982)), and subsection (d) on UGPPA (1982) Section 2-326 (UPC Section 5-426 (1982)). Subsections (b) and (c) are new.

SECTION 419. INVENTORY; RECORDS.

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

(b) A conservator shall keep records of the administration of the estate and make them available for examination on reasonable request of an interested person.

Comment

The time limit for the filing of the inventory has been reduced to 60 days from the 90 days provided in the 1982 UGPPA in order to coordinate with the filing of the conservatorship plan required by Section 418. 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.

The requirement in the 1982 UGPPA that the conservator provide certain individuals with a copy of the inventory has been revised and moved to Section 404(d). The conservator is no longer allowed to unilaterally decide whether the protected person is competent to understand the inventory and to withhold the protected person's copy. The inventory, like all other documents of which notice is required, must be provided to the protected person regardless of

competency.

This section is based on UGPPA (1982) Section 2-317 (UPC Section 5-417 (1982)).

SECTION 420. REPORTS; APPOINTMENT OF [VISITOR]; MONITORING.

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

(b) A report must state or contain:

(1) a list of the assets of the estate under the conservator's control and a list of the receipts, disbursements, and distributions during the period for which the report is made;

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

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

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

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

Comment

Similar to previous versions, this section requires a conservator to periodically account except that the requirement to “account” has been changed to the requirement to “report.” This change was made because a proper assessment of the conservator’s performance requires more than the mere verification of receipts and disbursements. A conservator is more than a manager of property. To assess the conservator’s compliance with the general duties stated in Section 418, the court must also determine whether the conservator has acted in accordance with the conservatorship plan, whether the conservator, to the extent feasible, has attempted to involve the protected person in decision making, and whether the conservatorship or its current scope is still appropriate.

The reporting requirements in this section are consistent with those in Section 317 for guardians of incapacitated persons. Enforcement of the reporting requirements under this section is a critical component of court oversight of conservatorships to prevent abuses. This includes the right of the court under subsection (a) to modify the reporting requirements as dictated by the circumstances of a specific conservatorship.

States are required under subsection (d) to establish a system for monitoring conservatorships, which would include, but not be limited to, mechanisms for assuring that annual reports are timely filed and reviewed. An independent monitoring system is crucial so that the court can adequately safeguard against possible abuses. Monitors can be paid court personnel, court appointees, or volunteers. For a comprehensive discussion of the various methods for monitoring conservatorships, see Sally Balch Hurme, *Steps to Enhance Guardianship Monitoring* (A.B.A. 1991). See also *AARP VOLUNTEERS: A RESOURCE FOR STRENGTHENING GUARDIANSHIPS* (AARP 1991).

States should also establish a plan for payment for the monitoring. In some states, the monitor may be a court employee or a volunteer. If the estate has sufficient funds to pay the monitoring fee, the estate should be charged accordingly. Only when an estate has insufficient assets to pay for monitoring should public funds be used to cover the cost of monitoring.

The National Probate Court Standards also provide for the filing of reports and procedures for monitoring conservatorships. See National Probate Court Standards, Standards 3.4.15 “Reports by the Conservator,” and 3.4.16 “Monitoring of the Conservator” (1993). The National Probate Court Standards additionally contains recommendations relating to the need for periodic review of conservatorships and sanctions for failure of conservators to comply with reporting requirements. See National Probate Court Standards, Standards 3.4.17 “Reevaluation of Necessity for Conservatorship,” and 3.4.18 “Enforcement.”

Subsection (a) of this section is derived from UGPPA (1982) Section 2-318 (UPC Section 5-418 (1982)). Subsections (b)-(d) are new.

SECTION 421. TITLE BY APPOINTMENT.

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

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

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

Comment

Subsection (a) of this section should be read in conjunction with Section 409(d), which provides that the appointment of a conservator or entry of another protective order is not a determination of incapacity. Consequently, the appointment of a conservator under Article 4 does not itself affect the protected person's ability to enter into contracts or engage in other transactions. Instead, protection against possibly improvident contracts is provided by vesting in the conservator legal title to the protected person's assets, the same as if the conservator were acting as a trustee. This allows for administration of the property independent of the actions of the protected person except to the extent the conservator is required to consult with the protected person as required by Section 418. See Section 422 for possible remedies for third parties who deal with a protected person without knowledge of the conservatorship.

The order appointing a conservator does not necessarily vest title in the conservator to all assets of the protected person, but only to assets subject to the conservatorship. Should the order of appointment list the assets subject to the conservatorship, only title to those assets is transferred to the conservator. Ordinarily, in the absence of an order limiting the scope of the conservatorship, title to all of the protected person's assets will be transferred to the conservator. However, if the protected person has executed a durable power of attorney, title to assets within the agent's control are not transferred to the conservator until such time as the power of attorney

is revoked and the assets subject to the agency come within the conservator's control. See Section 411(d).

The appointment of the conservator gives the conservator the authority over the protected person's property, or, if a limited conservator, to that property specified in the court's order. The letters of conservatorship are evidence of the conservator's authority and can be recorded to give notice.

The phrase "other property" in subsection (c) refers only to property title to which is ordinarily transferred by delivery of possession.

This section is based on UGPPA (1982) Sections 2-319(a) and 2-320 (UPC Sections 5-419(a) and 5-420 (1982)), modified to delete the former language that title to assets subject to a power of attorney vests automatically in the conservator.

SECTION 422. PROTECTED PERSON'S INTEREST INALIENABLE.

(a) Except as otherwise provided in subsections (c) and (d), the interest of a protected person in property vested in a conservator is not transferrable or assignable by the protected person. An attempted transfer or assignment by the protected person, although ineffective to affect property rights, may give rise to a claim against the protected person for restitution or damages which, subject to presentation and allowance, may be satisfied as provided in Section 429.

(b) Property vested in a conservator by appointment and the interest of the protected person in that property are not subject to levy, garnishment, or similar process for claims against the protected person unless allowed under Section 429.

(c) A person without knowledge of the conservatorship who in good faith and for security or substantially equivalent value receives delivery from a protected person of tangible personal property of a type normally transferred by delivery of possession, is protected as if the protected person or transferee had valid title.

(d) A third party who deals with the protected person with respect to property

vested in a conservator is entitled to any protection provided in other law.

Comment

This section provides a spendthrift effect for property of the protected person vested in the conservator. The section, like Section 421, is designed to allow the estate to be administered with a minimum of interference, and to make clear that the conservator, with respect to the property of the conservatorship, occupies a role similar to that of a trustee. The section is also designed to protect the estate, and hence the protected person, against possibly abusive or improvident claims. But some significant exceptions are recognized to protect the rights of third parties. An attempted transfer or assignment by the protected person, while ineffective to affect property rights, may give rise to a claim against the protected person for restitution or damages which, subject to presentation and allowance, may be satisfied pursuant to the claims procedure provided in Section 429. In addition, a creditor of the protected person, while forbidden to directly levy upon or garnish property held in the conservatorship, may be similarly entitled to relief under the claims procedures.

Subsection (c) addresses a special situation. While title to certain tangible personal property, such as an automobile, is transferred by means of a document of title, title to most tangible personal property is transferred simply by delivery of possession. Sales of such property are often casual, and purchasers do not usually inquire into the source of the seller's title. Upon the conservator's appointment, title to a protected person's tangible personal property, like title to the protected person's other assets, is transferred from the protected person to the conservator. But this transfer of title will normally not be known to a prospective purchaser, particularly if the tangible personal property is still in the protected person's possession. The effect of this subsection is to generally validate the title of such casual purchasers. The conservator may contest the purchaser's title only if the purchaser failed to pay full value, the purchaser knew of the conservatorship, or the purchaser, based on the circumstances, should have inquired into the conservatorship's existence.

Subsection (d) clarifies that this section does not supersede protections third parties may have under other law, such as under the statutes regulating commercial transactions.

Subsections (a) and (b) are based on subsections (b) and (c) of UGPPA (1982) Section 2-319 (subsections (b) and (c) of UPC Section 5-419 (1982)). Subsections (c) and (d) are new.

SECTION 423. SALE, ENCUMBRANCE, OR OTHER TRANSACTION

INVOLVING CONFLICT OF INTEREST. Any transaction involving the conservatorship estate which is affected by a substantial conflict between the conservator's fiduciary and personal interests is voidable unless the transaction is expressly authorized by the court after notice to interested persons. A transaction affected by a substantial conflict between personal

and fiduciary interests includes any sale, encumbrance, or other transaction involving the conservatorship estate entered into by the conservator, the spouse, descendant, agent, or lawyer of a conservator, or a corporation or other enterprise in which the conservator has a substantial beneficial interest.

Comment

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 without further proof. But while this principle is well-established, the exact parameters of the principle are less certain. This section, which is based on comparable provisions of the UPC, articulates the doctrine with more precision. Compare UPC Section 3-713. Under this section, a transaction involving the conservatorship property which was entered into by the conservator or specified relatives or business associates of the conservator is presumed to be premised on an impermissible advantage based on conflict of interest. However, transactions involving conservatorship property with parties not on the list are not necessarily valid. While transactions involving other parties are not presumed to be invalid, a transaction 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. Also, 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 limitation of time on when an action to void the transaction may be brought. Instead, a laches test will be applied.

Per Section 414, a petition to void a transaction may be filed either by the protected person or by any person interested in the protected person's welfare. Whether the court should grant or deny the petition will typically depend on the financial outcome of the conservatorship estate. Should the transaction have proven unprofitable to the conservator or related party, the court will 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.

This section is based on UGPPA (1982) Section 2-321 of the 1982 Act (UPC Section 5-421 (1982)).

SECTION 424. PROTECTION OF PERSON DEALING WITH CONSERVATOR.

- (a) A person who assists or deals with a conservator in good faith and for value in

any transaction other than one requiring a court order under Section 410 or 411 is protected as though the conservator properly exercised the power. That a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, but restrictions on powers of conservators which are endorsed on letters as provided in Section 110 are effective as to third persons. A person who pays or delivers assets to a conservator is not responsible for their proper application.

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

Comment

The 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 on limited conservatorship, the protection extended to third parties is not unlimited. Third parties are charged with knowledge of restrictions on the authority of limited conservators. Pursuant to Section 110, 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, such as the Uniform Commercial Code.

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).

This section is based on UGPPA (1982) Section 2-322 (UPC Section 5-422 (1982)).

SECTION 425. POWERS OF CONSERVATOR IN ADMINISTRATION.

(a) Except as otherwise qualified or limited by the court in its order of appointment and endorsed on the letters, a conservator has all of the powers granted in this section and any additional powers granted by law to a trustee in this state.

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

(1) collect, hold, and retain assets of the estate, including assets in which the conservator has a personal interest and real property in another state, until the conservator considers that disposition of an asset should be made;

(2) receive additions to the estate;

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

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

(5) invest assets of the estate as though the conservator were a trustee;

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

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

(8) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, and raze existing or erect new party walls or buildings;

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

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

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

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

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

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

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

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

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

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

(19) borrow money, with or without security, to be repaid from the estate

or otherwise and advance money for the protection of the estate or the protected person and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any assets, for which the conservator has a lien on the estate as against the protected person for advances so made;

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

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

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

(23) pay any sum distributable to a protected person or individual who is in fact dependent on the protected person by paying the sum to the distributee or by paying the sum for the use of the distributee:

(A) to the guardian of the distributee;

(B) to a distributee's custodian under [the Uniform Transfers to Minors Act (1983/1986)] or custodial trustee under [the Uniform Custodial Trust Act (1987)]; or

(C) if there is no guardian, custodian, or custodial trustee, to a relative or other person having physical custody of the distributee;

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

duties; and

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

Comment

This section is based on UGPPA (1982) Section 2-323 (UPC Section 5-423 (1982)) with some changes. For example, the provision authorizing delegation is now stated as a separate section. See Section 426. Also, subsection (b)(23) is revised to expand the list of individuals to whom the conservator may pay sums otherwise distributable to the protected person. The list now includes custodians under the Uniform Transfers to Minors Act (1983/1986) and trustees under the Uniform Custodial Trust Act (1987). But the most significant change to this section is the deletion of the language of former subsection (a) that allowed a conservator of a minor to exercise the powers of a guardian without seeking formal appointment to that office.

While subsection (b)(7) authorizes a conservator to deal with real property located in another state, before disposing of the property in the other state, local law may require that the conservator have some contact with or supervision by a court in that state.

In recent years, structured settlements have become more common. While the term “structured settlement” is not expressly used in this section, subsection (b)(20) would authorize a conservator to enter into such an agreement. The court, by means of a protective arrangement, may also approve a structured settlement without appointing a conservator. See Section 412(a)(2).

SECTION 426. DELEGATION.

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

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

(1) selecting an agent;

(2) establishing the scope and terms of a delegation, consistent with the purposes and terms of the conservatorship;

(3) periodically reviewing an agent’s overall performance and compliance

with the terms of the delegation; and

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

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

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

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

Comment

This new section is based on Section 9 of the Uniform Prudent Investor Act (1994), which itself was derived from the Restatement (Third) of Trusts: Prudent Investor Rule Section 171 (1992). The Uniform Prudent Investor Act (1994), despite its title, addresses more than investment of trust assets. It also covers a variety of topics, including delegation, relating to the general management of trusts. Section 9 of the Act is designed to replace Section 3(24) of the Uniform Trustee Powers Act (1964) on which the former delegation provision of this Act was based. Unlike UGPPA (1982) Section 2-323(c)(24) (UPC Section 5-423(c)(24)(1982)), which merely authorized delegation without specifying standards, this section subjects delegation to a standard of care.

The purpose of this section is to encourage and protect the trustee in making delegations appropriate to the facts and circumstances of the particular conservatorship. This section is designed to strike the appropriate balance between the advantages and hazards of delegation. The standard for whether a particular function is delegable by a conservator is whether it is a function that a prudent conservator might delegate under similar circumstances. This section does not mandate delegation or hold a conservator liable for failing to delegate. However, such liability may be imposed under some other section if the conservator, due to a failure to delegate, is unable to perform required duties. See, e.g., Section 418 (general duties of conservator).

This section applies to delegation both to agents and co-conservators. Whether a conservator may delegate to a co-conservator functions which may not be delegated to an agent and vice versa will depend on the facts and circumstances of the particular conservatorship.

Under subsection (b)(3), the duty to review the agent's performance includes the periodic

evaluation of the continued need for and appropriateness of the delegation, including the need to possibly terminate the relationship. The conservator's compliance with this duty should also protect the protected person against the risks of an overly broad delegation.

Although subsection (c) exonerates the conservator from personal responsibility for the agent's conduct when the delegation satisfies the standards of subsection (a), subsection (d) makes the agent responsible to the conservatorship.

SECTION 427. PRINCIPLES OF DISTRIBUTION BY CONSERVATOR.

(a) Unless otherwise specified in the order of appointment and endorsed on the letters of appointment or contrary to the plan filed pursuant to Section 418, a conservator may expend or distribute income or principal of the estate of the protected person without further court authorization or confirmation for the support, care, education, health, and welfare of the protected person and individuals who are in fact dependent on the protected person, including the payment of child or spousal support, in accordance with the following rules:

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

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

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

consider:

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

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

(C) other money or sources used for the support of the protected person.

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

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

Comment

This section sets forth a conservator's specific duties and powers with respect to ongoing distributions. Distributions upon termination of the conservatorship are addressed in Section 431. Special rules with respect to a termination due to the death of the protected person are covered in Section 428. Distributions under this section may be made without court authorization or confirmation.

This section is based on subsections (a) and (b) of UGPPA (1982) Section 2-324 (subsections (a) and (b) of UPC Section 5-424 (1982)) but with several changes. The categories for which distributions can be made have been expanded to include health and welfare. The authority to make distributions for the protected person's dependents has been clarified.

“Dependents” is not limited to dependents whom the protected person is legally obligated to support, but refers to individuals who are in fact dependent on the protected person, such as children in college and adult children with developmental disabilities. Child and spousal support payments are now specifically included within permitted distributions to dependents. Although Section 411 allows the making of a gift, it may only be done pursuant to court order. Under this section, a conservator may make a gift without court order if the gift meets the stated limitations.

SECTION 428. DEATH OF PROTECTED PERSON.

[(a)] If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the protected person which may have come into the conservator’s possession, inform the personal representative or beneficiary named in the will of the delivery, and retain the estate for delivery to the personal representative of the decedent or to another person entitled to it.

[(b)] If a personal representative has not been appointed within 40 days after the death of a protected person and an application or petition for appointment is not before the court, the conservator may apply to exercise the powers and duties of a personal representative in order to administer and distribute the decedent’s estate. Upon application for an order conferring upon the conservator the powers of a personal representative, after notice given by the conservator to any person nominated as personal representative by any will of which the applicant is aware, the court may grant the application upon determining that there is no objection and endorse the letters of conservatorship to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative.

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

conservator as personal representative.]

Comment

Subsection (a) lists the required duties of a conservator incident to the death of the protected person. The conservator must deliver to the court for safekeeping any will of the protected person which may have come into the conservator's possession, inform the personal representative or a devisee named in the will that the will has been delivered, and 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 protected person's estate. The conservator will then be unable to close the conservatorship because there is no "successor" to whom to deliver the protected person's assets. To enable the conservator to expeditiously close the conservatorship, this section specifies a streamlined process whereby the conservator can secure appointment as personal representative. These subsections are bracketed 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, the conservator-personal representative would be required to give notice of the appointment within 30 days. See UPC Section 3-705. States which require notice to interested persons prior to the appointment of a personal representative should modify subsection (b) accordingly.

This section is based on UGPPA (1982) Section 2-324(e) (UPC Section 5-424(e) (1982)).

SECTION 429. PRESENTATION AND ALLOWANCE OF CLAIMS.

(a) A conservator may pay, or secure by encumbering assets of the estate, claims against the estate or against the protected person arising before or during the conservatorship upon their presentation and allowance in accordance with the priorities stated in subsection (d).

A claimant may present a claim by:

- (1) sending or delivering to the conservator a written statement of the

claim, indicating its basis, the name and address of the claimant, and the amount claimed; or

(2) filing a written statement of the claim, in a form acceptable to the court, with the clerk of court and sending or delivering a copy of the statement to the conservator.

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

(c) A claimant whose claim has not been paid may petition the court for determination of the claim at any time before it is barred by a statute of limitations and, upon due proof, procure an order for its allowance, payment, or security by encumbering assets of the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party shall give to the conservator notice of any proceeding that could result in creating a claim against the estate.

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

(1) costs and expenses of administration;

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

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

(4) claims arising before the conservatorship; and

(5) all other claims.

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

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

Comment

This section provides a procedure for the expeditious payment and resolution of claims. Should the estate be insufficient to satisfy all claims, payment will be made in accordance with the priorities specified in subsection (d). Subsection (a) provides for the conservator's payment of appropriate claims and the method by which claims can be presented.

Subsection (d), which should be read in conjunction with the applicable bankruptcy law, is not intended to preclude the filing of a petition for bankruptcy if the protected person is otherwise eligible.

This section is based on UGPPA (1982) Section 2-327 (UPC Section 5-427 (1982)), which in turn was drawn from the claims procedure contained in Article III, Part 8 of the UPC, except that the priorities in subsection (d) are designed for a conservatorship as opposed to a decedent's estate. The principal update is to incorporate into this section a 1987 amendment made to UPC Section 3-806. The effect of this change is to clarify that a conservator may change an allowance of claim to a disallowance at any time prior to payment or court order. In addition, subsection (d)(3) has been revised to conform it to the revisions of the distribution standards under Section 427.

SECTION 430. PERSONAL LIABILITY OF CONSERVATOR.

(a) Except as otherwise agreed, a conservator is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate

unless the conservator fails to reveal in the contract the representative capacity and identify the estate.

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

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

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

[(e) A conservator is not personally liable for any environmental condition on or injury resulting from any environmental condition on land solely by reason of an acquisition of title under Section 421.]

Comment

Subsection (a) is significant in that it provides that the conservator is generally *not personally liable* for contracts entered into as the conservator as long as the conservator discloses the representative capacity in the contract as well as identifies the estate. Liability in such cases is limited to the estate assets. But the conservator will be personally liable if the contract expressly so provides.

Subsection (b) reverses the 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.

Subsection (c) confirms the intent of this section, that absent special agreement or other circumstances, a conservator is liable only in a representative capacity.

Subsection (e) is new, in recognition of the growing issue of environmental conditions on land that must be dealt with by the conservator. The effect of this subsection is to protect a conservator from possible liability due to the automatic transfer of title to the protected person's assets accruing upon the conservator's appointment pursuant to Section 421. For actions taken as conservator, the conservator's liability under state or federal environmental provision or regulation is generally limited to those assets held in the capacity as conservator. The conservator may be liable if the conservator's negligence causes or contributes to an environmental problem or potential environmental problem. Whether the conservator might be liable for actions or failures to act with respect to an environmental condition depends on both state and federal environmental regulations, including CERCLA (Comprehensive Environmental Response, Compensation and Liability Act), found at 42 U.S.C. § 9601 et seq.

This section is placed in brackets to signal to the enacting jurisdiction that it should expand on and conform the language of subsection (e) to whatever provisions it may have enacted with respect to liability of other types of fiduciaries for environmental conditions.

This section is based on UGPPA (1982) Section 2-328 (UPC Section 5-428 (1982)). This section, with the exception of subsection (e), is also similar to UPC Section 3-808 (personal representatives).

SECTION 431. TERMINATION OF PROCEEDINGS.

(a) A conservatorship terminates upon the death of the protected person or upon order of the court. Unless created for reasons other than that the protected person is a minor, a conservatorship created for a minor also terminates when the protected person attains majority or is emancipated.

(b) Upon the death of a protected person, the conservator shall conclude the administration of the estate by distribution to the person's successors. The conservator shall file a final report and petition for discharge within [30] days after distribution.

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

account for funds and assets of the protected person.

(d) Except as otherwise ordered by the court for good cause, before terminating a conservatorship, the court shall follow the same procedures to safeguard the rights of the protected person that apply to a petition for conservatorship. Upon the establishment of a prima facie case for termination, the court shall order termination unless it is proved that continuation of the conservatorship is in the best interest of the protected person.

(e) Upon termination of a conservatorship and whether or not formally distributed by the conservator, title to assets of the estate passes to the formerly protected person or the person's successors. The order of termination must provide for expenses of administration and direct the conservator to execute appropriate instruments to evidence the transfer of title or confirm a distribution previously made and to file a final report and a petition for discharge upon approval of the final report.

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

Comment

This section is new.

Termination of a conservatorship must be distinguished from termination of a particular conservator's appointment. For the provisions on termination of a conservator's appointment, see Section 112. This section does not apply to modification of a conservatorship, which is addressed in Section 414.

Upon termination of a conservatorship, a conservator is not entitled to an order of discharge until the court approves the conservator's final report. A "report" in subsection (b) 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 420 for the required contents. A report lacking in 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 protected person's assets and funds. After notice and hearing,

an order allowing a final report adjudicates all previously unsettled liabilities relating to the conservatorship. See Section 420(a).

If an enacting state chooses to use a different time period for the filing of the final report and petition for discharge than that contained in subsection (b), the time period used should not be significantly longer than the 30 days contained in subsection (b).

Subsection (d) requires the court to follow the same procedures for a petition to terminate a conservatorship as apply to the petition for conservatorship, which may include the appointment of a visitor and counsel in some cases. The standard to terminate a conservatorship is prima facie evidence, intentionally a lower standard than the standard for creating a conservatorship. Once the petitioner has made out a prima facie case, the burden then shifts to the party opposing the petition to establish by clear and convincing evidence that continuation of the conservatorship is in the best interest of the protected person. A similar standard applies to the termination of a guardianship for an incapacitated person. See Section 318(c) and comment.

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 executed the appropriate documents and delivered the property under the conservator's control.

To initiate proceedings under this section, the protected person or person interested in the protected person's welfare need not present a formal document prepared with legal assistance. A request to the court may always be made informally.

The termination provision of the 1982 UGPPA, which was quite abbreviated, was located at Section 2-329 (UPC Section 5-429 (1982)).

SECTION 432. REGISTRATION OF GUARDIANSHIP ORDERS. If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this state by filing as a foreign judgment in a court, in any appropriate [county] of this state, certified copies of the order and letters of office.

Comment

This section, which was added in 2010, is identical to Section 401 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007) (UAGPPJA). But unlike the UAGPPJA, which applies only to adult proceedings, this section and the following two sections also apply to minors. This section is codified here in Part 4 of this article and not with the other

guardianship provisions, which are codified in Parts 2 and 3, so that like the UAGPPJA, all of the provisions dealing with the ability of a guardian or conservator to act outside state boundaries (this section and Sections 433 and 434) will be codified in one place.

As stated in the General Comment to UAGPPJA Article 4:

“Article 4 (Sections 432 through 434 of this Act) is designed to facilitate the enforcement of guardianship and protective orders in other states. This article does not make distinctions among the types of orders that can be enforced. This article is applicable whether the guardianship or conservatorship is full or limited. While some states have expedited procedures for sales of real estate by conservators appointed in other states, few states have enacted statutes dealing with enforcement of guardianship orders, such as when a care facility questions the authority of a guardian appointed in another state. Sometimes, these sorts of refusals necessitate that the proceeding be transferred to the other state or that an entirely new petition be filed, problems that could often be avoided if guardianship and protective orders were entitled to recognition in other states.

“Article 4 provides for such recognition. The key concept is registration. Section 401 (Section 432 of this Act) provides for registration of guardianship orders, and Section 402 (Section 433 of this Act) for registration of protective orders. 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, Section 403 (Section 434 of this Act) authorizes the guardian or conservator to thereafter exercise all powers authorized in the order of appointment except as prohibited under the laws of the registering state.

“The drafters of the Act concluded that the registration of certified copies provides sufficient protection and that it was not necessary to mandate the filing of authenticated copies.”

The 2010 amendment replaces the previous version of Sections 432 and 433, which dealt only with the ability of a conservator to act outside the state of appointment and did not create a registration procedure.

SECTION 433. REGISTRATION OF PROTECTIVE ORDERS. If a conservator has been appointed in another state and a petition for a protective order is not pending in this state, the conservator appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this state by filing as a foreign judgment in a court of this state, in any [county] in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond.

SECTION 434. EFFECT OF REGISTRATION.

(a) Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in this state all powers authorized in the order of appointment except as prohibited under the laws of this state, including maintaining actions and proceedings in this state and, if the guardian or conservator is not a resident of this state, subject to any conditions imposed upon nonresident parties.

(b) A court of this state may grant any relief available under this [article] and other law of this state to enforce a registered order.

ARTICLE 5
MISCELLANEOUS PROVISIONS

SECTION 501. 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 502. SEVERABILITY CLAUSE. If any provision of this [act] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.

SECTION 503. EFFECTIVE DATE. This [act] takes effect

SECTION 504. REPEAL. The following acts and parts of acts are repealed:

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