**NCGA ANNUAL CONFERENCE**

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Carolina Beach, NC

UNOFFICIAL SUMMARY OF THE

ULC - UGPPA Drafting Committee meeting

By

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ISSUES FOR DISCUSSION – MORNING SESSION

ARTICLE I – GENERAL PROVISIONS

ARTICLE - SECTION 123 – 60 day time-frame to conform to the Uniform Commercial Code (UCC) – does this help as an addition to the Act.

Nina will identify key sections for bankers to consider.

ARTICLE 1 - CONFIDENTIALITY SECTIONS 307 and 408 of the ACT – key issue is applying confidentiality to guardianship of minors. There are policy and technical differences when dealing with minors. THERE WAS NOT CONSENSUS ON THIS ISSUE IN THE PREVIOUS MEETING OF THE COMMITTEE beyond a certain specific application – see 307 (a) – however this should be treated differently for minors in Section 2. The fact that some actions are filed creates problems for the individuals, especially if they are not found to be incapacitated. Consider expungement – but that could be too cumbersome. Maybe under certain circumstances the hearing, the file and access could be placed under seal. What about how security numbers, and bank accounts are identified – general they are not shown as full numbers in order to protect against scams. [NOTE: if this is an attempt to make all this uniform as to confidentiality it will fail simply because there are so many different variations across the country.] The practical question is who will have access to the detailed financial information and how will they be identified.

Consider ways by which alternative language may be offered for individuals having the right to request that the proceeding be closed and the records sealed. Would this extend to the existence of the guardianship as well as the filing of the guardianship petition itself. NOTE: In some states the guardianships regarding persons with developmental disabilities are always closed and kept confidential.

Create legislative notes to the Sections to suggest alternatives to confidentiality.

What about guardianship that have foreign nationals as the respondent. There may need to be a reference to how petitioners notify the foreign entity involved.

Subsection (b) of Section 307 will remain in brackets and (a) and (c) will be taken out of brackets.

IT MAY END UP THAT EVERYTHING IS PLACED IN BRACKETS WITH A LONG LEGISLATIVE NOTE.

ARTICLE 1 – KEY ISSUES – definition of “decision-making support” Section 102 (8) and how do we assure its accurate application in the Act. Compare to supported decision making which might rise in time to a level of agreement similar to POAs. See Section 301 (a)(1)(b). “Less restrictive may include…” and use in context with 301.

Note that there already is “Limited Guardianship” and this effectuates additional ways to apply less restrictive means. However, petitioners must be held to a showing that many specific lesser restrictive measures have been considered or pursued and will not work. Need to be able to show judges and practitioners what less restrictive really means. Terry Hammond mentioned that the Texas statute is being amended to confirm that the “supporters” in supported decision making are considered fiduciaries.

ARTICLE 1 – Section 118 Protective Arrangement instead of guardianship – take out the word “otherwise” in Section 118 (c)(2) with specific reference to 301 and 401.

When will the court step in and exclude the so-called “perpetrator” or “sweet heart” that are actually the “bad persons” that the respondent need to be protected from in the future. What about the concern of undue influence coupled with diminished capacity. There is a body of case law that creates changes. STRONG PROPOSAL TO DROP SUBSECTION (C). Subsection (d)

ARTICLE 1 – SECTION 124 Use of Agents – delegation by the appointee of certain tasks, but not a delegation of duties. Consider “subject to 121 (b) GOING TO RETITLE SECTION 121 Should the agent notice of all things going on in the guardianship that would impact on what the agent is doing. Need note that explains what the agent must know. But see Section 124 (a)(2)(B) by adding “taking into account the person’s long held beliefs.” Tie this to Section 123 What about this applying to minors?

Should there be a notice provision when a guardian delegates a major task to a third party? Consensus is yes for those functions where there really should be notice like moving the person out of state – see Section 310 (d). Do not want to allow the guardian to delegate visitation.

ISSUES FOR DISCUSSION – AFTERNOON SESSION FINISHING UP ON ALL SECTIONS OF ARTICLE 1

ARTICLE 1 SECTION 125 – Temporary Substitute Guardians – delete (d)(3)

ARTICLE 1 Section 104 (c)(1) and Section 110 – Court Appointment of Successor Guardian. What happens when there are co-guardians appointed. Must it be both acting in response to various duties – default is that they act together. Possibly eliminate “designated events” because it will always be when one is incapacitated or has died.

Looking at “least restrictive means” and clarifying the term as relates to the Constitutional mandate

ARTICLE 1 Section 108 (b) – should the last sentence be taken out?

ARTICLE 2 GUARDIANSHIP OF MINOR

The Article goes back to 1969 – only thinking about orphans – today there are additional issues of family dysfunction, like parents being addicts. Need to spend more time of minor issues.

ARTICLE 2 SECTION 204 – Right to counsel for the parents of the minor because of the parents losing their parental rights. Compare to appointment of counsel for parents when parental rights are being terminated. Compare right to counsel to appointment of counsel.

Usually in appointment of guardian of minor, the parents must consent or not show up for the noticed hearing. Otherwise, if objection, there is a right to counsel by the parents in the guardianship hearing.

ARTICLE 2 SECTION 211 – Real concern with 211 (c) that allows the Court to specifically authorize the guardian to consent to the adoption of the minor. Question – what does the UCJJA state. Bracket the language in (c) and couple it with legislative comment.

In ARTICLES 2 and 4 insert that parents have a right to counsel. What about bracketed section in ARTICLE 4 Conservatorship.

ARTICLE 2 SECTION 205 – Presence requirements – the section expects the minor to attend with certain exceptions expressly written in the section. Get “age” out of the requirement to appear at hearing. Compare to Section 409 – presence at hearing regarding conservatorship – should the same apply to minors here in Section 409 (include “clear and convincing evidence as to why the minor should not attend the hearing) as in Section 205.

ARTICLE 2 SECTION 206 - Minor’s Nominee – 2 issues – 1) standby guardianship; and 2) who has greater priority to nominate – usually the parent. Section 206 (c) is a paste up of the adult provision and this should be modified with different language.

ARTICLE 2 SECTION 202 – Protective Arrangement instead of guardianship for a minor. Raises question as to medical procedures – but that would go to another court. This focuses on keeping the rights of the parents rather than the minor. Difference between minors and adults – we’ve work much harder and longer on adults and not nearly as comfortable with the detail of guardianships of minors. MARTY FORD raised the issue of parenting rights of parents who themselves are intellectually impaired.

ARTICLE 2 SECTION 211 – POWERS OF GUARDIAN OF MINOR – should consider this as an area that states should consider limited guardianship for minors [33 states have limited guardianship for a minor] but do not couch it in terms of a protective arrangement. Compare to SECTION 201 (b) (3) and change that language of when the Court may appoint or order protective arrangement for a minor. Clear up the language for the court order in 206. Make some reference to limited guardianship.

When the parents are still living, there must be detail as to what they can do, like send birthday cards or be involved in major medical decisions.

ARTICLE 2 SECTION 212 – TERMINATION OF GUARDIANSHIP OF MINOR – clarifies levels of termination – This involves situations after the guardianship has been ordered and guardian of minor appointed. Look at section which includes minor’s death, adoption, emancipation, attaining age of majority, or other determinations by the Court.

ARTICLE 2 SECTION 432 Termination or Modification of conservatorship – the minor that turns 18 or age of majority – they make the decision to continue under the guardianship of minor

When parent seek termination – must show prima facie evidence of changed circumstances that show why the guardianship is no longer necessary. Debate over requiring the same hurdles for termination as for petitioning of the guardianship of the minor in the first place. Specific statement that termination is not determinative of custody. Maybe on motion the court may modify or limit the guardianship.

BEN ORZESKE – FOR THE ULC – Getting this enacted will be difficult because of the length, the complexity of the law and the differing views of advocates and organizations. His job is to coordinate getting our organizations to pass resolutions that ratify and support the Act.

ULC also needs help from us to assist the legislative drafting committee to make sure the Act read right and assure that legislators are aware of just how much is in the Act. Three month period between the mark up of the Act as legislation and the start of the various state legislatures – he hopes to get many of the states to be supportive of the Act in each state.

SATURDAY MORNING

ARTICLE 3 SECTION 411 Notice of the petition (402, 403) and the order (411) regarding conservatorship of minor. Notice to go to parents and adult siblings – but what about grandparents? Compare to notice in guardianship (203) – make all notice provisions parallel to each other.

REVIEW OF KEY CHANGES

1. Emergency guardian provision – Section 209 – start with 60 days with one extension of another 60 days – also for adults in Section 312 and add the extension. For the extension, the Court needs to make specific findings to extend the emergency order for up to another 60 days.

Allow sale of property under separate order – see Section 118

2. Standby guardian – Section 207, 208 - primarily dealing with parents – especially when there is a nominee in a Will. Procedures will allow the guardian while still living to seek the appointment of a standby guardian – question whether the guardian must first go to court to get the “Standby Order” – could appoint while still living, but on death go to court to get the Standby Order. Also, consider what happens with the deportation of parents – they don’t want to go to court in advance of being deported – so get the appointment done, and then once the parent is deported go get the standby order. POAs by the parent will probably not be effective. Hard to clarify the qualifying events that would trigger the standby guardian order. Add a section that allows the standby guardian to come into the court to show that the guardian unavailable or is not capable of serving. Have the court appoint a visitor or guardian ad litem to confirm the validity of the contention that the guardian is not available.

3. Delegation by parent – this has no fit in any of the sections. Use this as a discussion of yet another alternative to guardianship. However, schools and banks will not recognize the delegation. Leave at the end of Article 1 and have it run for 9 months to last the duration of the school year. Make this only apply to parents and not to guardians (See the 1997 UGPPA Section 105) Allow for expedited process.

ARTICLE 4 CONSERVATORS

ARTICLE 4 SECTION 405, 304 Appointment of the visitor – always require in guardianship but not always in conservatorship. Specifies what the visitor shall do. What about an obligation to examine financials – especially for exploitation and financial abuse. Include as a comment in the section. Many states will not provide for visitors if attorneys are involved. Also, states may not have the funds, or the people available for appointment of visitors. Make sure there is no conflict of interest between the visitor and the appointed counsel. Put burden on the court to appointment the visitor from a list. More often the visitor will be someone like a social worker rather than an attorney.

Revert back to the 1997 Act to determine what the baseline will be for the visitor. If visitor is mandatory, there will be a negative fiscal impact. Remember that a major objection to guardianship is the tremendous expense associated with the guardianship or conservatorship process.

In Texas, there is a voluntary training program conducted by the state Bar. However, visitors may the lesser expense and still allows the court to more fully investigate. Maybe have the court determine early on whether the case is a complex or simple case – might lead to a two track procedural proposition. Consider it as a tiered approach.

In the end, the majority view is to have mandatory visitor when no attorney is involved. Maybe add legislative note to reflect the concern for the fiscal impact of mandatory appointment of visitors. Provide alternatives with brackets and include extensive comments. [Court shall appoint a visitor] [Court shall appoint a visitor, unless respondent represented by court appointed counsel] Might allow the court to apportion fees between the visitor and attorney. As a deterrent, allow court to assess (tax, allocate or apportion) costs and fees against one or the other parties if the court finds bad faith.

ARTICLE 4 SECTION 419 Standard of care – compare to standards of care for trusts that come from other statutes. Conservator is a fiduciary and prudent investor rules apply. Refers to each state’s trust law related to standard of care. Include duty of loyalty. See NGA Standard 17. Should there by the infusion of person centered – see 419 (b) (c) and (d). Note difference between

guardianship plan (prospective) and report (retrospective). See issue related to deviation from the fiscal budget in Section 420. Report at least once per year. Consider the Arizona statute. See also Section 420 and what is meant by significant deviation. Allow for approval or objection to plan – look at Section 416.

Redraft with more detail regarding when a plan substantially changes based on current report requiring a new plan to be filed with the court. Add right to specifically object to the plan or the annual report. Must connect to the Article 3 Guardian’s plan Section 316 – use parallel approach.

ARTICLE 4 SECTION 425 426 – Agreements made by individual subject to conservatorship. 1997 Act actually vested title to the property of the conservatorship estate in the conservator. Delete that sentence – also delete “tangible personal property” because it does not make sense. Take out section 425 (c). This could chill otherwise valid commerce conducted with or on behalf of the conservatee. Most states do not take away the “right to contract” in conservatorships. Constructive notice requires a good faith component.

Modifying provisions where the individual subject to conservatorship is a minor.

ARTICLE 4 SECTION 413 – Emergency Conservator This has been addressed to some extent already. Importing emergency guardian provision from Section 209. NOTE THAT THERE IS LITTLE IF ANY DIFFERENCE BETWEEN EMERGENCY AND SPECIAL also allow 60 day order with up to 60 day extension.

ARTICLE 4 SECTION – consider modifying provisions where the individual subject to conservatorship is a minor.

OTHER ARTICLE 4 ISSUES – Appointment of conservator does not include a finding of incapacity. So the problem is that there is no use of the work “incapacity” because it’s a functional definition being used. Make this a note under 301 and 401.

AFTERNOON SESSION

ARTICLE 3 GUARDIANSHIP ISSUES

ARTICLE 3 SECTION 313 (c)(1) Pets – add language to address the pets of an adult subject to guardianship or conservatorship. Also include pets that are service and support animals.

ARTICLE 3 SECTION 314 Residential moves – if permanent move to assisted living or skilled nursing residence – it cannot be made if an objection has been filed with the court. Section 307 was amended to allow agent under POA for finances or health care access to evaluation absent court order to the contrary. Also in Section 408. Should this have a parallel provision between 3 and 4 and also Article 1.

Do word search on custody in Article 4 to be sure language is consistent.

Difficulty to do Medicaid planning for individuals. Take guardian’s plan approval out of the Act.

But make conservator’s plan more accountable. But made allow discretion where the court may approve. If no objection, the plan gets approved. Notice provision in other sections would apply. Family members will not feel empowered and if possible they should be given every opportunity to participate in the process. This is especially true for pro se individuals.

Petition signals that the plan will include the change of the respondent’s residence.

Now consider reducing the time period to something equal to a motion practice.

Bracket “nursing home” placement – a more restricted home placement. The more restricted environment would be a secured or locked unit. What do we want the words to mean? Sometimes more restrictive but not more secure. What about distance – say 50-100 miles away? Spell out freedom of movement or association. Number of days could be less than 60 – Section 311.

Back to Section 313 PETS – Guardian should be told of their duties to pursue less restricted alternatives.

Using decision making support. Need to give the guardian obligations to move towards less restrictive alternatives. See Section 313 Maybe put that in the Plan and then report about what has been done. Also Section 301(b) that would be reworded to do the same thing.

Restoration Section – this is going to the House of Delegates to recognize supported decision making as a grounds for restoration.