Committee On Improving Judicial Oversight
And Processing of Probate Court Matters

Minor to Adult Guardianship Workgroup
Report to the Committee
August 10, 2010

The Minor to Adult Guardianship Workgroup has held four meetings. The Workgroup members and staff who participated are as follows:

Workgroup Chair Judge David Mackey, Committee Chair Judge Ann Timmer, Jacob Schmitt, Jay Polk, Melissa Kushner, Kim Simmons, Becca Hornstein, Caroline Lautt-Owens and Rafayei Mgdesyan (summer extern to Judge Timmer).

Administrative Order No. 2010-52 identifies the charge to this Workgroup by the Committee as follows:

"[C]onsider if any changes to applicable statutes and court rules would help streamline the process for cases in which an incapacitated or vulnerable child reaches the age of majority and is in need of a guardian."

The group has identified a number of issues that are faced by parents of incapacitated or vulnerable children who are nearing their eighteenth birthdays and are in need of guardians. Those problems include:

1. Expense and difficulty of guardianship process.
2. Inability to obtain a guardianship appointment until the child turns eighteen.
3. Lapse in decision -- making authority between the child's eighteenth birthday and receiving guardianship authority.
4. Conflicts between divorced parents in guardianship proceedings.

The group has identified a number of themes that we propose addressing through statutory changes. Those themes are:

1. Updating the definition of an "incapacitated person" to accomplish two goals:
    A. To clarify that minors who are nearing majority and are also "incapacitated persons" are not excluded from the guardianship and conservatorship process prior to their eighteenth birthday.

B. To focus the court's attention on the actual incapacities and abilities of the person rather than on medical or mental health diagnoses.

2. Allow for non-testamentary, temporary appointments of guardians through other types of written instruments.
3. Provide an alternative track for the appointment of guardians when undisputed evidence of a long -- term disability is present by the time a child is 17 years and six months of age.
4. Encourage the greater use of limited guardianships and conservatorships.

Whether these changes are implemented, the group has identified the need for additional training for judicial officers who are assigned to handle guardianship and conservatorship cases as well as the need for early education regarding the guardianship and conservatorship process for the parents of incapacitated or vulnerable children before the child turns eighteen.

In the process of identifying those themes, the group has discovered that although Arizona is a Uniform Probate Code (UPC) state, there are numerous provisions of the UPC that have not be adopted by Arizona that would assist in lessening the problems experienced by parents of disabled children **and** update Arizona's guardianship and conservatorship statutes to conform with more widely accepted practices in the nation.

The group also has examined guardianship provisions of other UPC and non-UPC states and identified special processes authorized in those states for addressing the goals of our Workgroup. Specifically, group members have examined the laws of the UPC states of Alabama, Alaska, District of Columbia, Idaho, Maine, Montana, Nebraska, New Mexico, North Dakota, South Carolina and Utah as well as the non-UPC states of Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, Oklahoma, Pennsylvania and Tennessee.

Based upon our research to date, the workgroup has prepared the attached statutory changes for consideration and discussion. There is ongoing debate within the group as to the benefits and problems associated with the proposed changes. Please also note that the suggested changes impact issues beyond the workgroup's charge in order to ensure uniformity within the statutory scheme. Our goal is to

submit concrete proposals to the Committee for consideration at the September 8, 2010 meeting. This report highlights the discussion of the group regarding a number of those proposed changes.

I. Definition of "incapacitated person", pages 3 - 5:

The change to the definition of "incapacitated person" set forth in proposed A.R.S. §14-5101 is from the UPC, §5-102. The definition emphasizes a person's incapacity rather than a specific medical or mental health diagnosis. The group also added the word "only" after the term "other than being a minor" to emphasize that a minor with a lack of capacity for reasons other than just age is included in the definition. The group favors the proposed changes for a number of reasons:

1. It clarifies for judicial officers that a person under the age of eighteen is not disqualified from consideration for a guardianship and conservatorship when the need for protection arises due to reasons other than age. However, members of the group would not be in favor of such a clarification if it did not come with another protection discussed later regarding not considering a minor for such a protective process until they are over seventeen years old due to cognitive changes that continue to occur in young adults.
2. The definition shifts the Court's consideration from a diagnosis to consideration of actual incapacity and capacity. Such a consideration of abilities promotes the wider use of limited guardianships.

II. Appointment of Guardian By "Other Writing", pages 6 - 11:

The changes set forth in proposed A.R.S. §§14-5301 and - 5301.01 are from the UPC, §§5-302 and 5-303. Arizona currently provides for a testamentary appointment. The UPC authorizes appointment in a writing other than a will. The comments suggest that the writing can include "a durable power of attorney, a trust instrument or a specific document for the spousal or parental appointment of the guardian." The comments also address the benefit to parents of developmentally disabled children who need to plan for the continued care of their child not only upon death but in the event of the parent's incapacity. The same benefit is present for a spouse who is caring for their partner and who wishes to plan for continued care not only upon their death but upon their incapacity. The group was largely in favor of the proposed changes.

III. Judicial Appointment of Guardian, pages 12 – 20:

The changes set forth in proposed A.R.S. §§14-5303 and - 5303.01 are from the UPC, §§5-304 and 5-305. The proposed §14-5303 sets forth the more updated concept of emphasizing what the incapacity actually is rather than its mental health or medical label. It also emphasizes the consideration of limited versus an unlimited guardianship. The reference to an unlimited guardianship is consistent with what currently Arizona law refers to as a "general" guardianship. Subsection 8 of the proposed provision highlights the need for the petitioner and the Court to consider the least restrictive alternatives available before appointing an unlimited guardian. Although the group is still discussing some of the language, the group is generally in favor of the idea of a greater emphasis on limited guardianships.

The most controversial provision of proposed §14-5303.01 provides two alternatives regarding the appointment of a lawyer. The group largely favors ALTERNATE §(B) that mandates the appointment of counsel. The discussion regarding that alternative centered around two different considerations. The first was the actual need for an attorney in the most extreme and obvious guardianship cases versus the cost and disruption to the family. The second is the need for an appropriate advocate for the person who is subject to the guardianship process and the belief that an attorney can serve as a better advocate.

While the group invites comments on all areas of this report, the group is very interested in a broader range of input on this debate. The fact that the UPC proposes an alternative to the mandatory appointment of an attorney and the fact that other states have determined that there can be an alternative to the mandatory appointment of an attorney in every case, makes this issue a very interesting policy decision. The group largely favored the policy decision that Arizona already has made to mandate the appointment of an attorney; however, there are members of the group who would rather not have that fact stop a broader discussion of that issue.

IV. Special Provision for Incapacitated Minors Approaching Adulthood, pages 27 – 28:

The changes set forth in proposed A.R.S. §14-53XX are based upon provisions from Kansas and Alabama. A number of group members favor a different process for the most extreme cases of clearly incapacitated minors; however, the group is still studying alternatives to determine a final recommendation.

Alternative #1 does not provide for a different process than Arizona currently employs; however, it clarifies that the petition can be filed on behalf of a minor nearing majority and that it would take effect upon the minor's eighteenth birthday. The age at which such a petition could be filed is still being debated. Discussion has included seventeen, seventeen and six months as well as seventeen and nine months. The group largely agrees that such a provision should not provide for such a petition on behalf of a minor under the age of seventeen. This alternative also sets a six month limit on the timeliness of a professional evaluation.

Alternative #2 from Alabama provides for a different process for parents of children with "intellectual disabilities." It grants the Court discretion to "waive the procedural requirements" of notice, service and the appointment of an investigator. It does mandate the appointment of a guardian ad litem. Then it provides for a less formal interview process instead of a formal hearing and specifies the Court's options based upon the information provided.

There are other alternatives from the laws of other states that the group is considering. For example, Utah mandates the appointment of an attorney to represent the individual; however, that state permits the waiver of a court visitor (investigator) when the person allegedly suffers from (a) fourth stage Alzheimer's Disease,; (b) extended comatosis; or (c) profound mental retardation." The District of Columbia permits the Court to waive the appointment of a visitor and/or examiner if requested when it is alleged that the incapacity arises out of mental retardation. However, it also imposes a preference for "the appointment of an examiner and visitor who are qualified mental retardation professionals and who can collectively give a complete social, psychological, and medical evaluation of the individual."

It is important to note that Arizona has already replaced the term "mental retardation" with the term "cognitive disability" in Title 36, A.R.S. §36-551(13). A newer term in the field is "intellectual disability". The group will be discussing those definitions at the next workgroup meeting. Any comparable statute in Arizona will need to include the best and most current terminology.

The group has yet to have the opportunity to fully consider other issues that have been identified including:

1. Statutory changes that may be necessary to facilitate the transition between minor and adult conservatorships.
2. Recommendations regarding the needs of disabled minors in foster care who are nearing majority.

The group also is gathering a list of stakeholders for the Committee to contact for input concerning final recommendations. Stakeholder groups that have been identified so far are the following:

Department of Economic Security, Division of Developmental Disabilities (DDD).
Council For Jews With Special Needs, Inc.
State Bar, Probate Section.
KARE Family Center.
Center For Disability Law.

Although the group has members who are connected with DDD, Council For Jews With Special Need, Inc. and the State Bar, Probate Section, we have not obtained input from those organizations regarding the issues before the workgroup or developed a comprehensive list of stakeholders.

The group's next meeting is scheduled for August 27, 2010, 10:00 a.m. to 1:00 p.m. in Room 412 of the Arizona State Court's Building.

Suggestions regarding the issues, research information and stakeholders can be emailed to:

Judge David Mackey, dmackey2@courts.az.gov

MEMORANDUM

REGARDING STATUTORY CHANGES

MINOR TO ADULT GUARDIANSHIP WORKGROUP
REPORT TO THE COMMITTEE
AUGUST 10, 2010

The following constitutes proposed revisions to the Probate Code that impact the imposition of guardianships/conservatorships on adult incapacitated persons at the time they reach the age of majority (18). The purposes of the proposed revisions are to (1) provide a seamless transition for an incapacitated minor who remains incapacitated at the age of majority, (2) streamline the process for imposing a guardianship/conservatorship on such persons, and (3) broaden the range of permissible guardianships/conservatorships to give more autonomy to incapacitated adults when appropriate. In light of the additional charge to compare the Uniform Probate Code ("UPC") updates to our statutes, however, the recommended changes also concern guardianships for all incapacitated persons at any age.

Please note that I did not consider other aspects of the probate and juvenile codes that might need updating in light of any changes we recommend. If the supreme court agrees with recommended changes to Article 3 of the Code (guardians of incapacitated persons), it should examine other guardianship provisions to ensure consistency. For example, if the court agrees that § 14-5301 should be amended to allow for "stand-by" appointments, it should consider advocating for the same change in § 14-5202, which addresses testamentary appointments of guardians for minors regardless of incapacity. In light of both our charge and our limited timeframe, however, the Committee need not make that review but should merely note it, in my opinion.

The proposed changes are shown by redline and strike-out marks. Source information is noted as well as explanatory comments, when warranted. With some exceptions, the proposed changes track the 2006 version of the UPC. Although lengthy, I provide the UPC commentary, when pertinent, to give explanation for the utility and drawbacks for the suggested provisions (I've put the commentary in purple for ease of reference). I've set forth other provisions of Article 3 of Chapter 5 of Arizona's probate code ("Guardians of Incapacitated Persons") to place the recommended changes in context.

Chapter 1

General Provisions, Definitions and Probate Jurisdiction of Courts

Article 2. Definitions

A.R.S. § 14-1201. Definitions

In this title, unless the context otherwise requires:

. . . .

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

. . . .

22. "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 or a representative appointed pursuant to A.R.S. section 14-1408..

. . . .

31. "Minor" means an unemancipated individual who has not attained eighteen years of age.

Source: UPC (2008) 5-102. Although the UPC places these definitions in Chapter 5, our code defined these terms in Chapter 1 (General Provisions); I have therefore retained the definitions in this chapter, and they are applicable to the entire probate code unless otherwise noted. These changes recognize the broader range of guardianships and conservatorships as well as the availability of stand-by appointments. *See supra* suggested revisions to A.R.S. § 14-5301.

Chapter 5

Protection of Persons Under Disability and Their Property

Article 1. General Provisions

A.R.S. § 14-5101. Definitions

In this title, unless the context otherwise requires:

1. "Incapacitated person" means an individual who, for reasons other than being a minor only, 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.

. . . .

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

. . . .

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

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

10. "Ward" means an individual for whom a guardian has been appointed.

Source: UPC (2008) 5-102.

Comments: The following constitutes excerpts from the official comments to UPC 5-102, which bears on the utility of the above-recommended changes:

The concepts of limited guardian and limited conservator embraced in this article are reflected in the definitions of "guardian" . . . and "conservator" . . . .

While Part 4 authorizes the appointment of a conservator with limited powers, no provision is made 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, Part 4 instead allows the Court to appoint a "master." *See* Sections 5-405(b), 5-406(g) and 5-412(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 5-202 and 5-302. The definition of guardian . . . includes a limited guardian, an emergency guardian, or a temporary substitute guardian. *See* Sections 5-204, 5-311, 5-312, and 5-313. There is a distinction between an emergency guardian and a temporary substitute guardian. *Compare* Sections 5-312 and 5-313. 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" . . . 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 5-311 and 5-409 for examples. These concepts are carried throughout the article.***

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" . . . 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 5-304, 5-403.

The definition of "minor" . . . 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 5-210, 5-431. 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 person who is the subject of a proceeding is referred to as the "respondent." . . . . Once a guardianship is established, the incapacitated person or minor is referred to as the "ward." . . . 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." . . . 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. (Emphasis added.)

NOTE: The definition of "incapacitated person" to exclude those who can meet his/her needs with appropriate technological assistance is in line with the current version of A.R.S. § 14-5304(B)(3), which authorizes the court to appoint a general or limited guardian if the incapacitated person's needs cannot be met by less restrictive means, "including the use of appropriate technological assistance." This provision was added in 2003. *See* § 14-5304, historical note.

Article 2. Guardians of Minors

§ 14-5210 Termination of appointment of guardian; general

A guardian's authority and responsibility terminates on the death, resignation or removal of the guardian or on the minor's death, adoption, marriage or attainment of majority or as ordered by the court. Termination does not affect the guardian's liability for prior acts or the guardian's obligation to account for the ward's monies and assets. Resignation of a guardian does not terminate the guardianship until it has been approved by the court.

Source: UPC 5-210

Comments: The following constitutes the official comments to UPC 5-301, which bears on the utility of the above-recommended changes:

. . . . Guardianships created because the minor is also an incapacitated person are governed by Part 3 and may last into adulthood. . . . .

NOTE: The recommended change clarifies that the court can order a guardianship imposed on a minor to continue past the age of majority. This provision would assist guardians for incapacitated minors as it would be clear that the court could order such guardianships to continue without the need to start new proceedings as the minor enters adulthood.

Article 3. Guardians of Incapacitated Persons

§ 14-5300. 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.

Source: UPC 5-301

Comments: The following constitutes the official comments to UPC 5-301, which bears on the utility of the above-recommended changes:

This part provides for the creation and administration of guardianships for incapacitated persons. The definition of incapacitated person is found in Section 5-102(4). ***While an incapacitated person will typically be an adult, appointment can be made for a minor under this part if the reason for the appointment is an incapacity other than the minor's age. If an appointment is made under this part 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 5-201. 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 5-302, as well as that of the Court to appoint a guardian under Section 5-311. 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 5-107 regarding transfers of jurisdiction and Section 5-112 regarding termination of appointments. (Emphasis added.)

NOTE: I number this section as "14-5300" to denote that it is a new provision and is intended to come before the existing § 14-5301.

§ 14-5301. 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. Such appointments become effective only as set forth in A.R.S. section 14-5301.01(a).
(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. Such appointments become effective only as set forth in A.R.S. section 14-5301.01(a).
(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 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 5-312 or for the appointment of a limited or unlimited guardian under Section 5-304 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.

Source: UPC 5-302

Comments: The following constitutes the official comments to UPC 5-301, which bears on the utility of the above-recommended changes:

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 5-303(e) requires that a guardian appointed under this section seek Court confirmation no more than thirty days following the filing of notice of acceptance of office.

Sections 5-302 and 5-303 together are comparable to the standby guardianship provisions for minors in Section 5-202. 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 5-303(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 5-304. 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 state, 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 5-303(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. (Emphasis added.)

Section 14-5301.01 Appointment Of Guardian By Will Or Other Writing: Effectiveness; Acceptance; Confirmation.

(a) The appointment of a guardian under Section 14-5301 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 14-5301 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 14-5301.

(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 14-5301 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 14-5301.

(f) The authority of a guardian appointed under Section 14-5301 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 14-5301, 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.

Source: UPC 5-303

Comments: The following constitutes the official comments to UPC 5-303, which bears on the utility of the above-recommended changes:

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 thirty 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 thirty days following the filing of the notice of acceptance. Also, because an appointment under Sections 5-302 and 5-303 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 5-304 through 5-310.
The petition for confirmation of appointment to be filed by a guardian must comply with the requirements of Section 5-304 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 5-302(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.

§ 14-5302. Venue

The venue for guardianship proceedings for an incapacitated person is in the county where the incapacitated person resides or is present. If the incapacitated person is admitted to an institution pursuant to order of a court of competent jurisdiction, venue is also in the county in which that court sits.

§ 14-5303. 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 shall contain a statement that the authority granted to the guardian may include the authority to withhold or withdraw life sustaining treatment, including artificial food and fluid, and shall state, to the extent known:

1. The interest of the petitioner.

2. The name, age, residence and address of the respondent and, if different, the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made.

3. The name and address and priority for appointment of the person whose appointment is sought.

4. The name and address of all legal representatives, if any, for respondent.

5. 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 for no fee within two years 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
5.1 The name and address of any person responsible for care or custody of the respondent.

5.2 The name and address of any person nominated as guardian by the respondent

6. A general statement of the property of the respondent, with an estimate of its value and including any compensation, insurance, pension or allowance to which the person is entitled and the source and amount of any other anticipated income or receipts.

7. The reason why appointment of a guardian or any other protective order is necessary, including a brief description of the nature and extent of the respondent's alleged incapacity.

8. The type of guardianship requested. If an unlimited guardianship is requested, the petition must state that other alternatives have been explored and why a limited guardianship is not appropriate. If a limited guardianship is requested, the petition also must state what specific powers are requested.

Source: UPC 5-304

Comments: The following constitutes the official comments to UPC 5-504, which bears on the utility of the above-recommended changes:

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 5-309(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 Parts 1-4 of this article 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 the most recent revision of the Uniform Guardianship and Protective Proceedings Act (Parts 1-4 of this article) 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 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 5-102(5). Notice to such representative, as required by Section 5-309(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 5-305), and to enable the court to determine whether a protective order will be needed. *See* Section 5-311.

NOTES: In § (B)(5), I limited the person identified to one who has resided with the respondent 6 months within the last year before the petition is filed and did so for no fee. In doing so, I followed the notion set forth in the UPC comment that this person should be one with a close personal relationship to the respondent rather than someone who may have a financial stake in the matter. In § (B)(3), I deleted the term, "priority" because it does not appear to be a defined term and is confusing as it appears to contemplate a list of guardians not described otherwise in the provision. I rely on Jay or Judge Mackey to set me straight if I'm missing something.

I relocated the subject matter contained in §§ (C) and (D) to the provisions that follow because (1) this is how the UPC is set up, and (2) it's easier for parties to follow the structure of proceedings if broken into petition, pre-hearing events, and hearing.

A.R.S. § 14-5303.01. 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 an investigator. The duties and reporting requirements of the investigator are limited to the relief requested in the petition. The investigator must be an individual having training or experience in the type of incapacity alleged.

B. The court shall appoint a lawyer to represent the respondent in the proceeding if:

(1) requested by the respondent;

(2) recommended by the investigator; or

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

ALTERNATE § (B) if mandatory appointment of counsel is desired:

B. Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to represent the respondent in the proceeding.

END OF ALTERNATE PROVISION

(c) The investigator 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 investigator 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 investigator 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; **[NOTE: This provision is not needed if the statute requires mandatory appointment of counsel]**

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

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

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

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

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

(7) a statement confirming the investigator complied with sections (c) and (d) of this provision; and

(8) any other matters the court directs.

Source: UPC 5-305

Comments: The following constitutes the official comments to UPC 5-305, which bears on the utility of the above-recommended changes:

Alternative provisions are offered for subsection (b). Alternative 1 was favored by the drafting committee. Alternative 1 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. Appointments of a lawyer, nevertheless, is *required* under Alternative 1 when the court determines that the respondent needs representation, or counsel is requested by the respondent or recommended by the visitor.

Alternative 2 is derived from UGPPA (1982) Section 2-203 (UPC Section 5-303 (1982)). It is expected that in states enacting Alternative [2] of subsection (b), counsel will be appointed in virtually all of the cases. Alternative 2 was favored by the A.B.A. Commission on Legal Problems of the Elderly, which attached great significance to expressly making appointment of counsel "mandatory." Therefore, for states which wish to provide for "mandatory appointment" of counsel, Alternative 2 should be enacted.
In Alternative 1 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 1 of subsection (b) follows the National Probate Court Standards, Standard 3.3.5(a)(1) through (a)(3). Alternative 2 perhaps may be said to be in accord with the National Probate Court Standards, Standard 3.3.5(a)(4).

The drafting committee for the 1997 UGPPA (Parts 1-4 of this article) 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 the 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 1 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 5-417, otherwise the guardian must file a fee petition. *See* Section 5-316.

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 5-306. 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 1 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 Parts 1-4 of this article should consider developing a checklist for the items enumerated in subsection (e).

NOTES: The recommended revised statute gives more discretion to the court to determine whether an attorney is needed. This theme is carried out in the next provision, which gives discretion to the court to decide what further medical examinations are warranted. This flexibility would allow families with incapacitated young adults to bypass many of the required "hoops" when these individuals have well-documented medical evaluations and/or could not comprehend advice from an attorney. The workgroup and the Committee, ultimately, must decide how much flexibility a court should have, particularly regarding the issue of appointed legal representation.

The information required to be gathered by the investigator is not very different from that currently set forth in A.R.S. § 14-5303(C) and (D), although it is slightly more comprehensive. The key difference is that the respondent's views are collected.

I added §(e)(7) to require confirmation that the investigator performed his/her duties. I did so in light of the importance of the investigator and because the court likely would otherwise not know if the investigator glossed over his/her duties.

A new term is that the investigator must explain what's going on to the respondent but only to the extent the person can understand. Thus, an investigator can dispense with the farce of explaining the guardianship process to someone who clearly cannot comprehend.

The UPC uses the term "visitor." I substituted the term "investigator" as that is the term currently used in our statutes.

§ 14-5303.02 Judicial Appointment of Guardian: Professional Evaluation.

At or before a hearing under this part, the court may order a professional evaluation of the respondent and shall order the evaluation if (i) the respondent so demands, or (ii) the court cannot determine clearly based on its own assessment or the investigator's report that respondent is incapacitated. 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 and is acting within that person's scope of practice. 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.

Source: UPC 5-306

Comments: The following constitutes the official comments to UPC 5-306, which bears on the utility of the above-recommended changes:

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 5-305 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.

NOTES: I inserted the language requiring the court to order an evaluation if "the court cannot determine clearly based on its own assessment or the investigator's report that respondent is incapacitated." As you can see, the UPC comment assumed this would be the case, but I think it best to directly state it to give the court direction and to ensure consistent application of the provision.

Section 14-5303(D) currently requires the evaluation to be done by a physician, psychologist or registered nurse acting within that person's scope of practice. I kept the "scope" limitation but went with the UPC's language, which gives discretion to the court to appoint the appropriate professional. I don't know who else would be qualified to make such evaluations, but I think it best to leave the door open for that possibility and let the court decide who would be appropriate.

§ 14-5303.03 Confidentiality Of Records.

The written reports of an investigator 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 investigator, 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.

Source: UPC 5-307

Comments: The following constitutes the official comments to UPC 5-307, which bears on the utility of the above-recommended changes:

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.

§ 14-5303.04 Judicial Appointment of Guardian: Notice

(a) A copy of a petition for guardianship and notice of the hearing on the petition must be served personally on the respondent at least fourteen days before the hearing. 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 deprives the court of authority to grant the petition. The respondent can waive this notice requirement if that person attends the hearing and does so at that time.

(b) In a proceeding to establish a guardianship, notice of the hearing must be given to (i) the respondent's spouse, parents, and adult children or, if none exists, at least one of the respondent's closest adult relatives, if any can be found, and (ii) any person who has filed a demand for notice in the manner set forth in A.R.S. § 14-1401. Failure to give notice under this subsection does not preclude the appointment of a guardian or the making of a protective order.

Source: A.R.S. § 14-5309; UPC 5-309

Comments: The following constitutes the official comments to UPC 5-309, which bears on the utility of the above-recommended changes:

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.

. . . .

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 5-113 of this Act, that the respondent be given at least fourteen 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)).

NOTES: I changed the UPC version to speak in terms of "authority" rather than "jurisdiction" as there may be a need to conduct a hearing to discuss petitioner's inability to serve the respondent or to allow the respondent to waive the notice requirements.

The District of Columbia requires the petition to be served by first-class mail on the respondent within 3 days of filing. I like the quick and easy notice given to respondent, but I kept the personal service requirement as that is what is in our statutes currently, and I'm not aware of any problem with the procedure. We can discuss it if desired, however. DC ST 1981 § 21-2041(c).

§ 14-5303.05 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 investigator; be tried by a jury upon request, and otherwise participate in the hearing. The hearing may be held in a location convenient to the respondent upon a finding that respondent is unable to travel to court 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.

Source: UPC 5-308

Comments: The following constitutes the official comments to UPC 5-306, which bears on the utility of the above-recommended changes:

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 459 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)).

NOTES: The subject of this provision is currently found in A.R.S. § 14-5303(C). I varied from the UPC version in the following ways: (1) I kept the jury trial provision from the current statute [I question the utility of a jury, but left it in regardless for purposes of discussion], (2) I changed the UPC provision that stated the hearing could be held to a place convenient to the respondent, but put in language to cover situations when the respondent truly can't travel to court – e.g., in the hospital, in a nursing home.

The recommended changes vary from our current system by mandating the presence of the respondent and proposed guardian.

§ 14-5304. Findings; order of appointment; limitations; filing

(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; or

(2) with appropriate findings, treat the petition as one for a protective order under Section 14-5401 et seq., enter any other appropriate order, or dismiss the proceeding.

(3) appoint limited or unlimited co-guardians for a respondent if doing so is in the respondent's best interests. Should a conflict later arise between co-guardians, the court may appoint an attorney to represent the ward.

(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.

Source: UPC 5-311

Comments: The following constitutes the official comments to UPC 5-311, which bears on the utility of the above-recommended changes:

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 463 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 5-102(4) 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 Part 4 or dismiss the Part 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.

NOTES: I took out the UPC's reference to technological assistance, which is referenced in the comment. Because the availability of such assistance is built into the definition of "incapacitated person," the additional reference would be redundant and confusing. I also added subsection (a)(3) to clarify that a court may appoint an attorney to represent a ward when co-guardians, typically divorced parents, become acrimonious.

§ 14-53XX Judicial Appointment of Guardian: Special Provision for Incapacitated Minors Approaching Adulthood

Alternative #1

(a) Any party interested in the welfare of a minor who is at least seventeen years and six months old and alleged to be incapacitated may initiate guardianship proceedings pursuant to this article and request that any guardianship order, protective order, or other order take effect immediately on the minor's eighteenth birthday,

(b) The petitioner may provide with the petition a report of a professional evaluation that meets the requirements of A.R.S. § 14-5303.02. If the evaluation was conducted within six months of the date the petition is filed with the court, the petitioner may ask in the petition that the court accept this report in lieu of ordering any additional professional evaluation pursuant to A.R.S. § 14-5303.02.

SOURCES: None for (a). I chose the age of 17 to give time for all proceedings to conclude and a guardianship can be in place at the time of majority with no gap. The concept is in line with the UPC's view that the court has authority to appoint a guardian during minority that extends through majority.

Subsection (b) is roughly modeled on Kan. Stat. Ann. § 59-3060(c), although I added the 6 month provision to ensure that any evaluative reports are current.

NOTES: This provision clarifies the court's authority and gives parents and others a clear mechanism to follow to get a guardianship in place for their incapacitated children approaching adulthood. This provision will likely also eliminate the need for many emergency guardianship proceedings used by parents of young adult incapacitated persons. This alternative applies to anyone interested in the welfare of a minor – not just a custodial parent or adult sibling. It also provides a chance of some shortcut in proceedings, but not a lot.

If we recommend this provision, we must construct a parallel provision for conservatorships.

Alternative #2

(a) The custodial parent or parents or an adult custodial sibling of a minor who is at least seventeen years and six months old and incapacitated by an intellectual disability, may file, in lieu of a petition, a written request to be appointed guardian(s) of the minor effective on or after the minor's eighteenth birthday. The parent(s) or sibling shall provide with the request a report of a professional evaluation of the minor that meets the requirements of A.R.S. § 14-5303.02 and concerned an evaluation conducted at least six months before the request is filed with the court.

(b) Upon review of the request and evaluation report, the court may waive the procedural requirements set forth in this article, including notice and service and appointment of an investigator. If the court does not make this waiver, it shall dismiss the request and inform the requesting party that a guardianship order is available only upon compliance with the regular procedures set forth in this article.

(c) If the court waives the procedural requirements set forth in this article, the court shall appoint a guardian ad litem for the minor. The guardian ad litem shall then interview the minor and the custodial parent(s) or custodial sibling. In lieu of a formal hearing, the probate court shall hold an informal interview with the custodial parent(s) or custodial adult sibling, the minor, and the guardian ad litem.

(d) Following the interview, the court may do any of the following:

(1) Issue an order appointing the custodial parent(s) or custodial sibling as limited or unlimited guardian(s) of the minor effective on or after the minor's eighteenth birthday.

(2) Deny the request for appointment as guardian pursuant to these special proceedings allowed only for a custodial parent(s) or custodial sibling.

(3) Delay a determination on the request to gather additional information in compliance with one or more of the usual requirement for appointments and evaluations under other provisions of this article.

(e) Any request made under this provision must be filed before the minor's eighteenth birthday. The court may consider and rule upon such a request after the minor's eighteenth birthday, however.

SOURCE: Alternative #2 is based on Ala. Code 1975 § 26-2A-102(e). I made some tweaks to it, however, including specifying that these requests must be made between the minor's 17th and 18th birthdays and an evaluation report must be timely. I envision this provision as applying to the severely incapacitated child and his/her family. This will allow these parties to bypass the more complicated and time consuming steps of regular guardianships. It will also save the court time and resources that can be devoted to closer cases. Subsection (d) gives the court discretion to kick the proceedings over to a regular track. A comment to this provision could be crafted to inform readers of the types of situations likely to fall under this provision. The court would also have to receive training on the procedures to follow. We should discuss whether the only types of guardianships falling under this proceeding should be unlimited only; this would reserve the proceedings for the most severe cases. Personally, I like this provision.

If we recommend this provision, we may need to define "intellectual disability." Also, we should construct a parallel provision for conservatorships.

§ 14-5305. Acceptance of appointment; consent to jurisdiction

By accepting appointment, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian or mailed to him by ordinary mail at his address as listed in the court records and to his address as then known to the petitioner.

§ 14-5306. Termination or modification of guardianship for incapacitated person

(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.

SOURCE: UPC 5-318

COMMENTS: The following constitutes the official comments to UPC 5-318, which bears on the utility of the above-recommended changes:

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 5-314(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 5-317.

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.

§ 14-5307. Removal or resignation of guardian; termination of incapacity

A. On petition of the ward or any person interested in his welfare, the court may remove a guardian and appoint a successor if it is in the best interests of the ward. On petition of the guardian, the court may accept a resignation and make any other order which may be appropriate.

B. An order adjudicating incapacity may specify a minimum period, not exceeding one year, during which no petition for an adjudication that the ward is no longer incapacitated may be filed without special leave. Subject to this restriction, the ward or any person interested in his welfare may petition the court for an order that the ward is no longer incapacitated and for the removal or resignation of the guardian. A request for this order may be made by informal letter to the court or judge. Any person who knowingly interferes with the transmission of this request may be found in contempt of court.

C. Before removing a guardian, accepting the resignation of a guardian or ordering that a ward's incapacity has terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send an investigator to the residence of the present guardian and to the place where the ward resides or is detained to observe conditions and report in writing to the court.

. . . .

§ 14-5311. 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;

(4) the spouse of the respondent or a person 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 during the two-year period 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.

Source: UPC 5-310

Comments: The following constitutes the official comments to UPC 5-310, which bears on the utility of the above-recommended changes:

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 5-304(b)(4) and 5-309(b) require that the agent receive notice of the proceeding. Also, until the Court has acted to approve the revocation of that authority, Section 5-316(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 5-304, 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 Parts 1-4 of this article 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 1997 revision of the Uniform Guardianship and Protective Proceedings Act (Parts 1-4 of this article) 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)).