S C H E N C K, P R I C E, S M I T H & K I N G, LLP

ATTORNEYS AT LAW

HE AIN'T HEAVY, HE'S MY BROTHER: CONTESTED GUARDIANSHIPS AND INTERSTATE GUARDIANSHIP ISSUES

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Contested guardianship cases typically involve disputes among family members concerning the safety, living arrangements, autonomy and financial management of a family member who is elderly or has a cognitive impairment. While many family members initiate guardianships to protect an alleged mentally incapacitated person, some are motivated by a desire to control a relative and his or her assets. An elderly person may not see the need to be protected. Other relatives may object to having the initiating party control the affairs of the person in need of guardianship services.

Even if the alleged incapacitated person has previously executed a general durable power of attorney or power of attorney for health care, he or she may nevertheless be the subject of a contested guardianship application. There may be allegations of financial exploitation by the attorney-in-fact or family disputes involving the interpretation of a health care proxy.

In some instances, the alleged incapacitated person may contest the guardianship. A contested guardianship hearing may be held to determine whether the individual is capable of managing his or her own affairs or mediation may ensue. In other instances, particularly when the alleged incapacitated person has substantial assets, more than one family member may assert a claim to be appointed guardian. In such cases a contested guardianship hearing would be held to determine who can best serve as guardian unless the issue can be resolved through mediation.

In cases where someone has misappropriated assets from the alleged incapacitated person, whether directly or through the misuse of jointly titled accounts or a power of attorney, a guardianship action can be used to attempt to recover the assets. In cases where a person has exerted undue influence to cause the alleged incapacitated person's estate plan to be altered, a

guardianship proceeding can be a powerful tool to collect evidence regarding the undue influence that may have been used to change the estate plan. A guardianship action may also be used to restore original beneficiary designations on the alleged incapacitated person's financial accounts or otherwise restore the situation to the status quo ante.

In cases of substantial elder abuse involving physical or psychological harm to the alleged incapacitated person, emergency guardianships may be imposed to remove the alleged incapacitated person from an unsafe situation. A guardianship action may be appropriate in cases where the alleged incapacitated person is unable to acknowledge the abuse and is unable to stop the abuse without outside assistance.

Guardianship is a creature of state law. Although guardianship in all states involves court-supervised surrogate decision-making, procedural and substantive guardianship law varies significantly from jurisdiction to jurisdiction. Accordingly, guardianship trial practice differs to some degree in each state and sometimes, guardianship trial practice varies significantly in the courts of the same state. Nevertheless, there are various factors to consider in preparing for a contested guardianship action in each state.

Many states have statutes which confer upon the alleged incapacitated person a right to a jury trial. Guardianship matters, however, generally are not well suited for such trials. The alleged incapacitated person, who may be a vulnerable adult who is easily intimidated, may be unable to effectively give testimony before a jury. Family members may be uncomfortable disclosing sensitive family disputes to strangers in a jury box. Contested guardianship matters also can be time-consuming and expensive. They can tear families apart. The specter of a jury or bench trial may cause the warring parties to settle the dispute through judicial settlement

conferences or through formal or informal alternative dispute resolution proceedings. For these reasons, contested guardianship cases that are actually tried before a jury or a judge are the exception rather than the rule.

PREPARING A CONTESTED GUARDIANSHIP CASE

Alert the court that the guardianship may be contested. In many states, an attorney, "visitor", ad litem or court evaluator will be appointed by the court upon the commencement of a guardianship action. Court appointed individuals in contested guardianship matters should be experienced in dealing with vulnerable adults and sensitive family issues. Therefore, the petition should contain facts that alert the court that the matter may be contested so that an experienced person is appointed.

The petition should contain the requested relief. Where possible, prepare the petition in a way that gives the court the facts it needs to give your client the relief he or she seeks. For example, if your client wants an accounting from an attorney-in-fact who has abused the power of attorney, set forth the facts that entitle your client to an accounting and ask the court to order the accounting. The court cannot give your client the relief he or she wants if the court is not aware of what your client wants.

Know your state's pretrial procedure. Pretrial discovery is a powerful tool in contested guardianships. In many jurisdictions, the pretrial discovery methods that are available in civil litigation are also available in guardianship proceedings. Be aware of whether your guardianship court permits typical pretrial discovery such as interrogatories, demands for the production of documents, requests for admission and depositions. Your state's guardianship procedures may

allow for requests for accelerated discovery. Such requests may be appropriate in cases where swift resolution is necessary.

Engage in motion practice, if necessary. If an opponent refuses to disclose requested information, it may be necessary to file a motion with the court to compel the disclosure of that information. There may be time limits for filing such motions and procedures that must be followed prior to filing the motion. For example, a state's pretrial rules may require an attempt to settle the dispute with your opponent informally before filing a motion or it may be necessary to obtain court approval to file a discovery motion.

Determine whether you need expert witnesses. Many physicians who are willing to submit affidavits or reports in uncontested guardianship matters do not want to testify at trial. If you know that the matter is going to be contested, ask the doctor whether he or she is willing to testify at trial. In most cases, an expert witness must render an expert report and is subject to a discovery deposition in advance of trial. Ask the doctor how much they will charge to provide the report, appear at a deposition and testify at trial.

Prepare for pretrial conferences. The court may schedule a pretrial conference to manage discovery problems and to clarify and streamline the issues that will be presented at the trial. Litigants may have the opportunity to file pretrial memoranda with the court to set forth the factual and legal issues. The preparation of a pretrial memorandum can help the attorney organize his or her case for trial.

Know the rules of evidence. While the rules of evidence may be relaxed in uncontested guardianship matters, adherence to the rules may be required in contested guardianship matters, especially those cases that are tried before a jury. Armed with a working knowledge of the rules

of evidence, you can object to the admissibility of evidence where appropriate and be ready to defend objections from your opponent.

Prepare for trial. A trial may be streamlined through stipulations of fact. Such stipulations are more appropriate when the case will be tried before the bench than before a jury. The court may require the submission of trial briefs or pre-marked exhibits. Attention to detail and organization is critical to ensure that your case unfolds before the trier of fact in a way that is understood and compelling.

MEDIATION: AN ALTERNATIVE TO GUARDIANSHIP LITIGATION

Family members often have very different views on how an elderly or disabled relative should be cared for. According to one study, "nearly 40 percent of adult children providing parent care reported serious conflict with a sibling, usually related to lack of sufficient help from that sibling." Gentry, Deborah B., "Resolving Middle-Age Sibling Conflict Regarding Parent Care," *Conflict Resolution Quarterly*, Vol. 19:1, Fall 2001 at 35. One sibling may want a parent to move into an assistant living unit or a nursing home while the other sibling or the parent may want the parent to remain at home. The sibling who wants the parent to move may be the primary caregiver who feels the other siblings do not help enough. The sibling who wants the parent to stay home may be concerned about the costs of long-term care.

Mediation encourages consensus building within the family setting and fosters the preservation of relationships with family and friends. This form of alternative dispute resolution also can assure the retention of maximum possible independence and autonomous control over basic life decisions for the incapacitated person. A legal declaration of incapacity may be necessary, however, to protect the assets and person. In such cases, a court hearing may be

required because a person cannot enter into a consent order to declare himself or herself incapacitated or consent to the appointment of a guardian. *See, e.g., In re Guardianship of Macak,* 377 N.J. Super. 167 (App. Div. 2005).

It is helpful at the outset to understand what mediation is and what it isn't. Mediation is a form of alternative dispute resolution ("ADR"). ADR provides alternatives to traditional forms of dispute resolution, such as adjudication by a judge or a magistrate. Parties may agree to ADR by choosing to participate in mediation or arbitration or a combination of both and forego the trial process. Complementary Dispute Resolution ("CDR"), like ADR, provides alternatives to traditional forms of dispute resolution, such as adjudication by a judge or a magistrate, but those alternatives are considered to be complements to the traditional trial process. Parties may be required to participate in CDR by the court.

Collaborative law, a relatively new form of ADR, is a process whereby lawyers trained in collaborative representation and their clients agree to negotiate without the assistance of a third party neutral, unless they conclude that such involvement would be helpful. A party can end the collaborative law process and engage in litigation. The collaborative law attorneys, however, will have told their clients at the beginning that terminating the process will require them to obtain other counsel to represent them in the litigation. Collaborative law is most often used in divorces but may be appropriate for elder law matters as well.

Arbitration is a form of dispute resolution by which an impartial third party considers evidence presented by the parties and makes an award. Arbitration may be binding or non-binding by agreement of the parties or by statute or rule. Used primarily in civil matters, arbitration is not particularly suitable in resolving conflicts involving the elderly because of its adversarial nature and the arbitrator's inability to adjudicate issues of capacity.

In contrast to both collaborative law and arbitration, mediation is a process in which a neutral third party facilitates negotiations among the parties to assist them in reaching a mutually accepted settlement. The mediator has no power to make a decision regarding the outcome of the matter. Mediation often is beneficial in commercial, matrimonial and elder law disputes.

TYPES OF MEDIATION

There are several forms of mediation. Evaluative or interest-based mediation is grounded upon the outcome of the dispute. Typically, the attorneys or unrepresented parties present their factual and legal arguments to the neutral, who then assesses the strengths and weaknesses of those contentions and assists the parties in narrowing or resolving the issues. This kind of mediation may be successful in probate cases where the parties are not interested in having or continuing a personal relationship and may be satisfied with a financial solution.

Facilitative or therapeutic mediation focuses on the problem-solving abilities of the parties. The mediator may emphasize the emotional aspects of the dispute. The parties often discuss ways of handling similar disputes in the future. A mediator utilizing this approach refrains from imposing his or her own judgment with respect to the issues in dispute.

Some mediators vary the mediation approach depending on the parties. Successful mediators follow the lead of the parties and use whatever process will most likely lead to a satisfactory resolution.

ADVANTAGES AND DISADVANTAGES OF MEDIATION

There are several advantages to mediation. First, parties, rather than the courts, retain control over the resolution of their dispute. Second, mediation usually is less expensive and faster than the trial process. Parties who do not prevail on the trial court level often file an appeal. A successful mediation ensures against an appeal to another court. Third, mediation is

usually a confidential proceeding. Fourth, mediation usually takes place in a setting that is less intimidating than a court proceeding. As a result, the elderly person may be less confused and threatened. Finally, solutions can be more creative and more suited to needs of mediation participants than those possible through the normal litigation procedure.

Of course, there are disadvantages to mediation as well. Unlike many court decisions, mediation agreements have no precedential value. In addition, there is a danger that the rights of the elderly person may be compromised unnecessarily. For example, the elderly individual may agree to move out of his or her house into an assisted living facility to appease certain family members even though the person can afford to live at home with a full time caregiver and would rather do so. Moreover, the mediation process cannot resolve the issue of incapacitation. Although the parties may reach an agreement on the issue of who should serve as a guardian or conservator, court involvement nevertheless will be necessary to appoint the guardian or conservator.

THE COST OF MEDIATION

As with the cost of litigation, the cost of mediation varies throughout the country. Several jurisdictions have mediation programs where the mediators do not charge for their services. In other jurisdictions, mediators may serve at their current market rate per hour or an hourly rate may be set by the program. Mediation may take place at the beginning of the dispute or right before a trial is scheduled to occur. Inasmuch as there is no testimony taken, the mediation usually lasts only one or two days as compared to a trial, which may go on for weeks. The parties usually split the cost of the mediator equally.

INTERSTATE GUARDIANSHIP PROCEEDINGS

Family conflicts over relatives with diminished capacity are nothing new. In our increasingly mobile society, however, it has become more common for family members engaged in such disputes to move relatives with diminished capacity across state lines. The laws governing guardianships in two or more states may lead courts in those states to conclude that they have jurisdiction over the same alleged incapacitated person, leading to conflicts among states in addition to family members. This is because while some states, like New Jersey, base guardianship jurisdiction on domicile, others base jurisdiction on residence or physical presence in the state.

In New Jersey, jurisdiction over an incapacitated person requires a determination of domicile. *See, e.g., In re Seyse*, 353 N.J. Super. 580 (App. Div. 2002); certif. denied, 175 N.J. 80 (2002).; *In re Jacobs*, 315 N.J. Super. 189 (Ch. Div. 1998). The New Jersey Legislature, in revising the guardianship statutes, confirmed that a ward's domicile is a necessary criterion for the assertion of jurisdiction in that state. *See*, N.J.S.A. 3B:12-66.2. In *In re Jacobs, supra,* the court state that there are three ways to obtain domicile: "(1) through birth or place of origin; (2) through choice by a person capable of choosing a domicile; and (3) through operation of law in the case of a person who lacks capacity to acquire a new domicile by choice." It is well-settled in New Jersey that an incapacitated person may have the capacity to change his or her domicile. Assertions that an alleged incapacitated person changed domicile should be accompanied by physicians' affidavits stating that the person had the requisite mental capacity to do so.

UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT

The three most common interstate guardianship issues are: 1) the exercise of jurisdiction over a guardianship matter by two or more states; 2) the acceptance of a guardianship in another state; and 3) the transfer of guardianships to and from other states. While some states have laws dealing with some of these issues, there currently is no uniform interstate guardianship law throughout the states and therefore, there is considerable variation on how states address these issues.

In 1993, The Commission on National Probate Court Standards appointed by the National College of Probate Judges ("NCPJ") released the National Probate Court Standards, which sought to advance uniformity in probate court practice throughout the country. In 1998, the NCPJ adopted amendments to the National Probate Court Standards which offered specific recommendations on how probate courts should handle interstate guardianship issues. For example, Standard 3.5.1 recommends the development of rules and procedures to facilitate communication and cooperation among courts when guardianship petitions are filed in more than one jurisdiction. Standard 3.5.2 advises each court to determine whether there is a collateral attack on a guardianship or a guardianship proceeding in a different state. It further provides that courts in different jurisdictions should communicate with each other in order to resolve the conflict and sets forth procedures for such communications. The National Probate Court Standards on interstate guardianship jurisdiction can be found at http://www.probatect.org/ohioprobatecourts/pdf/national_probate_standards.pdf.

On August 2, 2007 the Uniform Law Commission (ULC) (formerly known as the National Conference of Commissioners on Uniform State Laws or NCCUSL)) approved the

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA or the Act) at its 116th Annual Meeting in Pasadena, California. The UAGPPJA, if adopted by the states, will provide the states with a solution for resolving multi-state jurisdictional disputes. The goal of the Act is to ensure that only one state exercises jurisdiction at any time. Accordingly, the act specifies which court has jurisdiction to appoint a guardian or conservator by determining the state that has primary jurisdiction. The UAGPPJA also provides standards for transferring jurisdiction to another state and recognizing and enforcing orders of other states.

The Act also sets forth procedures to deal with dueling proceedings in different jurisdictions, the appointment of emergency guardians, communications among the various courts and interjurisdictional guardianship transfers. It also addresses recognition and enforcement of orders in enacting states. The text of the UAGPPJA can be found at http://www.law.upenn.edu/bll/archives/ulc/ugijaea/2007_final.htm.

NAELA endorses the enactment of UAGPPJA. Its position is set forth on its website at http://www.naela.org/Media_PublicPolicyPosition.aspx.

INTERSTATE GUARDIANSHIP CONTESTS IN THE ABSENCE OF UAGPPJA

As noted above, two or more states may maintain personal jurisdiction over the alleged incapacitated person, especially when jurisdiction is based on criteria other than domicile. In determining the appropriate forum, courts may consider factors such as physical presence in the state, best interests of the alleged incapacitated person, the jurisdiction where there are greater ties, the location of witnesses, whether jurisdiction was obtained in an underhanded manner, comity and full faith and credit.

COMITY

When two courts have jurisdiction over a matter which substantially involves the same parties and the same issues, the state where the second action was filed has the discretion to refrain from exercising its jurisdiction in deference to the forum where the first action was filed. In essence, this principle known as comity is "a courtesy voluntarily extended to another state for reasons of practice, convenience and expediency." *F.F. v. G.A.D.R.*, 331 N.J. Super. 23 (App. Div. 2000), certif. denied, 165 N.J. 530 (2000). In *Yanocoskie v. Delaware River Port Auth.*, 78 N.J. 321, 324 (1978), the New Jersey Supreme Court stated that when a virtually identical action is pending in another forum, the New Jersey court should "adhere to the general rule that the court which first acquires jurisdiction has precedence in the absence of special equities."

In deciding whether to grant a "comity stay" or dismissal in deference to the first-filed proceeding, New Jersey courts rely on a test set forth in *American Home Prods . v. Adriatic Ins. Co.*, 286 N.J. Super. 24, 37 (App. Div. 1995) which relies on criteria similar to those used by federal courts. The party seeking a comity stay has the burden to demonstrate that "there is a first-filed action in another state; (2) both cases involve the same parties, the same claims and the same legal issues; and (3) the plaintiff will have the opportunity for adequate relief in the prior jurisdiction." *Exxon Research & Eng'g v. Indus. Risk Insurers*, 341 N.J. Super. 489, 506 (App. Div. 2001). If these factors are established, the burden then shifts to the party who wants the New Jersey court to proceed to demonstrate that "special equities" exist that are "sufficiently compelling to permit the action to proceed" in New Jersey. *Id.* "Special equities" may include a consideration of New Jersey public policy and the procedural status of the actions. *American Home Prods ., supra*, 286 N.J. Super. at 38.

FULL FAITH AND CREDIT

Jurisdictional disputes may arise when a guardian wants to make decisions regarding property or the care of a ward present in a state other than where the guardian was appointed. The majority of states have ancillary procedures authorizing foreign guardians to make property decisions in their states but a minority of states has express provisions authorizing foreign guardians to make personal care decisions. In the absence of specific statutory authority, a foreign guardianship should be recognized and given effect under the Full Faith and Credit Clause of Article IV, §1 of the United States Constitution. *See, e.g., In re Prye*, 169 S.W.3d 116 (Mo. Ct. App. 2005) (holding Illinois guardian entitled to recognition and enforcement by Missouri probate court). Full faith and credit however, will only be granted if the state which issued the order or judgment had personal jurisdiction and was not obtained by fraud. *Id.; see also, Philadelphia v. Austin*, 171 N.J. Super. 118 (Cty. Ct. 1979); aff'd, 171 N.J. 55 (1981).

APPENDIX 1

Sample Contested Guardianship Pleadings – Financial Abuse

COUNT ONE

1. Mary Jones is the Lucy Ricardo's niece and the closest blood relative.

2. As agent under the alleged September 23, 2008 Power of Attorney for Lucy Ricardo, Fred Simpson is in a confidential relationship with Lucy Ricardo.

3. Fred Simpson has made statements indicating that he can do as he wishes with Lucy Ricardo's funds.

4. A couple of years ago, Fred Simpson assisted Lucy Ricardo in the sale of her Mayberry home and utilized a portion of the proceeds of sale to purchase his current house located at 123 Main Street in Anytown, New Jersey.

5. Article 3. of the alleged Power of Attorney provides that the attorney-in-fact may only make gifts to Lucy Ricardo's spouse, children or grandchildren "but no other individuals."

6. Lucy Ricardo has no spouse, children or grandchildren.

7. Any gifts made by Fred Simpson under the alleged Power of Attorney should be returned.

8. Upon information and belief, in violation of N.J.S.A. 46:2B-8.13, Fred Simpson has breached his fiduciary duty to Lucy Ricardo by utilizing her funds for his own purposes.

9. Fred Simpson should account for his actions as agent under an alleged Power of Attorney for Lucy Ricardo.

WHEREFORE, Mary Jones respectfully seeks an Order:

(a) Directing Fred Simpson to provide an accounting of all of his actions as alleged agent-in-fact for Lucy Ricardo;

(b) Directing Fred Simpson to provide an accounting of all the assets he holds or held jointly with Lucy Ricardo, and immediately provide Mary Jones with a listing of any and all such property;

(c) Directing the return of any gifts made by Fred Simpson on behalf of Lucy Ricardo;

(d) Awarding cost of suit, including attorneys fees; and

(e) Ordering such other relief as this Court may deem just and proper.

COUNT TWO

1. Plaintiff, Mary Jones, repeats and realleges all allegations set forth above as if fully set forth at length herein.

2. On or about March 20, 2008 Lucy Ricardo entered into the alleged Lucy Ricardo Educational Trust Agreement (hereinafter "Trust").

3. Fred Simpson is the Trustee of the Trust.

4. The beneficiaries of the Trust are Suellen Simpson, Rita Russo, Carly Simpson, Mary Russo and Gina Russo.

5. Carly Simpson and Suellen Simpson are Fred Simpson's children.

6. Rita Russo, Mary Russo and Gina Russo are the children of Fred Simpson's wife and are of no blood relation to Lucy Ricardo.

7. Article V sets forth that Lucy Ricardo as grantor waives "irrevocably all rights, power and authority to amend or revoke this instrument or any trust hereby evidenced."

8. Trust has been funded with $250,000.

9. Upon information and belief, the Trust is the product of undue influence.

WHEREFORE, Mary Jones respectfully seeks an Order:

(a) Declaring the Lucy Ricardo Educational Trust Agreement void;

(b) Awarding cost of suit, including attorneys fees; and

(c) Ordering such other relief as this Court may deem just and proper.

COUNT THREE

1. Plaintiff, Mary Jones, repeats and realleges all allegations set forth above as if fully set forth at length herein.

2. From August 2008 through August 2009, various checks were written from Lucy Ricardo's checking account with the Third Avenue Bank payable to Fred Simpson.

3. Some of the checks are signed by Lucy Ricardo, while others are signed by Fred Simpson.

4. Such payments are the result of undue influence and/or a breach of Fred Simpson's fiduciary duty as agent under the alleged September 23, 2008 Power of Attorney.

5. Such payments were improvident gifts and Fred Simpson should return the funds to Lucy Ricardo.

WHEREFORE, Mary Jones respectfully seeks an Order:

(a) Compelling Fred Simpson to return all funds paid to him by Lucy Ricardo to Lucy Ricardo;

(b) Directing the return of any gifts made by Fred Simpson on behalf of Lucy Ricardo;

(c) Awarding cost of suit, including attorneys fees; and

(d) Ordering such other relief as this Court may deem just and proper.

COUNT FOUR

1. Plaintiff, Mary Jones, repeats and realleges all allegations set forth above as if fully set forth at length herein.

2. From August 2008 through August 2009, various checks were written from Lucy Ricardo's checking account with PNC Bank payable to Diane Simpson.

3. Such payments are the result of undue influence.

4. Such payments were improvident gifts and Diane Simpson should return the funds to Lucy Ricardo.

WHEREFORE, Mary Jones respectfully seeks an Order:

(a) Compelling Diane Simpson to return all funds paid to her by Lucy Ricardo to Lucy Ricardo;

(b) Directing the return of any gifts made by Fred Simpson on behalf of Lucy Ricardo;

(c) Awarding cost of suit, including attorneys fees; and

(d) Ordering such other relief as this Court may deem just and proper.

COUNT FIVE

1. Counterclaimant, Mary Jones, repeats and realleges all allegations set forth above as if fully set forth at length herein.

2. Upon information and belief, Lucy Ricardo executed a Power of Attorney or other document naming Diane Simpson as agent while Fred Simpson was out of state.

3. Diane Simpson should account for her actions as agent under an alleged Power of Attorney or other document for Lucy Ricardo.

4. Diane Simpson should return all of Lucy Ricardo's funds, which were used inappropriately.

WHEREFORE, Mary Jones respectfully seeks an Order:

(a) Directing Diane Simpson to provide an accounting of all of her actions as alleged agent-in-fact for Lucy Ricardo;

(b) Directing Diane Simpson to provide an accounting of all the assets she holds or held jointly with Lucy Ricardo, and immediately provide Mary Jones with a listing of any and all such property;

(c) Awarding cost of suit, including attorneys fees; and

(d) Ordering such other relief as this Court may deem just and proper.

SAFETY ISSUES

1. Michael S. Schwartz, the alleged incapacitated person, resides at ________, Denville, New Jersey.

2. Plaintiff, Sonia Schwartz., resides at _______, Danbury, Connecticut.

3. Mr. Schwartz is currently 83 years old and was born on _________. He is divorced. He has three adult children, including plaintiff.

4. Mr. Schwartz has been diagnosed with early dementia, frontal temporal type.

5. Plaintiff seeks to be appointed temporary and permanent guardian of the person and property of her father.

6. Mr. Schwartz's driver's license was suspended in July 2009 but due to his dementia, he still insists on driving. Attached as Exhibit A is a true copy of the Order of Suspension. Mr. Schwartz has received a ticket for speeding, and warnings for illegal passing, a broken mirror and for not wearing a seatbelt. He has been surcharged in New York and New Jersey for excessive points in each state. He has been involved in multiple automobile accidents. He crashed the front end of his car and windshield into a gate, scraped the side of his car and broke his sideview mirror trying to pass a truck. He also scraped the side of a loaner car given to him while his car was being fixed.

7. On at least two occasions Mr. Schwartz drove for miles on a flat tire.

8. Friends have made multiple calls to family reporting that Mr. Schwartz was observed repeatedly driving through stop signs, red lights and driving up on a curb. A neighbor of Mr. Schwartz reported that her son was almost hit by Mr. Schwartz in a crosswalk and that the incident was observed by a crossing guard.

9. In August 2009, plaintiff went to Mr. Schwartz's house to insist that he see a doctor. He was told by the doctor not to drive due to dementia and poor vision. The doctor contacted the New Jersey Motor Vehicles Commission.

10. Plaintiff offered Mr. Schwartz alternatives to driving and tried to have his car disabled but he insisted that he would have his car fixed or buy a new car.

11. Mr. Schwartz refused to see an eye doctor but finally relented. He was told not to drive due to dense cataracts. He refuses to undergo cataract surgery and continues to drive daily.

12. When his license was suspended in July 2009, Mr. Schwartz stated that he has a driver's license and would ignore the Order of Suspension.

13. Mr. Schwartz's car insurance was cancelled due to excessive speeding violations and accidents. Although he was warned that it is illegal to drive without car insurance he stated that he would ignore the cancellation of his insurance coverage.

14. Mr. Schwartz's family members consulted with the Morristown police regarding Mr. Schwartz's insistence on driving on three separate occasions. Officer Bolton went to Mr. Schwartz's home to warn him that he was driving illegally. Although he was warned that he was at risk for arrest, fines and impounding of his car, he went driving shortly after Office Bolton left Mr. Schwartz's house and made preparations to drive to Connecticut the following day.

15. Plaintiff's husband, Louis Black, called Mr. Schwartz twice a day for three days offering Mr. Schwartz a ride to Connecticut but Mr. Schwartz had forgotten the earlier conversation each time.

16. Earlier in 2009, while Mr. Schwartz's car was being repaired, Mr. Schwartz attempted to purchase a new car. Just as the papers were being signed, Mr. Schwartz's longtime

mechanic contacted the salesman to inform him that Mr. Schwartz was an impaired driver who should not be allowed to buy another car.

17. If a temporary guardian is not appointed to take custody of his car and ensure that he cannot purchase a new vehicle, bodily harm may be sustained by Mr. Schwartz and others.

18. Mr. Schwartz was raised as a Christian Scientist. Although he does not practice the religion he generally avoids doctors and modern medicine.

19. He has refused medication recommended for treatment of his dementia by Rita Fox, M.D. The family accepts his decision as consistent with his prior philosophy but encourages him to try treatment and offers to obtain medication for him.

20. Mr. Schwartz does not understand what Medicare is and does not utilize his eligibility for free treatment at the Veterans Administration as a service connected veteran and former prisoner of war.

21. Plaintiff engaged the services of Services and Resources for Seniors, Inc., a geriatric care management company in Morristown, New Jersey. If appointed, the co-guardians intend to continue to utilize the services of the care management company to assist in Mr. Schwartz's care.

22. On August 13, 2009, Dr. Fox, examined Mr. Schwartz. Dr. Fox diagnosed Mr. Schwartz with early dementia, frontal-temporal type. According to Dr. Fox, Mr. Schwartz has short term memory loss and significant loss of executive function, judgment and insight. Dr. Fox reports that Mr. Schwartz is unable to draw a clock from memory, is unable to name more than five animals or fruit in one minute and is unable to explain common proverbs including their literal meanings. Dr. Fox also notes that Mr. Schwartz's vision is severely impaired. Dr. Fox's Certification is attached hereto as Exhibit B.

23. On August 23, 2009, Stuart Lee, M.D. examined Mr. Schwartz. Dr. Lee diagnosed Mr. Schwartz with dementia combined Alzheimer's and multi infarct dementia. Dr. Lee stated that Mr. Schwartz's memory is severely impaired. He denies having any problems with his driving. He thought the year is 2009. He was unable to abstract proverbs. Dr. Lee's Certification is attached hereto as Exhibit C.

24. Based upon all of the foregoing and pursuant to N.J.S.A. 3B:12-24.1, it is requested that Sonia Schwartz. be appointed as temporary pending the return date of the Order to Show Cause. There is a critical need for an emergency guardian to be appointed because Mr. Schwartz can cause bodily harm to himself and others if he continues to drive and can cause substantial waste to his property as a result of his inability to manage his financial affairs.

25. Plaintiff believes that can fully carry out the duties of guardian of the person and of the property of Michael S. Schwartz, including but not limited to making decisions regarding his care, treatment and services, all as are in his best interests.

WHEREFORE, Plaintiff, Sonia Schwartz, demands that this Court enter Judgment:

(a) Appointing Sonia Schwartz as temporary guardian of the property of Michael S. Schwartz so that she can take custody of his car;

(b) Adjudicating Michael S. Schwartz to be a person in need of a guardian as a result of being unable to govern himself and manage his affairs;

(c) Granting letters of guardianship of the person and property of Michael S. Schwartz in accordance with R. 4:86-6 (c) on the grounds that Michael S. Schwartz is no longer able to govern and manage his person and property.

(d) Directing the Morris County Surrogate to issue Letters of Guardianship to Sonia Schwartz upon her duly qualifying as such;

(e) Waiving the filing fee for the report of the Court appointed counsel for Michael S. Schwartz;

(f) Allowing the court-appointed counsel for Michael S. Schwartz attorney fees and costs to be paid from Michael S. Schwartz's assets;

(g) Granting such other relief as the Court deems just and proper.

Colorado Statutes

Title 15. PROBATE, TRUSTS, AND FIDUCIARIES

COLORADO PROBATE CODE

Article 14.5. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

Current through March 3 of the 2011 Legislative Session

§ 15-14.5-101. Short title

This article may be cited as the "Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act".

History. L. 2008: Entire article added, p. 787, § 1, effective May 14.

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§ 15-14.5-102. Definitions

In this article:

(1) "Adult" means an individual who has attained eighteen years of age.

(2) "Conservator" means a person appointed by the court to administer the property of an adult, including a person appointed under section **15-14-401**.

(3) "Guardian" means a person appointed by the court to make decisions regarding the person of an adult, including a person appointed under section **15-14-301**.

(4) "Guardianship order" means an order appointing a guardian.

(5) "Guardianship proceeding" means a judicial proceeding in which an order for the appointment of a guardian is sought or has been issued.

(6) "Incapacitated person" means an adult for whom a guardian has been appointed.

(7) "Party" means the respondent, petitioner, guardian, conservator, or any other person allowed by the court to participate in a guardianship or protective proceeding.

(8) "Person," except in the term incapacitated person or protected person, means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(9) "Protected person" means an adult for whom a protective order has been issued.

(10) "Protective order" means an order appointing a conservator or other order related to management of an adult's property.

(11) "Protective proceeding" means a judicial proceeding in which a protective order is sought or has been issued.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Respondent" means an adult for whom a protective order or the appointment of a guardian is sought.

(14) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

History. L. 2008: Entire article added, p. 787, § 1, effective May 14.

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§ 15-14.5-103. International application of article

A court of this state may treat a foreign country as if it were a state for the purpose of applying this part 1 and parts 2, 3, and 5 of this article.

History. L. 2008: Entire article added, p. 788, § 1, effective May 14.

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§ 15-14.5-104. Communication between courts

(1) A court of this state may communicate with a court in another state concerning a proceeding arising under this article. The court may allow the parties to participate in the communication. Except as otherwise provided in subsection (2) of this section, the court shall make a record of the communication. The record may be limited to the fact that the communication occurred.

(2) Courts may communicate concerning schedules, calendars, court records, and other administrative matters without making a record.

History. L. 2008: Entire article added, p. 788, § 1, effective May 14.

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§ 15-14.5-105. Cooperation between courts

(1) In a guardianship or protective proceeding in this state, a court of this state may request the appropriate court of another state to do any of the following:

(a) Hold an evidentiary hearing;

(b) Order a person in that state to produce evidence or give testimony pursuant to procedures of that state;

(c) Order that an evaluation or assessment be made of the respondent;

(d) Order any appropriate investigation of a person involved in a proceeding;

(e) Forward to the court of this state a certified copy of the transcript or other record of a hearing under paragraph (a) of this subsection (1) or any other proceeding, any evidence otherwise produced under paragraph (b) of this subsection (1), and any evaluation or assessment prepared in compliance with an order under paragraph (c) or (d) of this subsection (1);

(f) Issue any order necessary to assure the appearance in the proceeding of a person whose presence is necessary for the court to make a determination, including the respondent or the incapacitated or protected person;

(g) Issue an order authorizing the release of medical, financial, criminal, or other relevant information in that state, including protected health information as defined in 45 CFR 164.504, as amended.

(2) If a court of another state in which a guardianship or protective proceeding is pending requests assistance of the kind provided in subsection (1) of this section, a court of this state has jurisdiction for the limited purpose of granting the request or making reasonable efforts to comply with the request.

History. L. 2008: Entire article added, p. 789, § 1, effective May 14.

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§ 15-14.5-106. Taking testimony in another state

(1) In a guardianship or protective proceeding, in addition to other procedures that may be available, testimony of a witness who is located in another state may be offered by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a witness be taken in another state and may prescribe the manner in which and the terms upon which the testimony is to be taken.

(2) In a guardianship or protective proceeding, a court in this state may permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic means. A court of this state shall cooperate with the court of the other state in designating an appropriate location for the deposition or testimony.

(3) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the best evidence rule.

History. L. 2008: Entire article added, p. 789, § 1, effective May 14.

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§ 15-14.5-201. Definitions - significant connection factors

(1) In this part 2:

(a) "Emergency" means a circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare, and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent's behalf.

(b) "Home state" means the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition.

(c) "Significant-connection state" means a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.

(2) In determining under sections **15-14.5-203** and **15-14.5-301(5)** whether a respondent has a significant connection with a particular state, the court shall consider:

(a) The location of the respondent's family and other persons required to be notified of the guardianship or protective proceeding;

(b) The length of time the respondent at any time was physically present in the state and the duration of any absence;

(c) The location of the respondent's property; and

(d) The extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship, and receipt of services.

History. L. 2008: Entire article added, p. 790, § 1, effective May 14.

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§ 15-14.5-202. Exclusive basis

This part 2 provides the exclusive jurisdictional basis for a court of this state to appoint a guardian or issue a protective order for an adult.

History. L. 2008: Entire article added, p. 790, § 1, effective May 14.

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§ 15-14.5-203. Jurisdiction

(1) A court of this state has jurisdiction to appoint a guardian or issue a protective order for a respondent if:

(a) This state is the respondent's home state;

(b) On the date the petition is filed, this state is a significant-connection state and:

(I) The respondent does not have a home state or a court of the respondent's home state has declined to exercise jurisdiction because this state is a more appropriate forum; or

(II) The respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order:

(A) A petition for an appointment or order is not filed in the respondent's home state;

(B) An objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and

(C) The court in this state concludes that it is an appropriate forum under the factors set forth in section **15-14.5-206** ;

(c) This state does not have jurisdiction under either paragraph (a) or (b) of this subsection (1), the respondent's home state and all significant-connection states have declined to exercise jurisdiction because this state is the more appropriate forum, and jurisdiction in this state is consistent with the constitutions of this state and the United States; or

(d) The requirements for special jurisdiction under section **15-14.5-204** are met.

History. L. 2008: Entire article added, p. 791, § 1, effective May 14.

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§ 15-14.5-204. Special jurisdiction

(1) A court of this state lacking jurisdiction under section **15-14.5-203** has special jurisdiction to do any of the following:

(a) Appoint a guardian in an emergency for a term not exceeding sixty days for a respondent who is physically present in this state;

(b) Issue a protective order with respect to real or tangible personal property located in this state;

(c) Appoint a guardian or conservator for an incapacitated or protected person for whom a provisional order to transfer the proceeding from another state has been issued under procedures similar to section **15-14.5-301**.

(2) If a petition for the appointment of a guardian in an emergency is brought in this state and this state was not the respondent's home state on the date the petition was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment.

History. L. 2008: Entire article added, p. 791, § 1, effective May 14.

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§ 15-14.5-205. Exclusive and continuing jurisdiction

Except as otherwise provided in section **15-14.5-204**, a court that has appointed a guardian or issued a protective order consistent with this article has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the appointment or order expires by its own terms.

History. L. 2008: Entire article added, p. 792, § 1, effective May 14.

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§ 15-14.5-206. Appropriate forum

(1) A court of this state having jurisdiction under section **15-14.5-203** to appoint a guardian or issue a protective order may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

(2) If a court of this state declines to exercise its jurisdiction under subsection (1) of this section, it shall either dismiss or stay the proceeding. The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian or issuance of a protective order be filed promptly in another state.

(3) In determining whether it is an appropriate forum, the court shall consider all relevant factors, including:

(a) Any expressed preference of the respondent;

(b) Whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation;

(c) The length of time the respondent was physically present in or was a legal resident of this or another state;

(d) The distance of the respondent from the court in each state;

(e) The financial circumstances of the respondent's estate;

(f) The nature and location of the evidence;

(g) The ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;

(h) The familiarity of the court of each state with the facts and issues in the proceeding; and

(i) If an appointment were made, the court's ability to monitor the conduct of the guardian or conservator.

History. L. 2008: Entire article added, p. 793, § 1, effective May 14.

§ 15-14.5-207. Jurisdiction declined by reason of conduct

(1) If at any time a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because of unjustifiable conduct, the court may:

(a) Decline to exercise jurisdiction;

(b) Exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to ensure the health, safety, and welfare of the respondent or the protection of the respondent's property or prevent a repetition of the unjustifiable conduct, including staying the proceeding until a petition for the appointment of a guardian or issuance of a protective order is filed in a court of another state having jurisdiction; or

(c) Continue to exercise jurisdiction after considering:

(I) The extent to which the respondent and all persons required to be notified of the proceedings have acquiesced in the exercise of the court's jurisdiction;

(II) Whether it is a more appropriate forum than the court of any other state under the factors set forth in section **15-14.5-206(3)** ; and

(III) Whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the jurisdictional standards of section **15-14.5-203**.

(2) If a court of this state determines that it acquired jurisdiction to appoint a guardian or issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney's fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses. The court may not assess fees, costs, or expenses of any kind against this state or a governmental subdivision, agency, or instrumentality of this state unless authorized by law other than this article.

History. L. 2008: Entire article added, p. 793, § 1, effective May 14.

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§ 15-14.5-208. Notice of proceeding

If a petition for the appointment of a guardian or issuance of a protective order is brought in this state and this state was not the respondent's home state on the date the petition was filed, in addition to complying with the notice requirements of this state, notice of the petition must be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the respondent's home state. The notice must be given in the same manner as notice is required to be given in this state.

History. L. 2008: Entire article added, p. 793, § 1, effective May 14.

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§ 15-14.5-209. Proceedings in more than one state

(1) Except for a petition for the appointment of a guardian in an emergency or issuance of a protective order limited to property located in this state under section **15-14.5-204(1)** (a) or (1) (b), if a petition for the appointment of a guardian or issuance of a protective order is filed in this state and in another state and neither petition has been dismissed or withdrawn, the following rules apply:

(a) If the court in this state has jurisdiction under section **15-14.5-203**, it may proceed with the case unless a court in

another state acquires jurisdiction under provisions similar to section **15-14.5-203** before the appointment or issuance of the order.

(b) If the court in this state does not have jurisdiction under section **15-14.5-203**, whether at the time the petition is filed or at any time before the appointment or issuance of the order, the court shall stay the proceeding and communicate with the court in the other state. If the court in the other state has jurisdiction, the court in this state shall dismiss the petition unless the court in the other state determines that the court in this state is a more appropriate forum.

History. L. 2008: Entire article added, p. 793, § 1, effective May 14.

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§ 15-14.5-301. Transfer of guardianship or conservatorship to another state

(1) A guardian or conservator appointed in this state may petition the court to transfer the guardianship or conservatorship to another state.

(2) Notice of a petition under subsection (1) of this section must be given to the persons that would be entitled to notice of a petition in this state for the appointment of a guardian or conservator.

(3) On the court's own motion or on request of the guardian or conservator, the incapacitated or protected person, or other person required to be notified of the petition, the court shall hold a hearing on a petition filed pursuant to subsection (1) of this section.

(4) The court shall issue an order provisionally granting a petition to transfer a guardianship and shall direct the guardian to petition for guardianship in the other state if the court is satisfied that the guardianship will be accepted by the court in the other state and the court finds that:

(a) The incapacitated person is physically present in or is reasonably expected to move permanently to the other state;

(b) An objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the incapacitated person; and

(c) Plans for care and services for the incapacitated person in the other state are reasonable and sufficient.

(5) The court shall issue a provisional order granting a petition to transfer a conservatorship and shall direct the conservator to petition for conservatorship in the other state if the court is satisfied that the conservatorship will be accepted by the court of the other state and the court finds that:

(a) The protected person is physically present in or is reasonably expected to move permanently to the other state, or the protected person has a significant connection to the other state considering the factors in section **15-14.5-201(2)** ;

(b) An objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the protected person; and

(c) Adequate arrangements will be made for management of the protected person's property.

(6) The court shall issue a final order confirming the transfer and terminating the guardianship or conservatorship upon its receipt of:

(a) A provisional order accepting the proceeding from the court to which the proceeding is to be transferred which is issued under provisions similar to section **15-14.5-302** ; and

(b) The documents required to terminate a guardianship or conservatorship in this state.

History. L. 2008: Entire article added, p. 794, § 1, effective May 14.

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§ 15-14.5-302. Accepting guardianship or conservatorship transferred from another state

(1) To confirm transfer of a guardianship or conservatorship transferred to this state under provisions similar to section **15-14.5-301**, the guardian or conservator must petition the court in this state to accept the guardianship or conservatorship. The petition must include a certified copy of the other state's provisional order of transfer.

(2) Notice of a petition under subsection (1) of this section must be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a guardian or issuance of a protective order in both the transferring state and this state. The notice must be given in the same manner as notice is required to be given in this state.

(3) On the court's own motion or on request of the guardian or conservator, the incapacitated or protected person, or other person required to be notified of the proceeding, the court shall hold a hearing on a petition filed pursuant to subsection (1) of this section.

(4) The court shall issue an order provisionally granting a petition filed under subsection (1) of this section unless:

(a) An objection is made and the objector establishes that transfer of the proceeding would be contrary to the interests of the incapacitated or protected person; or

(b) The guardian or conservator is ineligible for appointment in this state.

(5) The court shall issue a final order accepting the proceeding and appointing the guardian or conservator as guardian or conservator in this state upon its receipt from the court from which the proceeding is being transferred of a final order issued under provisions similar to section **15-14.5-301** transferring the proceeding to this state.

(6) Not later than ninety days after issuance of a final order accepting transfer of a guardianship or conservatorship, the court shall determine whether the guardianship or conservatorship needs to be modified to conform to the law of this state.

(7) In granting a petition under this section, the court shall recognize a guardianship or conservatorship order from the other state, including the determination of the incapacitated or protected person's incapacity and the appointment of the guardian or conservator.

(8) The denial by a court of this state of a petition to accept a guardianship or conservatorship transferred from another state does not affect the ability of the guardian or conservator to seek appointment as guardian or conservator in this state under article 14 of this title if the court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

History. L. 2008: Entire article added, p. 795, § 1, effective May 14.

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§ 15-14.5-401. Registration of guardianship orders

If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in this state by filing as a foreign judgment in a court, in any appropriate county of this state, certified copies of the order and letters of office.

History. L. 2008: Entire article added, p. 796, § 1, effective May 14.

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§ 15-14.5-402. Registration of protective orders

If a conservator has been appointed in another state and a petition for a protective order is not pending in this state, the conservator appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this state by filing as a foreign judgment in a court of this state, in any county in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond.

History. L. 2008: Entire article added, p. 796, § 1, effective May 14.

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§ 15-14.5-403. Effect of registration

(1) Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in this state all powers authorized in the order of appointment except as prohibited under the laws of this state, including maintaining actions and proceedings in this state and, if the guardian or conservator is not a resident of this state, subject to any conditions imposed upon nonresident parties.

(2) A court of this state may grant any relief available under this article and other law of this state to enforce a registered order.

History. L. 2008: Entire article added, p. 796, § 1, effective May 14.

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§ 15-14.5-501. Uniformity of application and construction

In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

History. L. 2008: Entire article added, p. 797, § 1, effective May 14.

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§ 15-14.5-502. Relation to electronic signatures in global and national commerce act

This article modifies, limits, and supersedes the federal "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001, et seq., but does not modify, limit, or supersede section 101 (c) of that act, 15 U.S.C. sec. 7001 (c), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

History. L. 2008: Entire article added, p. 797, § 1, effective May 14.

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§ 15-14.5-503. Transitional provision

(1) This article applies to guardianship and protective proceedings begun on or after May 14, 2008.

(2) Parts 1, 3, and 4 of this article and sections **15-14.5-501** and **15-14.5-502** apply to proceedings begun before May 14, 2008, regardless of whether a guardianship or protective order has been issued.

History. L. 2008: Entire article added, p. 797, § 1, effective May 14.

PROBATE COURT
CITY AND COUNTY OF DENVER, COLORADO

City & County Building
1437 Bannock Street, Room 230
Denver, CO 80202

In the Matter of the Estate of

Respondent.

GUARDIANSHIP/CONSERVATORSHIP CASE MANAGEMENT ORDER

The Court is in receipt of the Verified Petition to Appoint ☒ Guardian / ☒ Conservator that has been filed in the above case. Under the Colorado Uniform Guardianship and Protective Proceedings Act (C.R.S. § 15-14-101 et. seq.), the following procedure must now be followed. This procedure is designed to encourage the timely, just, and cost efficient resolution of guardianship/conservatorship cases.

I. SETTING THE MATTER FOR A HEARING
II. NOTICE
III. COURT-APPOINTED VISITOR
IV. NEW LEGISLATIVE REQUIREMENTS FOR GUARDIAN/CONSERVATOR NOMINEES
V. NECESSARY DOCUMENTS
VI. *PRO SE* (UNREPRESENTED) PARTIES

I. SETTING THE MATTER FOR A HEARING

The petitioner must set a hearing on the *Verified Petition to Appoint Guardian/Conservator_* before either the Judge or the Magistrate. Petitions to Appoint Guardian/Conservator will NOT be considered without an evidentiary hearing. The petitioner may set the hearing by contacting Sarah Solano at sarah.solano@judicial.state.co.us. If you are an attorney and the matter is uncontested, please set the matter on any Friday (giving enough time for proper notice – see section II) between 9:30am and 1:30pm, Room 232. You will confirm the time by leaving a message at (720)865-8349 with the date, time and case number. FAILURE TO CONFIRM THE DATE AT THIS NUMBER MAY RESULT IN YOUR HEARING BEING VACATED!!!

If the parties require an interpreter, counsel is responsible for ensuring that an interpreter is present at the hearing. Counsel is also responsible for informing the Court when they call to set the hearing, that an interpreter will be present at the hearing.

A. Respondent's Attendance:

Both the petitioner and the respondent are required to appear at the hearing unless waived by a court order issued on a motion. The Court places substantial weight upon the testimony offered at the hearing in determining whether to grant the Petition. If special circumstances exist that require that the respondent's attendance be excused, you must set forth the basis for your request in the Petition or in a separate motion.

B. Conducting the Hearing Effectively:

The Court expects the petitioner to provide evidence upon which the Court can make thorough findings of fact on the issues before the Court. You can usually do this by taking testimony from knowledgeable witnesses or by presenting an offer of proof in the presence of such witnesses. Regardless of how you proceed, the Court must have sufficient evidence on each element of proof in order for the petition to be granted. It is not the Court's responsibility to present your case: therefore, while the Court may occasionally ask a question of one or more of your witnesses, failure to provide evidence sufficient to support each and every allegation of your petition could result in your petition being denied or dismissed.

For the Court to appoint a guardian, the Court must find that the respondent is "*unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.*" (C.R.S. § 15-14-102(5)). For a Court to appoint a conservator, the Court must find by clear and convincing evidence, that "*the individual is unable to manage property and business affairs because the individual is unable to effectively receive or evaluate information or both or to make or communicate decisions, even with the use of appropriate and reasonably available technological assistance, or because the individual is missing, detained, or unable to return to the United States; AND by a preponderance of evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money.*" (C.R.S. § 15-14-401(1)(b)).

II. NOTICE

Pursuant to C.R.S. § 15-14-113, Petitions to Appoint a Guardian or Conservator and a Notice of Hearing must be **personally served** on the respondent if (s)he is over the age of 12, in accordance with the Colorado Rules of Probate Procedure **at least ten business days before the hearing.** These documents need only be served by U.S. mail (at least 13 business days before the hearing: 10 days plus 3 days for mailing) on all other interested parties (and on the respondent if the respondent is under the age of 12.). Please see form JDF 806 (notice of hearing) and JDF 807 (notice of hearing to respondent/minor) online at http://www.courts.state.co.us/chs/court/forms/probate/probate.htm. The people that need to be noticed for a guardianship petition can be found in C.R.S. § 15-14-205 and for a conservatorship petition in C.R.S. § 15-14-404(2). This usually includes the respondent's parents, guardian(s)/conservator(s), spouse, adult children, an adult with whom respondent has resided for more than 6 months within 1 year before filing petition, and persons responsible for respondent's care and custody (ie. Treating physician, legal representative, respondent's guardian/conservator nominee, the proposed guardian/conservator) as well as any person who has filed a request for notice with the Court. **REMEMBER** that business days do NOT include weekends or holidays.

Personal service means that a disinterested third person over age 18 hands the forms to the protected person. This must be done, no matter how disabled the person may be. **DO NOT MAIL THE FORMS TO THE RESPONDENT**. It is the petitioner's responsibility to arrange the personal service. Court staff cannot serve the forms on the protected person. The person serving the paperwork must complete the *Personal Service Affidavit* located on the second page of JDF 807. The *Affidavit* must indicate the protected person's name, the date served, the place served, and that the manner of service was "hand delivery." The *Affidavit* must be notarized.

You must file the completed Notice of Hearing, JDF 806 and the Notice of Hearing to Respondent/Minor, JDF 807, with the Probate Court Clerk's office **at least 48 hours before the hearing.** Both pages of the forms must be completed including the Certificate of Service and the Personal Service Affidavit. **If the respondent (over age 12) is not personally served or, if you have not filed the completed form JDF 807 by the 48 hour deadline, your hearing will be vacated.** This means you will have to reset the hearing date with the Division Clerk and again serve all interested persons with the notice of hearing for the new date.

Remember that the Court may automatically vacate your hearing date and time if you fail to give proper notice, or if you do not file proof of such notice with the Court at least 48 hours before the hearing. If your hearing is vacated, you will have to reschedule it, sending a new notice of hearing to each person entitled to it. Interested persons, **except a respondent**, may waive notice. (See form JDF 719 Waiver of Notice online at http://www.courts.state.co.us/chs/court/forms/probate/probate.htm).

A. Notice Requirements Pursuant to the Indian Child Welfare Act (ICWA) ****APPLIES TO MINOR GUARDIANSHIP PROCEEDINGS ONLY**

It is required that an investigation be made as to whether a child in a guardianship proceeding may be an Indian Child which would initiate notice requirements pursuant to the Indian Child Welfare Act (ICWA).

The beginning point for any determination of whether ICWA applies to a particular proceeding is an inquiry into whether the child involved is an "Indian Child" as that term is defined at 25 U.S.C. Section 1903(4). The definition requires that the child be a member of or eligible for membership in an Indian tribe and be the biological child of a member of an Indian tribe. One of the basic tenants of ICWA is that a child's Indian Tribe has a discrete interest, separate from a parent's or custodian's, in any proceeding involving custody, guardianship or adoption of an Indian Child that must be protected throughout the proceeding. ICWA allows the tribe an unqualified right to intervene in the proceeding, at any stage, as well as the right to request to transfer the proceeding to a tribal court. There are specific requirements regarding a transfer, as well as exceptions to a transfer, which must be reviewed.

Under ICWA, in any involuntary proceeding where the party initiating the proceeding knows or has reason to know that an Indian Child is involved, that party must notify the parent, custodian, and tribe by registered mail, with return receipt requested, of the commencement of the proceeding. The failure to serve proper notice is a jurisdictional defect.

III. COURT-APPOINTED VISITOR

Pursuant to C.R.S. § 15-14-305, upon receipt of a *Verified Petition to Appoint Guardian/Conservator* for an adult, the Court appoints a Visitor. The fee to the Petitioner for the Visitor is $100.00. Petitioner must pay the Visitor directly before a hearing will be held. The Visitor informs the respondent about the proceeding and makes a recommendation as to whether a lawyer should be appointed to represent the respondent and whether a *guardian ad litem* should be appointed to represent the respondent's best interest. The Visitor will contact the respondent and interview them and the petitioner in order to make these and other recommendations to the Court.

IV. LEGISLATIVE REQUIREMENTS FOR GUARDIAN/CONSERVATOR NOMINEES

Effective July, 2005, the Colorado legislature requires that, prior to appointment of a guardian or conservator, the guardian/conservator nominee must file a completed Acceptance of Office form including a name-based criminal history check and a current credit report for each nominee. Acceptance

of Office forms (JDF 805) are available in the Denver Probate Court Clerk's Office or online at: http://www.courts.state.co.us/chs/court/forms/probate/probate.htm.

A. Waiver of Criminal History and Credit Report:

Criminal history and credit report requirements may be waived by the Court for good cause OR in specific circumstances. (See paragraph 4 of the Acceptance of Office form for more information on specific waivers.) Instructions for obtaining a name-based criminal history check or a current credit history are located at the bottom of the second page of the Acceptance of Office form.

In order to protect a nominee's privacy, **Social Security numbers and account numbers should be redacted** before documents are filed electronically and will be redacted on *pro se* filings before documents are scanned and uploaded by Court staff. All credit reports will be and remain sealed in the Court files.

NOTE: If the nominated guardian/conservator is a professional fiduciary, they may request that the Court issue an Order excusing them from filing the criminal background check or credit history report based on their submission of these documents in a prior case within the last 12 months.

V. NECESSARY DOCUMENTS

If you have not already done so, the following documents must be filed **at least 48 hours before the scheduled hearing**:

*****NOTE: THE FORMS/ORDERS REQUIRED BY THE COURT CAN BE ACCESSED AT http://www.courts.state.co.us/district/02nd/probate/forms.htm**

For Appointment of Guardian:

- Affidavit of Personal Service on the respondent (served at least 10 days before the hearing) JDF 807
- Certificate of Service on all interested parties (served at least 10 days before the hearing) included as part of JDF 806
- Recent Doctor's Letter Describing Respondent's Incapacity
- Acceptance of Office form by nominated guardian JDF 805
- Legible copy of Driver's License or other government issued identification
- Name-Based Criminal Background Check of nominated guardian
- Credit History Report of nominated guardian
- Order Appointing Guardian for Minor (if respondent is under the age of 18) (in editable format) JDF 827
- Letters of Guardianship – Minor JDF 830 (in editable format)
- Order Appointing Guardian for Adult (if respondent is over the age of 18) (in editable format) JDF 848
- Letters of Guardianship – Adult JDF 849 (in editable format)
- Irrevocable Power of Attorney (if nominated guardian is domiciled out of state) JDF 721

For Appointment of Conservator:

- Affidavit of Personal Service on the respondent (served at least 10 days before the hearing) JDF 807
- Certificate of Service on all interested parties (served at least 10 days before the hearing) included as part of JDF 806
- Recent Doctor's Letter Describing Respondent's Incapacity
- Acceptance of Office form by nominated conservator JDF 805
- Legible copy of Driver's License or other government issued identification
- Name-Based Criminal Background Check of nominated conservator
- Credit History Report of nominated conservator
- Order Appointing Conservator for Minor (if respondent is under the age of 21) (in editable format) JDF 862
- Letters of Conservatorship – Minor JDF 863 (in editable format)
- Order Appointing Conservator for Adult (if respondent is over the age of 21) (in editable format) JDF 878
- Letters of Conservatorship – Adult JDF 880 (in editable format)
- Irrevocable Power of Attorney (if nominated conservator is domiciled out of state) JDF 721

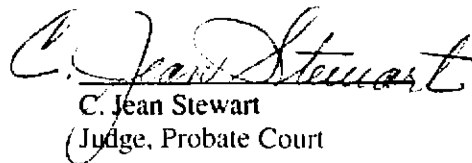
VI. *PRO SE* (UNREPRESENTED) PARTIES

If you choose to represent yourself, you are required to follow the same procedures as parties represented by attorneys. You should obtain from the Probate Court Clerk's office the packet of forms and instructions for self-represented parties (1437 Bannock Street, Room 230).

Petitioner shall provide a copy of this Order, to all counsel and self-represented parties. A certificate showing service of this Order and all other documents on the other party shall be filed with the court within ten (10) days after the date of this Order.

Dated: **December 10, 2010**

BY THE COURT:



C. Jean Stewart
Judge, Probate Court

HE AIN'T HEAVY, HE'S MY BROTHER: CONTESTED GUARDIANSHIPS AND INTERSTATE GUARDIANSHIP ISSUES**

ABA RPTE Spring Symposia, April 29, 2011

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**David English graciously provided the materials on the UAGPPJA. Slides have been edited and modified by Shirley Whitenack and Marco D. Chayet.

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System of Government

- The United States has a federal system of government. Certain legal subjects are controlled by the national government. Other subjects are controlled by the individual states.
- Guardianship is controlled by state law. Because there are 50 individual states, there are 50 different state guardianship laws.
- The District of Columbia and many American Indian reservations also have their own individual guardianship laws.

Uniform Law Conference

- To minimize the difference in state laws, the Uniform Law Conference of the US was formed over 100 years ago.
- Its objective is to promulgate model laws for states to enact.
- The Uniform Guardianship and Protective Proceedings Act, which dates back to 1969, has been enacted in about 20 states.
- But selected concepts in UGPPA, such as its provisions relating to jurisdiction, have been enacted in nearly all states.

The Problem of Terminology

- States differ on terminology for the person appointed by the court to handle the affairs of a minor or incapacitated adult.
- In a majority of American states, a “guardian” is appointed to make personal care decisions for the ward. A “conservator” is appointed in a so-called “protective proceeding” to manage the person’s property.
- But in many states, only a “guardian” is appointed, either a guardian of the person or guardian of the estate.
- To further confuse things, in California and Connecticut, guardians of the person and estate are appointed for minors, and conservators of the person and estate are appointed for adults.
- This presentation will use the uniform law terminology.

The Issue of Jurisdiction

- Because the US has 50 plus guardianship systems, problems of jurisdiction are frequent.
- Questions of which state has jurisdiction to appoint a guardian or conservator can arise between an American state and another country.
- But more frequently, problems arise because the individual has contacts with more than one American state.

Current Law

- In nearly all American states, a guardian may be appointed by a court in a state in which the individual is domiciled or is physically present.
- In nearly all American states, a conservator may be appointed by a court in a state in which the individual is domiciled or has property.

Problems With Current Law

- Cases where courts in more than one state have jurisdiction are increasing.
- Few states have effective procedures for transferring a case from one jurisdiction to another.
- No state has an effective mechanism for resolving disputes if courts in more than one state claim jurisdiction.

The Problem of Multiple Jurisdiction

- Domicile is a frequently litigated issue.
- Particularly if an individual has a retirement home in another state, the question of which state is the domicile may be uncertain.
- Basing jurisdiction on physical presence invites “parent snatching” or “granny napping” in order to establish jurisdiction in another state.

The Problem of Transfer

- To protect rights, a proceeding to appoint a guardian or conservator is necessarily expensive and time consuming.
- Should an individual under guardianship or conservatorship move permanently to another state, it may become necessary to appoint a guardian or conservator in another state.
- Few states have streamlined procedures for making such a second appointment.
- In most states, all of the procedures for an original appointment must be repeated.

The Problem of Court Cooperation

- Should guardianship or conservatorship proceedings be instituted in more than one state, cooperation between the courts involved is essential.
- Unfortunately, such cooperation is rare.
- Guidance is needed on which court is to decide the question of jurisdiction and the standard that court is to apply.

The Full Faith and Credit Problem

- The US Constitution generally requires that court orders in one state be honored in another state.
- But there are exceptions to the full faith and credit doctrine, of which guardianship and conservatorship law is one.
- Sometimes, guardianship and conservatorship proceedings must be initiated in a second state because of the difficulty of implementing a court order entered in another state.

The New Uniform Law

- To address these problems, the Uniform Law Conference in 2005 appointed a committee to draft a new uniform law.
- The work of the committee was completed in 2007.
- The original title of the proposed Act was the Uniform Guardianship Interstate Jurisdiction and Enforcement Act.
- To better reflect the Act's content, the drafting committee proposes that the name be changed to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

The Child Custody Analogy

- Similar problems of jurisdiction existed for many years in the US in connection with child custody determinations.
- If one parent lived in one state and the other parent lived in another state, frequently the courts in more that one state had jurisdiction to enter custody orders.
- Beginning in 1969, the US Uniform Law Conference approved model laws to minimize the problem of multiple court jurisdiction in child custody matters.
- The current version of this model law is known as the Uniform Child Custody Jurisdiction and Enforcement Act.
- The drafters of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act have elected to model much of their Act after the child custody model law.

Limitation to Adults

- The proposed guardianship jurisdiction act applies only to adult proceedings.
- The act is limited to adults because nearly all jurisdictional issues involving guardianships for minors are adequately addressed by the uniform law on child custody.
- But the uniform act on child custody only applies to minors, not adults.

The Proposed Model Law

- The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act has the following general objectives:
- To provide that except in cases of urgency, jurisdiction to appoint a guardian or conservator will usually be fixed in the courts of one and only one state.
- To provide a procedure for transferring a case from one state to another.
- To provide that guardianship and conservatorship orders entered in one state can be enforced in another state.

Key Concepts

- **To determine which court has primary jurisdiction, key concepts are to determine the individual's "home state" and "significant connection state."**
- **A "home state" is the state in which the individual lived for at least six consecutive months immediately before the commencement of the guardianship or protective proceeding.**
- **"Significant connection state," which is potentially broader concept, means the state in which the individual has a significant connection other than mere physical presence, and where substantial evidence concerning the individual is available.**

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General Rule

- General rule is that the home state has primary jurisdiction to appoint a guardian or conservator. This primary jurisdiction continues to apply for up to six months following a move to another state.
- Subsidiary rule is that a significant connection state has jurisdiction if the individual does not have a home state or the home state has declined jurisdiction on the basis that the significant connection state is a more appropriate forum.
- Whether or not the state is a home state or significant connection state, a state in which the individual is physically present has jurisdiction to appoint an emergency guardian if an urgency exists.

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Court Cooperation

- The proposed model act includes provisions re:
- Communicaton between courts in different states.
- Taking testimony in another state.
- Specifying which court has jurisdiction to decide jurisdiction if proceedings have been commenced in more than one state.

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Transfer to Another State

- The proposed act contains a procedure for transferring a proceeding to another state.
- To make the transfer, two court orders are necessary, one by the court giving up the case, and a second by the court in the other state that will be receiving the case.
- The court receiving the case must give full faith and credit to the order from the sending state, including the determination of the individual's incapacity and the identity of the guardian or conservator appointed.

Obligation of Transferring Court

- The court transferring the case must find that:
- The individual under guardianship will move permanently to another state;
- No objection to the transfer has been made or that if an objection has been made, the objectants have not established that transfer of the proceeding would be contrary to the individual's interests;
- The court is satisfied that the plans for the individual in the new State are reasonable and sufficient; and
- The court is satisfied that the proceeding will be accepted by the court to which the guardian or conservator has indicated the proceeding will be transferred.

Obligation of Receiving Court

- The court receiving the case must give full faith and credit to the order from the sending state, including the determination of the individual's incapacity and the identity of the guardian or conservator appointed.

Out of State Enforcement

- **To facilitate enforcement of guardianship and conservatorship orders in other states, the proposed model act authorizes registration of the order in the recording office of another state, and requires that the courts of the other state must give the order full faith and credit, whether or not it has been registered.**

International Application

- Under the model Act, an American state that has enacted the Act must recognize and enforce a guardianship or conservatorship order of a foreign country made under factual circumstances in substantial conformity with the Act except to the extent such order violates fundamental principles of human rights.

Adoption of the Act

- Alabama
- Alaska
- Arizona
- Colorado
- Delaware
- District of Columbia
- Illinois
- Iowa
- Maryland
- Nebraska (2011)
- Nevada
- North Dakota
- Oklahoma
- Oregon
- South Carolina
- Tennessee
- Utah
- Washington
- West Virginia

Act Introduced but Not Yet Adopted

- Arkansas
- Connecticut
- Idaho
- Indiana
- Kentucky
- Massachusetts
- Mississippi
- Missouri
- New Mexico
- Ohio
- South Dakota
- Vermont Virginia

UAGPPJA DEFINITIONS

- 102(3)-- "Guardian" means a person appointed by the court to make decisions regarding the person of an adult, including a person appointed under [insert reference to enacting state's guardianship statute].
- The UAGPPJA--102(6)--"Incapacitated person" means an adult for whom a guardian has been appointed.

BURDEN OF PROOF FOR GUARDIANSHIP LAWS BY STATE

- Clear and Convincing Evidence
  - Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia
- Clear, Cogent and Convincing Evidence
  - North Carolina, Washington
- Preponderance of the Evidence
  - Wyoming
- The appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person
  - Arkansas, Idaho, Massachusetts South Carolina, Utah

BURDEN OF PROOF FOR GUARDIANSHIP LAWS BY STATE

- The appointment of a guardian is necessary as a means of providing care and supervision of the physical person…of the incapacitated person…
  - Indiana
- Based upon evidence adduced
  - Oklahoma
- Beyond a reasonable doubt
  - New Hampshire
- If the court is satisfied that the person for whom a guardianship is sought is incapacitated and that judicial intervention in the person's personal freedom of action and decision is necessary to meet essential requirements for the person's physical health or safety
  - Montana

BURDEN OF PROOF FOR GUARDIANSHIP LAWS BY STATE

- Best interests of the disabled person
  - Delaware
- If, after the examination, the chancellor in vacation or the court in term-time is of the opinion that the applicant is incompetent to manage his or her estate, then it shall be the duty of the court to appoint a guardian of the estate of the applicant
  - Mississippi
- Allegedly incapacitated person is without capacity to govern or manage the person's own well-being and financial affairs, then the court will appoint a general guardian to exercise all rights and powers of the incapacitated person.
  - New Jersey

Preparing A Contested Guardianship Case

- **Alert the court that the guardianship may be contested.**
- **The petition should contain the requested relief.**
- **Know your state's pretrial procedure.**
- **Engage in motion practice, if necessary.**
- **Determine whether you need expert witnesses.**
- **Prepare for pretrial conferences.**
- **Know the rules of evidence.**
- **Prepare for trial.**

MEDIATION: AN ALTERNATIVE TO GUARDIANSHIP LITIGATION

- Mediation encourages consensus building within the family setting and fosters the preservation of relationships with family and friends. This form of alternative dispute resolution also can assure the retention of maximum possible independence and autonomous control over basic life decisions for the incapacitated person.
- Mediation may take place at the beginning of the dispute or right before a trial is scheduled to occur. Inasmuch as there is no testimony taken, the mediation usually lasts only one or two days as compared to a trial, which may go on for weeks. The parties usually split the cost of the mediator equally.
- Mediation is a process in which a neutral third party facilitates negotiations among the parties to assist them in reaching a mutually accepted settlement. The mediator has no power to make a decision regarding the outcome of the matter. Mediation often is beneficial in commercial, matrimonial and elder law disputes.

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Types of Mediation

- Evaluative or interest-based mediation is grounded upon the outcome of the dispute.
- Facilitative or therapeutic mediation focuses on the problem-solving abilities of the parties.

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Advantages of Mediation

- Parties, rather than the courts, retain control over the resolution of their dispute.
- Mediation usually is less expensive and faster than the trial process.
- Mediation is usually a confidential proceeding.
- Mediation usually takes place in a setting that is less intimidating than a court proceeding.
- Solutions can be more creative and more suited to needs of mediation participants than those possible through the normal litigation procedure.

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Disadvantages of Mediation

- Mediation agreements have no precedential value.
- There is a danger that the rights of the elderly person may be compromised unnecessarily.
- Mediation process cannot resolve the issue of incapacitation.
- Although the parties may reach an agreement on the issue of who should serve as a guardian or conservator, court involvement nevertheless will be necessary to appoint the guardian or conservator.

Cost of Mediation

- Costs vary throughout the country
- Several jurisdictions have mediation programs where the mediators do not charge for their services.
- In other jurisdictions, mediators may serve at their current market rate per hour or an hourly rate may be set by the program.

STEPS TO HANDLE INTERSTATE GUARDIANSHIP CONTESTS IN THE ABSENCE OF UAGPPJA

- Step 1: Determine the appropriate forum
- Step 2: Comity
  - When two courts have jurisdiction over a matter which substantially involves the same parties and the same issues, the state where the second action was filed has the discretion to refrain from exercising its jurisdiction in deference to the forum where the first action was filed.

Comity Stay

- The party seeking a comity stay has the burden to demonstrate that "there is a first-filed action in another state; (2) both cases involve the same parties, the same claims and the same legal issues; and (3) the plaintiff will have the opportunity for adequate relief in the prior jurisdiction." *Exxon Research & Eng'g v. Indus. Risk Insurers*, 341 N.J. Super. 489, 506 (App. Div. 2001).
- If these factors are established, the burden then shifts to the party who wants the New Jersey court to proceed to demonstrate that "special equities" exist that are "sufficiently compelling to permit the action to proceed" in New Jersey. *Id.*
- "Special equities" may include a consideration of New Jersey public policy and the procedural status of the actions. *American Home Prods ., supra*, 286 N.J. Super. at 38.

More Information

- This presentation has been necessarily brief.
- More detail concerning the Uniform Adult Guardianship and Protective Proceedings Jurisdiction act, including provisions not discussed in this presentation, may be found at www.nccusl.org.
- Please contact the presenters to obtain copies of sample pleadings.