

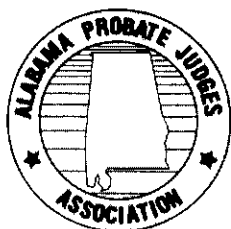
National Probate Legislation and Uniform Act

Professor John Craft

Clinical Associate Professor of Law

Faulkner University

Thomas Goode Jones School of Law



Probate Training Conference
September 13-14, 2018
University of Alabama School of Law
Tuscaloosa, Alabama



National Probate Legislation and Uniform Act

John C. Craft, Clinical Associate Professor of Law
Faulkner University – Thomas Goode Jones School of Law

Agenda

- Discuss national Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA)
 - Alabama Law Institute committee
- Discuss emphasis on “less-restrictive alternatives” to guardianship and conservatorship
 - Avoiding guardianship or conservatorship proceedings altogether
 - Encouraging the use of limited guardianships and conservatorships
- Provide practical tools for attorneys and courts to help effect the “least-restrictive alternative” principle

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

- Completed by the national Uniform Law Commission in November 2017.
- The complete act can be found at: <http://www.uniformlaws.org>.
- Already adopted by Maine, and introduced in New Mexico.
- Alabama's Uniform Guardianship and Protective Proceedings Act was passed in 1987.

UGCOPAA – 7 Emphases

- *Updated terminology*
- UGCOPAA uses terms such as “respondent” for the subject of a guardianship hearing, and “individual subject to guardianship” once a court order has been issued (away from “incapacitated person” or “ward”).

UGCOPAA – 7 Emphases

- *Person-centered planning*
- Under UGCOPAA, each guardianship and conservatorship will have an individualized plan that considers the person's preferences and values.

UGCOPAA – 7 Emphases

- *Express decision-making standard*
- UGCOPAA clarifies that a guardian/conservator is a fiduciary and must always act for the benefit of the person subject to guardianship or conservatorship. A guardian for an adult must make decisions the guardian reasonably believes the adult would make if able, unless doing so would cause harm to the adult. To the extent feasible, a guardian for an adult must promote the adult's self-determination, encourage the adult's participation in decisions, and take into account the values and preferences of the adult.

UGCOPAA – 7 Emphases

- *Enhanced notice*
- UGCOPAA enhances protection for individuals subject to guardianship or conservatorship without greatly increasing the costs of monitoring by allowing the court to identify other persons to receive notice of certain suspect actions, and who can therefore serve as extra sets of eyes and ears for the court.

UGCOPAA – 7 Emphases

- *Guaranteed visitation and communication*
- Without a court order, a guardian under UGCOPAA may not restrict a person under guardianship from receiving visits or communications from family and friends for more than seven days, or from anyone for more than sixty days. Unless the court orders otherwise, close family members must be notified of any change in residence.

UGCOPAA – 7 Emphases

- *Enhanced procedural rights*
- UGCOPAA requires notice of key rights to individuals subject to guardianship or conservatorship, including the right to independent legal representation.

UGCOPAA – 7 Emphases

- *Less-restrictive alternatives*
- UGCOPAA prohibits courts from issuing guardianship conservatorship orders when a less-restrictive alternative is available, such as supported decision-making, technological assistance or an order authorizing a single transaction.

Constitutional Roots

- Shelton v. Tucker, 364 U.S. 479 (1960). The “least restrictive alternative” principle was first recognized by the U.S. Supreme Court in *Shelton v. Tucker* and has been applied in a number of contexts, including institutionalization and guardianship, to limit state deprivation of individual rights and liberties only to the extent necessary to achieve the state’s legitimate purposes.

Importance of Less-Restrictive Alternatives

- Preserve an individual’s decision-making rights
- Use guardianship only when an individual cannot make decisions or needs protection from harm
- Balance the dual goals of self-determination and protection
- Prevent or delay unnecessary guardianships or conservatorships
- Avoid costly and burdensome time in court

Guardianship or Conservatorship Avoidance

- Surrogate Decision-Making. Think “substitute” – someone else makes an individual’s decisions.
- Supported Decision-Making. Legal and social concept in which an individual (especially someone with intellectual disabilities) remains at the center of the decision-making process, consulting with a network of supporters.

Surrogate Decision-Making

- Healthcare Decision-Making
 - Healthcare Power of Attorney. Ala. Code § 26-1A-404.
 - Advance Directive for Healthcare under the Alabama Natural Death Act. Ala. Code § 22-8A-1, et. seq.
 - Statutory Default Surrogate Decision-Maker. Ala. Code § 22-8A-11.
- Financial Decision-Making
 - Financial Power of Attorney under the Alabama Uniform Power of Attorney Act. Ala. Code §§ 26-1A-101 thru 26-1A-301.
 - Living Trust.
 - Social Security Representative Payee or VA Fiduciary.

A Note on the History of Powers of Attorney

- Powers of Attorney are the original guardianship/conservatorship avoidance instruments.
- Model Special Power of Attorney for Small Property Interests Act (1964). Designed as a less expensive alternative to conservatorship or guardianship. Intended for those “who, in anticipation or because of physical handicap or infirmity . . . wish to make provision for the care of their personal or property rights or interests, or both when unable to adequately take care of their own affairs.”
- Uniform Probate Code (1969) expanded use of Powers of Attorney.

Supported Decision-Making

- When an individual with cognitive challenges is the ultimate decision-maker, but is provided support from one or more persons who explain issues to the individual and, where necessary, interpret the individual’s words and behaviors to determine his or her preferences. The individual voluntarily enters into the arrangement, informally or by formal agreement.

Example of Supported Decision-Making



Limited Guardianships and Conservatorships

- Legal requirement to limit
- Examples of limited and single-transaction authority
- PRACTICAL Tool for Lawyers: 9 Steps in Supporting Decision-Making

Legal Requirement to Limit Ala. Code § 26-2A-105(a)

The court shall exercise the authority conferred in this division so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person's mental and adaptive limitations or other conditions warranting the procedure.

Legal Requirement to Limit Ala. Code § 26-2A-105(c)

The court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian otherwise conferred by this chapter and thereby create a limited guardianship. Any limitation on the statutory power of a guardian of an incapacitated person must be endorsed on the guardian's letters or, in the case of a guardian by parental or spousal appointment, must be reflected in letters issued at the time any limitation is imposed. Following the same procedure, a limitation may be removed or modified and appropriate letters issued.

Example Limiting a Guardian's Authority

Under UGCOPAA, a guardian for an adult may not restrict the ability of the adult to communicate, visit, or interact with others, including receiving visitors and making or receiving telephone calls, personal mail, or electronic communications, including through social media, or participating in social activities, unless:

- (1) a protective order is in effect that limits contact between the adult and a person; or
- (2) the guardian has good cause to believe restriction is necessary because interaction with a specified person poses a risk of significant physical, psychological, or financial harm to the adult and the restriction is:
 - (A) for a period of not more than seven business days if the person has a family or pre-existing social relationship with the adult; or
 - (B) for a period of not more than 60 days if the person does not have a family or pre-existing social relationship with the adult.

Single Transaction Authority Ala. Code § 26-2A-137(a)

If it is established in a proper proceeding that a basis exists for the appointment of a conservator or protective order as described in Section 26-2A-130, the court, without appointing a conservator, may authorize, direct, or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person.

Protective arrangements include payment, delivery, deposit, or retention of funds or property; sale, mortgage, lease, or other transfer of property; entry into an annuity contract, a contract for life care, a deposit contract, or a contract for training and education; or addition to or establishment of a suitable trust.

Single Transaction Authority

Ala. Code § 26-2A-137(b)

If it is established in a proper proceeding that a basis exists for the appointment of a conservator or protective order as described in Section 26-2A-130, the court, without appointing a conservator, may

authorize, direct, or ratify any contract, trust, or other transaction relating to the protected person's property and business affairs if the court determines that the transaction is in the best interest of the protected person.

Single Transaction Authority

Ala. Code § 26-2A-137(c)

The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters done pursuant to the order of appointment.

Examples of Single Transaction Authority

Under UGCOPAA, instead of appointing a conservator, a court may authorize or direct a transaction necessary to protect the financial interest or property of the respondent, including:

- ✓ an action to establish eligibility for benefits;
- ✓ payment, delivery, deposit, or retention of funds or property;
- ✓ sale, mortgage, lease, or other transfer of property;
- ✓ purchase of an annuity;
- ✓ entry into a contractual relationship, including a contract to provide for personal care, supportive services, education, training, or employment;
- ✓ addition to or establishment of a trust;
- ✓ ratification or invalidation of a contract, trust, will, or other transaction, including a transaction related to the property or business affairs of the respondent;
- ✓ settlement of a claim;
- ✓ restrict access to the respondent's property by a specified person whose access to the property places the respondent at serious risk of financial harm.

PRACTICAL Tool for Lawyers: 9 Steps in Supporting Decision-Making

- Information available at:
www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html
- Provides printable fillable tool that will assist practitioners in case analysis and case handling in a way that supports utilization of least restrictive alternatives in guardianship/conservatorship cases.
- Provides a resource guide and webinar to assist practitioners in using the tool.
- Encourage your attorneys and Guardians Ad Litem to use.

PRACTICAL Tool for Lawyers: 9 Steps in Supporting Decision-Making

1. **Presume** guardianship is not needed
2. Identify the **Reasons** for concern
3. **Ask** if a concern may be caused by a temporary or reversible condition
4. Assess **Community** supports
5. Has the person developed a **Team** to help make decisions?
6. Identify decisional abilities
7. Screen for and address **Challenges**
8. **Appoint** a legal surrogate
9. **Limit** any necessary petition and order