

Uniform Probate Code Revisited

And Why You Should Still Avoid It Whenever Possible

By GINA M. BARRY, Esq.

Suppose that tomorrow you are in an accident. Your injuries leave you unable to make your own medical and financial decisions. To make matters worse, you do not have a health care proxy or a durable power of attorney — documents that you could have signed naming someone to make those decisions for you. Your personal and financial future now lies squarely within the jurisdiction of the probate court and the costly, time-consuming, privacy-destroying processes known as guardianship and conservatorship.

The laws surrounding guardianship and conservatorship changed dramatically with the enactment of the Uniform Probate Code (UPC) in 2009. Prior to this, many felt that guardianships and conservatorships were obtained too easily and that there were not enough due-process protections in place for the incapacitated person. The UPC established additional safeguards to protect the alleged incapacitated person. While this is beneficial to the incapacitated individual, it means additional time, expense, and consternation for the petitioning party.

In order to have a guardian and/or conservator appointed, the court must declare the incapacitated person to be incompetent. Prior to the UPC, a guardian could be appointed to handle personal and financial decisions for an incompetent person. With some minor exceptions, under the UPC, a guardian can make only personal decisions, such as those involving support, care, education, health, and welfare, and a conservator can make only financial decisions. Thus, under the UPC, if someone needs to handle your personal and financial matters, they will have to be appointed as both your guardian and conservator. This now requires two separate petitions to the probate court, whereas previously only one petition would have been needed.



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Prior to the UPC, completing the petition to appoint a guardian or conservator was fairly simple. The entire petition consisted of one double-sided page. Under the UPC, the petition has increased to seven pages, and the information requested is much more comprehensive. As the UPC is geared toward allowing the incapacitated person to retain as much independence as possible, the court must seek information that would allow it to restrict the guardian or conservator to making only those decisions that are absolutely necessary, while allowing the incapacitated person to continue to make the decisions he or she remains capable of making. This correlates to a greater loss of privacy for the incapacitated individual.

At the time of the initial filing of either petition, it is necessary to provide the court with a completed medical certificate that is based upon an examination of the alleged incapacitated person, which occurred within 30 days of the filing. In the past, the medical certificate consisted of one double-sided page, and a physician could complete it with information that the he or she believed to be pertinent. Now, the medical certificate spans six pages, and the physician must answer specific questions detailing the incapacity. Again, there is a loss of privacy.

Under the new law, a medical certificate meeting the same requirements must also be filed when any petition is presented for

allowance. It is generally impossible to have a guardianship or conservatorship allowed within 30 days of filing. As such, this new rule essentially guarantees that two examinations and two certificates will be needed, which translates into added expense and increased time pressures.

Once a petition is filed, notice must be given to all interested parties, including the alleged incompetent person. This notice provides a date by which the person must object to the petition if desired. Under the UPC, the alleged incompetent person has a right to counsel, which would likely be exercised if there is a desire to object. Under the UPC, it also appears that the appointment of counsel can be requested by anyone, even if they are not involved in the case. If the alleged incompetent person is indigent, then their counsel will be paid for by the Commonwealth. Clearly, these new provisions are important to protect the civil liberties of the alleged incompetent individual.

Another new protective provision requires that a criminal-records check be run before any petitioner is appointed as a guardian or conservator. If the petitioner is being investigated or has charges pending for committing an assault and battery that resulted in a serious bodily injury to a minor or otherwise incapacitated person, that person cannot be appointed as a guardian or conservator. The judge always has

discretion with respect to who is appointed; therefore, it is likely that a record of different criminal activity could preclude appointment as well.

The UPC has also restricted some decisions typically made by a guardian that were not restricted in the past. For example, the guardian must receive court approval prior to revoking a previously executed health care proxy. In addition, the guardian must receive court approval prior to admitting the incapacitated person to a nursing home, even if the admission is solely for rehabilitation purposes. This provision is extremely problematic, as it has prevented incompetent individuals who have been hospitalized and are in need of rehabilitation from being admitted to the rehabilitation facility without a prior court order. This require-

ment often delays the needed admission to the rehabilitation facility for as much as 30 days or longer.

With respect to certain authorities requested, the court places itself in the incapacitated person's shoes in order to make the decision that the incapacitated person would make if competent. This is called substituted judgment. The most common substituted-judgment determination is related to whether the incapacitated person should be treated with antipsychotic medications. The UPC requires the incapacitated person to attend the hearing whenever the court is exercising substituted judgment. In the past, it was fairly easy to waive the appearance of the incapacitated person. Under the UPC, the court must find that extraordinary circumstances exist requiring the incapaci-

tated person's absence from the hearing.

Prior to the UPC, it was the duty of a conservator or guardian of an estate to file an account with the probate court on a yearly basis. If the account was not filed, it would not be uncommon for this failure to go unnoticed. The UPC requires a conservator to file an account on an annual basis. With respect to conservators appointed under the UPC, the court has been proactive about requiring conservators to file accounts in a timely manner. If they are not, the conservator could be removed by the court and a successor conservator appointed.

Ultimately, the UPC has vastly changed the legal landscape regarding incapacity, and the process has not gotten any easier. Fortunately, in almost all cases, you can avoid having

to navigate this landscape by executing a health care proxy and durable power of attorney. These documents establish a plan that can be carried out without court intervention and without subjecting you to the UPC. ❖

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