
EMERGENCY GUARDIANSHIP

-- Immediate and Invaluable --

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INTRODUCTION

Emergency guardianships are an immediate and invaluable means to protect a person left vulnerable by cognitive frailties, or by reason of being a minor. Guardianship and/or conservatorship statutes exist in all states, but some states may not have emergency guardianship statutes, or some emergency guardianship statutes may not contain the full powers or protections that are desirable. The National Conference of Commissioners on Uniform State Laws¹ (NCCUSL), adopted the Uniform Guardianship and Protective Proceedings Act in 1997 (UGPPA)². This act contains comprehensive provisions for emergency guardianship, emergency protective proceedings for the protection of property, and permanent guardianship and conservatorship. UGPPA is available for use by all states for full or partial adoption. UGPPA has now replaced the guardianship provisions of the prior Uniform Probate Code (UPC)³. Five states have adopted UGPPA – Alabama, Colorado, Hawaii, Minnesota, and Montana⁴.

UGPPA is an important foundation for discussions about emergency guardianship because it is a comprehensive model act designed with the input of a

¹ A full listing of all uniform state laws and the states that have adopted the uniform laws, as well as copies of all uniform state laws, is available at the NCCUSL web site, www.nccusl.org.

² See, UGPPA (1997)(Prefatory Note).

³ *Id.* UGPPA (1997) was designed to act as a stand-alone uniform law. *Id.*

⁴ National Conference of Commissioners on Uniform State Laws (last visited August 2008), http://www.nccusl.org/update/uniformact_factsheets/uniformacts.

coalition of leader organizations⁵. The 1997 Act revised the prior UGPPA Act originally created in 1982 and includes significant updates in keeping with developments among the states in the application of guardianship as a protective proceeding⁶. The 1997 Act significantly recognizes the following evolving principles:

1. Guardianship and conservatorship should be viewed as a last resort;
2. Limited guardianships or conservatorships should be used whenever possible; and
3. The guardian or conservator should always consult with the ward or protected person, to the extent feasible, in making decisions.

These concepts in UGPPA are important when considering the use of emergency guardianship, or similar proceedings, to assist a person believed to be in need of immediate assistance. Emergency proceedings can provide immediate and powerful authority for a guardian to use in assisting a vulnerable person, but if the powers are not limited in scope, or if protective procedures are not utilized, those powers can be abused and the welfare of the person or property actually jeopardized. Even with emergency proceedings, the goal should always be to use the least restrictive proceeding to obtain only those powers necessary to protect the

⁵ See, UGPPA (1997)(Prefatory Note)(Organizations included the American Bar Association Senior Lawyers Division, Real Property Probate and Trust Law Section, and Commissions on Legal Problems of the Elderly and Mental and Physical Disability Law; AARP; and National Senior Citizens Law Center).

⁶ UGPPA (1997)(Prefatory Note)

person, and always with a focus on the specific needs and wishes of the person being protected. When the guardian’s focus is on the guardian and/or other persons affected by the guardianship, the results can be disastrous for the person requiring protection.

Practitioners in states who do not have emergency guardianship or other protective proceedings for adults, or whose state does not provide the levels of protection and limitation outlined in these materials, are encouraged to consider the model provided by UGPPA and engage in advocacy at the state level for institution of provisions protecting a person in need, while at the same time preserving that person’s rights and dignity.

I.

CHARACTERISTICS OF EMERGENCY GUARDIANSHIPS⁷

A. **Types**

1. Emergency Guardianship
2. Protective orders for property/emergency conservatorship
3. Temporary Substitute Guardianship
4. Emergency Temporary Guardianship

⁷ The general term “guardianship” will be used in these materials, and the term includes emergency conservatorships where state law may use this term instead of, or in addition to, the term “guardianship.”

B. Definitions

The following definitions apply generally:

Guardian A person who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or spouse, or by the court. The term includes a limited, emergency, and temporary substitute guardian but not a guardian ad litem⁸.

Conservator A person who is appointed by a court to manage the estate of a protected person. The term includes a limited conservator⁹.

Emergency Guardian

A person whose appointment is immediately necessary in order to protect the health, safety, or welfare needs of another person believed to lack capacity¹⁰ to make personal or financial decisions.

Temporary Substitute Guardian

A person whose appointment is for a temporary period of time, but who is immediately necessary in order to replace a guardian who is ineffective or not properly carrying out the duties of guardian.

UGPPA separates the protective mechanisms for adults into two categories:

guardianship and conservatorship. It is possible under UGPPA to request the

⁸ UGPPA (1997), § 102(4).

⁹ UGPPA (1997), § 102(2).

¹⁰ An incapacitated person is defined as an individual who, for reasons other than being a minor, is unable to receive and evaluate information to make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance. UGPPA (1997), § 102(5).

appointment of a guardian, but not request or receive the appointment of a conservator. This is in keeping with the following precepts:

1. That a guardian or conservator should be appointed as a **last resort** and only if there are no other lesser restrictive alternatives that will meet the person's needs; and
2. That the scope of guardianship and conservatorship should be limited whenever possible, and tailored to meet the needs of the incapacitated person only insofar as is required¹¹.

In states where the court has the discretion to appoint an emergency guardian of both person and property, or of only person or only property, or even for the exercise of only some personal or property rights, the scope of a finely-tailored emergency guardianship would properly be characterized as a "limited" emergency guardianship.

In general, an **emergency guardianship** is a type of guardianship that is deemed necessary for the immediate protection of the person or property of a vulnerable or allegedly incapacitated person. Under UGPPA, an emergency guardianship should only be established if the ordinary guardianship procedures "will likely result in substantial harm to the respondent's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances¹²." Further, emergency *guardianships* are not utilized to provide immediate protection of a person's property or to provide immediate assistance in

¹¹ UGPPA (1997), *Prefatory Note*.

¹² UGPPA (1997), § 312(a).

the management of property¹³; instead, emergency guardianships are limited to the protection of another person's **health, safety, or welfare**.

For property concerns, UGPPA creates a mechanism for immediate relief through the appointment of a "master"¹⁴. The master's role is designed to be limited and to carry out only those tasks that are specifically ordered by the court¹⁵. The master does not have the powers and duties of a conservator, but can be appointed to protect and/or manage the incapacitated person's property *after* a proper petition for the appointment of a conservator has been filed. UGPPA asserts that the rights involved in the appointment of a guardian are broader in scope and require a more detailed appointment process, but adopts a less-extensive process for appointment of conservators, instead deferring to the court's ability to enter orders of protection for the property for emergency and non-emergency matters¹⁶.

A **temporary substitute guardian** temporarily replaces the appointed guardian for a temporary period of time, suggested to be no more than six months in duration¹⁷. The appointed guardian's powers are suspended during the tenure of

¹³ *Id.*

¹⁴ UGPPA (1997), § 406(g).

¹⁵ UGPPA (1997), § 405 (Comment).

¹⁶ UGPPA (1997), Art. 4 (Comment).

¹⁷ UGPPA (1997), § 313(a).

the temporary substitute guardian's appointment¹⁸. Due to the fear that the appointed guardian is possibly abusing, neglecting or otherwise causing harm to the ward, the appointment of a temporary substitute guardian is meant to be an immediate appointment¹⁹. The proof required is generally that the appointed guardian is not effectively performing the duties of office, and the ward's welfare requires immediate attention²⁰.

In some states, an emergency guardianship, or an **emergency temporary guardianship**, is the method for providing immediate assistance to a person who lacks the ability or capacity to manage their affairs, both in terms of personal rights decision-making, as well as for property management and financial decision-making²¹. The ability to protect the "whole person" is housed within one statutory provision, with the flexibility for the court to create only so much of an emergency guardianship as is necessary for the person's protection, or protection of the financial resources necessary to maintain that person.

¹⁸ *Id.*

¹⁹ UGPPA (1997), § 313 (Comment).

²⁰ *Id.*

²¹ *See e.g.*, Fla. Stat. § 744.102(9)(2008)(defining a guardian as "a person who has been appointed by the court to act on behalf of a ward's person or property, or both."); § 755 Ill. Comp. Stat. § 5/11a-4 (2008)(authorizing the court to appoint an emergency temporary guardian to have all powers and duties of a guardian of the person or the estate as the court deems necessary); N.J. Stat. Ann. § 3B:12-24.1(c)(3)(West 2008)(emergency temporary guardian may be appointed with authority to make financial, social, medical or mental health decisions as deemed necessary by the court to protect the person or property from substantial harm).

C. Filing Requirements

In some states, an emergency guardian may only be appointed after the filing of a petition to determine capacity and/or a petition for appointment of a permanent limited or plenary guardian²². The National Probate Court Standards suggest that courts always require the filing of a petition for permanent conservatorship before entertaining a petition for the appointment of an emergency temporary conservator²³. The contemporaneous filing of permanent conservatorship petition with the emergency petition is seen as a safeguard to show a good faith request for emergency relief pending the outcome of a full determination of the need for a guardian, and as a back-stop to limit the risk that a stand-alone emergency appointment would last too long, or even indefinitely²⁴.

UGPPA, on the other hand, does not suggest that a petitioner for the appointment of emergency guardian also be required to file a petition for appointment of a permanent guardian²⁵. Commissioners were concerned that a requirement that a permanent guardianship petition be filed at the same time as the emergency petition is filed would “lend an air of inevitability that a permanent

²² See e.g., Fla. Stat. § 744.3031(2008); N.J. Stat. Ann. § 3B:12-24.1(c)(1)(West 2008); Cal. Prob. Code § 2250(a)(1)(West 2008).

²³ National Probate Court Standards, § 3.4.6(a)(1993).

²⁴ National Probate Court Standards, § 3.4.6 (1993)(Commentary).

²⁵ § 312 (Comment).

guardian should be appointed²⁶.” The comments go on to state that the quantum of proof required for the appointment of a permanent guardian is not reduced or changed simply because an emergency guardian was previously appointed. However, experience dictates that a person appointed as the emergency guardian who also files for appointment as the permanent guardian can get a “leg up” in a guardianship contest over who should be appointed as the permanent guardian.

D. Notice

Notice to the potential ward, next of kin, and other interested persons is required to meet due process concerns in all guardianship proceedings. In some circumstances, notice may be deferred until after the establishment of an emergency guardianship. Standard 3.4.7 of the National Probate Code Standards, establishes the following essential criteria for what constitutes adequate notice to the potential ward, also called the “respondent²⁷.”

1. The respondent must receive timely *written* notice of the proceedings that is in plain (versus lawyer) language and in large type.
2. The notice shall be received prior to a scheduled hearing.
3. The notice shall indicate the time and place for the hearing.

²⁶ *Id.*

²⁷ Defined as an individual for whom the appointment of a guardian or conservator or other protective order is sought. UGPPA (1997), § 102(12).

4. The notice shall state the nature and possible consequences of the proceedings.
5. The notice shall state the respondent's rights.
6. The respondent shall receive a copy of the petition(s) with the notice.

An example of a form that supplies the above-stated information is provided at the end of these materials. Additional provisions include providing notice of the proceedings to family members²⁸ and "others entitled to notice," as determined by the governing court.

All notices, whether served before or after the emergency proceedings, should be served in person by an officer or other person who is in plain clothes, and who is trained and instructed how to communicate and interact with persons who have diminished capacity or other vulnerabilities²⁹. *Failure to provide the required notice should preclude the court from granting the emergency petition because the court would lack jurisdiction over the alleged incapacitated person*³⁰.

²⁸ This includes respondent's spouse, adult children, parents, or the nearest adult relative if the prior next of kin are deceased or cannot be found. National Probate Court Standards, §3.4.7 (Commentary).

²⁹ National Probate Court Standards, §3.4.7 (Commentary).

³⁰ See UGPPA (1997), §§309(a) and 404(a), and comments.

E. Hearing

i) Ex-parte proceedings

The term “ex-parte” is defined as hearings in which the court or tribunal hears only one side of the controversy³¹. UGPPA, the National Probate Court Standards, and many state laws allow for ex-parte emergency guardianship proceedings in order to immediately, without the delay associated with the prior notice and hearing requirements, appoint an emergency guardian with authority to take immediate action for the person or property. The one-sided nature of ex-parte emergency guardianship procedures make it fraught with danger to the alleged incapacitated person and may lack the checks and balances necessary to protect the constitutional rights of that person against abuse of dignity, privacy, and the enjoyment of life, as well as against the taking of that person’s property³². This is further exacerbated by the fact that although counsel may have been appointed for the alleged incapacitated person, such counsel also does not require notice in *ex-parte* petitions for emergency appointment.

Ex-parte appointments should be rare. The authors are aware of cases in which emergency guardians have been appointed *ex-parte* and the emergency

³¹ Black’s Law Dictionary 576 (6th ed. 1990).

³² Consider that when an ex-parte proceeding is instituted and an emergency guardian appointed, the attorney for the petitioner and the petitioner/guardian will generally be entitled to payment of their fees and expenses, regardless of whether there is ultimately a permanent guardianship established.

guardians have utilized the guardianship to enrich themselves and their attorney, continue their emergency appointment indefinitely (failing appropriate ongoing supervision by the court), and place the alleged incapacitated person in a restrictive care setting without that person's ability to give input. Some egregious examples include that the alleged incapacitated person did not have the appointment of counsel for the protection of their rights, nor was immediate notice and hearing provided after the *ex-parte* appointment to ensure due process protections and court review.

The minimum showing that should be required for an *ex-parte* order of appointment as emergency guardian is that the respondent will be **immediately and substantially harmed** before a hearing on the appointment of an emergency guardian can be held³³. The substantial harm should be catalogued and verified by **affidavit or sworn testimony**³⁴. UGPPA urges that *ex-parte* emergency appointments occur only upon this high quantum of evidence and only if the alleged incapacitated person is given full notice **within 48 hours** after the emergency appointment³⁵. A hearing to determine if the appointment was appropriate must be held promptly after the appointment, and UGPPA recommends no more than five (5) days before a hearing is held on the *ex-parte*

³³ UGPPA (1997), § 312(b).

³⁴ *Id.*

³⁵ *Id.*

appointment³⁶. For an *ex-parte* temporary substitute guardian appointment, UGPPA recommends that notice to the ward and the affected guardian be given no later than five (5) days after appointment of the temporary guardian³⁷.

The National Probate Court Standards suggest additional restraints on *ex-parte* emergency appointments: requiring that a petition for permanent guardianship or conservatorship be filed at the same time as the emergency appointment is requested; that the petition for permanent appointment be set on an expedited basis; prompt notice to the respondent upon the emergency appointment; and carefully limiting the powers of the emergency temporary guardian or conservator³⁸. It is recognized that cases sometimes present themselves where a person urgently requires decision-making assistance where waiting for a hearing for the emergency appointment would put the person or their property at risk, but it is also acknowledged that where *ex-parte* emergency proceedings are abused, they have the potential to produce “significant or irreparable harm to the interests of the respondent” and “when continued indefinitely they bypass procedural protections to which the respondent would otherwise be entitled.”³⁹

³⁶ *Id.*

³⁷ § 313(a).

³⁸ §§ 3.3.6(a)-(d), 3.4.6(a)-(d).

³⁹ *Id.* (Commentary); UGPPA (1997), § 312 (Comment)(citing to the classic case for emergency guardianship, when a person needs a medical procedure, but lacks the capacity to consent, has no known legal appointments for such decision-making, and/or no one else is available or willing to act in making the health-care decision.).

ii) Notice proceedings

When a petition for emergency guardianship or other emergency protective proceedings is filed and an *ex-parte* appointment is not requested, the emergency appointment will only proceed after prior notice and hearing. Such “notice proceedings” require, at a minimum, that counsel be appointed immediately to represent the alleged incapacitated person, that the hearing on the emergency petition be convened expeditiously, and that notice of the hearing is given promptly to the respondent and respondent’s counsel⁴⁰. The proposed guardian and the alleged incapacitated person are required to attend the hearing unless excused by the court⁴¹. The alleged incapacitated person has the right at the hearing to present evidence and subpoena witnesses and documents; examine witnesses, including experts; and have the hearing convened in a convenient location (particularly if the person is hospitalized or otherwise unable to travel to the courthouse)⁴². Additionally, to protect the respondent’s privacy, the hearing may be closed at that person’s request (or at the request of that person’s attorney)⁴³.

⁴⁰ UGPPA (1997), § 312(a).

⁴¹ UGPPA (1997), § 308(a).

⁴² *Id.*

⁴³ *Id.*

F. Appointment of Counsel and/or a Visitor or Monitor

It is critical that a person subjected to any type of protective proceeding be afforded the right to counsel or some other type of advocate or protector. UGPPA requires, at a minimum, that a “visitor⁴⁴” be appointed, and allows the court discretion to appoint counsel for the alleged incapacitated person whenever a non-emergency petition for guardianship is filed⁴⁵. In applications for permanent guardianship, the appointment of counsel is not mandatory⁴⁶.

The role of counsel is as *advocate* for the alleged incapacitated person, with no duty to report to the court, whereas the role of visitor is as *investigator and reporter* for the court⁴⁷. Although one of the visitor’s roles is to provide the respondent with information regarding his or her rights during the proceedings, the giving of legal advice is properly limited to a person who is licensed as an attorney in the jurisdiction where the proceeding is filed. While a visitor may simply outline the respondent’s rights, the visitor would not be qualified to provide legal advice regarding legal options or remedies; thus, in those situations, counsel must

⁴⁴ In some states, different terminology may be used, such as “court monitor.” See Fla. Stat. §§ 744.107 and 744.1075 (2008). Further, individual states may not require the appointment of a visitor or monitor, or may only require it under certain circumstances, including at the request of a person with a bona fide interest in the proceedings. *Id.*

⁴⁵ § 305(a)-(e).

⁴⁶ *Id.*

⁴⁷ § 305 (Comment); § 3.3.5(b), National Probate Court Standards (1993).

be provided. The visitor may recommend to the court that counsel be appointed, and the respondent may also request the appointment of counsel⁴⁸.

A visitor's role is not as advocate for the alleged incapacitated person, but instead is to gather information and report to the court⁴⁹. The role includes:

1. Interviewing the respondent, explaining the petition(s), explaining the respondent's rights, and explaining the guardian's powers and duties;
2. Obtaining respondent's views about the proposed guardian and the scope and duration of the proposed guardianship;
3. Informing respondent of the right to employ counsel or have counsel appointed by the court;
4. Informing respondent that costs and expenses of the proceedings will be paid from respondent's assets;
5. Interviewing the proposed guardian;
6. Visit the respondent's current or proposed dwelling; and
7. Interview physicians or other persons with knowledge about the respondent's medical or mental conditions.

Upon completion of his or her duties, the visitor must file a prompt report with the court⁵⁰. The report must include a recommendation on whether a lawyer should be appointed for respondent; a summary of daily function the respondent can manage

⁴⁸ UGPPA (1997), § 305(b).

⁴⁹ *Id.* at § 305(c).

⁵⁰ *Id.* at § 305(e).

without assistance, with some assistance, or not at all; recommendations regarding the appropriateness of the guardianship, including whether less restrictive means of assistance are available and the scope of guardianship that is suggested; a statement regarding the proposed guardian's qualifications and whether respondent objects or agrees to the proposed guardian, and whether further professional evaluation is necessary⁵¹.

Although UGPPA's emergency guardianship procedures do not require the appointment of a visitor prior to appointment of the *emergency* guardian, there may be circumstances where such appointment on an expedited basis would be wise and necessary. UGPPA does require the **immediate** appointment of counsel for the respondent upon the filing of a petition to appoint an emergency guardian⁵². Some states mandate the appointment of counsel upon the filing of a petition to determine incapacity⁵³, or any other proceeding initiated to determine incapacity and for the appointment of a guardian⁵⁴.

⁵¹ *Id.*

⁵² § 312(a); *See also*, Colo. Rev. Stat. § 15-14-312(1)(2008).

⁵³ *See e.g.* Fla. Stat. § 744.331(2)(b)(2008)(court shall appoint an attorney for each person alleged to be incapacitated in all cases involving a petition for adjudication of incapacity, and the alleged incapacitated person has the right to substitute his or her own attorney for court-appointed counsel).

⁵⁴ New Jersey Court Rule 4:86-4(b)(2008)(appointment of counsel required for all persons alleged to be incapacitated, regardless of whether the alleged incapacitated person retains his or her own attorney).

G. Burden of proof

The burden of proof for the appointment of an emergency guardian or an emergency conservator/master is not specifically provided in UGPPA⁵⁵. The burden of proof should be by clear and convincing evidence showing that delay would result in substantial harm to the respondent's health, safety, or welfare, and no other person has the authority or willingness to act in the circumstances⁵⁶. Thus, there must be sufficient proof of an urgent need for the appointment of a surrogate decision-maker for a person who is then incapable of making informed decisions, and proof that there are no viable less restrictive alternatives to emergency guardianship that would suffice. For *ex-parte* emergency proceedings, the burden should remain clear and convincing evidence, with the additional hurdle of sworn testimony in lieu of a full emergency hearing, and proof that the respondent would be substantially harmed before an emergency hearing could be held⁵⁷.

⁵⁵ The burden of proof for establishing a permanent guardianship or conservatorship under UGPPA (1997) is by clear and convincing evidence. §§ 311(a)1 and 401(2)(A).

⁵⁶ See UGPPA (1997), § 312(a).

⁵⁷ UGPPA (1997), § 312(b).

II.

PURPOSES FOR EMERGENCY PROCEEDINGS

The establishment of an emergency guardianship is an immediate, sometimes “one-sided,” proceeding designed to provide quick protection of an incapacitated person. Although time is of the essence in emergency proceedings, courts must be very vigilant in ensuring that an emergency guardianship is established for a necessary and proper purpose, and must monitor the status of the emergency guardianship to make sure that the emergency guardianship is, in fact, a temporary one. Additionally, every petitioning attorney and every attorney for the alleged incapacitated person has a duty to make sure the process is fair and that the statutes and rules that provide necessary due process protections are followed. The National Probate Court Standards recognizes that the imposition of a temporary conservatorship provides minimal due process protections, but has the potential to infringe significantly on the respondent’s legal rights⁵⁸. Less restrictive alternatives, such as specific orders of protection (for immediate payment of bills and the like) are encouraged over broad emergency guardian or conservator powers⁵⁹.

⁵⁸ §3.4.6, Commentary.

⁵⁹ *Id.*

Types of matters for which emergency guardianship or other protective proceedings are appropriate include:

- To stop exploitation.
- To enjoin harmful behavior by others against the ward (abuse, neglect, exploitation, isolation, exporting ward from state of residence into foreign jurisdiction).
- To initiate a lawsuit on the ward's behalf where the statute of limitations is expiring.
- To apply for needed government benefits for the ward's health care, support or maintenance.
- To defend the ward in a lawsuit to prevent entry of a default.
- To assert the ward's immediate contractual legal rights (such as for rent or other contractual income).
- To stop the ward from endangering self or property (via exploitative marriage; unsafe travel; self-neglect; mental health breakdowns; large or imprudent gifts; failure to manage property for own benefit; trouble with IRS or other governmental entities; or failing to protect real property).
- To make necessary and immediate health care decisions, including medication administration, surgical decisions, mental health placement decisions, and end-of-life decisions.
- To make immediate residential placement decisions, such as moving from independent living to assisted living or long-term care.

Emergency proceedings can also be abused, sometimes with the unwitting assistance of petitioner's counsel based on bad-faith allegations by a petitioner.

Some examples of inappropriate or questionable use of emergency guardianships include:

- To get a “leg up” on the permanent appointment as guardian.
- To force a person to go to or remain in a foreign jurisdiction.
- To obtain access to the ward’s funds for the guardian’s own needs.
- To keep the ward from other family and friends.
- To force the ward into more restrictive residential placement in order to preserve the ward’s assets for the benefit of others after the ward’s death.
- As a source of income for the guardian.
- As a source of control over the ward versus the ward’s spouse, or versus the ward’s children or other next of kin.
- For purposes of “pre-probate” litigation.
- To gain control over the ward’s medical decisions and medicine management in order to subjugate the ward for the guardian’s own benefit.
- To hasten the ward’s medical decline and/or death.
- To control the ward’s social interactions to the ward’s detriment.
- To obtain private information that would not be obtainable without guardianship.
- To alter pay-on-death accounts or change beneficiary designations.

III.

CAPACITY ISSUES AND EMERGENCY GUARDIANSHIPS

Emergency guardianships uniformly do not require a finding of incapacity prior to their institution. Even during the emergency guardianship, it is generally the law that the ward is presumed to have capacity unless adjudicated as incapacitated to exercise particular legal rights. UGPPA is clear that the appointment of an emergency guardian is not a determination of the respondent's capacity or incapacity⁶⁰.

While still presumed to have capacity, the ward under an emergency guardianship could make or change a will, advance directives, durable powers of attorney, or a trust during the emergency guardianship, but prior to a finding of incapacity⁶¹. These documents may be subject to later challenge if the ward is ultimately determined to lack the capacity to have understood the import and nature of the documents, but emergency guardianships generally do not prevent a person from taking matters into her own hands prior to final adjudication.

The fact that a person subjected to an emergency guardianship or other protective proceeding is presumed to retain capacity until adjudicated otherwise ,

⁶⁰ § 312(c); *See also*, Colo. Rev. Stat. § 15-14-312(3)(2008).

⁶¹ In some states, durable powers of attorney may be suspended during the pendency of the determination of capacity. *See e.g.* Fla. Stat. §709.08 (3)(c)1 (2008).

coupled with the potential for an immediate, sometimes *ex-parte*, guardianship that may include broad powers should create in all practitioners the need for pause and deliberation before such guardianship is forced upon a legally capacitated adult.

IV.

EMERGENCY GUARDIANSHIP DURATION

Emergency guardianships should be short in duration. UGPPA recommends that they survive no longer than sixty (60) days. The National Probate Court Standards strongly suggest that a shorter period of thirty (30) days be the limited duration for emergency guardianships. Some states allow for longer periods, or authorize extensions of the initial emergency guardianship upon a showing of necessity⁶².

Temporary substitute guardianships should not last longer than six (6) months⁶³. If a different guardian is required at the end of the temporary guardianship, the court should appoint a successor permanent guardian, perhaps even the temporary guardian.

V.

EMERGENCY GUARDIANSHIP REPORTING REQUIREMENTS

Other than the reporting requirements for visitors, or other similar protectors, appointed upon the filing of a guardianship petition, neither UGPPA

⁶² See e.g. Fla. Stat. § 744.3031(3) (2008).

⁶³ UGGAPA, § 313(a).

nor the National Probate Court Standards suggest any interim reporting requirements for the emergency guardian. States may require that emergency guardians report initially, or periodically⁶⁴, and courts may use their inherent judicial authority to require periodic reports from emergency guardians, or may appoint a visitor or court monitor to obtain information for the court to protect the ward and the integrity of the guardianship system.

VI.

ETHICAL ISSUES IN EMERGENCY GUARDIANSHIPS

An attorney for the emergency guardian or conservator may owe a special duty to the vulnerable adult who is the subject of the guardianship proceedings, and as a result, may be liable for the improper actions of the guardian who causes personal or financial harm to the vulnerable adult⁶⁵. The American Bar Association's Model Rules of Professional Conduct Rule 1.6 and comments thereto represent the majority rule that an attorney representing a fiduciary (such as

⁶⁴ See e.g. Fla. Stat. § 744.3031 (2008)(requiring emergency temporary guardians who are not ultimately appointed as the limited or plenary guardian to account to the court, the ward and other interested persons regarding the ward's person and property within 30 days after expiration or termination of the emergency guardianship).

⁶⁵ *Fickett v. Superior Court*, 558 P.2d 988 (Ariz. Ct. App. 2d 1976)(attorney for guardian of incompetent assumes a relationship with the guardian and the ward, and attorney can be held liable for the guardian's actions if attorney knew or should have known of actions by guardian harming ward or ward's estate). See also Florida Attorney General Opinion 96-94 (1996)(opining that the Florida guardianship statutory scheme recognized that the incapacitate ward is the intended beneficiary of the attorney's services to the guardian and that an attorney for the guardian and is compensated from the ward's estate owes a duty of care to the ward and the guardian).

a guardian or trustee) does not owe a duty to the person for whom the fiduciary is legally responsible⁶⁶. The minority rule is provided in the Restatement of the Law Governing Lawyers, is based on established case law around the country, and establishes a duty on the attorney toward a non-client when:

1. The client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the non-client;
2. The circumstances make it “clear” that the lawyer “knows” that he must take certain action within the scope of the representation to prevent or rectify the client’s breach of fiduciary duty to the non-client if
 - a. The breach is a crime or fraud, or
 - b. The lawyer assisted or is assisting in the breach;
 - c. It is not reasonable for the non-client to protect his own rights; and
 - d. The imposition of the duty on the lawyer will not “significantly impair” the lawyer’s obligations to his client⁶⁷.

As society ages and the number of people with vulnerabilities increases, the minority rule may become the majority rule in order to provide as much protection to vulnerable adults as possible.

Attorneys representing guardians are in a unique position, having both the knowledge of a guardian’s goals or actions, as well as the power to prevent or abet any goals that are not for the ward’s benefit. Emergency guardianships, particularly *ex-parte* proceedings, should create in the guardian’s attorney an even

⁶⁶ Ronald D. Rotunda, John S. Dzienkowski, *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility*, § 1.7-6(a)(2005-2006).

⁶⁷ *Id.*

greater desire for scrutiny over the intentions of the would-be guardian⁶⁸.

Regardless of laws, rules or cases that proscribe certain conduct by attorneys representing fiduciaries, all attorneys asked to initiate emergency guardianships must do so only in the most urgent and necessary of cases and only after much scrutiny regarding the petitioner's goals and intentions in establishing an emergency guardianship.

Ethical questions for consideration

1. Is counsel for petitioner ethically obligated to request that the court appoint counsel, and/or a "visitor" or other protector even if none is required by statute?
2. Is counsel for petitioner ethically required to schedule a prompt hearing after an *ex-parte* guardianship is established, but before the final guardianship hearing?
3. What are the ethical obligations of counsel for petitioner in whether to request an emergency guardianship *ex-parte*? Is it ethically appropriate to request an *ex-parte* guardianship for the convenience of the petitioner?
4. Should a petition for appointment of an emergency guardian be used to beat others to the courthouse in order to obtain a "leg up" for plenary appointment? What if that person is the right person for the appointment and the rush to the courthouse is to prevent a less-desirable petitioner from being appointed?

⁶⁸ See, *In re: Matter of Patti Sue Mullins*, 649 N.E. 2d 1024 (Ind. 1995)(attorney representing emergency guardian sanctioned for ethical violations in failing to fully inform the court regarding all material facts that would have enabled the court to make an informed decision regarding the emergency appointment, regardless of whether the material facts were adverse).

5. Should a petition for appointment of an emergency guardian be used to keep a person in a foreign jurisdiction if a person in the domiciliary jurisdiction is filing a petition for appointment in the person's state of domicile?
6. What is an attorney's ethical responsibility if the attorney represents the emergency guardian and learns that the guardian is using the guardianship for means other than to benefit or protect the ward?

VII.

REAL-LIFE USES

Emergency guardianships are used for a variety of purposes, both fact-related and strategic. The following are examples of such uses for education and discussion of their propriety and the ethical issues involved:

1. Protecting property

See, e.g., *Borden v. Guardianship of Elsa Marie Borden-Moore*, 818 So.2d 604 (Fla. 5th DCA 2002)

2. Protecting of a ward's physical person

See, e.g., case of Brooke Astor, New York

3. Obtaining physical custody of a ward

See, e.g., *Weissenbom v. Graham*, 963 So.2d 275 (Fla. 4th DCA 2007), *Gomez v. Suarez*, 33 Fla. L. Weekly D1662 (Fla. 5th DCA), *Guardianship of Clara Fernandez*

4. Affecting venue

See, e.g., *Weissenbom*

5. Taking medical decisions away from named surrogate

See, e.g., In Re: Maria Isabel Duran, 769 A.2d 497 (Penn. Super. Ct. 2001)

6. Affecting estate planning

See, e.g., Pessarra v. Siedler, 2008 Tex. App. LEXIS 5307 (Tex. App. 1st Dist. 2008)

7. Manipulating choice of attorney for ward

See, e.g., Pessarra.

8. Removing people from ward's life

See, e.g., State of Idaho v. Fancher, 186 P.3d 688 (Idaho Ct. App. 2008)

9. Getting attorney fees for yourself

See, e.g., Butler v. Guardianship of Mallie S. Peacock, 898 So.2d 1139 (Fla. 5th DCA 2005)

APPENDIX

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| Appendix A | Examples of forms for notice to alleged incapacitated person (Florida; Colorado) |
| Appendix B | Selected portions of UGPPA § 312 (Emergency Guardian) § 313 (Temporary Substitute Guardian) § 406 (Preliminaries to Hearing/Emergency Protection of Property) |
| Appendix C | Selected portions of the National Probate Court Standards § 3.3.6 Emergency Appointment of a Temporary Guardian §3.4.6 Emergency Appointment of a Temporary Conservator |