



Supreme Court — THE JUDICIARY • STATE OF HAWAII
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Mark E. Recktenwald
CHIEF JUSTICE

JUDICIARY COMM. NO. 1

December 16, 2013

The Honorable Donna Mercado Kim
President
The Senate, State of Hawaii
State Capitol, Room 409
415 S. Beretania Street
Honolulu, HI 96813

The Honorable Joseph M. Souki
Speaker
The House of Representatives, State of Hawaii
State Capitol, Room 431
415 S. Beretania Street
Honolulu, HI 96813

Re: Act 236, Session Laws of Hawaii 2012 (SB2318, SD1, HD2, CD1)
Relating to Adult Guardianship and Protective Proceedings Jurisdiction

Dear President Kim and Speaker Souki:

I am pleased to transmit the Report of the Judiciary Working Group Relating to Adult Guardianship and Protective Proceedings Jurisdiction, dated October 21, 2013. As suggested by the 2012 Conference Committee Report No. 98-12 for SB2318, SD1, HD2, CD1, I established a working group within the Judiciary to facilitate the implementation of this measure.

Thank you for the opportunity to submit the aforementioned report.

Very truly yours,

MARK E. RECKTENWALD
Chief Justice

MER:lco
Enclosure

cc: Members of the Twenty-Seventh Legislature
Judge Derrick H. M. Chan
Rodney A. Maile, Administrative Director of the Courts

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JUDICIARY COMM. NO. 1

October 21, 2013

TO: Mark E. Recktenwald, Chief Justice
Hawai'i Supreme Court

FROM: Derrick H. M. Chan, Chair
Judiciary Working Group Relating to Adult Guardianship
and Protective Proceedings Jurisdiction

RE: Report of Judiciary Working Group Relating to Adult
Guardianship and Protective Proceedings

Pursuant to your Order dated September 5, 2012 establishing the Judiciary Working Group Relating to Adult Guardianship and Protective Proceedings Jurisdiction ("Working Group"), the Working Group submits for your consideration the report outlining the activities and steps taken by the Working Group to facilitate the implementation of Act 236, 2012 Session Laws of Hawaii, Relating to Adult Guardianship and Protective Proceedings Jurisdiction ("Act 236") including any findings, recommendations, proposed rule amendments, and proposed legislation, if any.

Activities of the Working Group

The Working Group performed the following tasks:

1. Reviewed Act 236
2. Reviewed the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, its Commentary, Prefatory Notes and Legislative Notes.
3. Reviewed the history of the Act during the 2012

legislative session, with emphasis on legislative response to Judiciary testimony.

4. Consulted with judges in all four circuits regarding feasibility of implementation and anticipated impact of Act 236.
5. Compared the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act with corresponding provisions in Act 236 [codified in the chapter assigned by the Revisor of Statutes, HRS chapter 551G].
6. Investigated the practices of other states that have adopted the Uniform Probate Code and the Uniform Guardianship and Protective Proceedings Act by reconciling existing statutory provisions with the new provisions of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.
7. Assessed the feasibility of implementing Act 236.

Background

Uniform Probate Code. Act 200, Session Laws of Hawaii 1976, adopted the National Conference of Commissioners on Uniform State Laws' 1969 version of the Uniform Probate Code ("UPC"), which created chapter 560, Hawaii Revised Statutes ("HRS"). HRS chapter 560, consists of eight Articles, including Article V, Guardianship and Protective Proceedings. Act 288, Session Laws of Hawaii 1996, adopted Articles I to IV of the National

Conference of Commissioners on Uniform State Laws' 1993 version of the UPC which revised the general provisions and provisions concerning decedents' estates in HRS chapter 560.

Uniform Guardianship and Protective Proceedings Act. Act 161, Session Laws of Hawaii 2004, revised Article V of HRS chapter 560, to adopt the National Conference of Commissioners on Uniform State Laws' 1998 version of the Uniform Probate Code Part 5, also known as the Uniform Guardianship and Protective Proceedings Act ("UGPPA").

Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Act 236 adopted the National Conference of Commissioners on Uniform State Laws' 2007 Uniform Adult Guardianship and Protective Proceedings *Jurisdiction Act* (emphasis added) ("UAGPPJA" or "Uniform Act"), a copy of which is attached hereto as Exhibit 1.

Act 236 created a new HRS chapter, codified by the Revisor of Statutes as Chapter 551G. Act 236 has an effective date of September 1, 2014. Parts I (General Provisions), III (Transfer of Guardianship or Conservatorship), and IV (Registration and Recognition of Orders from Other States) of the new HRS chapter created by Act 236 apply retroactively to all guardianship and protective proceedings. Part II (Jurisdiction) applies to guardianship and protective proceedings that began on or after the effective date.

Legislative Response To Judiciary Concerns

On January 20, 2012, companion bills HB 2193 and SB 2318 were introduced as part of the Kupuna Caucus package. The stated purpose of both measures was "to ensure that only one state has jurisdiction in guardianship and protective proceedings at any one time" and to set forth "specific guidelines to determine jurisdiction."

House Bill 2193. The House Committee on Human Services ("HUS") heard HB 2193. Standing Committee Report No. 204-12 noted:

. . . [The] Judiciary testified that this measure may not be necessary and may subject families and guardians to increased complexity and additional procedures. For example, under Hawaii law, the circuit court has jurisdiction over protective proceedings and the family court has jurisdiction over guardianship proceedings. Hawaii law defines "protective proceeding" as a "proceeding held pursuant to part 4 of article V" of the Uniform Probate Code, Chapter 560, Hawaii Revised Statutes relating to the protection of property of protected persons. Under the uniform law, which is the subject of this measure, however, "protective proceeding" is defined as "a judicial proceeding in which a protective order is sought or has been issued."

The Judiciary testified that families are able to seek guardianship for challenged minors before they reach 18 years of age, thus providing seamless protection after the minor reaches the age of majority. This bill appears to not allow that as it applies only to an "incapacitated person" who is an adult.

In addition, the Judiciary testified that the measure would require changes to court policies, procedures and rules, and this measure might consume valuable and limited staff resources.

The HUS passed HB 2193 unamended.

The House Committee on Judiciary ("JUD") heard HB 2193. The Standing Committee Report No. 577-12 noted that the Judiciary

"offered comments on the measure." The JUD changed the effective date from "on approval" to January 7, 2059 "to facilitate additional discussion." HB 2193 HD 1.

Senate Bill 2318.

The Senate Committee on Human Services ("HMS") heard SB 2318. Standing Committee Report No. 2082 stated, in part:

The Executive Office on Aging and the Commission to Promote Uniform Legislation supported the measure. The Judiciary offered comments on the measure.

Your Committee notes the concern expressed by the Judiciary that this measure may not be necessary and may subject families and guardians to increased complexity and procedures. According to the Judiciary, families are currently able to seek guardianship for challenged minors before they turn eighteen, which provides seamless protection after the minor reaches the age of majority. This measure, as currently drafted, appears to not allow this protection as "incapacitated person" is defined as an adult. Your Committee further notes the Judiciary's concern with regard to the measure's potential negative impact on the Judiciary's operations. Your Committee recognizes that this measure would require changes to court policies, procedures, and rules and in light of the budget shortages caused by the current economic downturn, the additional work required pursuant to this measure would consume valuable and limited Judiciary staff resources.

Your Committee encourages the testifiers to work together on the measure as it moves through the legislative process to the Committee on Judiciary.

The HMS changed the effective date from "on approval" to July 1, 2014, "encourag[ed] the Judiciary and the Commission to Promote Uniform Legislation to work together to properly implement the salutary purposes of this measure," and made "technical, nonsubstantive amendments for the purposes of clarity and consistency." SB 2318 SD 1.

The Senate Committee on Judiciary and Labor ("JDL") held decision making on SB 2318 SD1. Standing Committee Report No. 2505 on S.B. No. 2318 S.D. 1 noted that the Committee "did not receive any testimony on this measure." (The Notice of Decision Making had stated that written comments could be offered, but no public testimony would be accepted.) The JDL passed SB 2318 SD1 unamended.

The House Committee on Human Services ("HUS") heard SB 2318 SD1. Standing Committee Report No. 984-12 stated, in part:

Your Committee respectfully notes that the Judiciary testified that this bill may not be necessary and may subject families and guardians to increased complexity and procedure. For example, under Hawaii law, the circuit court has jurisdiction over protective proceedings and the family court has jurisdiction over guardianship proceedings. The Judiciary added that families are currently able to seek guardianship for challenged minors before they turn 18 years of age, but the bill appears to not allow that as it defines an "incapacitated person" as an adult. Finally, the Judiciary asserted that the bill would require changes to court policies, procedures, and rules, and as a result, these changes would consume valuable and limited staff resources in a time of economic downturn.

The HUS passed SB 2318 SD1 unamended.

The House Committee on Judiciary ("JUD") heard SB 2318 SD1. Standing Committee Report No. 1274-12 noted that the Judiciary "offered comments on the measure." The JUD changed SB 2318 SD 1 by replacing its content with HB 2193 HD 1 "which contains virtually identical substance content" and made "further technical amendments for clarity, consistency, and style." SB

2318 SD1 HD1.

The House Committee on Finance ("FIN") heard SB 2318 SD1 HD1. Standing Committee Report No. 1576-12 noted that the Judiciary "provided comments." The FIN changed the effective date from July 1, 2014 to July 1, 2030. SB 2318 SD1 HD2.

A Conference Committee convened to resolve differences between SB 2318 SD1 and SB 2318 SD1 HD2. Conference Committee Report No. 98-12, on S.B. No. 2318 S.D. 1 H.D. 2 C.D. 1 stated, in part:

Your Committee on Conference notes the Judiciary's general concern with regard to the potential unintended consequences of this measure, such as families and guardians being subjected to increased complexity and procedure and possible conflicting definitions between federal (sic) and state law. Therefore, your Committee on Conference urges the Chief Justice to establish, if deemed appropriate by the Chief Justice, a working group within the Judiciary to facilitate the implementation of this measure. If the working group is established, your Committee on Conference respectfully requests the Chief Justice to share a report of the working group's activities with the Legislature.

The Committee on Conference changed the effective date from July 1, 2014 to September 1, 2014. SB 2318 SD1 HD2 CD1.

In summary, effective date changes ("on approval," then July 1, 2014, then July 1, 2030, then September 1, 2014) and technical revisions (such as whether to spell "section" with an upper case "S" or lower case "s") aside, the bill emerged substantively unchanged from its introduction.

The Uniform Act

Adoption Outside of Chapter 560

A Prefatory Note at the beginning of the UAGPPJA offers placement options for states, such as Hawaii, that have also adopted the UPC and the UPPGA. The Prefatory Note provides, in part, as follows:

PREFATORY NOTE

The Uniform Guardianship and Protective Proceedings Act (UGPPA), which was last revised in 1997, is a comprehensive act addressing all aspects of guardianships and protective proceedings for both minors and adults. The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) has a much narrower scope, dealing only with jurisdiction and related issues in adult proceedings. . . .

States may enact the UAGPPJA either separately or as part of the broader UGPPA or the even broader Uniform Probate Code (UPC), of which the UGPPA forms a part. Conforming amendments to the UGPPA and UPC are expected to be approved in 2009 that will facilitate enactment of the UAGPPJA by states that have enacted the UGPPA or UPC.

A search of the Uniform Law Commissioners' website failed to uncover the 2009 conforming amendments to the UGPPA or UPC that would facilitate enactment of the UAGPPJA by states that have enacted the UGPPA or UPC referred to in the Prefatory Note.

Act 236 enacted the UAGPPJA "separately" as a new chapter in the HRS, not "as part of the broader UGPPA" (Parts 1 to 4 of Article V within HRS chapter 560), nor "as a part of the even broader UPC" (HRS chapter 560).

According to the Uniform Law Commissioners Enactment Status

Map for the Uniform Probate Code, Hawaii is one of 18 states and territories that have enacted the UPC, the other 17 being Alaska, Arizona, Colorado, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Dakota, South Carolina, Utah, and the Virgin Islands. (<http://uniformlaws.org/Act.aspx?title=Probate Code as of 9/5/2013>).

According to the Uniform Law Commissioners Enactment Status Map for the Uniform Guardianship and Protective Proceedings Act, Hawaii is one of five states that have enacted the UGPPA, the other four being Alabama, Colorado, Minnesota, and Massachusetts. (<http://uniformlaws.org/Act.aspx?title=Guardianship and Protective Proceedings Act as of 9/5/2013>).

According to the Uniform Law Commissioners Enactment Status Map for the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, Hawaii is one of 37 states and territories that have enacted the UAGPPJA, the other 36 being Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. (<http://uniformlaws.org/Act.aspx?title=Adult Guardianship and>

Protective Proceedings Jurisdiction Act as of 9/6/2013).

The three other states that have enacted both the UPC and the UGPPA are Colorado, Massachusetts, and Maine. The Working Group considered whether these states adopted the UAGPPJA and if so, whether the UAGPPJA was adopted "separately," as part of the "broader UGPPA," or as part of the "even broader UPC."

According to the Uniform Law Commissioners' website, both Colorado and Minnesota have adopted the UAGPPJA, and in Massachusetts a bill adopting the UAGPPJA is pending before the legislature. Both Colorado and Minnesota adopted the UAGPPJA as part of the broader UPC and in close proximity to the UGPPA.

Colorado Revised Statutes

TITLE 15 Probate, Trusts and Fiduciaries
Colorado Probate Code
Article 14 Persons Under Disability - Protection
Article 14.5 Uniform Adult Guardianship and Protective
Proceedings Jurisdiction Act

Minnesota Statutes

Chapter 524: Uniform Probate Code
Article 5: Protection of Persons Under Disability and
Their Property
Parts 6-9: Uniform Adult Guardianship and Protective
Proceedings Jurisdiction

Reconciling Existing and New Provisions.

Section 503 of the Uniform Act and the Legislative Note that follows Section 503 state as follows:

SECTION 503. REPEALS. The following acts and parts of acts are hereby repealed:

- (1)
- (2)
- (3)

Legislative Note: Upon enactment, the state should repeal existing provisions on subject matter jurisdiction for adult guardianship and protective proceedings. If existing provisions address proceedings for both minors and adults, the provisions should be amended to limit their application to minors. In addition, the state should repeal or limit to minors any existing provisions authorizing transfer of a guardianship or conservatorship proceeding to another state and any provisions authorizing a guardian or conservator to act in another state.

Our Legislature did not heed the call for repeal of existing provisions in the following three areas:

- a) jurisdiction for adult guardianship and protective proceedings;
- b) authority to transfer of a guardianship or conservatorship proceeding to another state; and
- c) authority for a guardian or conservator to act in another state.

The Working Group has identified issues with all three.

a. Subject Matter Jurisdiction

The enactment of the UAGPPJA created a conflict between statutory provisions on subject matter jurisdiction in Hawaii courts. New § -8 in Act 236 [codified as HRS § 551G-12] provides that the exclusive jurisdictional basis for a court of the State of Hawaii to appoint a guardian or issue a protective order for

an adult is found in the UAGPPJA. However, HRS § 560:5-106 sets forth subject matter jurisdiction for guardianship and protective proceedings for adults and for minors.

Neither Act 236 [codified as HRS chapter 551G] nor Chapter 560 limits the application of Chapter 560 to minors or otherwise reconciles the new and existing laws. Thus, two alternative statutory provisions apply to subject matter jurisdiction.

HRS § 560:5-106 provides as follows:

§560:5-106 Subject matter jurisdiction. This article applies to, and the court has jurisdiction over, guardianship and related proceedings for individuals domiciled or present in this State, protective proceedings for individuals domiciled in or having property located in this State, and property coming into the control of a guardian or conservator who is subject to the laws of this State.

(1) Circuit court jurisdiction. The circuit court shall have concurrent jurisdiction over guardianships and related proceedings concerning incapacitated adults. The circuit court shall not have jurisdiction over guardianships and related proceedings concerning minors. The circuit court shall have exclusive jurisdiction over conservatorship proceedings and those proceedings under part 4 of this article, for both adults and minors;

(2) Family court jurisdiction. The family court shall have exclusive jurisdiction over guardianships and related proceedings concerning minors and concurrent jurisdiction over guardianship and related proceedings concerning incapacitated adults. The family court shall have exclusive jurisdiction over guardianship proceedings concerning minors, regardless of whether the proceeding is based upon the minor's age or the minor's status as an incapacitated person; and

(3) Consolidation of proceedings regarding same person. Where protective and guardianship proceedings relating to the same person have been initiated, they may be consolidated in the court as the court in the exercise of its discretion shall determine.

The new § -8 in Act 236 [codified as HRS § 551G-12] provides

as follows:

PART II. JURISDICTION

§ -8 Exclusive basis. This part provides the exclusive jurisdictional basis for a court of the State of Hawaii to appoint a guardian or issue a protective order for an adult.

The language in § -8 is based on Section 202 of the Uniform Act. Section 202 of the Uniform Act and the Comment following Section 202 state, in pertinent part (emphasis added):

SECTION 202. EXCLUSIVE BASIS. This [article] provides the exclusive jurisdictional basis for a court of this state to appoint a guardian or issue a protective order for an adult.

Comment

. . . . [T]his section provides that this article is the exclusive jurisdictional basis for determining jurisdiction to appoint a guardian or issue a protective order for an adult. *An enacting jurisdiction will therefore need to repeal any existing provisions addressing jurisdiction in guardianship and protective proceedings cases. A Legislative Note to Section 503 provides guidance on which provisions need to be repealed or amended.* . . .

Notwithstanding the Comment following Section 202 of the Uniform Act, Act 236 contains no provision limiting the application of HRS § 560:5-106 to minors or otherwise reconciling new and old law.

Meaning of "Court". It is unclear which "court" Act 236 [codified as HRS chapter 551G] refers to when using the term "the court" or "a court" in Hawaii because the definition of "court" in Chapter 560 rests on jurisdiction as set forth in HRS § 560:5-

106. The new chapter does not define "court" and does not incorporate by reference the definitions of "court" from Chapter 560.

HRS chapter 560 defines "court" as follows:

CHAPTER 560
UNIFORM PROBATE CODE

ARTICLE I
GENERAL PROVISIONS, DEFINITIONS, AND
PROBATE JURISDICTION OF COURT

PART 2. DEFINITIONS

§560:1-201 General definitions. Subject to additional definitions contained in the subsequent articles that are applicable to specific articles, parts, or sections, and unless the context otherwise requires, in this chapter:

"Court" means the circuit court in this State having jurisdiction in matters relating to the affairs of decedents.

ARTICLE V
GUARDIANSHIP AND PROTECTIVE PROCEEDINGS

PART 1. GENERAL PROVISIONS

§560:5-102 Definitions. In parts 1 through 4 of this article:

"Court" means either a circuit court in this State having jurisdiction in matters relating to the affairs of decedents or the family court, depending on which court has subject matter jurisdiction under section 560:5-106.

b. Transfer of Proceeding to and from Another State

The enactment of Act 236 also gives rise to a conflict over which procedure governs transfer of guardianship or conservatorship proceedings to another state. HRS § 560:5-107 provides as follows:

§560:5-107 Transfer of jurisdiction. (a) After the appointment of a guardian or conservator or entry of any other protective order, the court making the appointment or entering the order may transfer the proceeding to a court in another circuit in this State or to another state if the court is satisfied that a transfer will serve the best interest of the ward or protected person.

(b) If a guardianship or protective proceeding is pending in another state or a foreign country and a petition for guardianship or protective proceeding is filed in a court in this State, the court in this State shall notify the original court and, after consultation with the original court, assume or decline jurisdiction, whichever is in the best interest of the ward or protected person.

(c) A guardian, conservator, or like fiduciary appointed in another state may petition the court for appointment as a guardian or conservator in this State if venue in this State is or will be established. The appointment may be made upon proof of appointment in the other state and presentation of a certified copy of the portion of the court record in the other state specified by the court in this State. Notice of hearing on the petition, together with a copy of the petition, shall be given to the ward or protected person, if the ward or protected person has attained fourteen years of age, and to the persons who would be entitled to notice if the regular procedures for appointment of a guardian or conservator under this article were applicable. The court shall make the appointment in this State unless it concludes that the appointment would not be in the best interest of the ward or protected person. Upon the filing of an acceptance of office and any required bond, the court shall issue appropriate letters of guardianship or conservatorship. Within fourteen days after an appointment, the guardian or conservator shall send or deliver a copy of the order of appointment to the ward or protected person, if the ward or protected person has attained fourteen years of age, and to all persons given notice of the hearing on the petition.

Testimony of the Commission to Promote Uniform Legislation in support of the UAGPPJA included the following statement with

regard to "[t]he Problem of Transfer":

Oftentimes, problems arise even absent a dispute. Even if everyone is agreed that a guardianship or conservatorship should be moved to another state, few states have streamlined procedures for transferring a proceeding to another state or for accepting such a transfer. In most states, all of the procedures for an original appointment must be repeated, a time consuming and expensive prospect.

Hawaii is among the "few" states that have streamlined transfer procedures. HRS § 560:5-107, Transfer of jurisdiction, authorizes the transfer of a guardianship or conservatorship proceeding (for minors and adults) to a court in another state without requiring "all of the procedures for an initial appointment [to be] repeated." The new § -16 in Act 236 [codified as HRS § 551G-21] likewise prescribes procedures for the transfer of a guardianship or conservatorship to another state.

There is also a conflict between HRS chapter 560 and Act 236 regarding the transfer of guardianship or conservatorship proceedings from another state to Hawaii. HRS § 560:5-107 authorizes the transfer of a guardianship or conservator proceeding from another state to this state and § -17 in Act 236 [codified as HRS § 551G-22] likewise prescribes procedures for the transfer of a guardianship or conservatorship from another state to this state.

Notwithstanding the Legislative Note that follows Section

503 regarding the need to repeal or limit to minors any existing provisions authorizing transfer of a guardianship or conservatorship proceeding to another state, neither Act 236 nor Chapter 560 limit the application of Chapter 560 to minors nor otherwise reconcile the new and existing laws. Thus, two alternative statutory provisions apply to the transfer of a guardianship or conservatorship.

By contrast, Colorado adopted the UAGPPJA as Article 14.5 of the Colorado Probate Code and amended its counterpart to HRS § 560:5-107. New paragraphs 2(b) and 3(b) were added to Colorado Revised Statutes Section 15-14-107 stating "In matters concerning adults, the provisions of Article 14.5 apply" and adding "Except as provided in paragraph (b)" at the beginning of paragraphs 2(a) and 3(a). Minnesota amended Minnesota Statutes Chapter 524.5-107, its counterpart to HRS § 560:5-107, as follows (emphasis added):

Minn. Stat. § 524.5-107 TRANSFER OF JURISDICTION. (a) Following the appointment of a guardian or conservator or entry of another protective order, the court making the appointment or entering the order may transfer the proceeding to a court or another county in this state or in the case of a minor to another state if the court is satisfied that a transfer will serve the best interest of the ward or protected person. (b) A guardian of a minor, conservator of a minor, or like fiduciary for a minor appointed in another state may petition the court for appointment as a guardian or conservator in this state if the state has jurisdiction. ...

c. Authority for Guardian or Conservator to Act in Another State

The enactment of the UAGPPJA creates a conflict over which procedures govern the filing of a foreign order from another state. Currently HRS § 560:5-433 permits a conservator appointed in another state to exercise powers in Hawaii upon the filing in probate court in Hawaii of authenticated copies of letters of appointment from the other state and any bond. HRS § 560:5-433 provides as follows:

§ 560:5-433 Foreign conservator; proof of authority; bond; powers. If a conservator has not been appointed in this State and a petition in a protective proceeding is not pending in this State, a conservator appointed in the state in which the protected person resides may file in a court of this State, in a circuit in which property belonging to the protected person is located, authenticated copies of letters of appointment and of any bond. Thereafter, the conservator may exercise all powers of a conservator appointed in this State as to property in this State and may maintain actions and proceedings in this State subject to any conditions otherwise imposed upon nonresident parties.

Act 236 contains a new "PART IV" entitled "REGISTRATION AND RECOGNITION OF ORDERS FROM OTHER STATES." Part IV calls for filing an order from another state as a foreign judgment and sets forth the procedure for doing so. Under existing Hawaii law, HRS chapter 636C, the Uniform Enforcement of Foreign Judgments Act, governs enforcement of foreign judgments.

Again, neither Act 236 nor Chapter 560 limit the application of Chapter 560 to minors or otherwise reconciles the new and

existing laws and thus two alternative statutory provisions apply to procedures governing the filing of a foreign order from another state. Both HRS § 560:5-433 in probate court, and Part IV of the new chapter created by Act 236, as a civil matter in circuit court, apply to adult conservatorships orders from another state.

Other Unintended Consequences: Transition from Minor to Adult Guardianship

Enactment of the UAGPPJA raises concerns about unintended consequences such as subjecting families and guardians to increased complexity and procedures, disrupting a continuum of care for minor incapacitated individuals who transition to adult guardianship or conservatorship upon attaining the age of eighteen.

HRS chapter 560 defines "incapacitated person" as follows:

§560:1-201 General definitions. Subject to additional definitions contained in the subsequent articles that are applicable to specific articles, parts, or sections, and unless the context otherwise requires, in this chapter:

. . . .

"Incapacitated person" shall have the meaning provided in section 560:5-102.

§560:5-102 Definitions. In parts 1 through 4 of this article:

. . . .

"Incapacitated person" means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-

care, even with appropriate and reasonably available technological assistance.

§ -2 in Act 236 [codified as HRS § 551G-2] defines "incapacitated person" as "an adult for whom a guardian has been appointed." Currently, under Article 5 of Chapter 560, families are able to seek guardianship for incapacitated minors before they turn 18 years of age. Act 236 prevents continuity because it limits the definition of "incapacitated person" to an adult.

Possible Impact on Judicial Circuits

Making Act 236 operational may require new rules, forms, policies and procedures and legal research. For example, Hawaii judges may be expected to compel individuals to appear in a courtroom in Hawaii, produce evidence, and give testimony before a Hawaii judge in accordance with another state's procedures. The Working Group sought comment from judges in all four judicial circuits regarding the impact of Act 236 that they would anticipate based on their own experience in court.

Necessity. None of the judges recalled situations that they were aware of that would be or would have been affected by Act 236. One guardianship of an adult who lives in Hawaii and has family living in another state came to mind, but it was noted that a case of that nature is extremely rare, and there is no indication that it would be affected by Act 236. None had heard

of guardianship or conservatorship cases being transferred to Hawaii from another state, nor of guardianship or conservatorship cases being transferred from Hawaii to another state.

Judges were aware of cases involving Acknowledgment of Conservator's Authority that out-of-state conservators currently obtain pursuant to Rule 120 of the Hawaii Probate Rules.

Ambiguity as to "court." Some judges expressed concern that the lack of conformity with the Uniform Probate Code's (HRS chapter 560) definition of "court" (Family or Probate Court) may give rise to issues in this state or elsewhere. Others felt that current statutory provisions sufficiently distinguish between Family Court and Probate Court jurisdiction.

International application. Some judges had concerns about the provision in § -3 of Act 236 authorizing a Hawaii court to treat a foreign country as if it were a state. A question arose as to whether diplomatic channels would be involved.

Communication with a court in another state. In principle, the requirement in § -4 of Act 236 that the Hawaii court make a record of communications with a court in another state regarding a proceeding arising under Act 236 is considered appropriate and practicable. However, practical concerns related to communication with another state include: (1) cases with higher priority on the part of the other jurisdiction may result in

delayed responses and/or responses from staff rather than a judge; (2) effects of time differences vis-a-vis the requirements of Act 236; and (3) differing capabilities of "recordation."

Cooperation with court in another state. In appropriate circumstances, the provisions in § -5 of Act 236 allowing courts of another state to request Hawaii courts (and vice versa) to hold evidentiary hearings, to order the production of evidence or testimony, to order an investigation of a person, to forward to another court transcripts and records of the Hawaii courts, to issue orders to assure the appearance of persons in another state's proceedings, and to issue an order authorizing the release of medical information could be very helpful to all of the jurisdictions involved. On the other hand, the logistics required to make workable arrangements in different states with different policies, procedures, rules, and time zones, will consume valuable staff time and resources.

Taking testimony in another state. Provisions in § -6 of Act 236 allow courts to order witness testimony to be taken in another state, and authorize courts to permit testimony by telephone, audio visual, and other electronic means. This provision appears problematic as there may be inconsistencies between the foreign state and Hawaii. It is not known whether these issues can be dealt with adequately on a case-by-case basis.

Act 236 § -6(c) prohibits judges from excluding documentary evidence based on an objection that the original is required based on Rule 1002 of the Hawaii Rules of Evidence ("HRE"), Requirement of Original. HRE 1002 provides that "[t]o prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise required in [the HRE] or by statute." § -6(c) falls within the "except as otherwise required . . . by statute" clause of Rule 1002. The possibility was raised that HRE 1002 may need to be examined as § -6(c) appears well suited for court proceedings in the future.

Exclusive jurisdictional basis. Language in § -8 of Act 236 establishing Part II of HRS chapter 551G as the "exclusive jurisdictional basis for a court of the State of Hawaii to appoint a guardian or issue a protective order for an adult" raises serious concern. This statement of exclusivity runs counter to jurisdictional provisions in HRS chapter 560.

Notice of proceeding. § -14 in Act 236 [codified as HRS § 551G-18] creates additional notice requirements if Hawaii is not the respondent's home state on the date a petition is filed in Hawaii for appointment of a guardian or issuance of a protective order. In addition to Hawaii notice requirements, notice must be given to persons who would be entitled to notice if the proceeding were brought in the respondent's home state, but in

the manner required by notice provisions in Hawaii. This provision raised no concerns for the judges. However, litigants, including the State and the Office of Public Guardian, may incur additional fees and costs not required under the current statute.

Transfer of guardianship or conservatorship to another state; Accepting guardianship or conservatorship transferred from another state. Sections 16 and 17 in Act 236 [codified as HRS § 551-21 and § 551-22] and HRS § 560:5-107 appear to address the same subject, but differ in the manner in which Hawaii courts are to review and rule on transfers. Sections 16 and 17 provide that the court shall issue an order provisionally granting a petition once certain facts have been established. The existing law, HRS § 560:5-107, offers more flexibility and appears to be less restrictive. HRS § 560:5-107 provides that the court shall make the appointment unless it concludes that the appointment would not be in the best interest of the protected person. No objection appears to be required to trigger the court's ability to determine whether it would be in the best interest of the protected person under HRS § 560:5-107.

Finding of incapacity. § -17(g) in Act 236 [codified as HRS § 551-22(g)] provides that in granting a petition under § -17 accepting a guardianship or conservatorship transferred from another jurisdiction, the Hawaii court must recognize the other state's order, including the determination of the protected

person's incapacity and the appointment of the guardian or conservator. The judges generally seemed comfortable with the requirement that a Hawaii court accept another court's finding of incapacity. A potential area of concern is the limitation on further litigation in the receiving state. However, in the event that the Hawaii court (receiving state) detected an issue not addressed in the out-of-state (sending state) proceeding, the Hawaii judge could communicate with the the out-of-state court pursuant to § -4 regarding factors that the other court was not aware of.

Overall impact. Situations triggering the need to determine whether Hawaii or another state has jurisdiction would be rare. If Act 236 applied only to the occasional case that might arise, Act 236 would have no impact on Hawaii courts, and the benefits of Act 236 would outweigh any potential administrative burden that might be placed on our courts.

Findings

Based on the foregoing, the Working Group finds as follows:

The Working Group finds that the UAGPPJA (Act 236) will apply to very few cases as compared with the circuit courts' overall caseloads. Nevertheless, the Working Group identified concerns regarding a conflict of laws between the pre-existing provisions of Chapter 560, Article V and the new provisions of

Act 236.

The Working Group finds that Act 236 was adopted without due consideration of its impact on existing law governing jurisdiction within Hawaii's state court system. Adopting § -8 of Act 236 as the "exclusive jurisdictional basis" for adult respondents in guardianship and conservatorship cases creates uncertainty in a body of law that determines the proper forum for respondents in Hawaii.

The Working Group finds that many difficulties noted in this Report can be traced directly to the choice to enact the UAGPPJA "separately," and not "as part of the broader UGPPA" or "as part of the even broader UPC" (HRS chapter 560).

Act 236 did not repeal or limit to minors any existing statutory provisions, leaving Hawaii courts with conflicting statutory provisions incapable of being "implemented".

Adoption of the Act 236 "separately," i.e. outside of an appropriate section within the within the UPC creates ambiguity because it renders definitions of "court" in HRS §§ 560:1-201 and 5-102 inapplicable to Act 236.

The Working Group finds the change brought about by Act 236 to be unnecessary, if the objective is to avoid a time-consuming and expensive process that takes place "in most states," but not in Hawaii.

The Working Group finds that this measure may disrupt a

continuum of care for minor incapacitated individuals who transition to an adult guardianship or conservatorship upon attaining the age of eighteen.

Recommendation

Due to the aforementioned concerns regarding ambiguities, conflicting provisions, implementation of the UAGPPJA, its impact on existing guardianship and conservatorship cases in Hawaii court, and the rare circumstances under which it would apply in guardianship and conservatorship cases, the Working Group recommends the REPEAL of Act 236, 2012 Session Laws of Hawaii.