



VIRGIN ISLANDS
BAR ASSOCIATION

Legislation & Law Reform Committee

Testimony on Bill 35-0174

May 24, 2024

Uniform Guardianship, Conservatorship, and Other Protective

Arrangements Act with amendments and for other related purposes

By Jessica McKenney, Chair of VIBA Legislation and Law Reform Committee

Good afternoon Honorable Members of the Legislature,

I am here today in my capacity as Chair of the Virgin Islands Bar Association Legislation and Law Reform Committee. The Committee's goals are to review bills for efficiency and effectiveness, encourage stakeholder engagement and provide input on potential human rights and public interest impacts. To note, these comments have not been reviewed or approved by the Virgin Islands Bar Association Board of Governors, and does not necessarily reflect the views of the Bar.

Regarding Bill 35-0174, I would like to make technical and practical comments to aid in consideration and drafting of this bill, which will be provided as examples and other information below:

Terms and Phrases

Terms like, *substantial harm*, before appointing an emergency guardian may create unintended high bars to giving minors and adults in-need an immediate guardian. Additionally, this specific provision states that must be likely to prevent substantial harm AND no other person appears to have authority and willingness to act in the circumstances. There may be a minor or adult who has no one to act on their behalf or take care of them, but who may not be in danger of substantial harm. There is a similar standard for conservatorships.

Additionally, the bill states that an adult subject to guardianship or conservatorship shall be given by the court a notice that states, among other things, their right to be involved in decisions affecting them (including decisions about their care, dwelling, activities or social activities) and their health-care to the extent *reasonably feasible*. It may be helpful to analyze whether this term creates a high enough standard to ensure the individual is being involved in all decision-making to the extent possible, including by possibly replacing the term *reasonably feasible* with *possible*.

Moreover, the definition of incapacitated person contains the term *meet essential requirements 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*, which should be reviewed to ensure it does not create a standard where the respondent must prove that they meet essential requirements and have capacity, as opposed to the petitioner being responsible for proving if they believe a person is incapacitated. *Essential requirements* may be able to be replaced with a term such as *unable to meet physical health, safety, self-care*. Additionally, *technical assistance* might should be updated to include supported decision making, which includes assistance beyond technology.

In general, terms similar to the above should be analyzed to ensure unintended standards are not created by the court, as the court needs to read meaning into every word the Legislature passes in a bill.

Rights of the respondent

Section 5-310 requires that the judge state whether a person retains the right to vote and to marry (and to provide findings and support) in an order appointing a guardian. Other provisions also seem to state a guardian's ability to decide marriage, divorce and annulment matters with court approval. However, it does not seem necessary that such determinations be required to be made in every order for guardianship, as these are rights that should not be removed ordinarily. It is suggested these provisions be reviewed and possibly removed, particularly for voting. However, if there are particular concerns for a specific case that respondent may be forced or tricked to marry, etc. then maybe the consideration comes into play that court approval needed, or that guardian responsible for ensuring will of respondent, etc.

It was suggested by an attorney in the community that instead of requiring a statement of whether a person retains the right to vote or to marry, something to the extent, "the individual retains all other civil rights granted as a citizen" be written.

There are sections about an adult subject to guardianship's dwelling and choices to move that individual, and those sections should be reviewed very carefully to ensure that a person, particularly older persons, can age in place if that is their will and to the extent possible.

Provisions of the bill, generally, seem to state that termination of a guardianship or conservatorship occur upon death or order of the court. All provisions should be reviewed to ensure that (1) even with a guardianship, conservatorship or protective arrangement, the individual is free to make their own decisions to the extent they are able (even accounting for that ability changing over time) and (2) that an individual is able to quickly terminate all or part of a guardianship, conservatorship or protective arrangement if they are not an incapacitated individual.

Notice, Hearing and Petition Provisions

There seems to be numerous provisions related to notices, in particular, in this bill for different types of guardianship and conservatorship hearings. There are also multiple hearing and petition provisions. These provisions should be reviewed to ensure they are all consistent, particularly regarding notice. It may be helpful to consolidate into one or two notice, petition and hearing sections

(for example, one for guardianships and one for conservatorships), to assist in consistency and reviewing.

Additionally, some provisions require that several parties receive notice, but aside from usually requiring that the respondent actually receive notice, is a statement that “failure to give notice under this subsection does not preclude the court from appointing a guardian” for seemingly all other parties. This includes adult children, persons caring for the adult, etc. not having to be served for the court to appoint a guardian. If certain relationships to the respondent are applicable, it may be important to require notice to these persons to ensure the best interest of the respondent is being considered by the judge.

Moreover, when drafting a petition, the petitioner only needs to provide information regarding the reason a guardianship or conservatorship is being requested ‘to the extent known.’ The reason for requesting a guardianship, conservatorship or protective arrangement might should be required information in the initial petition to preliminarily establish that there is a valid basis for the petition.

Capacity

Under § 5-304, appointment of a visitor is required to interview the respondent, which includes informing the respondent, interviewing the petitioner and proposed guardian, visiting the respondent’s dwelling and potential dwelling, and filing a detailed report with the court, that includes for example, recommendation for appointment of attorney for respondent, summary of self-care and independent-living tasks respondent can manage without support, could manage with support, and cannot manage, appropriateness of a guardianship and whether protective arrangement or other less restrictive alternative meets the respondents needs, etc.

However, it may not always be practical for the court to employ a visitor, especially in a timely manner. Therefore, it may be helpful to write alternatives to an appointment, such as allowing the judge to conduct the interview tasks, probably during a hearing, to request documentation, including pictures of living situations, etc., to include elements of a visitor’s report in its decision or order. Additionally, it may be helpful to delete limiting sentences, such as that a visitor “must be an individual with training or experience in the type of abilities, limitations, and needs alleged in the petition” to not further and unduly limit who may act as a visitor. Moreover, it may be helpful to add that a guardian ad litem can act as a visitor or that a visitor appointment is optional.

It was pointed out to me by an attorney in the community that currently, sometimes a visitor and a guardian ad litem are both appointed in a case, and some of their duties may overlap, such as visiting the person’s dwelling—this may further strain limited resources.

Additionally, the Legislature should consider reviewing all instances where court approval is required to assess whether there are alternatives to court approval, which could take time and may hinder time sensitive decisions, etc.

Timing

The bill only allows for emergency guardian and conservators to be appointed for 60 days with one 60 day extension.

This may cause additional judicial resources to be used to deal with an issue where an emergency guardian or conservator is needed beyond these timeframes and may also cause additional vulnerability to the individual needing guardianship or conservatorship. This may occur even though the statute calls for a hearing within 5 days to determine the appropriateness of the appointment.

Additionally, a provision of the bill seems to require that a guardian initiate a proceeding for a conservatorship or protective arrangement instead of conservatorship if necessary to protect the individual's property. This may create an undue burden to the guardian, including of time and money. This could possibly be moved to 5-314(a), which lists powers that a guardian may engage.

Relevance of other statutes

Based on conversations with attorneys in the community, there may be other existing laws that should be reviewed in conjunction with this bill, such as existing laws regarding disabilities and child custody, to ensure provisions, for example definitions, are consistent. Additionally, it may be helpful to review the existing guardianship and conservatorship bill to ensure the provisions seen as hindering in the existing bill are addressed in the new bill.

Stakeholders

It seems that further discussions with stakeholders may be helpful, and can include sending the bill for review, as well as, general conversations and asking for feedback on their experiences with guardianships and conservatorships.

The goal of this testimony was to provide examples and general technical and practical feedback for consideration when reviewing this bill as a whole. In addition to what has already been said, it may also be helpful to conduct research on the issues that individuals subject to guardianship and conservatorship have faced to ensure adequate safeguards are in place to protect their rights to the extent possible.

I am happy to discuss my comments on this bill further, and I thank you very much for your time today.