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Family Law - Guardianship - The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act: A Uniform Solution to an Arkansas Problem

Stephen Rauls

FAMILY LAW—GUARDIANSHIP—THE UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT: A UNIFORM SOLUTION TO AN ARKANSAS PROBLEM

I. INTRODUCTION

Americans need each other's help. As of 2003, 35.9 million Americans were sixty-five or older, 4.7 million of whom were eighty-five or older.[1] Approximately 5.3 million Americans suffer from Alzheimer's disease.[2] Another estimated seven to eight million have mental disabilities.[3] When members of these and other fragile groups are unable to protect their own interests, courts in all fifty states have procedures to appoint guardians for them.[4] Statistics on guardianship are difficult to come by; most courts do not themselves know how many guardianships they are ostensibly monitoring.[5] The closest thing to a definitive study of the subject, conducted by the Associated Press in 1987, estimated that there were 300,000 to 400,000 adult guardianships in force at the time.[6]

Meanwhile, the United States is a very mobile society. In 2002 alone, more than forty million Americans moved.[7] In a typical year, some seven million Americans move from one state to another.[8] When these two groups—the dependent and the mobile—overlap, they expose a hole in the legal system that threatens to swallow the rights of some of our most vulnerable citizens. The mere act of moving a ward across state lines may cost a guardian his or her legal authority.[9] Worse, a third party who spirits a ward out of state is often beyond the reach of the guardian and the appointing court.[10] A major source of these problems is parochial statutory regimes

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1. WAN HE ET AL., 65+ IN THE UNITED STATES: 2005 1 (U.S. Census Bureau 2005).

2. Alzheimer's Association, *2009 Alzheimer's Disease Facts and Figures*, 5 ALZHEIMER'S & DEMENTIA 234, 237 (2009).

3. Naomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 STETSON L. REV. 143, 150 (2007).

4. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE 2 (2004).

5. *Id.* at 3.

6. WINDSOR C. SCHMIDT, JR., GUARDIANSHIP: COURT OF LAST RESORT FOR THE ELDERLY AND DISABLED 183 (1995). This figure has to be considered a very rough estimate. In 1992, the Center for Social Gerontology estimated that the number of adult guardianships could be anywhere between 500,000 and 1,250,000. Anthony E. Rothert, *When Wards Leave the State, Will Their Guardians' Authority Be Recognized?*, 94 ILL. B.J. 555, 555 (2006).

7. JASON P. SCHACHTER, GEOGRAPHICAL MOBILITY: 2002 TO 2003 2 (U.S. Census Bureau 2004).

8. *Id.* at 2, tbl. A.

9. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 4, at 3.

10. The most famous example of the "granny-snatching" phenomenon is probably the story of Lillian Glasser, an elderly multimillionaire who became the subject of a protracted custody battle between her children. Ms. Glasser's daughter, a Texan, and Ms. Glasser's son, a New Jerseyan, reportedly spent more than three million dollars of Ms. Glasser's fortune on

that presume that all guardianships will begin and end within state lines, making adult guardianship jurisdiction an area of law ripe for reform.

The best prospect for guardianship reform in Arkansas is the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). The UAGPPJA was promulgated in 2007 by the National Conference of Commissioners on Uniform State Laws for the purpose of facilitating the transfer and enforcement of guardianships across state lines.[11] The UAGPPJA was considered briefly by the Arkansas legislature in the spring of 2009,[12] but was withdrawn for further study by members of the Arkansas bar.[13]

This note will make the case for the UAGPPJA in Arkansas. First, it will consider Arkansas law as it now stands and present a case study that illustrates the problems that can arise under present law.[14] Next, it will discuss the UAGPPJA in detail: its history, its purpose, and its provisions.[15] In the final section, the note will again narrow its focus to Arkansas law and the ways that enactment of the UAGPPJA would affect Arkansans in particular.[16]

II. BACKGROUND: THE STATE OF ADULT GUARDIANSHIP JURISDICTION LAW

Although the Arkansas Code is quite thorough on the subject of adult guardianships created and enforced within the state, it gives scant consideration to the possibility that guardians and wards will travel into and out of the state. That being the case, Arkansas courts are on shaky legal ground when they attempt to resolve issues between in-state and out-of-state guardians.[17] In at least one recent case, an appeal and reversal resulted from an Arkansas

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the dispute. Rachel Emma Silverman, *Latest Custody Battle: Who Gets Mom*, WALL ST. J., Aug. 17, 2006, at D1. After a sojourn in the Texas court system, the New Jersey court resolved the dispute in favor of the son in an eighty-two page opinion. Zeke MacCormack, *Daughter Ordered to Repay Millions*, SAN ANTONIO EXPRESS-NEWS, Mar. 16, 2007, at 1A.

11. Sally Balch Hurme, *Crossing State Lines: Issues and Solutions in Interstate Guardianships*, 37 STETSON L. REV. 87, 120 (2007).

12. S.B. 327, 87th Gen. Assemb., Reg. Sess. (Ark. 2009).

13. E-mail from John C. Calhoun, Co-chair, Uniform Laws Committee of the Arkansas Bar Association (Oct. 16, 2009, 15:32 CST) (on file with author).

14. *See infra* notes 17–50 and accompanying text.

15. *See infra* notes 51–101 and accompanying text.

16. *See infra* notes 102–120 and accompanying text.

17. *See, e.g.*, Hetman v. Schwade, 2009 Ark. 302, ___ S.W.3d ___ (holding unanimously that Arkansas courts could not touch out-of-state guardians, but disagreeing on the legal basis for the decision in a pair of concurring opinions); *see also* Merchants Bonding Co. v. Starkey, 337 Ark. 229, 987 S.W.2d 717 (1999) (holding that a guardian removed by an Arkansas court did not forfeit a bond posted in connection with a Texas guardianship over the same ward).

circuit court's improper exercise of authority over a guardian appointed in Pennsylvania.[18] Arkansas is not alone in its struggle with this evolving area of law.[19] The problem is pervasive enough that a national movement is underway to reform and standardize adult guardianship jurisdiction law.[20]

A. Adult Guardianship Jurisdiction Law in Arkansas

Arkansas law permits the appointment of a guardian to care for an incapacitated person, defined as:

> [A] person who is impaired by reason of a disability such as mental illness, mental deficiency, physical illness, chronic use of drugs, or chronic intoxication, to the extent of lacking sufficient understanding or capacity to make or communicate decisions to meet the essential requirements for his or her health or safety or to manage his or her estate.[21]

A guardianship may encompass the ward's person, estate, or both.[22] The guardian is empowered to act on the incapacitated person's behalf as necessary "to care for and maintain the ward" or to "protect and preserve" the ward's estate.[23] Any adult (who is neither a felon nor insane) or charitable corporation is qualified to serve as a guardian.[24]

Jurisdiction over guardianship[25] matters in Arkansas depends on the location of the ward; actions for the appointment of a guardian may be filed in the county where the prospective ward is domiciled.[26] Arkansas courts may also appoint a guardian for an incapacitated person who is domiciled in another state, so long as that person resides or has property in Arkansas.[27] The law assumes that a guardian, once appointed, will stay put: there is no mention in Arkansas law of transfer of guardianships out of state.[28]

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18. *Hetman*, 2009 Ark. 302, at 10, ___ S.W.3d at ___. The *Hetman* case is discussed at length in notes 32–45 and accompanying text.

19. At least eighteen states have enacted new guardianship jurisdiction legislation since 2007. UNIFORM LAW COMMISSION, A FEW FACTS ABOUT THE UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT (2007), *available at* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uagppja.asp.

20. *See infra* notes 53–57 and accompanying text.

21. ARK. CODE ANN. § 28-65-101(5) (West 2004).

22. *Id.* § 28-65-101(3).

23. *Id.* § 28-65-301.

24. *Id.* § 28-65-203.

25. This note uses the term "guardianship" to refer to both guardianships of the person and guardianships of property (conservatorships). There is a distinction between the two in Arkansas law, but they are treated the same for jurisdictional purposes. *See id.* § 28-65-102.

26. *Id.* § 28-65-202(a). Arkansas's emphasis on domicile is typical. *See infra* note 64.

27. ARK. CODE ANN. § 28-65-202.

28. There is, however, considerable attention to the subject of transfer of guardianships between counties within Arkansas. *See, e.g., id.* § 28-65-202(c)(1) ("If it appears to the court

Arkansas law does, however, contemplate recognition of guardians appointed in other states, at least for some purposes. Arkansas Code section 28-65-601 provides that a guardian appointed in another state may petition an Arkansas court to recognize his or her authority to dispose of property or bring lawsuits on the ward's behalf.[29] If it is in the incapacitated person's best interest, the court may even terminate an existing Arkansas-created guardianship for the benefit of the foreign guardian.[30] Arkansas law is unusually open to out-of-state guardians in this regard.[31]

What actually happens when an Arkansas court is faced with litigation between guardians appointed by two different states? The problem came before the Arkansas Supreme Court as recently as May, 2009, in *Hetman v. Schwade*.[32] In 2000, Jean Hetman and Annamarie Schwade were appointed by a Pennsylvania court as co-guardians of their mother, Alexandra Vicari.[33] Ms. Hetman had sole authority to sign checks on Mrs. Vicari's behalf.[34] Over the next six years, Mrs. Vicari lived in a number of residential care facilities in Pennsylvania and New Jersey.[35] In 2006, Ms. Schwade moved Mrs. Vicari to Eureka Springs and asked the Carroll County Circuit Court to appoint her as her mother's guardian.[36] Ms. Hetman filed suit in Pennsylvania court to challenge the change of guardianship, and the Carroll County court declined to rule on the matter until the Pennsylvania proceedings played out.[37] Ultimately, the Pennsylvania court terminated Ms. Hetman's Pennsylvania guardianship, freeing the Carroll County court to appoint Ms. Schwade as Mrs. Vicari's sole guardian in Arkansas.[38]

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at any time before the termination of the guardianship that the proceeding was commenced in a county of improper venue, the court shall order the proceeding transferred to another probate court.").

29. *Id.* § 28-65-601. The statute is silent on the foreign guardian's authority to make medical or other decisions.

30. *Id.* § 28-65-602.

31. Hurme, *supra* note 11, at 104–05 (comparing Arkansas's law governing foreign guardians with that of Ohio).

32. 2009 Ark. 302, ___ S.W.3d ___.

33. *Id.* at 1, ___ S.W.3d at ___.

34. *Id.* at 2, ___ S.W.3d at ___.

35. *Id.*, ___ S.W.3d at ___. Ms. Hetman would have been empowered to deal with the New Jersey facilities on Mrs. Vicari's behalf because New Jersey law allows foreign guardians to file their guardianship with the local court and exercise their guardianship powers within the state. Sally Balch Hurme, *Mobile Guardianships: Partial Solutions to Interstate Jurisdiction Problems*, NAELA Q., Summer 2004, at 6, App. A (app. *available at* www.abanet.org/rppt/meetings_cle/spring2003/pt/InterstateElder/hurme.pdf).

36. *Hetman*, 2009 Ark. 302, at 2, ___S.W.3d at ___.

37. *Id.*, ___ S.W.3d at ___.

38. The Arkansas court styled its action as accepting the "transfer of the jurisdiction of the Guardianship of the Estate and Person of Alexandra Vicari," *Id.* at 3, ___ S.W.3d at ___, but that seems to have been a judicial creation. The Arkansas guardianship statutes do not expressly provide for transfer of guardianships into or out of the state.

Problems arose when Ms. Schwade examined Mrs. Vicari's finances and was dissatisfied with Ms. Hetman's stewardship. Ms. Schwade filed a petition with the Carroll County Circuit Court to order an accounting from Ms. Hetman.[39] The circuit court obliged, finding that Ms. Hetman had submitted to the jurisdiction of the Arkansas court by filing petitions with that court in connection with the 2006 fight over Ms. Schwade's appointment.[40] Ms. Hetman appealed, and the Arkansas Supreme Court reversed.[41] According to the Arkansas Supreme Court, an Arkansas court has no authority to order an accounting from a guardian who was not appointed in Arkansas.[42]

The supreme court's rationale for its ruling was nuanced. First, the court stated emphatically that Arkansas courts "had both subject-matter jurisdiction over the matter of the guardianship and personal jurisdiction over Hetman."[43] Then, just a few sentences later, the court held that Ms. Hetman, having been appointed to and relieved of guardianship in Pennsylvania, was not a guardian within the meaning of Arkansas's accounting statute.[44] As such, the court lacked the authority to make demands of her.

In a concurring opinion, Chief Justice Jim Hannah, joined by Justices Gunter and Danielson, contended that the distinction made by the majority between subject matter jurisdiction and authority to order an accounting was a meaningless one.[45] Subject matter jurisdiction, the concurrence implies, *is* authority.[46] The court may have had subject matter jurisdiction over Ms. Schwade's Arkansas-created guardianship, but it absolutely did not have subject matter jurisdiction over Ms. Hetman's Pennsylvania-created guardianship.[47] From the Chief Justice's point of view, the case began and ended with the question of jurisdiction.[48]

Justice Brown wrote a second concurrence, also joined by Justices Gunter and Danielson. Without weighing in on the jurisdiction question,

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39. *Id.* Arkansas Code section 28-65-320 requires Arkansas guardians to file a written accounting with the court annually. A final accounting is required within sixty days of termination of the guardianship. ARK. CODE ANN. § 28-65-320 (LEXIS Repl. 2004).

40. *Hetman*, 2009 Ark. 302, at 4,___ S.W.3d ___, ___.

41. *Hetman*, 2009 Ark. 302, ___ S.W.3d ___.

42. *Id.* at 9, ___ S.W.3d at ___.

43. *Id.* at 7, ___ S.W.3d at ___.

44. *Id.* at 12, ___ S.W.3d at ___ ("Guardianship proceedings are purely statutory, and the particular circumstances of this case turn upon the absence of statutory authority to order a foreign guardian to render a statutory accounting . . . ."). The code provision at issue was ARK. CODE ANN. section 28-65-320(a) (LEXIS Repl. 2004). ("[A] guardian of the estate shall file with the court annually . . . and within sixty days after termination of his [or her] guardianship, a written verified account of his or her administration.").

45. *Hetman*, 2009 Ark. 302, at 14, ___ S.W.3d at ___ (Hannah, C.J., concurring).

46. *Id.*, ___ S.W.3d at ___ ("Jurisdiction is the power of the court to hear and determine the subject matter in controversy between the parties.").

47. *Id.*, ___ S.W.3d at ___.

48. *Id.*, ___ S.W.3d at ___.

Justice Brown urged the state legislature to seal the gap in access to legal relief for guardians that *Hetman* represents.[49] One possible solution mentioned by Justice Brown—a solution that he acknowledged might not apply directly to the facts of *Hetman*—was passage of the UAGPPJA.[50] Justice Brown's tentative endorsement represents the first (and, as of this writing, the only) direct reference to the UAGPPJA in any state court opinion in the nation.

B. National Reform Efforts

The UAGPPJA is the product of a long evolutionary process.[51] Jurisdiction reform has been on the agenda of scholars and practitioners in the field of elder law for decades.[52] When the second National Guardianship Conference met in 2001, its first recommendation was that "standard procedures be adopted to resolve interstate jurisdiction controversies and to facilitate transfers of guardianship cases among jurisdictions."[53] The National Academy of Elder Law Attorneys, the National Guardianship Association, and the National College of Probate Judges followed up that recommendation with an implementation plan that called for a uniform act to be drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL).[54]

The NCCUSL promulgated the UAGPPJA in 2007.[55] Like any uniform law, the UAGPPJA depends on wide adoption for its success.[56] So far, part or all of the UAGPPJA has become law in eighteen states and the District of Columbia.[57] In composing the Act, the uniform law commissioners were

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49. *Id.* at 15, ___ S.W.3d at ___ (Brown, J., concurring).

50. *Id.* at 16 n.8, ___ S.W.3d at ___.

51. Hurme, *supra* note 11, at 119–21.

52. Express calls for a uniform law of the UAGPPJA variety go back at least as far as 1992. *See* A. Frank Johns, Vicki Gottlich & Marlis Carson, *Guardianship Jurisdiction Revisited: A Proposal for a Uniform Act*, 26 CLEARINGHOUSE REV. 647 (1992). The proposal made by Mr. Johns and his co-authors is remarkably similar to the solution ultimately put forward by the NCCUSL. It differs from the UAGPPJA mainly in its call for a national guardianship registry to track guardians and wards. *Id.* at 651.

53. WINGSPAN—THE SECOND NATIONAL GUARDIANSHIP CONFERENCE, RECOMMENDATIONS (2001), *available at* http://www.naela.org/pdffiles/Recommendations.pdf. The first national guardianship conference was held in 1988 and did not address jurisdiction issues. American Bar Association, Guardianship: An Agenda for Reform (1989).

54. Hurme, *supra* note 11, at 120.

55. *Id.* at 121.

56. *See generally* UNIFORM LAW COMMISSION, ANNUAL REPORT, *available at* http://www.nccusl.org/nccusl/docs/AnnReport_08_web.pdf.

57. UNIFORM LAW COMMISSION, A FEW FACTS ABOUT THE UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT (2007), *available at* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uagppja.asp. The juris-

attacking three problems: first, the problem of determining the proper jurisdiction when a guardianship is created;[58] second, the problem of transferring the guardianship from one state to another when a ward moves;[59] and third, the problem of empowering guardians to act for their wards in states other than the one where the guardianship was created.[60] More generally, the UAGPPJA is intended to promote communication and cooperation between courts in different states when dealing with adult guardianships.[61] The Act's approach to all of these problems is discussed in some detail below.

Much of the UAGPPJA is modeled on the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which has been in existence since 1997.[62] All fifty states have adopted the UCCJEA, largely to comply with the federal Parental Kidnapping Prevention Act.[63] Particularly, the UAGPPJA owes the concepts underpinning its rules to determine initial jurisdiction in guardianship actions to the UCCJEA.[64] Under the UAGPPJA, as in child custody cases, jurisdiction for a guardianship determination depends on the home state of the prospective ward.[65] This means that, absent some emergency, only a state where the incapacitated person resided for six consecutive months immediately prior to the guardianship action can exercise jurisdiction.[66] Where no state qualifies as a home state (e.g., in cases where the incapacitated person has been peripatetic, living in no state for

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dictions that have enacted at least part of the UAGPPJA are Alabama, Alaska, Arizona, Colorado, Delaware, District of Columbia, Illinois, Iowa, Maryland, Minnesota, Montana, Nevada, North Dakota, Oklahoma, Oregon, South Carolina, Tennessee, Utah, Washington, and West Virginia. *Id.*

58. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT Prefatory Note, 8A U.L.A. 2 (Supp. 2009).

59. *Id.*

60. *Id.*

61. Hurme, *supra* note 11, at 129.

62. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT Prefatory Note, 8A U.L.A. 3 (Supp. 2009). Child custody proceedings were considered an apt model for adult guardianship reform even before adoption of the UCCJEA. *See* Johns et al., *supra* note 47, at 650.

63. ROBERT E. OLIPHANT & NANCY VER STEEGH, WORK OF THE FAMILY LAWYER 266 (2d ed. 2008). The Arkansas version of the UCCJEA is codified at ARK. CODE ANN. sections 9-19-101 to -405 (LEXIS Repl. 2009). The Parental Kidnapping Prevention Act is codified at 28 U.S.C. § 1738A (2000).

64. Hurme, *supra* note 11, at 122–23.

65. *Id.*

66. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT § 201(a)(2), 8A U.L.A. 15 (Supp. 2009). In an emergency, defined in the act as "a circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare . . . ," a court that would not otherwise have jurisdiction may appoint a temporary guardian for no more than ninety days. *Id.* § 204, 8A U.L.A. 20–22 (Supp. 2009).

more than five months), any state with significant connections to the incapacitated person can step up and exercise jurisdiction.[67]

The limitation of jurisdiction to the incapacitated person's home state is a direct response to the "granny-snatching" phenomenon.[68] When jurisdiction is based solely on the presence of the incapacitated person, as it often is,[69] prospective guardians have an incentive to forum shop, shuttling an incapacitated relative to a state where other relatives or caretakers may find it too difficult or expensive to contest the guardianship.[70] Competing guardianships and years-long legal battles are frequent consequences.[71] Under the provisions of the UAGPPJA, there would be one and only one proper forum for most guardianship determinations.[72] Should a court suspect a litigant of manipulating even the UAGPPJA's strict jurisdiction rules, the UAGPPJA permits the court to decline jurisdiction in favor of a more appropriate forum.[73]

Once a guardianship has been established, the UAGPPJA has provisions designed to ease the transfer of that guardianship to a new state.[74] At present, laws in most states make no provision at all for transfer of guardianships.[75] Instead, a guardian who moves across state lines with a ward will probably have to start a guardianship proceeding from scratch in the new state.[76] Under the UAGPPJA, a guardian may carry an appointment across state lines by filing for transfer of the guardianship first in the court having jurisdiction over the guardianship,[77] then in the state to which it is to

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67. *Id.* § 203(2), 8A U.L.A. 18 (Supp. 2009). Whether a state has significant connections to an incapacitated person is a question for the court. The UAGPPJA offers these factors to consider in making the determination: family connections in the state, time spent in the state, presence of the incapacitated person's property in the state, and administrative ties to the state such as voting registration or filing of tax returns. *Id.* § 201(a)(3), 8A U.L.A. 16 (Supp. 2009).

68. Peter Page, *Dealing with 'Granny Snatching': Model Law Aims to Untangle Adult Guardianship*, NAT'L L.J., Nov. 12, 2007, at 4; *see also* note 10, *supra*, for an example.

69. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT Prefatory Note, 8A U.L.A. 2 (Supp. 2009) ("In nearly all American states, a guardian may be appointed by a court in a state in which the individual is domiciled or is physically present.").

70. *See generally* John MacCormack, *Guardianship Case Lets Loose Calls for Reform*, SAN ANTONIO EXPRESS-NEWS, Mar. 14, 2006, at 1B.

71. *Id.*

72. Hurme, *supra* note 11, at 123.

73. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT § 207, 8A U.L.A. 23 (Supp. 2009). Specifically, a court may decline jurisdiction if it "determines that it acquired jurisdiction to appoint a guardian or issue a protective order because [of] . . . unjustifiable conduct . . . ." *Id.*

74. *Id.* §§ 301–302, 8A U.L.A. 27–29 (Supp. 2009).

75. Hurme, *supra* note 11, at 110–11.

76. *Id.* at 111.

77. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT § 301, 8A U.L.A. 27–28 (Supp. 2009).

be transferred.[78] The entire process can take place before the incapacitated person actually moves, eliminating any "black-out" period between the termination of a guardianship in one state and its re-creation in another.[79]

The UAGPPJA instructs courts to grant and accept transfers liberally under most circumstances. The transferring court need only be satisfied that any interested parties have been given the opportunity to object, that the incapacitated person is in fact moving to the new state, and that adequate care for the incapacitated person has been arranged in the new state.[80] On the receiving end, courts should accept transfers so long as interested parties are given an opportunity to object and the guardian is qualified under local law.[81] Because the UAGPPJA makes no changes to substantive guardianship law, courts receiving transfers are instructed to modify incoming guardianships as necessary to conform to local law.[82] For the guardian, the main benefit of the UAGPPJA's transfer process comes from being spared the need to relitigate the question of the ward's incapacity.[83]

The UAGPPJA makes it easy for guardians to exercise their powers outside of the states where they were appointed. A guardian who wants to act for a ward in another state (e.g., to dispose of property or arrange for health care) need only register the guardianship with a court of that state by presenting a certified copy of the original court order.[84] The guardian is instructed to notify his or her home state of the registration and may not register the guardianship in a state where a guardianship petition is already pending.[85] Once registered, the guardian enjoys all powers conferred by the guardianship that are lawful in the state of registration.[86]

States without the UAGPPJA vary widely in their treatment of foreign guardians.[87] Even within a state, the demands made on a foreign guardian may vary depending on whether the guardian is asking to make decisions about property or health care.[88] The registration and recognition provisions

78. *Id.* § 302, 8A U.L.A. 28 (Supp. 2009).

79. Hurme, *supra* note 11, at 127.

80. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT § 301(d), 8A U.L.A. 31 (Supp. 2009).

81. *Id.* § 302(d), 8A U.L.A. 28 (Supp. 2009).

82. *Id.* § 302(f), 8A U.L.A. 28 (Supp. 2009).

83. Hurme, *supra* note 11, at 138. In Arkansas, a professional evaluation of the prospective ward and a hearing are required before a person can be declared incapacitated. ARK. CODE ANN. §§ 28-65-212 to -213 (LEXIS Repl. 2004).

84. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT § 401, 8A U.L.A. 30 (Supp. 2009).

85. *Id.*

86. *Id.* § 402, 8A U.L.A. 30 (Supp. 2009).

87. Hurme, *supra* note 11, at 103–04.

88. *Id.*

of the UAGPPJA apply equally to guardianships of the person and guardianships of property.[89]

Pervasive in the UAGPPJA is the admonition that courts should communicate and cooperate. Specifically, courts are empowered to ask courts in other states to hold hearings, order investigations or evaluations of persons, order the production of evidence, or order necessary parties to appear.[90] More broadly, the comments to the UAGPPJA advise that "[c]ourt cooperation is essential to the success of this Act."[91] This is so because a number of provisions of the UAGPPJA require guardians to file petitions in more than one court.[92] Communication is also expressly required by the UAGPPJA in cases where competing would-be guardians file petitions in different states.[93]

C. Response to the UAGPPJA

In the two years since its promulgation, the UAGPPJA has garnered endorsements from a number of authoritative organizations in the field of elder law. The National College of Probate Judges and the National Guardianship Foundation, both of which had a hand in drafting the UAGPPJA, adopted nearly identical resolutions that characterized the Act as an effective means of addressing the dilemmas faced by courts in interstate guardianship proceedings.[94] The National Academy of Elder Law Attorneys endorsed the UAGPPJA as a mechanism for resolving frequent multijurisdictional disputes.[95] The Conference of Chief Justices and the Conference of State Court Administrators adopted a joint resolution touting the

89. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT §§ 401–402, 8A U.L.A. 30 (Supp. 2009).

90. *Id.* § 105(a), 8A U.L.A. 12 (Supp. 2009).

91. *Id.* § 105 cmt., 8A U.L.A. 12 (Supp. 2009).

92. *See, e.g., id.* Art. 3, 8A U.L.A. 26–29 (Supp. 2009) (requiring a guardian to file petitions in both the transferring and receiving state when petitioning for the transfer of a guardianship); *Id.* § 401, 8A U.L.A. 30 (Supp. 2009) (requiring a guardian to notify the court in his or her home state before registering the guardianship with a court in another state).

93. *Id.* § 209, 8A U.L.A. 24–25 (Supp. 2009).

94. NATIONAL COLLEGE OF PROBATE JUDGES, RESOLUTION IN SUPPORT OF: THE UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT (2007), *available at* http://www.nccusl.org/Update/Docs/NCPJ%20Endorse.pdf; Letter from the National Guardianship Foundation to the National Conference of Commissioners on Uniform State Laws (May 7, 2007), *available at* http://www.nccusl.org/Update/Docs/NGA%20Endorse.pdf.

95. Letter from the National Academy of Elder Law Attorneys to David Nixon, Commissioner, The National Conference of Commissioners on Uniform State Laws (Feb. 13, 2008), *available at* http://www.nccusl.org/Update/Docs/NAELA%20Endorse.pdf.

"benefits of clear and uniform jurisdiction rules" such as those represented by the UAGPPJA.[96]

The Alzheimer's Association is also on board; its endorsement letter cites a number of hypothetical cases in which the UAGPPJA would ease guardianship transitions for alzheimer's and dementia patients.[97] One scenario of particular interest to the Alzheimer's Association's elderly constituency is the UAGPPJA's application to the "snow bird" population: retired individuals who spend parts of the year in two or more homes, maintaining no permanent residence. In non-UAGPPJA states, where interstate courts do not communicate with one another, it is all too easy for would-be guardians to find themselves shuttling from court to court as each declines jurisdiction.[98] The UAGPPJA makes the proper forum easier to identify.

Another scenario that has been arising more and more often is the aging parent who maintains a permanent home but pays extended visits to children in another state. If one of those children suspects that the parent needs the help of a court-appointed guardian, the court in the state where the parent is present needs to be able to communicate with the court in the state where the parent is domiciled to determine which court should exercise jurisdiction. The Alzheimer's Association supports the UAGPPJA because it would facilitate that communication.[99]

Another potential benefit of the UAGPPJA, cited by the American Bar Association Commission on Law and Aging, is the prevention of elder abuse.[100] The UAGPPJA stands to reduce elder abuse not just because the Act expressly requires a court to consider whether abuse or neglect has occurred when deciding whether to exercise jurisdiction, but because the interstate communication facilitated by the Act makes it less likely that abuse will go undetected.[101] The consensus among elder law experts seems to be

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96. Letter from the Conference of Chief Justices and the Conference of State Court Administrators to Martha Lee Walters, President, The National Conference of Commissioners on Uniform State Laws (Sept. 29, 2008), *available at* http://www.nccusl.org/Update/Docs/CCJ%20Endorse.pdf.

97. ALZHEIMER'S ASSOCIATION, ADULT GUARDIANSHIP JURISDICTION CASE STATEMENT, *available at* http://www.nccusl.org/Update/Docs/Alzheimers%20Assoc%20Support%20Letter.pdf.

98. *Id.*

99. *Id.*

100. Lori A. Stiegel & Erica F. Wood, *Nine Ways to Reduce Elder Abuse Through Enactment of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act*, *available at* http://www.abanet.org/aging/guardianshipjurisdiction/nine_ways.pdf.

101. *Id.*; *see also* UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT § 206(c), 8A U.L.A. 22 (Supp. 2009) ("In determining whether it is an appropriate forum, the court shall consider all relevant factors, including . . . (2) whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation.").

that universal adoption of the UAGPPJA would benefit judges, attorneys, guardians, and wards.

III. PROPOSAL: IMPLEMENTING THE UAGPPJA IN ARKANSAS

A. The UAGPPJA in the Arkansas Code: How It Would Change Existing Law

Because the UAGPPJA is intended to supplement, not replace, substantive guardianship law, its passage in Arkansas would conflict with few existing statutes. A sub-committee of the Arkansas Bar Association Uniform Laws Committee has studied the issue and identified a small handful of statutes that might need to change with the adoption of the UAGPPJA.[102] Chief among them are provisions that confer jurisdiction in guardianship proceedings based on the "residence" or "domicile" of the prospective ward.[103] These would need to change to reflect the "home state" concept preferred by the UAGPPJA.[104] Arkansas's provisions for recognition of foreign guardians would also largely be replaced by the UAGPPJA.[105] Lastly, the Arkansas statute that equates conservatorship with guardianship for jurisdiction purposes[106] would be made redundant by the UAGPPJA, which applies to both.

On the whole, implementing the UAGPPJA in Arkansas would be easy because it would make only modest changes to existing law. Its biggest departure from the present law, the use of an incapacitated person's home state to determine initial jurisdiction, is already familiar to judges in Arkansas and throughout the United States because of the UCCJEA's long-standing

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102. Letter from John Mikesch and Amy Johnson to the Uniform Laws Committee of the Arkansas Bar Association (Nov. 16, 2007) (on file with author).

103. The Adult Maltreatment Custody Act, ARK. CODE ANN. section 9-20-108 (LEXIS Repl. 2009), permits protective proceedings to be brought in the county where "the maltreated adult resides." For adult guardianship proceedings, ARK. CODE ANN. section 28-65-202(a) (LEXIS Repl. 2004) provides that "[t]he venue for the appointment of a guardian shall be: (1) In the county of this state which is the domicile of the incapacitated person; or (2) If the incapacitated person is not domiciled in this state, but resides in this state, then in the county of his or her residence . . . ."

104. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT § 201(a)(2), 8A U.L.A. 15 (Supp. 2009); *see also supra* note 49 and accompanying text.

105. ARK. CODE ANN. §§ 28-65-601 to -602 (LEXIS Repl. 2004) (permitting guardians from out of state to petition Arkansas courts for permission to control their wards' property in Arkansas). Interestingly, section 28-65-602 expressly acknowledges that there may be two competing guardians: one appointed in Arkansas and another appointed elsewhere. That Arkansas even needs a statutory provision that contemplates this is symptomatic of the need for better interstate communication between courts when guardianships are created.

106. ARK. CODE ANN. § 28-67-102 (LEXIS Repl. 2004).

use of the home state concept in child custody cases.[107] Attorneys should find it easy to adjust to the change for much the same reason. Prospective guardians, too, could be expected to welcome the predictable, bright-line rules associated with home state determinations. By comparison, the concepts of residency and domicile are vague and subject to manipulation.[108]

The other provisions of the UAGPPJA would serve to clarify more than to alter existing law. The UAGPPJA's transfer provisions would, if anything, reduce congestion in probate courts. At present, the law does not guide a court's decision as to whether to reopen the question of an incoming ward's incapacity. Under the UAGPPJA, uncontested transfers would be purely procedural matters.[109] When it comes to registration of foreign guardianships, the UAGPPJA differs little from Arkansas law as it now stands.[110] Wards could only benefit from the addition of the UAGPPJA's notice requirements to Arkansas's already generous recognition standards. No part of the UAGPPJA is likely to present problems for Arkansas's judges or elder law practitioners.

B. The UAGPPJA in the Trenches: How It Might Have Changed *Hetman v. Schwade*

More to the point, adoption of the UAGPPJA in Arkansas would be likely to solve problems like the one presented by *Hetman v. Schwade*. At first blush, *Hetman* seems to be an example of existing guardianship jurisdiction law working perfectly. Neither Pennsylvania nor Arkansas has adopted the UAGPPJA, yet Mrs. Vicari made a smooth transition from Pennsylvania to Arkansas and from one guardian to another. But even those parts of the *Hetman* case that went well might have gone better under a uniform legal scheme.

Ms. Schwade moved her mother to Arkansas without the Pennsylvania court's permission, then asked the Arkansas court to bless the move. This attempted end-run around the Pennsylvania court system is exactly the kind of forum-shopping the UAGPPJA is intended to prevent. Existing law did not require the Arkansas court to decline jurisdiction, but it wisely did so. Afterward, the move from Pennsylvania to Arkansas proceeded much as it

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107. *See supra* note 26 and accompanying text.

108. *See, e.g.*, Martin v. Simmons First Trust Co., 371 Ark. 484, 486–88, 268 S.W.3d 304, 307–08 (2007) (stating that a legally incapacitated person cannot form the requisite intent to change his or her domicile). One can see how such rulings are problematic for guardians who want to move their wards across state lines.

109. *See supra* notes 74–83 and accompanying text.

110. For a discussion of the UAGPPJA's provisions for registration of foreign guardians, see *supra* notes 84–86 and accompanying text. Arkansas law on the subject is briefly considered *supra* at notes 29–31 and accompanying text.

would have if Arkansas and Pennsylvania had been UAGPPJA states: Ms. Schwade initiated proceedings in Pennsylvania court, then perfected the change of guardianship in Arkansas court. Had the parties and courts been guided by the UAGPPJA, the chief difference would have been that all of the court proceedings—in Pennsylvania and Arkansas—could have taken place before Mrs. Vicari moved.[111] That would have been an improvement for two reasons. First, Mrs. Vicari would have been spared the risk of having to move twice if Ms. Schwade's bid for guardianship fell apart in the Arkansas court. Second, there would have been no transitional period during which Mrs. Vicari was living in Arkansas without an Arkansas-appointed guardian.

The circuit court that heard Ms. Schwade's petition for Arkansas guardianship might also have benefited from the UAGPPJA's clarifying language. The Arkansas court's extension of full faith and credit to the Pennsylvania court's determination that Mrs. Vicari was incapacitated seems to have been a matter of comity rather than law. Indeed, the plain language of Arkansas's statutes seems to disfavor reliance on even an Arkansas court's previous determination of incapacity.[112] The UAGPPJA would permanently resolve that question in favor of full faith and credit.[113] Under the UAGPPJA, the only reasons to reject the transfer of a guardianship are the ineligibility of the foreign guardian to serve as a guardian under local law or a legitimate objection by the incapacitated person or other interested party.[114]

Of course, those are the parts of the *Hetman* case that went well. The heart of the matter was Ms. Schwade's attempt to demand an accounting from Ms. Hetman. That demand was an appeal to substantive guardianship law, not the procedural law affected by the UAGPPJA. Even so, the procedures provided by the UAGPPJA could have saved Ms. Schwade a good deal of time, money, and grief.

For Ms. Schwade, the upshot of her trip to the Arkansas Supreme Court was outright dismissal of her case. That need not have happened under the UAGPPJA. The *Hetman* court held that an Arkansas court could not

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111. Hurme, *supra* note 11, at 127.

112. *See* ARK. CODE ANN. § 28-65-220 (LEXIS Repl. 2004) ("When a guardian dies, is removed by order of the court, or resigns . . . the court may appoint another guardian in his [or her] place in the same manner and subject to the same requirements as are provided in this chapter for an original appointment of a guardian.").

113. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT § 302(g), 8A U.L.A. 29 (Supp. 2009). *See also* Hurme, *supra* note 11, at 136–37 ("The Uniform Adult Guardianship and Protective Proceedings Jurisdiction act has states set aside . . . procedural and substantive distinctions in favor of giving effect to the Full Faith and Credit Clause.").

114. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT § 302(d), 8A U.L.A. 28 (Supp. 2009).

order an accounting from Ms. Hetman on its own authority, but the UAGPPJA expressly authorizes courts to ask a court in another state to "order a person in that state to produce evidence"[115] or to "order any appropriate investigation of a person involved in a proceeding."[116] Naturally, courts in UAGPPJA states are also authorized to comply with such requests.[117] Thus, under a UAGPPJA regime the Arkansas court would not have needed personal jurisdiction over Ms. Hetman or subject matter jurisdiction over her guardianship. Any demands on Ms. Hetman would have been made by the Pennsylvania court at the Arkansas court's request.

Under the UAGPPJA, *Hetman* would not have been a question of whether an Arkansas court could order an accounting from a Pennsylvania guardian. It would have been a question of whether Ms. Hetman could be forced to provide an accounting to any court.[118] While that question is beyond the scope of this note, the point is that Ms. Schwade could have litigated the issue from start to finish in Carroll County Circuit Court. Instead, she was forced to go to the highest court in the state and is still left to decide whether it is worth her time and energy to begin the litigation anew in Pennsylvania, literally a thousand miles from home.[119] Given that the object of Ms. Schwade's legal odyssey was to get to the bottom of some thirty thousand dollars in accounting irregularities,[120] one has to wonder if another round of litigation would be worth the costs.

IV. CONCLUSION

Adoption of the UAGPPJA would be good for Arkansas. With a dozen states already on board, the UAGPPJA is approaching the critical mass it needs to become standard operating procedure nationwide. The Act's similarities to the long-standing UCCJEA would make its implementation smooth and easy, and prompt enactment of adult guardianship reform would

115. *Id.* § 105(a)(2), 8A U.L.A. 12 (Supp. 2009).

116. *Id.* § 105(a)(4), 8A U.L.A. 12 (Supp. 2009).

117. *Id.* § 105(b), 8A U.L.A. 12 (Supp. 2009).

118. As the opinions in *Hetman* pointed out, the answer to that question is not obvious. Under Pennsylvania law, the court had the option of demanding an accounting from Ms. Hetman upon termination of the guardianship. It did not do so. Hetman v. Schwade, 2009 Ark. 302, at 2 n.3, ___ S.W.3d ___, ___. However, the Pennsylvania court has the power to reopen guardianship cases to investigate allegations of fraud. *Id.* at 15, ___ S.W.3d at ___ (Hannah, C. J., concurring). For a discussion of guardianship monitoring practices generally, see Karp and Wood, *supra* note 3.

119. This was the solution envisioned by the Chief Justice in his *Hetman* concurrence: "Schwade is not left without a remedy. The Orphans' Court in Pennsylvania specifically ordered that the record in that case be retained. An accusation that a guardian supervised by the Pennsylvania courts defrauded a ward may result in . . . ordering an accounting by Hetman." *Hetman*, 2009 Ark. 302, at 15, ___ S.W.3d at ___ (Hannah, C. J., concurring).

120. *Id.* at 3, ___ S.W.3d at ___ (majority opinion).

head off the sort of federal intervention that precipitated adoption of the UCCJEA.[121] Most importantly, the UAGPPJA would serve a real need in Arkansas. As *Hetman* demonstrates, guardianship jurisdiction reform is not just for headline-grabbing cases of would-be heirs kidnapping their wealthy elders. Movement of guardians and their adult wards across state lines is routine in our modern, mobile society. Arkansas needs a law that treats these movements as routine. Guardians, wards, and elder law attorneys gain little from opinions like *Hetman*, which only delineate the relief that Arkansas courts cannot supply. By enacting the UAGPPJA, the Arkansas legislature would provide a clear and comprehensive guide to caretakers of the dependent and elderly who move into and out of the state.

*Stephen Rauls**

121. There is no question that Congress considers state-by-state variation in guardianship law a problem. In 2004, the U.S. Government Accountability Office reported that "jurisdictional issues complicate oversight" of guardianships. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 4, at 9.

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