

WRITTEN TESTIMONY OF THE STANDING COMMITTEE
ON THE UNIFORM PROBATE CODE AND PROBATE
COURT PRACTICES OF THE JUDICIARY OF THE STATE
OF HAWAII RE: HB293 RELATING TO PROTECTIVE PROCEEDINGS

HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY

FEBRUARY 3, 2009; 2:00 p.m.

This written testimony is submitted on behalf of the Standing Committee on the Uniform Probate Code and Probate Court Practices of the Judiciary of the State of Hawaii (the "Probate Committee"). The Probate Committee was organized pursuant to Resolution No. 91-25, adopted by the sixth annual Hawaii State Judicial Conference. The Probate Committee is comprised of four circuit court judges, each representing a Circuit Court of the Judiciary of the State of Hawaii and nine attorneys who practice estate planning and probate law, all of whom have been appointed by the Chief Justice of the Supreme Court of the State of Hawaii. These comments represent the views of the attorney members of the Probate Committee only.

The Probate Committee supports HB 293.

The purpose of HB 293 is to restore flexibility in criteria applied by the court in deciding whether appointment of a conservator is appropriate, without impairing due process rights of respondents in protective proceedings.

HRS §560:5-401 authorizes the court to appoint a temporary or permanent conservator or otherwise protect an individual's property if certain statutory requirements are met. HRS §560:5-401(1) deals with protection of the property of a minor because of the individual's minority. HRS §560:5-401(2) applies to both minors and adults.

One requirement of HRS §560:5-401(2) is that the court determine that the individual whose property is to be protected, whether minor or adult, is "unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or to make or communicate decisions, even with the use of appropriate and reasonably available technological assistance, or because the individual is missing, detained, or unable to return to the United States."

Act 161, SLH 2004, Relating to Guardianship and Protective Proceedings, which took effect on January 1, 2005, repealed the prior version of HRS §560:5-401 and adopted the present language. The prior statutory language provided, in pertinent part, that appointment of a guardian of a person's property or other protective order could be made if the court determined that "the person is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, disappearance or other incapacity."

In theory, the provisions of the new Uniform Guardianship and Protective Proceedings Act (UGPPA) promote independence through the tailoring of protective arrangements to the least restrictive means. In practice, however, the current statutory language has had unintended consequences: the court cannot appoint a conservator for an individual with physical challenges who might welcome and benefit from a protective arrangement if the individual can receive and evaluate information and can make and communicate decisions.

To remedy this situation, this bill partially restores statutory criteria applicable prior to January 1, 2005, when the UGPPA took effect. The revised language extends eligibility for protective arrangements beyond those unable to manage property or business affairs because of “an impairment in the ability to receive and evaluate information or make or communicate decisions” to include those unable to manage because of “another physical, mental or health impairment.”

Heightened due process afforded under the UGPPA are not affected by this bill. Accordingly, this measure will improve conditions for those seeking protection without detriment to those who do not.

Respectfully submitted this 2nd day of February, 2009.

By: _____
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