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FISCAL IMPACT REPORT

ORIGINAL DATE 02/10/09
 LAST UPDATED 03/07/09 **HB** _____

SPONSOR Wirth

SHORT TITLE Uniform Probate Code Revision **SB** 497/aSJC

ANALYST Wilson

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		Indeterminate See Below	Indeterminate See Below	Indeterminate See Below	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB161, SB 135 & SB 178
 Conflicts with HB462

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Aging & Long Term Services Department (ALTSD)
 Developmental Disabilities Council (DDPC)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to SB 497 does the following:

Clarifies that “claims” does not include estate or inheritance taxes or demands or disputes regarding title of a decedent an {sic} incapacitated person or a minor protected person to specific assets alleged to be included in the estate.

Clarifies that “interested person” includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent a minor protected or an incapacitated person.

Removes “ward” from several sections and replaces it with “protected person”.

Clarifies that “parent” means a parent whose parental rights have not been terminated or relinquished.

Clarifies that a “protected person” means a minor or other person for whom a guardian or conservator has been appointed or other protective order has been made.

In addition the following is added to the bill:

A non vested property interest is invalid unless when the interest is created, it is certain to vest or terminate no later than 21years after the death of an individual then alive; or the interest either vests or terminates within 90 years after its creation.

A general power of appointment not presently exercisable because of a condition precedent is invalid unless when the power is created, the condition precedent is certain to be satisfied or to become impossible to satisfy no later than 21years after the death of an individual then alive; or the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

A non general power of appointment or a general testamentary power of appointment is invalid unless when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or the power is irrevocably exercised or otherwise terminates within 90 years after its creation.

In determining whether a non vested property interest or a power of appointment is valid under each of the above three paragraphs, the possibility that a child will be born to an individual after the individual's death shall be disregarded.

If in measuring a period from the creation of a trust or other property arrangement, the amendment has language in a governing instrument that seeks to disallow the vesting or termination of any interest or trust beyond; or seeks to postpone the vesting or termination of any interest or trust until or seeks to operate in effect in any similar fashion upon, the later of:

1. the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or
2. the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement. that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

The rest of the amendment changes are clean up and renumbering.

Synopsis of Original Bill

Senate Bill 497 updates and makes technical revisions to the Uniform Probate Code (UPC), the Uniform Trust Code (UTC), and the Uniform Principal and Income Act (UPIA). It cleans up language and provides clarification to those acts. It also enacts the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). In addition the bill amends and recompiles the Uniform Disclaimer of Property Interests Act (UDPIA).

UPC

SB 497 expands the application of the code to the disclaimer of property interests by persons in New Mexico, certain kinds of trusts and other governing instruments that are governed by the laws of New Mexico, and the apportionment of taxes on estates subject to tax by New Mexico.

The UPC is also amended to expand the subject matter jurisdiction of the district court to include survivorship and related accounts and similar property interests, disclaimer of interests in property, apportionment of taxes on estates and, in addition to trusts, other governing instruments except wills.

The bill amends the UPC to provide that in judicial proceedings involving trusts, or estates of decedents, minors, protected persons or incapacitated persons, and in judicially supervised settlements, an order binding the sole holder or all co-holders of a general testamentary power of appointment binds other persons to the extent their interests as objects, takers in default or otherwise are subject to the power. If no conservator or guardian has been appointed, a parent may represent a minor child.

SB 497 provides that an emancipated minor who is of sound mind may make a will, and amends the bill to provide that a will or any part of a will is revoked by executing another subsequent document or expressly revokes the previous will or part thereof.

SB 497 enacts new sections of the UPC as follows:

- The court may reform the terms of a governing instrument to conform the terms to the transferor's intention if it is proved by clear and convincing evidence that the transferor's intent and the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.
- The court may modify the terms of a governing instrument in a manner that is not contrary to the transferor's probable intention to achieve the transferor's tax objectives.
- The court may provide that the modification has retroactive effect.

The bill amends the section of the bill, governing the transfer of title to a homestead to a surviving spouse by affidavit, to raise the cap on the value of a homestead from \$100,000 to \$500,000.

UPIA

SB 497 expands and clarifies sections governing deferred compensation, annuities and similar payments and income taxes.

UDPIA

SB 497 recompiles the Uniform Disclaimer of Property Interests Act.

UAGPPJA

The UAGPPJA was drafted by the National Conference of Commissioners on Uniform State Laws and approved and recommended for enactment in 2007. To date, four states have adopted the Act. The commissioners summarize the Act as follows:

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. UAGPPJA has a much narrower scope, dealing only with jurisdiction and related issues. The new UAGPPJA addresses many problems relating to multiple jurisdiction, transfer, and out of state recognition. It has been endorsed by the National Guardianship Foundation and the National College of Probate Judges. Endorsement by the American Bar Association is expected at the ABA's 2008 mid-year meeting.

Due to increasing population mobility, cases involving simultaneous and conflicting jurisdiction over guardianship are increasing. Even when all parties agree, steps such as transferring a guardianship to another state can require that the parties start over from scratch in the second state. Obtaining recognition of a guardian's authority in another state in order to sell property or to arrange for a residential placement is often impossible. The UAGPPJA will, when enacted, help effectively to address these problems.

The UAGPPJA permits communication by a New Mexico court with a court in another state concerning a proceeding arising pursuant to the act. The UAGPPJA provides for cooperation between a New Mexico court and a court of another state. The act allows a court on its own motion to order that the testimony of a witness be taken in another state in a guardianship or protective proceeding.

The UAGPPJA sets out factors for the court to consider in determining whether a respondent has a significant connection with a particular state. The act specifies the circumstances providing a New Mexico court with jurisdiction to appoint a guardian or issue a protective order for a respondent, and the circumstances under which a New Mexico court lacking jurisdiction has special jurisdiction.

SB 497 also addresses exclusive and continuing jurisdiction, determination of an appropriate forum, when a New Mexico court may decline jurisdiction or exercise limited jurisdiction or continue jurisdiction. The act also addresses the rules that apply when a petition for the appointment of a guardian or issuance of a protective order is filed in New Mexico and in another state and neither petition has been dismissed or withdrawn.

The UAGPPJA also provides that a guardian or conservator appointed in New Mexico may petition the court to transfer the guardianship or conservatorship to another state. The act provides for the registration foreign judgment governing guardianship orders and protective orders in a New Mexico court.

UTC

SB 497 amends provisions of the Uniform Trust Code to provide for the application and relevancy of amendments to the code.

SB 497 appeals and recompiles various statutory sections.

FISCAL IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary will be proportional to the enforcement of this law and commenced proceedings provided for under the Guardianship and UAGPPJA and other amended acts. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. Conversely, by providing a jurisdictional roadmap within the UAGPPJA - most often currently crafted in a time- and resource-consuming, case-by-case manner - adoption of the act may lessen the burden upon judicial resources.

SIGNIFICANT ISSUES

The DDPC provided the following:

There are no significant issues adversely affecting guardianship of adults. While this bill is not from a specific recommendation from the Guardianship Task Force, it is supported by the state agencies involved in the task force, and was coordinated with those state agencies. The task force focused on in-state matters rather than on inter-state.

To address problems listed above, in 2007 the Uniform Law Commission (ULC) approved the UAGPPJA to clarify jurisdiction and provide a procedural roadmap for addressing multi-state dilemmas. The UAGPPJA cannot work as intended - providing jurisdictional uniformity and reducing conflict - unless all or most states adopt it.

The American Bar Association endorsed the UAGPPJA in August 2007, and there is support from the American College of Trust and Estate Counsel Foundation. The ABA Commission's *Joint Campaign for Uniform Guardianship Jurisdiction* is also funded by the ABA Section of Real Property, Trust and Estate Law and the Uniform Law Foundation.

This bill will improve the interaction between states and with tribal courts related to guardianship and will improve performance by clarifying jurisdictions, roles and responsibilities, improving communications, and helping prevent inconsistencies and conflicts of law. Adult guardianships often involve more than one state. As a result, judges, guardians, and lawyers frequently face questions about:

- determining which state has jurisdiction to appoint a guardian or conservator;
- transferring an existing guardianship from one state or country to another; and
- recognizing and giving full faith and credit to a guardianship order from another state.

Lack of clear jurisdictional guideposts can take up vast amounts of time for courts and lawyers, and:

- cost thousands of dollars, burden family members, and exacerbate family conflict;
- often take years to resolve and waste precious court resources addressing these issues;
- facilitate “granny snatching” and other abusive actions; and
- may result in physical or emotional harm to the incapacitated person.

ADMINISTRATIVE IMPLICATIONS

Jurisdictional questions can drain vast amounts of resources and time for courts. By addressing these issues and providing guidance, the use of judicial resources may be lessened.

RELATIONSHIP

HB 161, Guardian of Protected Person Responsibility does not present a conflict, although it amends some of the same sections in SB 497 related to guardianship of adults. HB161 implements the recommendations from the Guardianship Task Force related to changes to statutes. HB161 includes improvements in the interaction of different statutes related to guardianship, including amending the:

Uniform Health Care Decisions Act

- Mental Health Care Treatment Decisions Act
- Mental Health and Developmental Disabilities Code
- Probate Code

HB 161 amends the same section of statute as SB 178, Interstate Mental Health Compact

A common change among all these and other statutes is to replace the use of ward with protected person for the adult or emancipated minor for whom a guardian has been appointed.

SB135 does not present a conflict, nor does it amend any of the same sections in SB497 related to guardianship of adults. SB135 will conduct a review of guardian cases in the Second Judicial District to assess the scope of the need for a monitoring program and whether site visits to guardians are productive monitoring tools.

HB462 conflicts with SB497; HB462 proposes an additional exception to the Statutory Rules Against Perpetuities which would permit a trust to hold personal property in perpetuity.

TECHNICAL ISSUES

ALTSD notes that SB 497 should be coordinated and reconciled with HB 161 and SB 178 to eliminate conflicts

OTHER SUBSTANTIVE ISSUES

This bill helps reduce elder abuse. Elder abuse is used generically to include physical and sexual abuse, financial exploitation, psychological or emotional abuse, neglect by others, abandonment, and sometimes self-neglect.

Elder abuse is committed by family members, friends, fiduciaries including guardians and conservators, paid and volunteer caregivers, and others in a relationship of trust to the victim.

Guardianship may be a necessary tool to stop elder abuse. Guardianship may be required to remove an incapacitated victim of financial exploitation from the control of the exploiter or is needed to obtain medical care for an incapacitated victim of neglect.

At other times, however, guardianship may be the cause of elder abuse. A guardian may financially exploit or neglect the incapacitated person for whom the guardian was appointed to act.

The failure of courts to monitor guardianships leaves older people vulnerable to elder abuse.

DW/mc:svb