From the Desk of the Outgoing President

2022 is the fifty-fourth anniversary of our National College of Probate Judges, and it has been my pleasure and honor to serve as your President since my inauguration at our very successful Fall 2021 Conference last November in beautiful and historical Savannah, Georgia, where so many of you helped me to make my term a very successful year for NCPJ. We have grown since 1968 as the leading judicial organization in the United States for courts with probate jurisdiction.

In 1968 as we started on our professional journey we were usually primarily involved in presenting seminars for our membership and other probate professionals. We organized in 1974 to presenting our conferences annually. We rarely achieved a large attendance at our conferences during these early years of our existence, averaging about 50 judge attendees a year but in the latter 1970s we brought our yearly registration to about 150 and we often had to decline requests to participate because of the lack of suitable accommodations.

Before 1968 probate judges nationwide lacked their own organization which existed as our own place to go for educational and cultural advancement and to generate our own organization as did other professional groups. With NCPJ we now have our own forum for promoting the efficient administration of probate justice in all courts in the United States which exercise probate jurisdiction which primarily involves guardianships and conservatorships of incapacitated adults and minor children, inheritance rights, protection of the assets of persons in need of protection, adoptions, name changes and other matters involving the settlement of the financial affairs of decedents who die with or without a will.

Last May it was my honor to preside over a very successful Spring 2022 NCPJ conference in Colorado Springs in the shadow of Pikes Peak, and this summer to represent NCPJ at the National Conference of the American Judges Association in Philadelphia where I was invited to speak by the President of AJA at their Annual Business Meeting, where it was proposed that NCPJ and AJA begin discussions on dual membership of our respective organizations. We are looking forward to a very successful professional association with AJA in the near future to our mutual benefit.

NCPJ’s progress goes on and on, as we reach even newer heights in improving probate justice nationwide. I was not there at the beginning of NCPJ in 1968 but I have been a member for over 40 years as we have brought NCPJ into an organization of national significance. I know that you all remain as committed as I am to our efforts to improving the National College of Probate Judges even more. We are optimistic that we will do so as we continue our dedication to improving probate justice nationwide.

My term as your President will come to an end at the November 2022 meeting of our NCPJ in Destin, Florida where we are planning many educational presentations.

The COVID pandemic slowed NCPJ down a bit in recent years, but we are now poised to make a lot of professional progress. Our Executive Committee has unanimously approved a proposal for necessary Bylaws changes, approved unanimously by our Bylaws Committee, which we as an organization will be voting on at our annual Business Meeting in Destin this November 2022, and we have many other existing proposals for improving NCPJ’s progress over the coming years. Please join us at our upcoming conferences next year in Tucson, Arizona and Tampa, Florida as we continue our dedication to our founding principles to improve probate justice in all courts in the United States that exercise probate jurisdiction.

NCPJ extends a special thanks to Judge Heather Galvin, who co-edited and secured articles for this edition of the Journal.

James P Dunleavy
NCPJ President 2021-2022
**Augmented Estates and Spouses**

By: Michael Lentz, Esq. and Brianna Pickhardt, Esq. of Lawrence Law Firm Baltimore, MD

Virtually all states provide a spouse with the statutory right to elect against a decedent’s will and instead inherit some statutorily-defined portion of the decedent’s estate. Such statutes, of course, protect surviving spouses from their negligent or contumacious former spouses by guaranteeing that a surviving spouse inherits a certain minimum portion of the decedent’s estate.

However, spouses could still disinherit each other by inter vivos transfers of assets to other joint ownership vehicles – primarily revocable trusts. Many states now attempt to close this loophole by using an “augmented” estate, consisting not only of the decedent’s probate estate, but also assets that a decedent transferred inter vivos – the most common statutory description is “non-probate transfers to others.” See, e.g., Alaska Stat. § 13.12.202 (2019); VA Code Ann. § 64.2-308.6 (2016). The augmentation schemes vary in terms of what gets added back to the probate estate, whether other benefits to the survivor (such as homestead exemptions, family allowances, and inter vivos transfers to the survivor) reduce the augmented estate, and whether the survivor’s share of the augmented estate varies with the length of the marriage.

Augmentation is fraught with complications, as it frustrates the intent of a decedent and may also interfere with property or expected inheritance of third parties. Where an augmented estate substantially exceeds a decedent’s probate estate, a spouse entitled to one half of the augmented estate might be entitled to force the liquidation of non-probate assets.

While a full fifty-state survey is beyond the scope of this article, the article will highlight one of the newest and most protective augmented estate statutes, adopted by the General Assembly of Maryland, effective on October 1, 2020 [MD Code Ann., Est. & Trst, § 3-404 (2020)], as well as a common sense middle ground that provides spousal protection while eliminating some of the complications associated with broad, general augmentation.

Under Maryland’s prior elective share statute, surviving spouses had no claim to any non-probate assets. Disinherited spouses often became frustrated litigants and forced courts to decide, on a case-by-case basis, whether non-probate assets should be included in the elective share calculation.

Maryland’s Augmented Spousal Elective Share Law includes virtually all of a decedent’s current and former assets in the estate for the purposes of calculating a spouse’s elective share. In particular, it includes, in addition to the probate estate:

- All revocable trusts of the decedent;
- All property with respect to which the decedent, immediately before death, held a qualifying power of disposition;
- All qualifying joint interests of the decedent; and
- All qualifying lifetime transfers of the decedent.


Maryland’s move to offer additional protection to surviving spouses is not unique. Each state’s legislative solution for calculating a spousal elective share falls into one of three broad categories. The national results run the gambit from states where elective shares are expressly prohibited (usually community property states), to states where the spouse’s elective share is calculated from only probate assets, to states where the elective share is calculated using an augmented estate including both probate and non-probate assets.

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Augmented Estates and Spouses (continued from page 2)

Each of the states making up the third broad category includes different non-probate assets in the augmented estate. At one end of the spectrum, non-probate assets are included in the augmented estate only to the extent that the surviving spouse can prove that the transfer was intended to disinherit them. See e.g., In re Estate of Thompson, 2014 Ark. 237, 434 S.W. 3d 877 (2014) (trust assets included in estate for elective share purposes because husband transferred them to trust intending to disinherit wife). Maryland bookends the other side of the spectrum as the only state including virtually all non-probate assets in the augmented estate.

For example, Maryland includes “qualifying lifetime transfers,” which are any transfers during the decedent’s life in which the decedent retained, through or after death, any one of six interests, including possession, use or enjoyment, or the right to receive income from the property. In between these two bookends, states range from broadly including non-probate assets in the augmented estate [e.g., Kansas includes all non-probate transfers to persons other than the surviving spouse (see KSA 59-6a203)] to including only a subset of non-probate assets [e.g., Pennsylvania includes only 1/3 of the decedent’s non-probate property (see 20 PA Code § 2203)].

Augmentation in any form presents practical issues for spouses, and therefore for litigators and judges. The estate’s inventory reports and required accountings make valuing the decedent’s probate assets a comparatively easy task. However, a surviving spouse may well not know about all of the assets that might come within an augmented estate. A spouse with significant questions, but no meaningful avenue for discovery, might be forced to caveat a will or initiate other litigation outside of a probate court, if only to obtain subpoena power to investigate non-probate assets.

Such litigation immediately raises jurisdictional and procedural questions. Can a probate court exercise jurisdiction over, or compel information about, non-probate assets? Is the time for electing against the will extended through the close of the caveat?

The narrow approach to augmentation adopted by the Supreme Court of Arkansas in In re Estate of Thompson has much to recommend it. By allowing a spouse to claw back transfers undertaken with nefarious intent, it provides the protection that forms the underpinning for all elective share legislation. But, by requiring a spouse to prove nefarious intent, the Arkansas approach also protects the expressed will of a decedent, provides a framework for surviving spouses to obtain pertinent information, and minimizes the risk of unforeseen consequences to third parties.

Minor Guardianship

By: Deborah Cochelin, Esq. of Deborah Cochelin Law Office in Seattle, WA

Development of Minor Guardianship

Historically, a minor guardianship was a legal relationship created by the court for appointing a non-parent as a child’s substitute parent when a legal parent is unable to manage the minor’s property and person. Minor guardianship was never considered either family law or probate law but rather was reserved unto the Probate or Orphans’ Court since arising most often in the context of death and involving management of a minor’s estate. For that reason, a minor guardianship is frequently referred to as a probate guardianship.

The present day concept of minor guardianship originated in English law. During American colonial times, these laws were adopted and applied when children for whom courts appointed guardians were predominantly legal orphans, “incapacitated” by their youth, and who had inherited money and property from their fathers. Even ancient biblical translations interpreted that legal orphans were fatherless children, irrespective of whether the mother was alive and remarried. Mothers simply had no standing and limited rights in these situations.

Traditionally, when children needed immediate care for their personal protection, the basis for the minor’s personal protection in kinship care or fictive kin care is as deeply rooted as the origins of minor guardianship. This care occurs when a person functions as a child’s full-time parent without the court’s intervention under informal arrangements. These “first-responder” type persons might include siblings,
Minor Guardianship (continued from page 3)

grandparents, aunts, and other close relatives or other adults who have a family relationship or ties with the child, such as a neighbor or teacher. Incidences which prompt kinship care may include illness, poverty, incarceration, death, violence, or other family crises. Further, the relationship is generally respected on the basis of the family’s cultural values and emotional ties.

Children who did not have the benefit of kinship caregivers, or even one living parent, were destined to an orphanage which formed the roots for today’s state implementation of a foster system, including group homes and institutions. Many orphanages were formed in response to the children left with one or no parents. Institutional orphanages were uncommon before the early 19th century. In 1729, the first orphanage in the United States was created. According to “Orphanage: An Historical Overview,” the orphanage institution was created “to care for white children” who had been orphaned by a “conflict between Indians and Whites at Natchez, Mississippi.” Orphanages soon increased, and between 1830 and 1850 alone, private charitable groups established 56 children’s institutions in the United States. Not soon thereafter, the Civil War created a surge of minor children who needed parents.

The next wave of care needed for minor children sprang from newly arrived immigrants and those children of the destitute and the poor. For that reason, orphans were considered to be in the same class as the poor and were dealt with similarly. From these early times, since it was up to the local governments to deal with the poor, the State assumed responsibility for these children.

The Orphan Train Movement of the late 19th century provided some relief by delivering children to various parts of the country in an elaborate scheme which was good and bad. Operating between 1854 and 1929, this supervised welfare program transported and relocated about 250,000 children from crowded Eastern cities of the United States to foster homes located largely in rural areas of the Midwest. The co-founders of the Orphan Train Movement claimed that these children were orphaned, abandoned, abused, or homeless, but this was not always true. They were mostly the children of new immigrants and the poor and destitute families living in these cities. Many criticisms of this welfare program included ineffective screening of caretakers, insufficient follow-ups on placements, and using many children as strictly slave farm labor. Many children lost their identities through forced name changes and moves. Not all train children were actually true orphans but were made into orphans by forced removal from their families to break up immigrants from undesirable backgrounds.

The Progressive Movement or Progressive Era was an intense period of U.S. history that focused on social reform from the period between Reconstruction after the American Civil War and the entry of America into the First World War. In the early 1900’s, the Progressive Era reformers began to have a big influence on social thought in America which included rethinking orphanage due to its deplorable conditions. This humanistic social change lead to the creation of the earliest form of the child welfare system that caused orphanages to dissolve in the early part of the 20th century. It was also during the Progressive Era when the family courts began to deal with parental abuse, neglect, or abandonment in contrast to previous more informal processes. These early dependency proceedings began taking place in juvenile courts, and not probate courts. At about the same time, the modern use of the word “orphan,” a child who had lost or been abandoned by both parents, was also no longer politically correct.

Closing the Gap
The pendulum for minor guardianship has swung from asset protection to more relevant and pressing issues today for the private personal protection of the minor. In other words, during the majority of its establishment and use, minor guardianships were predominantly used to address the financial needs of legal orphans and later shifted to striking a balance of preserving kinship ties while ensuring a child’s safety and protection. As children were increasingly placed with relatives after removal from their parents’ care, the potential role of relatives for permanency outcomes had to be considered, and not merely for placement.
Minor Guardianship (continued from page 4)

The two distinct legal mechanisms of “public” dependency and “private” minor guardianships, although used in similar contexts and concerns, lead to different results for families. Today’s minor guardianships address a very different set of needs for families in crisis. Children may have lost one or both parents and become social orphans, suffering from neglect and abuse as the victims of parents with substance abuse problems. In these cases, minor guardianships are most commonly employed to address a child’s need for care of their “person” when a living parent is in a crisis.

Until recently, minor guardianship laws have failed somewhat to equip courts with the authority and guidance necessary to effectively address the interests of children, their parents, and their relative caregivers. Although closing the gap between early forms of minor guardianship and today’s laws better meet the needs of children and families, it is not a panacea. The momentum for this effort started within the first Uniform Probate Code (UPC) approved by the Uniform Law Commission (ULC) in 1969. By 2017, these laws evolved into the UGCOPAA, Uniform Guardianship Conservatorship and Other Protective Arrangements Act. Although not all states adopted these uniform provisions, probate-based minor guardianships were and are trending in that direction. Furthermore, closing the gap means more accountability and information required, plus the expansion of the duties of the minor’s guardian and conservator.

An exception to some of the uniform laws embraced by the States for minor guardianships was the 1978 enactment of the Indian Child Welfare Act (ICWA). This federal law governs jurisdiction over the removal of Native American (Indian) children from their families in custody, foster care and adoption cases. In particular, the ICWA was enacted using Federal standards after Native American children were systematically removed at much higher rates than non-Native American children, often without evidence of abuse or neglect that would be considered grounds for removal. These children were then placed with non-Native American families, with the intent to deprive them of their Native family or culture. The law also established standards regarding termination of parental rights to protect the best interests of Native American children to keep them connected to their families and Tribes.

The ULC’s acts closely parallel provisions for adult and minor guardianships, making minor guardianships more closely resemble adult guardianships. The mechanics of initiating a minor guardianship proceeding from petitioning to appointment are also largely similar. Most guardians are appointed with a parent’s consent and use the minor’s best interest as the standard of proof for the appointment. However, absent such consent, the standard of proof of the unfitness of a parent is not equivalent to that for termination of parental rights in a dependency action which is sometimes more stringent.

Guardianship statutes say little regarding the petitioner’s qualifications for appointment as a guardian of a minor. Under the early laws, courts preferred that the person appointed have at least some prior connection to the child, such as being a close family member, and preferably male, rather than a “stranger in blood.” If there was a disputed appointment, the choice of guardian was based on the

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welfare or best interest of the child, the standard which exists today. Many of the guardian’s duties and powers now are similar to those in the adult guardianship statues. The most compelling difference from the past is that today’s guardian’s letters of minor guardianship may serve as evidence of the guardian’s authority to perform parent-like functions, i.e. to enroll the minor in school, to access health care for a child, to determine where the child will live, and, along with other actions, to obtain and manage benefits and property, if not a substantial amount. These useful powers also implicitly extend, however, to determining whether the minor has visitation or other contact with their parent. Although the appointment of a guardian does not terminate parental rights permanently, the rights of a parent are subject to those of the guardian.

The concept of a limited guardianship, granting the guardian something less than full powers, allows the minors to exercise some control over their own residence and wages. The language used for these limited type of guardianships is consistent with the approach developed for adults who are subject to guardianships. This objective, as reflected in the development of the UGPPA, permits a court to limit the guardian’s powers “in the interest of developing self-reliance” on the part of the minor or for “other good cause.”

The UPC is silent on the allocation of burden of proof for terminating the minor guardianship earlier than when a minor turns 18. Moreover, proving that termination of the guardianship is in the child’s “best interest” is a difficult burden for most parents to meet, particularly when a guardianship has been in place for a long time. Some experts have suggested that the court and the parties take a reunification-oriented approach from the outset of the guardianship case with the end goal of the guardianship serving as family law goals with the assistance of a court-appointed guardian ad litem to facilitate these transitional steps.

**Conclusion**

Minor guardianships are increasingly in demand due to the burgeoning need for child protection. Despite the steps taken to improve minor guardianships, significant modifications and adjustments are constantly evolving to accommodate a swiftly changing and growing mobile society. For this reason, more uniformity of the minor guardianship laws based on prescient insights from past and present is essential to safeguarding the best interests of this country’s minor children.

**Article Submissions**

The NCPJ Journal is published in the spring and fall and welcomes scholarly submissions for publication. If you or someone you know is interested in submitting an article for publication in a future NCPJ Journal, please do so by emailing ncpj@ncsc.org.
Upcoming Conferences

Spring 2023 — Tucson, AZ
May 9-12, 2023
Loews Ventana Canyon Resort
7000 N Resort Drive
Tucson, AZ 85750

Fall 2023 — Tampa, FL
November 15-18, 2023
Grand Hyatt Tampa Bay
2900 Bayport Drive
Tampa, FL 33607

Award Applications

Nominations should be submitted either via email to NCPJ@nesc.org, through the online form at www.ncpj.org, or by mail to National College of Probate Judges, 300 Newport Avenue, Williamsburg, VA 23185. Full details about each award are available at www.ncpj.org.

Treat Award for Excellence

The Treat Award for Excellence, named after Hon. William Treat, New Hampshire Probate Judge and founder and President Emeritus of NCPJ, was established by NCPJ in 1978 to recognize and encourage achievements in the field of probate law and related fields consistent with the goals of the NCPJ. The College annually selects one individual, a resident of the United States, who has made a significant contribution to the improvement of the law or judicial administration in probate or related fields, which contribution is of outstanding merit. Nominations for the Treat Award for Excellence are due by July 1 each year, and the award is presented to the recipient at the Annual Meeting which takes place during the Fall Conference.

“Isabella” Award

The “Isabella” Award, named after NCPJ member and California Probate Judge, Hon. Isabella Horton Grant, was established by NCPJ to recognize and encourage achievements in a variety of activities, such as innovative programs leading to improvements in guardianship laws; articles, treatises, books or other publications of unusual quality and impact on guardianship issues; and leadership roles or other activities in organizations that have led to significant improvements in the laws, administration, or practices in the guardianship field. Nominations for the “Isabella” Award are due by December 1 of each year, and the award is presented to the recipient at the Spring Conference.
Endnotes

AUGMENTED ESTATES AND SPOUSES

1. Those that do not are all community property states, in which the problem of spousal disinheri-
   tance is essentially eliminated by the community property framework.

2. Other states include Colorado, Hawai’i, Kansas, Maine, Minnesota, Montana, North Dakota, South Da-
   kota, Utah, and West Virginia.

3. “[q]ualifying joint interest” and “qualifying lifetime transfer” are each defined by statute. MD Code
   Ann., Est. & Trst., § 3-401(h) & (i) (2020).

4. These states include Arizona, Louisiana, Nevada, New Mexico, Texas, and Washington.

5. These states include California, Connecticut, Delaware, Washington D.C., Georgia, Hawai’i, Illinois, Ken-
   tucky, Massachusetts, Michigan, Mississippi, Missouri, Ohio, Oklahoma, Rhode Island, South Carolina,
   Tennessee, Vermont, and Wyoming.

6. These states include Alabama, Alaska, Arkansas, Colorado, Florida, Idaho, Indiana, Iowa, Kansas,
   Maine, Maryland, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Car-
   olina, North Dakota, Oregon, Pennsylvania, South Dakota, Utah, Virginia, West Virginia, and Wiscon-
   sin.