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Major Bill Targeting Enhanced Protection for Minors and Adults in USVI Moves Forward

Proposed legislative changes aim to align USVI's guardianship laws with federal guidelines, ensuring safer and less restrictive care options

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Janeke Simon **May 27, 2024**

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Sen. Novelle Francis is the sponsorship of the sweeping guardianship and conservatorship reform in the USVI By. V.I. LEGISLATURE

The current legal framework governing forms of protective custody including guardianships and conservatorships is undergoing wholesale reform in the USVI with the passage in committee of Bill 35-0174.?

“When I first filed this bill draft, my intention was only to address the concerns brought forward by the Virgin Islands AARP specific to our elderly community,” said the bill’s primary sponsor

Senator Novelle Francis, speaking to members of the Committee on Rules & Judiciary on Friday. “However, upon a closer review of the statute enacted in 2016, and the recommendations of the legislature's legal counsel, it became apparent that the best approach for this bill was to update the existing Guardianship and Protective Proceedings Act.”

Not only would the complete replacement ensure that the territory is in compliance with federal guidelines, but it would also ensure “the least restrictive means necessary for protecting both minors and adults who cannot care for themselves,” said Mr. Francis, noting that over a fifth of the territory's population is over the age of 65.

He urged his colleagues not to be daunted despite the draft legislation's hefty size, explaining that a piecemeal revision may have left unacceptable gaps and omissions in the statute.?

Invited testifiers were largely supportive of the proposed legislation, although some expressed the need for some tweaking to ensure the new legal regime would work as intended. Chief Territorial Public Defender Julie Todman anticipates that the measure “should reduce expenses, increase accountability, reduce crime, clarify rights, and reduce court backlogs.”

Although not directly involved in guardianship proceedings, Office of the Public Defender has interest in the legislation because “when guardians commit acts of abuse and exploitation, the impact can be tragic and unimaginable and often leads to criminal charges,” meaning that a defendant may need to be assigned an attorney from the Office of the Public Defender, explained Ms. Todman.

She praised the measure's provision of “clear rules and laws for non-lawyers to follow and understand,” noting how the lack of clarity often adds additional toxic stress to an already volatile situation. Ms. Todman also highlighted the provisions for the registration of guardianships issued in other jurisdictions, and for non-parties to receive notice of guardianship proceedings and outcomes, among other progressive reforms.

Troy De Chabert-Houston, state director for the Virgin Islands AARP, was on hand to lend his support to the measure. He called the new bill an “upgrade” of the current legislation, which was put forth by the AARP along with several other partners and enacted in 2016. The upgrade, he said, makes it “a more efficient and more fair system for older Virgin Islanders,” and ensures that the AARP is able to honor the civil rights of its 21,000 members who call the territory home.

Meanwhile, Chief Counsel for Uniform Law Commission (ULC) Ben Orzeske noted that the last Uniform Act on Guardianship approved by the ULC dates back to 1997. Currently, “the average adult who is subject to guardianship has fewer rights than a convicted felon. That's not right, and this is an issue that needs to be addressed by the Legislature, in the Virgin Islands and in states across the U.S. That's what's happening with the current version of this Uniform Act,” Mr. Orzeske told lawmakers.?

He noted that if passed soon, the Virgin Islands would be at the vanguard of the reform wave. The new Uniform Act has only been adopted in two states thus far, although an additional number of jurisdictions are moving the measure through the legislative process. “This is a complicated area of law,” Mr. Orzeske said, “one where significant reform is needed.”

Among the benefits of the new law, Mr. Orzeske highlighted the power granted to the court to be more flexible in making the individualized arrangements that are best for each candidate for guardianship, including the implementation of “less restrictive solutions that will divert a significant number of cases out of the guardianship system entirely.”

In response to a question from Senator Milton Potter, Mr. Ozerske expressed the belief that under the new law, the controversial conservatorships that governed the lives of pop idol Britney Spears and football sensation Michael Oher would never have been allowed. "At every stage of the process, there's greater protection in this law than there would be under your current law," he noted.

Tom Bolt, chair of the Bar Association's Probate Law Committee, echoed the sentiments of the testifiers before him in calling the draft bill a much-needed, timely intervention – part of a larger plan to "bring our probate, guardianship and estate planning laws into the 21st century."

Despite the need for the updated measures, Mr. Bolt nevertheless urged that the Legislature delay bringing the new provisions into force until the new year, "to give the bench, the court administration and the bar...the opportunity to receive continuing legal education and to prepare for implementation of this important legislation."

The Department of Human Services supported the measure in large part, with Assistant Commissioner Carla Benjamin providing suggestions on revisions to hone the language of the draft legislation, including the provision of legal counsel to parents and minors by default instead of upon request. Ms. Benjamin also recommended the deletion of verbiage that suggested that the court could under certain circumstances sanction the marriage of someone under the age of 18, a concept which she said violated prevailing territorial law banning child marriage. She argued that the legislation should include a requirement for the court to bear the same responsibility DHS has when placing a child under a guardianship to ensure the minor's health, safety and welfare – conducting criminal background checks and the like.

Administrator of Courts Regina Petersen concerned herself with the operational impact of the draft legislation, which she testified would not be inconsequential. "The current bill's adoption will result in substantial increases in costs associated with court-appointed counsel and other judicial resources from mandatory hearings," Ms. Petersen told lawmakers. She suggested that rather than make counsel for parties in guardianship matter mandatory, discretion should remain with the presiding judges as to when and how counsel is appointed if a party is unable to afford private representation. "We should carefully survey the legal landscape to determine the right fit for the territory based on size, available resources and available service arrays," Ms. Petersen cautioned. "I think more time is needed for thorough evaluation and informed decision making prior to adoption," she advised.

Jessica McKinney, chair of the VI Bar Association Legislation and Law Reform Committee, also advised on tweaking the verbiage in the draft legislation to ensure the absence of negative unintended consequences following its enactment. She recommended careful attention be paid to terms including "substantial harm", "reasonably feasible", and "essential requirements" to ensure that unduly high standards must be met by vulnerable individuals to receive the care and protection under a guardianship. Ms. McKinney also called for a review of the provisions of the legislation to ensure that protective arrangements can be exited freely once the individual is able to make their own decisions, "even accounting for that ability to change over time."

Lawmakers were by and large supportive of the intent of the measure, and commended Sen. Francis and the bill's cosponsors for the comprehensive reform being offered.

However some, including Senator Milton Potter, acknowledged that more work may need to be done before the draft is ready to become law. "I am not sure if it is right to move forward right now," said Mr. Potter, citing the magnitude of the wholesale repeal-and-replace effort for his

hesitation.

Senator Franklin Johnson wondered whether the new legislation could address the perennial problem of elderly people being abandoned at hospitals by their next of kin. According to Mr. Orzeske, “there are provisions to prevent the horrible situation you describe of neglect by guardians.” Mr. Bolt also believed the scenario described by Mr. Johnson would be addressed by the new measures, but without explicit language in the bill, Ms. Benjamin was not so sure. “I haven't seen anything that would hold anyone who is legally responsible for the finances...responsible if they decided not to come pick them up from the hospital,” she noted.

However, as Mr. Orzeske explained, since a guardian is a fiduciary, they are legally required to act in the best interest of the person that they are representing, including using the person's resources for their benefit, not the fiduciary's. Mr. De Chabert-Schuster disclosed that the AARP was “working on a very comprehensive piece of anti-elder abuse legislation,” which he says takes this thorny issue into consideration. “We're moving toward encouraging the legislature to make abandonment and neglect a felony,” he said, noting that this was already the case in California and some other states.

Notwithstanding the calls for amendments and further consultation on this far-reaching bill, Sen. Francis urged his colleagues to advance the measure immediately, with any required tweaks being done subsequently. “We have a real life situation occurring here,” he said. “Every time we delay moving critical legislation forward, is justice delayed, is justice denied.” He vowed that if committee members moved the draft legislation forward, the bill sponsors would “do the heavy lifting that's required now” to ensure that the suggested amendments are incorporated into the final version.

Ultimately, all six committee members in attendance did as their colleague asked of them, and approved the measure to be considered by the full legislative body.