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**STEVEN M. GARVER**

OF COUNSEL:  
JOHN I. GRUEN

June 25, 2008

The Honorable Diane M. Strickland

In re: Boyd Graves Sub-committee to study Guardians for Non-Resident Plaintiffs

Dear Judge Strickland:

Our sub-committee was made up of the Honorable James Almand, Tom Blair, Esq., Cindra Dowd, Esq., Marni Byrum, Esq., the Honorable William Taylor, J. Lee Osborne, Esq., the Honorable J. Michael Gamble, and myself. Our charge was to determine if there was a need for statutory change such that a non-resident guardian could file suit in Virginia (to toll the statute of limitations) to bring an action on the basis for appointment of an in state Guardian for a non-resident who was deemed incompetent.

Our sub-committee examined Title 37.2 of the Virginia Code which provides for the appointment of Guardians and Conservators and also looked at §26-59 which deals with nonresident fiduciaries. Clearly an incompetent cannot bring an action in his own name in Virginia and the Courts have generally found an action by a foreign guardian in the Virginia Courts as a nullity. It would appear that currently there is a problem with foreign incompetents who wish to bring an action in Virginia Courts in that though some judges have used §26-59 to permit appointment of a guardian for a non-resident incompetent when his home jurisdiction has appointed a guardian, other courts have held that the Title 26 remedy is not broad enough to encompass appointment as contemplated under Title 37.2. In some instances, a guardian ad litem has had to travel outside the Country to comply with the requirements of Title 37.2 and getting testimony and providing for service can be a problem. Likewise, the expense can be enormous, the delays detrimental to the tolling of the statute of limitations, and the procedure cumbersome depending on the country or state which makes the appointment of a foreign guardian. (The federal courts have a procedure to remedy this problem and do not dismiss the cause for lack of the proper party, but permit the substitution, if necessary to relate back to the actual filing date.)

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The sub-committee learned that the recognition of foreign guardians, which may resolve the issue, is a part of a uniform act which was adopted in 2007 by the National Conference of Commissioners on Uniform Laws. It has been adopted by several states. Our inquiry to the Virginia Bar Association Committee for legislative matters dealing with wills and estates has prompted that committee to look at the new uniform act known as the 'Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act' which addresses many issues of foreign incompetents and issues of competing jurisdictions, but which also provides for a guardian to be appointed based upon a proceeding in a foreign jurisdiction and provides for evidence to be taken in the foreign jurisdiction if appropriate.

We also considered remedies which like the federal system would permit the substitution of a party to relate back; a provision to permit the filing by a foreign guardian provided that within 90 days an in state guardian was appointed; and a provision which would permit the Virginia Court to recognize the finding of incompetency by the foreign jurisdiction, but then provide for the appointment by the Virginia Court of a Guardian to bring the action.

Though, many of these ideas have merit, it was the sub-committees consensus opinion that it would not be wise to report positively on any of these proposals until an evaluation of the Uniform Act (as it might be adopted in Virginia) was made and that was beyond the charge and time of the sub-committee. Though some further action may be advisable, it would appear that waiting to see what may be adopted in the Uniform Act and whether it still leaves a void was the recommendation of the sub-committee at this time.

If the Conference deemed it appropriate, a special committee might be appointed to review the Uniform Act, this committee might be asked to consider the Uniform Act, we might defer to another organization such as the VBA to evaluate the Uniform Act, or we might table the issue to see what the legislature might do to adopt the Uniform Act. Otherwise the issue may be tabled until Virginia takes a position on the Uniform Act.

I have attached a copy of the Uniform Act hereto for consideration.

Yours,

/s/

Steven M. Garver

cc: Sub-Committee Members

Editor's Note: The Committee's recommendation was that there be no change in Virginia law at this time and that the Unif

**Diane Strickland**

**From:** Lee Osborne [losborne@cbolaw.com]  
**Sent:** Friday, July 11, 2008 10:36 AM  
**To:** Diane Strickland  
**Cc:** Coleman, Nan; Guy Tower  
**Subject:** RE: Boyd-Graves Subcommittee Report on the Appointment of a Foreign Guardian

Diane –

As you may be aware, I am on both the Boyd-Graves subcommittee on this issue as well as the Legislative Committee of the Wills, Trusts and Estates Section of the Virginia Bar Association. As our BG committee looked at this issue (and realized it was larger than the initial question posed), I took the matter to the WTE committee for their input. We had been involved in the earlier revisions to the Adult Guardianship statutes some years back in a multi-disciplinary committee that was appointed by the legislature I believe. According to some on our WTE committee, this issue was left on the table at that time, but a number of our members are very interested in the Uniform Act. I am trying to determine from our chair, Nan Coleman, how best to approach a study of this act and whether the WTE legislative committee would like to take the lead in that effort as was indicated at our last meeting. I raised this possibility with our BG subcommittee and thought there was general support for us doing that. I am sure we will welcome the involvement of the BG subcommittee in whatever way is appropriate, and we certainly do not want to step on any toes here. Once I have Nan's input, I will get back with you on this.

Lee

**From:** Diane Strickland [mailto:dmstrick@cox.net]  
**Sent:** Thursday, July 10, 2008 12:52 PM  
**To:** 'Steve Garver'  
**Cc:** wtaylor@courts.state.va.us; mebyrum@mcquadebyrum.com; jgamble208@aol.com; mgamble208@comcast.net; tblair@ccbbk.com; Lee Osborne; 'James Almand'; cdowd@serpefirm.com  
**Subject:** RE: Boyd-Graves Subcommittee Report on the Appointment of a Foreign Guardian

Dear Committee Members,

Thank you for your diligent service in exploring the issue of a foreign guardian. I write to inquire as to whether you would be willing to be reappointed at the October Conference to evaluate the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act?

I hope that you have a pleasant summer and I look forward to seeing all of you on October 24.

Diane Strickland