

# Agenda

## Ad Hoc Committee on Probate Law and Procedure

December 19, 2008  
12:00 to 2:00 p.m.

Administrative Office of the Courts  
Scott M. Matheson Courthouse  
450 South State Street  
Executive Dining Room

Approval of minutes	Tab 1	Judge George Harmond
Draft Report	Tab 2	Tim Shea

**Committee Web Page:** <http://www.utcourts.gov/committees/adhocprobate/>

# Tab 1

## MINUTES

### Ad Hoc Committee on Probate Law and Procedure

Administrative Office of the Courts

450 South State Street

Salt Lake City, Utah 84114-0241

November 14, 2008 - 12:00p.m.

#### ATTENDEES

Kent Alderman  
Kerry Chlarson  
Mary Jane Ciccarello  
Judge George Harmond  
Marianne O'Brien  
Julie Rigby  
Kathy Thyfault

#### EXCUSED

Judge Reese Hanson  
Maureen Henry  
Justice Richard Howe  
Steve Mikita  
Judge Gary Stott

#### STAFF

Diana Pollock  
Tim Shea

### I. WELCOME AND APPROVAL OF MINUTES

Judge Harmond welcomed the committee members to the meeting. Mary Jane Ciccarello made a motion to accept the minutes of the October, 2008 meeting. Kathy Thyfault seconded the motion. The motion passed unanimously.

### II. DRAFT REPORT

Tim Shea reviewed the draft report with the committee. The committee agreed with Mr. Shea's suggestion that hearings be interpreted and that forms and information be translated into Spanish.

Mr. Shea said he wanted to confirm that the standard for appointing a conservator should be the respondent's incapacity, just as in a guardianship. He observed that the grounds for the two under the current law are very similar and are equated in practice, but that under the current law and the 1997 Uniform Act, appointment of a conservator requires something less than incapacity. Discussion followed, and the committee concurred that appointment of a conservator should require that the respondent be incapacitated. The descriptions of the standards are very similar. The factors that influence the findings are the same.

Mr. Alderman said that we must continue the practice of permitting a person to request the appointment of a conservator without proving incapacity. Mr. Shea agreed and said that under current law a person can also request the appointment of a guardian, although it may not happen

as frequently. Appointment of a conservator because the respondent is missing also would not require showing incapacity.

Mr. Alderman said that the report implies there are more impecunious cases than perhaps there are. Ms. Ciccarello thought that data on impecunious cases might be available from a 2005 study on pro se cases. It was agreed that the focus should remain on impecunious cases, but to recognize that lawyers are representing clients pro bono and for pay. The committee agreed that the report should recommend gathering data as a by-product of processing the case.

Mr. Shea summarized that the committee had decided in an earlier meeting that the appointment should come from the court even if someone had made an appointment by will. So Mr. Shea combined that concept with a new provision from the 1997 Uniform Act that permits confirmation of an appointment by will during a person's life. The result is that a person can nominate someone to serve as guardian or conservator and can petition to have the court confirm the nomination, but the determination of incapacity and appointment would come later, following normal procedures. The committee thought the judge should be able to reconsider whether appointing the nominee remained in the respondent's best interests. Some committee members thought the confirmation process would not be used very often.

Mr. Alderman thought that until a list of lawyers maintained by the bar is available there should be forms developed for a motion and order to appoint an attorney. It was also suggested that there should be a motion and order to withdraw money from a bank account. Ms. Thyfault suggested specialized forms for annual reports about minors. Mr. Shea will add those to the list.

## **STATUTES**

Tim Shea asked if the committee was comfortable with the scope he has taken, including guardianships and conservatorships for minors. Mr. Shea used the 1997 Act as a model. The committee thought this was appropriate. Using the Uniform Act would not allow us to get too far from the norm. This will be our best opportunity to integrate the entire package.

Mr. Shea asked whether the committee was comfortable with moving the procedural provisions to the rules of civil procedure. Mr. Chlarson asked whether the Supreme Court would be amenable to a section of the rules dealing with a probate matter. Mr. Shea thinks they will be. He said that they have started special family law rules with Rule 100. He has suggested starting the probate rules with Rule 150. It was observed that if procedures need to change in the future, it will be easier to do so by rule.

Mr. Chlarson asked how to decide what should be in statute and what should be in rule. Mr. Shea said that his general approach is to use statutes for substantive rights and to use rules for the progress of the case through the courts. Although there are some provisions with features of both. Mr. Shea said that the Commission on Uniform Laws drafts everything as a statute, but that in Utah the Supreme Court has responsibility for the procedural features. He thought that Utah could still adopt the uniform act's provisions, but do some of it by rule rather than statute. The committee agreed that adopting procedures by rule was appropriate.

The committee discussed particular parts of the draft statutes.

It was stated that the committee had earlier decided to add the phrase “self injurious behavior” when describing abuse of the respondent. Mr. Shea will make that change.

Mr. Shea asked about the language of the current law that prohibits a professional guardian from making a profit. Mr. Alderman said that had been a compromise when the law was adopted and should be removed.

Mr. Alderman suggested that the respondent’s rights in proceedings after appointment expressly include the right to an attorney. Mr. Shea will make that change.

Mr. Shea asked whether the guardian for a minor should have the same reporting requirements as a guardian for an adult. Also whether the guardian should file a management plan. The committee decided that the requirements should be the same.

Mr. Alderman suggested that in considering whether to appoint a guardian, the court should not just consider whether alternatives were in place, but whether they were meeting the respondent’s needs. The main reason for a guardian or conservator may be because the attorney in fact is depleting the estate. Mr. Shea will make that change.

The committee thought that the guardian’s authority to accept payments on behalf of the respondent should be increased from \$10,000 to \$100,000.

Mr. Shea asked what to do with the three sections at the end of the current law on guardianships that have no counterpart in the uniform act. Ms. Ciccarello said that the VA required a guardian rather than a representative payee to accept benefit payments. After discussion the committee decided that the VA determination of “incompetence” could be used as evidence of “incapacity” in a guardianship proceeding.

Mr. Shea said that the section governing expedited proceedings for appointing a guardian for a resident of the Developmental Center did not appear to be expedited because it restates all of the procedures for regular appointments using different language. The difference is the limited authority and duties of the guardian. The committee suggested that Mr. Shea review revisions with Steve Mikita.

Mr. Shea said that he had redrafted the grounds for appointing a conservator so that incapacity is one of the grounds. A minor is legally incapacitated but cannot be functionally incapacitated. So he included all of the grounds on which a conservator could be appointed for a minor separate from the grounds on which a conservator could be appointed for an adult. The section is the equivalent of the 1997 Uniform Act but is drafted differently.

Mr. Shea asked how the committee wanted to handle the authority to give gifts because the 1997 act is inconsistent. In one section it requires court approval and in another section it does not. The committee thought that the risk of depleting the estate under the guise of gifts was

too great, and that gifts should be approved by the court. The conservator could list a gift schedule in the management plan.

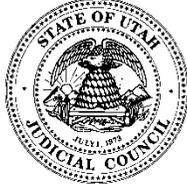
Mr. Alderman noted that if there is a conservator and an attorney in fact, the conservator's authority should prevail. Mr. Shea confirmed that the 1997 Act was opposite. The committee agreed that we should not follow the 1997 Act. Otherwise, there is no point to having a conservator. Mr. Shea will make that change.

Mr. Shea asked the committee about the authority of the conservator to borrow money from the estate. He said that the guidelines he had drafted with Ms. Ciccarello advised against this. Mr. Alderman said that it was common authority for a trustee, but that it was probably inappropriate for a conservator. Mr. Shea will move the provision so the conservator needs court approval to borrow from the estate.

Mr. Shea asked about the legislation to create an account to pay respondent's lawyer if the estate is not able. He said that this will not be funded and recommended against advancing it. Mr. Chlarson though it was not responsible to recommend legislation that could not be given effect. After discussion, the committee decided to include the recommendation, but not any legislation. The legislation can be reconsidered when the economy and state revenue pick up.

There being no further business the committee adjourned at 3:05 p.m.

# Tab 2



## Administrative Office of the Courts

Chief Justice Christine M. Durham  
Utah Supreme Court  
Chair, Utah Judicial Council

### MEMORANDUM

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Daniel J. Becker  
State Court Administrator  
Myron K. March  
Deputy Court Administrator

**To:** Probate Committee  
**From:** Tim Shea *TS*  
**Date:** December 11, 2008  
**Re:** Report

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I have attached the next draft of the report, statutes and rules. I've shown substantive edits to the report by interlineation. In the statutes, I've removed the yellow highlighting from provisions that we concluded last time and added highlighting to parts that have changed or parts where I have a question.

#### Statutes

Lines 555, 914, and 1059: Increase the guardian's authority to receive the ward's money to \$100,000 per year.

Line 1024: Permit the court to review whether the alternatives are meeting the respondent's needs. (Consider whether this language is adequate.)

Lines 1382-1385: Move the gift-giving provision to the section requiring court approval.

Line 1531: I have not yet moved this phrase to the section requiring court approval because we may have misread it last time. This phrase may be intended to permit the conservator to borrow money on behalf of the estate to be repaid from the estate (not borrow money from the estate). If that is correct, I recommend adding the phrase "on behalf of the estate" after "borrow money." If we read it correctly the first time, I will move this phrase so that it requires court approval to borrow from the estate.

#### Rules

We did not reach the rules last time, so they remain the same with two exceptions. The November 2 draft of Rule 155 required the court to appoint a visitor. That is the recommendation of the 1997 Uniform Act. Kent suggests that if we require the appointment of a lawyer, the appointment of a visitor can safely be left to the discretion of the court. This draft permits but does not require a visitor.

The November 2 draft of Rule 158 said nothing about background checks. In reviewing my notes I could not remember whether the committee had decided in favor

The mission of the Utah judiciary is to provide the people an open, fair,  
efficient, and independent system for the advancement of justice under the law.

of background checks or simply declaring arrests and convictions. I have drafted it both ways. We can include either or both.

My other questions about the rules remain in yellow embedded in the draft.

Encl. Draft report

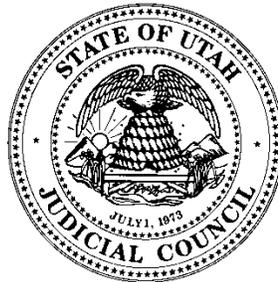


# Utah State Courts

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## Ad hoc Committee on Probate Law and Procedure

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Final Report to the Utah Judicial Council  
January 26, 2009

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**The mission of the Utah judiciary is to provide the people an open, fair, efficient, and independent system for the advancement of justice under the law.**

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Ad hoc Committee on Probate Law and Procedure  
Final Report to the Judicial Council  
January 26, 2009

Prepared by  
Administrative Office of the Courts  
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January 26, 2009

The Honorable Christine M. Durham  
Chief Justice, Utah Supreme Court  
Presiding Officer, Utah Judicial Council  
P.O. Box 140210  
Salt Lake City, Utah 84114-0210

Dear Chief Justice Durham:

On behalf of the Judicial Council's ad hoc Committee on Probate Law and Procedure, I am pleased to submit this final report with recommendations.

The Judicial Council's charge to the committee was very broad, encompassing nearly any part of probate policy that we decided needs attention. We focused immediately on protective proceedings in the district court. Yet, as narrowly as we have focused our attention, the topic is complex enough to have required all of our time. So the work on the probate code and the needs of the elderly remains unfinished.

We offer extensive recommendations in the area of guardianships and conservatorships. This package combines necessary changes to statutes and rules, improved forms and education, and nothing less than a cultural shift in the way we think of guardianships and conservatorships.

The appointment of a guardian or a conservator removes from a person a large part of what it means to be an adult: the ability to make decisions for oneself. The appointment often comes later in one's life, but not always. Younger adults incapacitated by accident, disease or developmental limitations also are affected. We terminate this fundamental and basic right with all the procedural rigor of processing a traffic ticket.

- The definition of incapacity is essentially the same as it was 100 years ago.
- The respondent is sometimes not represented.
- The respondent is sometimes represented by a lawyer recruited by the petitioner's lawyer.
- The respondent's lawyer sometimes acts as *guardian ad litem* rather than advocate.
- There is little or no procedure to elicit and challenge evidence.
- The evidence itself is cursory.
- Once appointed, guardians are often given the authority of a conservator whether or not that authority is warranted by the respondent's circumstances.
- Statutes claim to prefer limited authority for guardians and conservator, but fail to describe less restrictive alternatives.
- Plenary appointments are common with little evidence to support the need.
- There is no planning to help the respondent live life as independently as possible.
- There is no regulation of professional guardians.
- There is little education or assistance for family guardians

- There is little training for judges and clerks.

The *Deseret News* recently reported that when it “went to court to watch guardianship proceedings, it was startling how quickly someone could be stripped of all decisionmaking rights. Once the paperwork is in order, ‘hearings’ average seconds, not minutes.”

Utah is not unique. Quite the contrary. Most states have let slip this important area of the law.

We classify the appointment of a guardian or a conservator as a probate case, but guardianships and conservatorships have more in common with domestic cases than with the intergenerational transfer of property. They share many of the emotional and family financial issues of a divorce. The court defines future family relationships. We offer our recommendations with this idea in mind.

Our recommendations retain the basic concept of the Uniform Guardianship and Protective Proceedings Act to avoid contested litigation whenever possible. But uncontested does not mean automatic. We recommend a much more fully developed process to better protect the respondent and to present better evidence on which to make a measured intervention.

We have three recommendations that require public money:

- attorney fees and expenses of indigent respondents;
- interpreting guardianship and conservatorship proceedings and translating forms and materials for non-English speaking respondents; and
- a coordinator to recruit and train volunteers to serve as court visitors.

We recognize that the significant decline in state revenue means there will be no general fund appropriation for programs such as these. Nevertheless, we make the recommendations hoping that funding may someday be available. In the meantime, we recommend that the courts and the Bar pursue funds that might be available through *and Justice for All*, the Utah Bar Foundation, grants, and other sources.

Beyond these funds, we recognize that our recommendations require a particularized inquiry into the respondent’s circumstances. The inquiry replaces traditional subjective judgments about the reasonableness of the respondent’s behavior with a more focused decision about the respondent’s capabilities and limitations. And all of that translates into more time.

We recommend that this report be presented to judges, lawyers, guardians, conservators, health care providers, service providers and other stakeholders for critical analysis which can be integrated into legislation and rules for 2010.

I want to thank the committee members and staff for their dedicated time and attention to the grand concepts and the many, many details of a program of this scope. We were well served.

Finally, I want to thank Judge Sheila McCleve for her work as the first chair of the committee. Circumstances meant that she was not able to remain as chair, but her initial guidance showed us the way.

Sincerely,

George M. Harmond  
Committee Chair

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**(1) Summary of recommendations**

- Modernize the definition of incapacity to focus on functional limitations. Require proof of incapacity (among other grounds) to appoint a conservator as well as a guardian.
- Enforce the requirement to prove incapacity by clear and convincing evidence.
- Consider in every case ordering that the respondent be evaluated by a physician or psychiatrist and by a court visitor. Adopt uniform forms on which to report the results of a clinical and social evaluation.
- Appoint a lawyer to represent the respondent in conservatorship cases, as is now done in guardianship cases.
- Require the respondent's lawyer to be from a roster of qualified lawyers maintained by the Utah State Bar. Establish minimum qualifications for the roster. Appropriate funds to pay the respondent's lawyer if the respondent cannot afford a lawyer and does qualify for existing programs.
- Respondent's lawyer should be an independent and zealous advocate, rather than a *guardian ad litem*.
- If the court determines that a petition resulted in an order beneficial to the respondent, and if funds are available in the estate, permit the court or conservator to pay the reasonable and necessary expenses, costs and attorney fees from the estate.
- Require the respondent to attend all hearings unless the respondent waives that right or unless the court finds that attending the hearing would harm the respondent. Take steps to accommodate the special needs of respondents at court hearings.
- Appoint a certified court interpreter if the respondent does not understand English.
- Refer protective proceedings to mediation. The mediation community should develop training for mediating protective proceedings, including especially the skills and accommodations necessary when mediating with a person of potentially diminished capacity.
- Consider appointing a commissioner to hear probate matters, including guardianship and conservatorship cases, in districts with sufficient caseload.
- With a few exceptions, classify guardianship and conservatorship records as private.
- Require the petitioner to show that alternatives less restrictive than appointing a fiduciary have failed or that they would not be effective. Presume, rather than favor, limited guardianships. Adopt laws, procedures and forms that make limited guardianships a realistic option.
- Require the fiduciary to use the "substitute judgment" standard for decisionmaking on behalf of the respondent except in those limited circumstances in which the "best interest" standard may be used.

- Adopt special procedures for temporary emergency appointments.
- Permit a person to nominate, rather than appoint, a guardian for a child or spouse, and to petition to confirm the nomination during one's lifetime.
- Require the fiduciary to write a management plan and file it with the court.
- Appoint a coordinator to develop a program of volunteer court visitors.
- Regulate the profession of guardian through the Division of Occupational and Professional Licensing. Require background checks for private guardians and conservators.
- Develop training for lawyers, judges and court staff. Develop outreach and assistance to guardians, conservators, respondents and the public.
- Unify the laws regulating guardians and conservators except where there is sound policy to differentiate them.

## (2) Introduction

The general state of guardianships and conservatorships may depend upon whom one talks to. Although a bit dated, one court group, while recognizing that abuses occur, notes that, "the great majority of guardianships ... are initiated by people of goodwill who are in good faith seeking to assist and protect the respondent. ... Furthermore, in the great majority of guardianship proceedings, the outcome serves the best interests of the respondent and an appointed guardian acts in the respondent's best interests."<sup>1</sup> On the other side of the coin, empirical researchers from a similar time period, while noting the benefits of guardianships, report that "guardianship ... often benefit[s] the guardian more than the ward and [can] hasten institutionalization for the protected person. ... [H]earings [are] extremely brief, [do] not rely upon medical testimony, and often [result] in plenary orders ...."<sup>2</sup>

The committee members' experience supports both views. Many of the conclusions we reach are based on our observations and experience. We have no statistics to offer because, like most jurisdictions, other than the number of petitions filed, we record little in a systematic way. In how many cases is the respondent excused from the trial? In how many cases is the respondent not represented by counsel? Not evaluated by a physician or psychiatrist? By a court visitor? In the end, we do not know. Based on our experience we know which observations in the national literature and in the committee testimony ring true.

Appointing a guardian or a conservator is one the most significant interventions by a court into a person's life. Like a prison sentence or commitment to a mental health facility, the appointment takes from that person the freedom to decide for oneself many,

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<sup>1</sup> National Probate Court Standards, Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships, Section 3.3 (1993). Hereafter cited as National Probate Court Standards.

<sup>2</sup> Clinical Evidence in Guardianship of Older Adults Is Inadequate: Findings From a Tri-State Study, *The Gerontologist* Vol. 47, No. 5 (2007) by Jennifer Moyer, PhD, Stacey Wood, PhD, Barry Edelstein, PhD, Jorge C. Armesto, PhD, Emily H. Bower, MS, Julie A. Harrison, MA, and Erica Wood, JD. pp 604–605, citing earlier studies. Hereafter cited as "Moyer."

and often times all, of the large and small issues we face every day. Appointing a guardian or conservator legally changes an adult into a child once more, and, as with a child, someone else decides those questions.<sup>3</sup>

Presumably, in the process of appointing a guardian or conservator, “procedural protections work to ensure that putative wards are fully informed, properly evaluated, zealously defended, that the issues are fully developed and heard, and that an intervention is finely tuned to the needs and preferences of individuals.”<sup>4</sup> Yet those protections are applied inconsistently at best.

The law requires that the respondent be represented, but that does not always happen. If the respondent is represented, the attorney might have been recruited by the petitioner’s attorney. Or might fulfill the role of a *guardian ad litem* rather than advocate. The standard to declare someone incapacitated is clear and convincing evidence, but clinical evidence is usually modest. Procedures are cursory. The *Deseret News* reports that “hearings’ average seconds, not minutes.”<sup>5</sup>

The guardian is usually granted plenary authority over the respondent, with little or no exploration of the respondent’s capabilities and in the face of laws that prefer limited authority. Annual reports by guardians and conservators have been required for many years, but only recently has the district court enforced the requirement. The court has no way to verify the truth of those reports, except by objections from the respondent’s family, which might be uninterested or perhaps does not exist.

Press reports and official investigations in other states have revealed ruined lives and have sent fiduciaries to prison.<sup>6</sup> Although Utah has so far avoided the scandalous headlines in which a fiduciary abuses, neglects or defrauds the person s/he is responsible for, there is no reason to believe that guardians and conservators in Utah are any less prone to abuse or fraud than those in other states whose malfeasance and negligence have been discovered.

Most petitions are filed in good faith to appoint a person of goodwill who will serve in the best interests of the protected person, but we rely primarily on good faith and goodwill to achieve that result. Good intentions and lack of oversight have, over time, led to summary proceedings that presume to protect the respondent from others and from self, but that offer little real protection from the process itself or from those we put in charge of the respondent’s life. And even one case in which the fiduciary takes advantage of the person s/he is supposed to take care of is one too many. Summary proceedings and trust in the capability and goodwill of guardians and conservators are

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<sup>3</sup> Indeed, under current Utah law, “Absent a specific limitation . . . , the guardian has the same powers, rights, and duties respecting the ward that a parent has respecting the parent’s unemancipated minor child. . . .” Utah Code Section 75-5-312(2).

<sup>4</sup> Charles P. Sabatino, *Competency: Refining Our Legal Fictions, Older Adults’ Decision making and the Law* 1, 2 (Michael Smyer, K. Warner Schaie & Marshall B. Kapp eds., Springer Publg. 1996), pp 20-21.

<sup>5</sup> <http://deseretnews.com/article/1,5143,705265008,00.html?pg=2> *Deseret News*, November 24, 2008. Who should make choices for the elderly? By Elaine Jarvik and Lois M. Collins.

<sup>6</sup> See e.g., stories linked at: [http://www.citibay.com/cgi-bin/directory.pl?etype=odp&passurl=/Society/Issues/Violence\\_and\\_Abuse/Elder/Guardianships/](http://www.citibay.com/cgi-bin/directory.pl?etype=odp&passurl=/Society/Issues/Violence_and_Abuse/Elder/Guardianships/).

easy, but they deny many respondents the level of independence they may be capable of.

To be sure, there are cases in which the respondent is so clearly incapacitated that substantial medical evidence would be costly and without purpose. There are cases in which the respondent is so fully incapacitated that plenary control over that person is the most appropriate arrangement. But not in all cases. Many cases present nuances that need to be explored and capacities that need to be protected.

In Utah, as in most states and in national standards, guardianships and conservatorships are classified as probate cases, yet today they have more in common with family law than with probate law. Those who need protection or help are often seniors but not always. The families involved face the same emotional and financial drain faced in divorce. Although we do not intend to reclassify an entire area of the law, we recommend significant changes to many statutes and rules with the dynamics of family relationships in mind.

This is an area that is ripe for collective action. There are roles here for all three branches of government, the Bar, the health care community, and even the larger public community. This is what we hope to achieve:

- a deliberate inquiry into the limitations and needs of the respondent;
- a measured intervention based on those limitations and needs; and
- oversight to protect the quality of life of a respected individual.

### **(3) Definition of “incapacity”**

#### **(a) Inadequacy of current definition**

Merely defining the term “incapacity” is a complex matter. Is it a legal standard or medical? Is it cognitive or functional? What factors are relevant? Can a person lack capacity for some purposes and have capacity for others? Yet we must agree on a definition because the appointment of a guardian or conservator<sup>7</sup> rests upon the finding that a person is incapacitated.

The current statutes governing guardians and conservators were enacted in 1975 and are based on the Uniform Guardianship and Protective Proceedings Act of 1968. Medical care for and everyday functioning of people well into later life has improved a lot in 40 years, but our definition of “incapacity,” the keystone to the entire protective arch, is not that much different from the definition at the time of statehood.

Utah law defines an incapacitated person as:

any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or

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<sup>7</sup> Current Utah law permits the appointment of a conservator if the respondent “is unable to manage the person’s property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance....” Utah Code Section 75-5-401(2). Except for confinement, detention and disappearance as reasons to appoint a conservator, this definition is essentially the same as incapacity for the appointment of a guardian.

other cause, except minority, to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

Utah Code Section 75-1-201(22).

Although the statute has never been amended to reflect the decision, our Supreme Court has added that the lack of understanding or capacity to make or communicate decisions (required by statute) must be so impaired that the person is unable to care for personal needs or safety to such an extent that illness or harm may occur.

We hold that ... a determination that an adult cannot make 'responsible decisions concerning his person' and is therefore incompetent, may be made only if the putative protected person's decisionmaking process is so impaired that he is unable to care for his personal safety or unable to attend to and provide for such necessities as food, shelter, clothing, and medical care, without which physical illness or harm may occur.

*In re Boyer*, 636 P.2d 1085, 1089 (Utah 1981).

In other words, poor choices alone – even choices that a reasonable person would describe as irresponsible – do not make one incapacitated.

The Uniform Guardianship and Protective Proceedings Act of 1997 moves away from the traditional “physical illness” and “mental illness” found in the 1968 Uniform Act to focus on the ability to receive and evaluate information or to make or communicate decisions.<sup>8</sup>

Many states and the National Probate Court Standards have moved away from cognition and decisionmaking to focus on functional limitations: What can the respondent do and not do? In this approach, cognition and executive functioning remain important, perhaps more important than most other functioning, but, in the end, they are simply functions in which the respondent may face limitations. This definition inherently answers the question: Can a person lack capacity for some purposes and retain capacity for others? At least potentially, the answer is “yes,” depending on the nature of the functional limitations.

This approach requires a particularized inquiry into the respondent's circumstances, which necessarily is more difficult and time-consuming. The inquiry replaces traditional subjective judgments about the reasonableness of the respondent's behavior with a more focused decision about the respondent's capabilities and limitations.<sup>9</sup>

Whether the determination of incapacity is a medical or legal decision is more easily concluded. Given the consequences of the decision, it has to be a legal decision judicially made. The decision might be heavily influenced by medical evidence and opinions, but the decision itself remains a legal consequence.

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<sup>8</sup> Uniform Guardianship and Protective Proceedings Act of 1997, Section 102(5). Hereafter cited as 1997 Uniform Act.

<sup>9</sup> Judicial Determination of Capacity of Older Adults in Guardianship Proceedings, American Bar Association Commission on Law and Aging – American Psychological Association (2006). Hereafter cited as Judicial Determination of Capacity.

**(b) Recommended definition**

By evaluating our current statute and case law, the definitions in other states and those recommended in national standards, and by considering similar concepts from Utah law in other applications, we recommend the following definition of incapacity for the appointment of either a guardian or a conservator:

“Incapacity” means a judicial determination that an adult’s ability, even with assistance, to

- (a) receive and evaluate information,
- (b) make and communicate decisions,
- (c) provide for necessities such as food, shelter, clothing, health care or safety,
- (d) carry out the activities of daily living, or
- (e) manage his or her property

is so impaired that illness or physical or financial harm may occur. Incapacity is a judicial decision, not a medical decision, and is measured by functional limitations.

Although not mentioned in the *Boyer* holding, we recommend adding “financial harm” to the definition of “incapacity” so that one definition can serve as the grounds for appointing a guardian or a conservator, rather than the separate but similar definitions we have now. The importance of this small change can be lost in the enormity of the project. Historically, appointment of a conservator has not been a determination of the respondent’s incapacity.<sup>10</sup> With this change, a conservator cannot be appointed unless the respondent is incapacitated.

The grounds for appointing a conservator should also include because the respondent is missing, detained, or unable to return to the United States and by request of the person to be protected. But the definition of incapacity as grounds to appoint a guardian or conservator should be the same for both offices.

**(c) Factors**

We propose several factors that the judge might consider when determining the respondent’s capacity. Most will be familiar to those experienced in protective proceedings.

- (1) whether the respondent’s condition, limitations and level of functioning leave the respondent at risk of:
  - (a) his or her property being dissipated;
  - (b) being unable to provide for his or her support, or for the support of individuals who are in fact dependent upon the respondent;
  - (c) being financially exploited;
  - (d) being abused or neglected, including self abuse; or
  - (e) having his or her rights violated;

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<sup>10</sup> Utah Code Section 75-5-408(2); 1997 Uniform Act Section 409(d).

- (2) whether the respondent has a physical or mental illness, disability, condition, or syndrome and the prognosis;
- (3) whether the respondent is able to evaluate the consequences of alternative decisions;
- (4) whether the respondent can manage the activities of daily living through training, education, support services, mental and physical health care, medication, therapy, assistants, assistive devices, or other means that the respondent will accept;
- (5) the nature and extent of the demands placed on the respondent by the need for care;
- (6) the nature and extent of the demands placed on the respondent by his or her property;
- (7) the consistency of the respondent's behavior with his or her long-standing values, preferences and patterns of behavior, and
- (8) other relevant factors.

We want to focus on one factor in particular: the respondent's values, preferences and patterns of behavior. Although it comes late in the list, it is perhaps one of the more important factors. Two brief quotes from the benchbook *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings* by the ABA indicate why.

Capacity reflects the consistency of choices with the individual's life patterns, expressed values, and preferences. Choices that are linked with lifetime values are rational for an individual even if outside the norm."<sup>11</sup>

Each of the above factors must be weighed in view of the individual's history of choices and expressed values and preferences. Do not mistake eccentricity for diminished capacity. Actions that may appear to stem from cognitive problems may in fact be rational if based on lifetime beliefs or values. Long-held choices must be respected, yet weighed in view of new medical information that could increase risk, such as a diagnosis of dementia.<sup>12</sup>

#### **(4) Evidence of incapacity**

##### **(a) Inadequacy of current evidence**

On what basis should the court decide whether a person is incapacitated? Although the statute requires only that the judge be "satisfied"<sup>13</sup> that the respondent is incapacitated, the actual standard – clear and convincing evidence – is well settled. This

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<sup>11</sup> Judicial Determination of Capacity, p 5.

<sup>12</sup> Judicial Determination of Capacity. p 12.

<sup>13</sup> Utah Code Section 75-5-304(1).

is the law from the Utah Supreme Court<sup>14</sup>, and it is in keeping with the 1997 Uniform Act.<sup>15</sup>

Yet from the experience of committee members, it often does not require very much evidence to satisfy that high standard. In an empirical study of guardianship cases in Colorado, Massachusetts, and Pennsylvania,<sup>16</sup> researchers found:

- Written evaluations were filed in all but one case in Massachusetts and Colorado, and in 75% of the cases in Pennsylvania.
- Evaluations were submitted by physicians in 98% of the Massachusetts cases and in 88% of the Pennsylvania cases. In Colorado, clinical reports were submitted by physicians (57%), psychologists (27%), other professionals (9%), or a multidisciplinary team (6%) consistent with the 1997 Uniform Act.
- The average length of clinical reports in Colorado as 781 words, 244 words in Pennsylvania and 83 words in Massachusetts.
- 75% of the Massachusetts reports were hand written, and 65% of these had at least some portion that was illegible. In Pennsylvania and Colorado, reports were almost always typed.

That 83 words, some of which are illegible, might be offered as clear and convincing evidence is beyond belief.

### **(b) Recommendation**

The Wingspan Conference recommends that “the pre-hearing process include a separate court investigator or visitor, who must identify the respondent’s wants, needs, and values.”<sup>17</sup> The 1997 Uniform Act also recommends that a court visitor be required.<sup>18</sup> Utah law provides that the court may appoint a visitor to interview the respondent, – providing independent evidence – but there is no requirement to do so, unless the petitioner proposes that the respondent be excluded from the hearing. By omitting this step, the court denies itself critical information with which to assess the respondent’s functional abilities and limitations, values, and history, all of which affect the fiduciary’s appointment and authority.

A judge should never rely exclusively on a clinical evaluation secured by the petitioner. “A clinical evaluation secured by the petitioner is for the purpose of supporting the petition and may lack attention to the individual’s areas of strength, a prognosis for improvement, or important situational factors. An independent assessment can flesh out skeletal or purely one-sided information.”<sup>19</sup>

The American Bar Association Commission on Law and Aging, in conjunction with the American Psychological Association and the National College of Probate Judges, has prepared a template for a clinical evaluation of the respondent.<sup>20</sup> We have studied it

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<sup>14</sup> *In re Boyer*, 636 P.2d 1085, 1092 (Utah 1981).

<sup>15</sup> 1997 Uniform Act, Sections 311 and 401.

<sup>16</sup> Moyer, p 608.

<sup>17</sup> Wingspan - The Second National Guardianship Conference, Recommendations, Recommendation 30, 31 Stetson L. Rev. 595, 601 (2002). Hereafter cited as Wingspan Conference.

<sup>18</sup> 1997 Uniform Act Section 305.

<sup>19</sup> Judicial Determination of Capacity, p 8.

<sup>20</sup> Judicial Determination of Capacity, pp 25-32.

and expanded upon it with suggestions from other sources. It is extensive. Parts of it may not be relevant in some cases, and we recommend that those be excised. The judge should not be required to order the respondent to submit to a clinical evaluation, but we recommend its consideration in every case.

An evaluation by a multidisciplinary team, as in Colorado, may be beyond the means of nearly all families, but we recommend at least the perspective of a court visitor in addition to that of the clinician. Evaluation by a medical professional will probably occur in a clinical setting, but evaluation by the court visitor should, whenever possible, be in the respondent's usual environment and with all due consideration for his or her privacy and dignity.<sup>21</sup>

Although Utah Rule of Civil Procedure 35 governs the examination of a party when the party's "mental or physical condition ... is in controversy," we recommend that a special rule govern the respondent's examination in protective proceedings. Rule 35 was written for personal injury cases and contains provisions inappropriate to these circumstances.

Evidence from family, friends, colleagues, religious ministers, care providers and others will provide the judge with information about who this respondent is, and will enable the judge to decide, not just the respondent's capacity, but also the details of the guardianship plan. A fuller picture of the respondent – gained through more complete evidence – is desperately needed.

## **(5) Respondent's lawyer**

Under Utah law, the court must appoint a lawyer to represent a respondent in a guardianship proceeding<sup>22</sup> and may do so in a conservatorship proceeding<sup>23</sup> unless the respondent has a lawyer of his or her own choice. Given the importance of the proceedings, it is critical that the respondent have a lawyer.

### **(a) Current availability of lawyers**

Legal Aid Society of Salt Lake and Utah Legal Services are the primary free legal service providers in Utah. Legal Aid Society of Salt Lake is limited to Salt Lake County. Utah Legal Services represents clients throughout the state. Both represent clients in a variety of cases for which the client must income-qualify.

With intermittent grant funding, the Legal Aid Society of Salt Lake represents for free the respondent in a guardianship petition in Salt Lake County if the respondent meets the income guidelines. There is no age restriction.

Utah Legal Services, by contract with many of the counties under the Older Americans Act,<sup>24</sup> represents for free the respondent in a guardianship petition if the respondent is 60 or older and if there is sufficient funding through the local Area Agency

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<sup>21</sup> Guardianship, An Agenda for Reform: Recommendations of the National Guardianship Symposium and Policy of the American Bar Association. Recommendation III-B. 13 Mental & Physical Disability L. Rep. 271, 289 (1989). Hereafter cited as the Wingspread Conference.

<sup>22</sup> Utah Code Section 75-5-303(2).

<sup>23</sup> Utah Code Section 75-5-407(1).

<sup>24</sup> Utah Legal Services is not the exclusive provider. Some counties contract with individual lawyers.

on Aging. There is no income-qualification under the Older Americans Act, but resources are limited, so the local Area Agencies on Aging find legitimate ways to prioritize services. If there is not sufficient funding through the local Area Agency on Aging, Utah Legal Services tries to recruit a lawyer to represent the respondent for free. If the respondent is under 60, Utah Legal Services tries to recruit a lawyer to represent the respondent for free, but the respondent must meet income guidelines.

Sometimes a respondent will have a lawyer who has represented her or him in another matter. The respondent – or perhaps the petitioner on the respondent’s behalf – will seek representation by that lawyer. Sometimes that lawyer may be the “family” lawyer, whose interests may be divided between the respondent and the family members who are trying to do their best by the respondent. In some cases the petitioner’s lawyer might recruit a lawyer to represent the respondent.

We focus on the need for representation of an indigent respondent because that is where the need is most acute. But the private bar is doing its share. Private attorneys represent respondents and are paid by the respondent in very traditional arrangements. Lawyers represent respondents for free or for a reduced charge when recruited by the Office of Public Guardian, Utah Legal Services or Legal Aid Society of Salt Lake.

However, some respondents simply will be missed by the conditional and informal arrangements for free legal representation, yet they cannot afford to hire a lawyer.

Regardless who represents the respondent, the question “Who pays?” is equally critical. Utah law provides that if the petition is “without merit,” the petitioner pays court costs and the respondent’s lawyer. Otherwise, the respondent must pay for representation, but the respondent often cannot afford an attorney even though s/he may not qualify for one of the free Utah programs.

Finally, how qualified is the lawyer? Lawyers from Legal Aid Society of Salt Lake and Utah Legal Services are highly qualified and overworked. Their pro bono recruitment efforts usually produce a lawyer qualified for the case, which may run from well qualified in a complex case to modestly qualified in simpler, uncontested cases. In the experience of committee members, however, and from testimony by lawyers experienced in this area, there are many cases in which the respondent’s lawyer lacks the qualifications to present the respondent’s case for capacity or for less restrictive alternatives.

### **(b) Recommendation**

The Wingspread Conference recommends that “courts should help develop an ongoing system that will ensure effective legal representation of respondents.”<sup>25</sup> We recommend an ambitious program to give real effect to that policy: to ensure in a systemic way that respondents are represented by qualified attorneys.

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<sup>25</sup> Wingspread Conference. Recommendation IV-D.2. 13 Mental & Physical Disability L. Rep. 271, 295 (1989).

### **(i) Conservatorships**

We begin by recommending legislation to require representation for the respondent in petitions to appoint a conservator as well as in petitions to appoint a guardian. Utah law currently requires representation in the latter case and permits it in the former. The reason for the distinction usually involves the explanation that a conservator controls only the respondent's property, while a guardian controls the respondent's person. But in our society, a person who loses the right to decide how to invest and spend money and how to manage property has lost just as much as the person who loses the right to vote or to make health care decisions. Representation in conservatorships is just as necessary as in guardianships. Mandatory representation in both types of appointments is recommended by the National Probate Court Standards.<sup>26</sup>

### **(ii) Roster**

The Wingspread Conference recommends that "training should be ... required for attorneys who wish to be appointed as counsel in guardianship cases...."<sup>27</sup> To better ensure the qualifications of the lawyer representing the respondent, we recommend that, unless the respondent has the lawyer of his or her own choosing, the district court appoint a lawyer from a roster of lawyers maintained by the Utah State Bar under the authority of the Supreme Court. There should be minimum requirements for training, observation, mentoring and continuing education to qualify for the roster. We recommend an appropriation to pay for some of the appointments, but all appointments should be from the roster, unless the respondent has retained his or her own lawyer.

The appointment would be, essentially, a rotation: When a petition in a protective proceeding is filed, the clerk would offer the appointment to the first lawyer in order on the roster willing to accept assignments in that county. The lawyer would review the case for conflicts of interest and other factors that might impede the lawyer from independent and zealous representation of the respondent. If the lawyer declines the appointment, the clerk would offer the appointment to the next lawyer on the roster. Upon accepting the appointment, the judge would enter an order appointing the lawyer, and the clerk would move the lawyer's name to the bottom of the roster.

The executive director of the Utah State Bar would maintain and publish a roster of lawyers qualified to represent respondents in protective proceedings. A lawyer would be added to the list in the order in which s/he certifies to meeting the minimum requirements. To qualify for the roster, a lawyer would have to:

- acquire at least four hours of MCLE or four hours of accredited law school education in the law and procedures of protective proceedings;
- observe a mentor representing at least one respondent, which may be satisfied under Rule 14-807, Law student assistance;
- serve as co-counsel with a mentor representing at least one respondent, which may be satisfied under Rule 14-807, Law student assistance;
- serve as lead counsel with a mentor representing at least one respondent;

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<sup>26</sup> National Probate Court Standards. Standards 3.3.5 and 3.4.5.

<sup>27</sup> Wingspread Conference. Recommendation II-D(2). 13 Mental & Physical Disability L. Rep. 271, 286 (1989).

- be recommended by one's mentors;
- agree to represent indigent respondents for attorney fees approved by the court; and
- agree to represent respondents who are not indigent based on the person's ability to pay.

To be retained on the roster the lawyer would biannually certify to have:

- acquired at least two hours of MCLE in the law and procedures of protective proceedings; and
- represented at least two indigent respondents.

Minimum education requirements would be part of and not in addition to existing mandatory continuing legal education requirements. If there are not at least two indigent respondents to be represented, that requirement would be waived. The executive director should be able to waive the initial or continuing requirements that show competence if the lawyer demonstrates by education and experience proficiency in the law and procedures of protective proceedings.

Even if the respondent has retained a lawyer, the court should have the discretion to evaluate the lawyer's qualifications and, if they are found lacking, to appoint someone from the roster.

### **(iii) Money**

The Wingspan Conference recommends that "innovative and creative ways be developed by which funding sources are categorically directed to guardianship."<sup>28</sup> Finding the money to pay lawyers willing to take assignments is the most difficult part of this program. [Until the significant recession and the decline in state revenue, we were prepared to recommend using public funds to pay lawyers to represent indigent respondents who do not qualify for other free programs. Under current economic conditions, it would be futile and irresponsible to pursue that objective, but we continue to believe the objective is sound. So we describe our proposal, but include no implementing legislation.](#)

The needs of the most indigent are being met – as well as they can be met – through Legal Aid Society of Salt Lake and Utah Legal Services. We mean not to interfere with those services. Utah Legal Services can serve clients whose income is below 200% of the federal poverty guideline, so we start our program where they leave off.

We recommend that a lawyer appointed from the roster be paid \$50 per hour if the respondent's income is between 200% and 300% of the of the federal poverty guidelines or the respondent does not have sufficient income, assets, credit, or other means to pay the expenses of legal services without depriving the respondent or the respondent's family of food, shelter, clothing, and other necessities. In future years, the \$50 per hour would be adjusted for inflation. Respondents who do not meet this test would pay for representation from their estates, based on the ability to pay.

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<sup>28</sup> Wingspan Conference. Recommendation 7, 31 Stetson L. Rev. 595, 596 (2002).

**(iv) Role of respondent’s lawyer**

Currently, Utah law distinguishes between the role of the respondent’s lawyer in guardianship and conservatorship cases. If the petition is to appoint a guardian, the lawyer has the traditional duty to “represent” the respondent.<sup>29</sup> If the petition is to appoint a conservator, the lawyer “has the powers and duties of a guardian ad litem.”<sup>30</sup> Under the 1997 Uniform Act, the court appoints a lawyer to “represent” the respondent in guardianship and conservatorship cases.<sup>31</sup> The National Probate Court Standards recommend that the role of counsel is to advocate for his or her client.<sup>32</sup> The Wingspread Conference<sup>33</sup> and the Wingspan Conference<sup>34</sup> recommend zealous advocacy by the respondent’s lawyer.

We concur that the lawyer’s role is to represent the respondent (not the respondent’s best interests) independently and zealously, just as in any other attorney-client relationship. Rule of Professional Conduct 1.14 already advises the lawyer on representing a person of diminished capacity,<sup>35</sup> and that rule has recently been revised, in keeping with the ABA Ethics 2000 Commission and the recommendations of the Wingspan Conference,<sup>36</sup> to allow the lawyer greater flexibility to take protective action. The Probate Code should not interfere with that relationship.

**(6) Petitioner’s lawyer**

Utah law does not contain any provisions for petitioner’s representation in a guardianship proceeding, but permits the petitioner in a conservatorship proceeding to charge the cost of his or her lawyer to the respondent’s estate.<sup>37</sup> There is no sound reason to distinguish the two.

Public policy should encourage family members to serve as guardians as well as conservators. Family members know and love the respondent better than anyone. Without family members willing to serve, the role falls to the Office of Public Guardian, which will increase the cost to the state. The tasks of a guardian and conservator are already difficult and time-consuming. The recommendations in this report, although they will improve the process, also will increase the cost.

If a protective proceeding is legally necessary to benefit the respondent, and if the respondent’s estate is ample enough to provide for the respondent and still pay the expense of that process, then the court or conservator should be permitted to pay reasonable and necessary fees and expenses from the estate. This is the conclusion of the 1997 Uniform Act.<sup>38</sup> [Although it may seem harsh to pay the petitioner’s expenses](#)

<sup>29</sup> Utah Code Section 75-5-303(2).

<sup>30</sup> Utah Code Section 75-5-407(2).

<sup>31</sup> 1997 Uniform Act, Section 406

<sup>32</sup> National Probate Court Standards. Standards 3.3.5 and 3.4.5.

<sup>33</sup> Wingspread Conference. Recommendation II-C. 13 Mental & Physical Disability L. Rep. 271, 285 (1989)

<sup>34</sup> Wingspan Conference. Recommendation 28. 31 Stetson L. Rev. 595, 601 (2002).

<sup>35</sup> Rule of Professional Conduct 1.14. See also RPC 1.6, also amended as part of the Ethics 2000 project to allow disclosure of some information.

<sup>36</sup> Wingspan Conference. Recommendation 59. 31 Stetson L. Rev. 595, 607 (2002).

<sup>37</sup> Utah Code Sections 75-5-414 and 75-5-424(3)(w).

<sup>38</sup> 1997 Uniform Act, Section 417.

from the respondent's estate, we ask ourselves "Who is the estate intended to benefit?" It is far better to expend the estate to protect the respondent than to preserve it for the heirs.

There should be restrictions. The petition should be found to have been brought in good faith and prosecuted responsibly. The costs and fees should be reasonable and necessary. The petition should result in the appointment of a guardian or conservator or in another order that benefits the respondent. And the respondent's estate must be able to afford the expense.

The Legislature rejected a similar policy in the 2005 General Session,<sup>39</sup> but we believe it to be a sound policy, and urge the Legislature to reconsider.

## **(7) Court process**

### **(a) The hearing**

Although called a "hearing" by statute, it has all of the trappings of a trial. The respondent has the right to be present and to be represented by a lawyer. The respondent has the right to present evidence and cross-examine witnesses. Indeed, the respondent in a guardianship proceeding has the right to a trial by jury,<sup>40</sup> although that right is seldom exercised, and is not included in the 1997 Uniform Act. Much more concerning than the infrequency of trial by jury is the frequency with which the respondent is absent from the hearing. The statute establishes the respondent's right to be present, but in our experience, the respondent often is not.

The due process hearing rights that are uniformly recommended<sup>41</sup> are all recognized by Utah law. There is no inadequacy in that regard. Rather the inadequacy is in practicing what the law provides.

Beyond ensuring the rights already established, recommend that, if possible, the court conduct the hearing in a setting that is accessible by and comforting to the respondent. This would include ADA accommodations, but also:

- holding the hearing later in the morning, rather than first thing;
- more open space in the hearing room to accommodate wheelchairs;
- holding the hearing in chambers or other less intimidating surroundings; and
- slowing the frenetic pace of too many hearings in too short a time.

We began this report by likening the effect of appointing a guardian or conservator to a criminal sentence or commitment to a mental health facility. The deprivation of civil liberties is almost as great. Therefore, just as in a criminal or commitment proceeding, we recommend that the judge appoint a certified interpreter at state expense if the respondent does not adequately speak or understand English. The forms and other public information and instructions recommended later in this report should be

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<sup>39</sup> See HB 167, Elder Protection Provisions by Rep. Patricia Jones.

<sup>40</sup> Utah Code Section 75-5-303(4).

<sup>41</sup> National Probate Court Standards, Standard 3.3.8; 1997 Uniform Act, Section 308. Wingspan Conference. Recommendation 27, 31 Stetson L. Rev. 595, 601 (2002); Wingspread Conference. Recommendation II-B(2); 13 Mental & Physical Disability L. Rep. 271, 283 (1989).

translated into Spanish. We recommend that Rule 3-306 be amended to add protective proceedings to the list of casetypes requiring a court-appointed certified interpreter.

**(b) Mediation**

Mediation would seem to be particularly suitable for adult guardianship cases for a number of reasons. These cases usually 1) involve ongoing family relationships and the inevitably-attendant emotional issues; 2) include sensitive information that the participants would prefer to keep private; 3) sometimes require flexible and creative resolutions; and 4) often involve parties who cannot afford protracted litigation. Yet the use of mediation in adult guardianship cases raises a host of questions. ... An adult guardianship case, by its very nature, centers on an individual whose capacity is in question. Guardianship adjudications are designed to offer maximum protection to that individual because he or she may not be capable of protecting himself or herself. Mediation, on the other hand, is grounded in the principle of self-determination and presumes that the parties are capable of participating in the process and bargaining for their own interests. Can these two concepts be reconciled?

Is the Use of Mediation Appropriate in Adult Guardianship Cases? Mary F. Radford, 31 Stetson L. Rev. 611, 639-640 (2002), hereafter cited as "Radford."

Although mediation of guardianship and conservatorship proceedings is not without its critics,<sup>42</sup> many organizations and individuals recommend that mediation be an integral part of those cases,<sup>43</sup> and we concur.

Professor Radford concludes, after a thorough analysis from which we draw liberally, that mediation is appropriate in guardianship and conservatorship cases, but that these cases present several issues that must be carefully considered by the mediator and the judge.

**(i) Capacity of respondent to mediate**

The ADA Mediation Guidelines recommend special factors for the mediator to consider when mediating with a person of potentially diminished capacity:

1. The mediator should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options and make and keep an agreement.

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<sup>42</sup> See e.g., Winsor C. Schmidt, Jr., What is Known and not Known about the State of the Guardianship and Public Guardianship System Thirteen Years After the Wingspread National Guardianship Symposium. 31 Stetson L. Rev. 1027, 1032-1033 (2002).

<sup>43</sup> See e.g., National Probate Court Standards, Standard 2.5.1. Wingspan Conference. Recommendation 24, 31 Stetson L. Rev. 595, 600 (2002) The Center for Social Gerontology, <http://www.tcsq.org/>. Professor Mary F. Radford, 31 Stetson L. Rev. 611, 685 (2002).

2. If a party appears to have diminished capacity or if a party's capacity to mediate is unclear, the ... mediator should determine whether a disability is interfering with the capacity to mediate and whether an accommodation will enable the party to participate effectively.

3. The ... mediator should also determine whether the party can mediate with support.

ADA Mediation Guidelines, Guideline I.D.<sup>44</sup>

Even if the respondent lacks capacity to participate, the ADA Guidelines permit mediation if s/he is present and a surrogate represents the respondent's interests, values and preferences and makes decisions for the respondent.<sup>45</sup>

[The Center for Social Gerontology's] Adult Guardianship Mediation Manual also offers mediators a set of guidelines for determining whether the adult has capacity to participate in the mediation. These guidelines appear in the form of eight questions:

- 1) Can the respondent understand what is being discussed?
- 2) Does he or she understand who the parties are?
- 3) Can the respondent understand the role of the mediator?
- 4) Can the respondent listen to and comprehend the story of the other party?
- 5) Can he or she generate options for a solution?
- 6) Can he or she assess options?
- 7) Is the respondent expressing a consistent opinion?
- 8) Can he or she make and keep an agreement?

Radford, 31 Stetson L. Rev. 611, 650 (2002), citing The Center for Social Gerontology's Adult Guardianship Mediation Manual.

### **(ii) Power imbalance among the parties**

The mediator must remain alert to power imbalances among the parties and take appropriate measures to neutralize them, such as:

- ensuring that the respondent is adequately represented;
- structuring presentations so that the respondent is allowed to speak first;
- ensuring the neutrality of the mediation site;
- encouraging experts to convey information in an understandable manner; and
- intervening to clear up confusion and assuage the respondent's fears. 46

The more subtle obstacle to self-determination by an adult ... is the tendency of family members, attorneys, judges, and perhaps even mediators to want to structure a framework that is protective of the adult but that may not necessarily protect the adult's fundamental right to autonomy. ... The mediator, as guardian of the principle of self-determination, must remain alert to the distinct possibility that the other,

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<sup>44</sup> <http://www.cojcr.org/ada.html>

<sup>45</sup> ADA Mediation Guidelines, Guideline I.D.4.

<sup>46</sup> Radford, 31 Stetson L. Rev. 611, 652 (2002).

"saner," parties to the mediation are asserting their own values rather than reflecting the values of the adult.

Radford, 31 Stetson L. Rev. 611, 653-654 (2002).

### **(iii) Mediator training**

The Wingspan Conference recommends that "standards and training for mediators be developed in conjunction with the Alternative Dispute Resolution community to address mediation in guardianship related matters."<sup>47</sup> We concur.

Mediation of protective proceedings requires training and experience that the Utah community may not yet have. Because mediation of protective proceedings has a relatively short history in Utah, because the only specialized training of court-annexed ADR providers focuses on family law disputes,<sup>48</sup> and because of the special risks of mediating protective proceedings, we encourage the mediation community to develop training classes and materials along the lines recommended by the Wingspread Conference:

- (a) the rights and procedures applicable in guardianship proceedings;
- (b) the aging process and disability conditions, and the myths and stereotypes concerning older and disabled persons;
- (c) the skills required to effectively communicate with disabled and elderly persons;
- (d) the applicable medical and mental health terminology and the possible effects of various medications on the respondent; and
- (e) services and programs available in the community for elderly and/or disabled persons.<sup>49</sup>

The Center for Social Gerontology also offers a substantial curriculum for mediation training in guardianship proceedings.<sup>50</sup>

### **(c) Probate commissioner**

The Wingspan Conference recommends judicial specialization in guardianships,<sup>51</sup> however, we do not. We recommend extensive judicial education and training, but we do not recommend appointing a specialized probate judge. Training for all will have to serve the objectives of specialization by a few.

Although the clerks' office in some districts has a recognizable probate department, the district court has favored the general assignment of cases among its judges for many years. The same factors that make specialization in probate attractive – small caseload, specialized procedures, and expansive geography – also work against

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<sup>47</sup> Wingspan Conference. Recommendation 22. 31 Stetson L. Rev. 595, 599 (2002).

<sup>48</sup> CJA 4-510(3)(C).

<sup>49</sup> Wingspread Conference. Recommendation II-D. 13 Mental & Physical Disability L. Rep. 271, 286 (1989).

<sup>50</sup> <http://www.tcsg.org/mediation/manual.htm>.

<sup>51</sup> Wingspan Conference. Recommendation 56. 31 Stetson L. Rev. 595, 606 (2002).

specialization. At some point, there may be sufficient caseload to merit an arrangement similar to the district court’s “tax court,” a handful of judges from around the state, who are assigned the regular variety of cases from their home district but who are assigned probate cases from all of the districts when a case is contested.

We do recommend that the district courts consider appointing commissioners to specialize in probate law much as they have done in family law. In the Third District, instead of adding a judge when growth warrants it, consider appointing a probate commissioner – not a guardianship specialist, but a probate specialist. In the other urban districts – Districts Two, Four and Five – there may be sufficient caseload between family and probate cases to warrant a commissioner.

**(d) Access to records**

During our study, the Judicial Council asked for our recommendations on public access to guardianship and conservatorship records. We recommended that, except for the appointment order and letters, which must be public, guardianship and conservatorship records be classified as “private”: available to the court and to the parties, but not to the public. Rule 4-202.02 has since been amended accordingly.

Our research showed that, of the states that make an express classification, about half allow public access and half do not.<sup>52</sup>

Public	Private
Arizona	Alaska
Arkansas	California
Connecticut	Colorado
Illinois	Delaware
Indiana	Florida
Iowa	Georgia
Kansas	Idaho
Louisiana	Kentucky
Nebraska	New Mexico
Nevada	South Dakota
Oregon	Hawaii - Guardian
Washington	
Wyoming	
Hawaii - Conservator	

As we noted in our earlier recommendation: guardianship and conservatorship records and hearings historically have been public not because of any deliberate decision, but because no one seems to have asked whether they should be private. Hearings should remain public. Public scrutiny controls abuse and assures people that the authority granted by the court is appropriate. Public records serve this important goal just as much as public hearings, but court records contain significant medical information, financial information, living situation, and personal identifying information about the respondent. The respondent, almost by definition, is vulnerable to being victimized and the court records provide the information with which to do so. The combination of public hearings and private records, while not common, has precedent in juvenile court cases and

<sup>52</sup> The 1997 Uniform Act also recommends that guardianship and conservatorship records be confidential. Sections 307 and 407.

adoption cases.

There are records that can safely remain public. The appointment order and letters have been mentioned. These are necessarily public because they need to be shared on a regular basis with people not associated with the case; sometimes even recorded as part of public land records. The existence of the case (case name and number) and the register of actions or docket should also be public. The latter of these was swept in with our earlier recommendation because of the district court case management system's inability to differentiate the docket from the rest of the case. But there is no privacy or security interest to be protected, and the administrative office of the courts is working to sequester the documents filed in a guardianship or conservatorship case while allowing public access to the record of the document having been filed.

## **(8) Fiduciary authority**

### **(a) Less restrictive alternatives to guardianship or conservatorship**

Currently, in order to appoint a guardian with plenary authority, the court must make a finding that nothing less is "adequate."<sup>53</sup> We believe that the petition should review the alternatives to appointing a guardian or conservator and explain why none are appropriate.<sup>54</sup> The hearing should include evidence to support that conclusion.

Less restrictive alternatives may go unexplored simply because of unfamiliarity, so we describe some here. The following options are some alternatives to guardianship or conservatorship (There may be others.) that may meet the respondent's needs.<sup>55</sup> All require the respondent's cooperation. Some require the respondent's capacity.

#### **(i) Alternatives for financial decisionmaking**

**Representative payee.** Several federal agencies, such as the Social Security Administration, can appoint a person to receive benefits on behalf of a beneficiary who is unable to administer his or her finances. A representative payee maintains control over the benefits, signs all checks drawn on the benefits, and spends the benefit money to meet the needs of the beneficiary. A person applying to an agency to be a representative payee does not first need to be appointed as a guardian or conservator.

**Trust.** Trusts can be useful planning tools for incapacity because they can be established and controlled by a competent person and continue if that person later becomes incapacitated. The trustee holds legal title to the property transferred to the trust and has the duty to use the property as provided in the trust agreement which can be for the benefit of the trustor during his or her lifetime. Trusts are regulated by statute and should be drafted by a lawyer.

**Power of attorney.** Power of attorney is a document in which a person authorizes an agent to act when the person cannot. The power of attorney can be for a specified

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<sup>53</sup> Utah Code Section 75-5-304(2).

<sup>54</sup> Wingspan Conference. Recommendation 20. 31 Stetson L. Rev. 595, 598 (2002). Wingspread Conference. Recommendation I-A. 13 Mental & Physical Disability L. Rep. 271, 277 (1989).

<sup>55</sup> Borrowed liberally from *Alternatives to Guardianship and Conservatorship for Adults in Iowa*, The Iowa Department of Elder Affairs and the Iowa Governor's Developmental Disabilities Council, pp 6-13 (2001).

time or until the person cancels it. The power of attorney can grant a specific authority or grant more general authority to act in financial transactions. Some common powers of attorney:

- Open, maintain or close bank accounts or brokerage accounts
- Sell, lease or maintain real estate
- Access safe deposit boxes
- Make financial investments
- Borrow money, mortgage property, or renew debts
- Prepare and file income tax returns
- Vote at corporate meetings
- Purchase insurance for the principal's benefit
- Defend, prosecute, or settle any lawsuit
- Start or carry on a business
- Employ professional assistants, such as lawyers, accountants, and real estate agents
- Apply for benefits and participate in governmental programs
- Transfer property to a trustee
- Disclaim an inheritance

**Joint bank account.** In a joint bank account a trusted friend or family member co-owns the account with the person. Both have ownership of and access to the account, so great caution should be taken.

**Automatic banking.** A person might retain control of his or her own affairs with the help of automatic deposits and automatic bill payments.

**Trusted help.** A person may be able to manage his or her own financial affairs simply with help, either by a family member or trusted friend or by a professional. Such an assistant could help organize a budget, write checks for the person's signature, assist with related paperwork, and propose and explain investments. Be watchful for undue influence by the person providing help.

## (ii) Alternatives for health care decisionmaking

**Advance health care directive.** Advance directives are instructions a person gives to health care providers and family to make sure his or her wishes regarding health care are followed.

**Power of attorney.** Power of attorney can also be used for health care decisions. Power of attorney is a document in which a person authorizes an agent to make health care decisions when the person cannot. This agent is required to make health care decisions according to directions provided by the person.

## (iii) Crisis intervention

**Mediation, counseling, and respite support services.** Counseling may be helpful if a person does not lack capacity, but is unwilling to agree to reasonable requests. A mediator may be able to help reach a compromise. Respite care provides temporary relief to the caregiver if the caregiver or the person cared for are aged 60 or older. The

respite may be brief, 2-3 hours, or longer than 24 hours, and the care may take place at the individual's residence or elsewhere.

**(iv) Organizations willing to help**

**Area Agencies on Aging** administer programs for those aged 60 and over such as:

- Access to other services: transportation, outreach, and information and referral;
- Community services: congregate meals, legal services, case management, and continuing education;
- In-home services: respite care, home health, homemaker, home-delivered meals and chore maintenance; and
- Services to residents of care-providing facilities.

**Community based services.** There are free and low-cost services offered by government agencies, religious organizations and others, such as home nursing, home health aides, homemakers, home delivered meals, mental health services, and transportation.

**(b) Fiduciary's limited authority**

If the respondent is incapacitated and a guardian is needed, plenary authority, except when the respondent is completely incapacitated, is universally condemned.<sup>56</sup> Although plenary appointments are relatively common under our current statutes, even current law directs the judge to "prefer" limited authority over plenary appointments.<sup>57</sup> Unfortunately, after that brief admonishment, the statute does nothing to support the result, other than require a finding that nothing else will do.

We believe that the "petition and order should include detailed statements of the respondent's functional capabilities and limitations".<sup>58</sup> The hearing should include evidence of the same. The order should be tailored to the respondent's particular limitations. In our proposed statutes, rather than presuming full authority and requiring an express limitation of it, as the Code does now,<sup>59</sup> the authority of the guardian would be presumed limited to the authority expressly stated in the order. Only by listing all available authority would the court be able to make a plenary appointment, which should require findings supported by clear and convincing evidence that such an appointment is necessary.<sup>60</sup>

There is no simple formula that will help judges make the determination.  
The following broad classification could serve as an initial schema:

If minimal or no incapacities, petition not granted, use less restrictive alternative.

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<sup>56</sup> Wingspread Conference. Recommendations III-D and IV-B. 13 Mental & Physical Disability L. Rep. 271, 290 and 292 (1989). Wingspan Conference. Recommendations 38 and 39. 31 Stetson L. Rev. 595, 602-603 (2002). National Probate Court Standards, Standard 3.3.10. 1997 Uniform Act, Section 314. Judicial Determination of Capacity, p 2.

<sup>57</sup> Utah Code Section 75-5-304(2).

<sup>58</sup> Wingspread Conference. Recommendation IV-B. 13 Mental & Physical Disability L. Rep. 271, 293 (1989).

<sup>59</sup> Utah Code Section 75-5-312(2).

<sup>60</sup> Wingspan Conference. Recommendation 39. 31 Stetson L. Rev. 595, 603 (2002).

If severely diminished capacities in all areas or if less restrictive interventions have failed, use plenary guardianship.

If mixed strengths and weaknesses, use limited guardianship.

The cases in which there are “mixed areas” of strengths and weaknesses present the greatest challenge – and the greatest opportunity – for the “judge as craftsman” to tailor a limited order to the specific needs and abilities of the individual.

Judicial Determination of Capacity, p 13.

### **(i) Guardian or Conservator?**

In determining the appropriate authority, the judge should decide whether the respondent’s limitations require a guardian, a conservator or both. And this ultimate decision should be reflected in the petition that starts the case. Practice over the years has degenerated to the point that many, probably most, petitioners request appointment to both offices, when one or the other alone might do. Petitioners, who know only the basic idea that a conservator is responsible for the respondent’s estate and a guardian is responsible for the respondent’s care and well-being, may not realize the significant additional fiscal responsibility that comes with being a conservator.

Currently, guardians have some modest authority over the respondent’s estate.<sup>61</sup> We propose delineating the guardian’s authority for many everyday property transactions, reserved to a conservator if one is appointed, that may reduce the need for a conservator. Only if the petitioner requests authority beyond these transactions and the judge agrees that it is needed should a conservator be appointed.

Under current law, a guardian may receive the respondent’s money and property and has a duty to “conserve any excess for the ward’s needs,”<sup>62</sup> a simple standard met by a simple savings account. A conservator, on the other hand, must meet the much higher standards of a trustee,<sup>63</sup> exercising reasonable care, skill, and caution as would a prudent investor<sup>64</sup> and making reasonable efforts to verify facts<sup>65</sup> while investing and reinvesting the respondent’s estate.<sup>66</sup> Family guardians probably do not have that acumen, do not need that authority, and would do well to leave the responsibility to a professional conservator.

### **(ii) Retained rights – Restrictions on authority**

The respondent should retain all rights, power, authority and discretion not expressly granted to the guardian by statute or court order.

The right of the respondent to vote in governmental elections is particularly difficult. The right cannot be assigned to the guardian in any event, but when is it proper to deny

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<sup>61</sup> Utah Code Section 75-5-312(2)(b) (commence protective proceedings); (2)(d)(i) (initiate proceedings to compel support); (2)(d)(ii) ((receive money and property deliverable to the respondent).

<sup>62</sup> Utah Code Section 75-5-312(2)(d)(ii).

<sup>63</sup> Utah Code Section 75-5-417(1); Utah Code Section 75-5-424(1).

<sup>64</sup> Utah Code Section 75-7-902(1).

<sup>65</sup> Utah Code Section 75-7-902(4).

<sup>66</sup> Utah Code Section 75-5-424(2).

that right to the respondent? We propose the standard recommended by the ABA. The respondent retains the right to vote in governmental elections unless “the court finds [by clear and convincing evidence] that the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process.”<sup>67</sup> It would be helpful if further statutory and practical changes were implemented to accommodate voting by respondents determined to be incapacitated, but that is beyond the scope of this report.

The guardian should not be able to:

- consent to commitment of the respondent to a mental retardation facility (The guardian should petition the court for an order under with Title 62A, Chapter 5, Part 3, Admission to Mental Retardation Facility.);
- consent to commitment of the respondent to a mental health care institution (The guardian should petition the court for an order in accordance with Title 62A, Chapter 15, Part 6, Utah State Hospital and Other Mental Health Facilities.);
- consent to sterilization of the respondent; (The guardian should petition the court for an order in accordance with Title 62A, Chapter 6, Sterilization of Handicapped Person.); or
- consent to termination of the parental rights in the respondent or of the respondent’s parental rights in another. ([The guardian should petition the juvenile court to terminate parental rights.](#))

Unless permitted by the court, the guardian should not be able to:

- consent to the admission of the respondent to a psychiatric hospital or other mental health care facility;
- consent to participation in medical research, electroconvulsive therapy or other shock treatment, experimental treatment, forced medication with psychotropic drugs, abortion, psychosurgery, a procedure that restricts the respondent’s rights, or to be a living organ donor;
- consent to termination of life-sustaining treatment if the respondent has never had health care decisionmaking capacity;
- consent to name change, adoption, marriage, annulment or divorce of the respondent;
- prosecute, defend and settle legal actions, including administrative proceedings, on behalf of the respondent;
- establish or move the respondent’s dwelling place outside of Utah; or
- restrict the respondent’s physical liberty, communications or social activities more than reasonably necessary to protect the respondent or others from harm.

### **(iii) Maximizing respondent’s independence – Decisionmaking standard**

Our Supreme Court requires that when appointing a guardian, the court “must consider the interest of the ward in retaining as broad a power of self-determination as is consistent with the reason for appointing a guardian of the person.”<sup>68</sup> Further, “the

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<sup>67</sup> Resolution of the ABA House of Delegates approved on August 13, 2007.

<sup>68</sup> *In re Boyer*, 636 P.2d 1085, 1090-1091 (Utah 1981).

court's order should require the guardian to attempt to maximize self-reliance, autonomy and independence...."<sup>69</sup> Reacquiring capacity is legally and practically possible, and the guardian should take reasonable steps to that end.

Regardless whether the respondent might reacquire capacity, maximizing independence includes applying the "substitute judgment" standard when making decisions on the respondent's behalf. When the guardian or conservator uses the substitute judgment standard s/he makes the decision that the respondent would have made when competent. The fiduciary therefore has a duty to learn the respondent's values, preferences and patterns of behavior that form the basis of what respondent would have done. Substitute judgment is the decisionmaking standard used in all circumstances except those that permit the "best interest" standard to be used.

The fiduciary may use the best interest decisionmaking standard when:

- (a) following the respondent's wishes would cause her or him harm;
- (b) the guardian or conservator cannot determine the respondent's wishes; or
- (c) the respondent has never had capacity.

When the guardian or conservator uses the best interest standard, s/he makes the decision that is the least intrusive, least restrictive, and most normalizing course of action to accommodate the respondent's particular functional limitations.

#### **(iv) Respondent's values, preferences and patterns**

The respondent's values, preferences and patterns of behavior should play a big role in shaping the outcome of a petition to appoint a guardian or conservator. Not only are they important in determining capacity, as discussed in Section (3)(c), but also in determining who the fiduciary should be, the fiduciary's authority, and even in some of the fiduciary's decisions, such as medical and financial decisions and living arrangements.<sup>70</sup> If the court and the fiduciary are to give any realistic meaning to the standard of "substitute judgment," it is critical to learn what those values, preferences and patterns are. The respondent may have something to say. The clinician and court visitor should include the respondent's values, preferences and patterns of behavior as part of their investigation. Family, friends, colleagues, religious ministers, care providers and others also may have useful evidence.

### **(9) Emergency appointments**

Current Utah law permits the emergency appointment of a temporary guardian,<sup>71</sup> but there is no similar provision for a temporary conservator. Emergency appointments are sometimes necessary, but our current statute provides less protection to the respondent than the Rules of Civil Procedure provide to a defendant for a temporary restraining order.<sup>72</sup> The 1997 Uniform Act addresses these shortcomings and we have integrated

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<sup>69</sup> Wingspread Conference. Recommendation IV-B. 13 Mental & Physical Disability L. Rep. 271, 293 (1989).

<sup>70</sup> Judicial Determination of Capacity, p 5.

<sup>71</sup> Utah Code Section 75-5-310.

<sup>72</sup> Utah Rule of Civil Procedure 65A. Injunctions. Our current statute regulating emergency petitions does not require appointment of counsel for the respondent, even though counsel is required for regular petitions.

many of its features into our proposed legislation. We have also integrated the features of a temporary restraining order and preliminary injunction, procedures lawyers and judges are familiar with.

The authorities differ on whether a regular petition should be filed with the emergency petition. Standard 3.3.6(a)(2) of the National Probate Court Standards recommends it. The 1997 Uniform Act Section 312 recommends against it. The Wingspan Conference also seems to recommend that a regular petition be required.<sup>73</sup> The commentary to the 1997 Uniform Act argues that requiring a petition “lends an air of inevitability that a permanent guardian should be appointed;” that respondent’s need for a guardian might be temporary and his or her long-term needs might be met by other mechanisms.

Our current Utah statute is silent on the question, and usually courts do not require a regular petition. We endorse that model, for the reasons explained in the 1997 Uniform Act, and simply because requiring a regular petition, especially the more detailed petition we envision, in the midst of an emergency is unrealistic. On the other hand, the court must guard against the emergency appointment becoming *de facto* permanent because of the failure to monitor the appointment.

Our proposal requires a hearing on the emergency petition and notice to the respondent unless the respondent would be harmed before a hearing could be held. Only in the latter case, may the judge consider evidence of the emergency *ex parte*. The guardian’s authority would be limited to what is justified by the emergency and expressly stated in the order. A hearing on the emergency appointment must be held within 5 days after the appointment and notice of the appointment and hearing given within 2 days. An emergency order without hearing and notice would expire after 5 days. An emergency order with hearing and notice would expire after 60 days.<sup>74</sup>

## **(10) Appointments by will or signed writing**

This is one of our more technical recommendations, and one in which we move away from current Utah law and the 1997 Uniform Act. Currently, Utah allows a person to appoint a guardian for a minor child or an incapacitated adult child or spouse by will or signed writing.<sup>75</sup> A person may also nominate a guardian for a spouse or child, but the difference between a nominee and an appointee is not entirely clear.<sup>76</sup> A person may nominate, but not appoint, a conservator for a spouse or child.<sup>77</sup> Other designated

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<sup>73</sup> Wingspan Conference. Recommendation 34. 31 Stetson L. Rev. 595, 602 (2002). Although not stating directly that a regular petition should be required, the Conference recommends that the emergency appointment require “a hearing on the permanent guardianship as promptly as possible....”

<sup>74</sup> Sixty days conforms to the 1997 Uniform Act, Section 312, but it is twice as long as current Utah law. We believe that by imposing a more rigorous process on the emergency appointment, it is safe to extend the time in which to conduct the medical and social evaluations and prepare evidence for the regular hearing.

<sup>75</sup> Utah Code Sections 75-5-202.5 and 75-5-301.

<sup>76</sup> Compare Utah Code Section 75-5-311 with 75-5-301.

<sup>77</sup> Utah Code Section 75-5-410.

people may nominate a guardian or conservator to replace them in the priority list of appointees.<sup>78</sup>

The 1997 Uniform Act clarifies some points, but not others. The 1997 Uniform Act continues the distinction between appointing a guardian and nominating a conservator. It permits the appointing parent or spouse to petition the court to confirm the appointment before the parent's or spouse's death or incapacity but not to confirm a nomination. It permits a respondent to nominate a guardian or conservator while s/he still has capacity to do so, but it does not permit a respondent to confirm the nomination. The respondent's nominee has top priority, but that is always subject to the court's authority to appoint in a different order.

The 1997 Uniform Act requires the appointee, whether confirmed beforehand or not, to file an acceptance of appointment, and if not confirmed beforehand, to file a petition to confirm the appointment. The 1997 Uniform Act makes the appointment effective upon acceptance by the appointee, without ever determining that the respondent is incapacitated.<sup>79</sup>

There is no need for such complexity. There is need for more protection.

We propose a simpler model applicable to guardians and conservators, minors and adults that better protects the respondent's rights. We begin with the premise that, if a guardian or conservator is to act under judicial approval, the court should make the appointment, not the parent or spouse.

A person should be able to nominate a guardian or a conservator for oneself, for one's child or for one's spouse. And that person should be able to petition the court to confirm the nomination and cut off the rights of others to object. [It is, in effect, a contingent appointment, subject to a later determination of respondent's incapacity and that the appointment remains in the respondent's best interest.](#)

We endorse this new feature of the 1997 Uniform Act, but couch it in terms of nomination rather than appointment. A person who anticipates incapacity should be able to take comfort in the knowledge that his or her preference of guardian or conservator will be appointed at some future date; similarly for the spouse of an incapacitated person or parent of an incapacitated or minor child. Confirmation does not determine incapacity; only who will be the fiduciary. Upon the death or incapacity of the nominating person, the court would still determine the respondent's incapacity and the limits of the fiduciary's authority. If the nomination is not confirmed beforehand, the nominee would have his or her designated priority for appointment, subject to the usual court authority to appoint in a different order.

Our recommended approach creates a simple, uniform process for all combinations of guardians and conservators, minors and adults. And it ensures that a court will determine the nature and extent of the respondent's incapacity and the limits of the fiduciary's authority.

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<sup>78</sup> Utah Code Sections 75-5-311 and 75-5-410.

<sup>79</sup> 1997 Uniform Act Sections 202, 302, 303, 310, and 413.

## **(11) Monitoring guardians and conservators**

### **(a) Planning**

Oversight of guardians and conservators begins with the fiduciary's assurance to the court that s/he recognizes his or her authority, its limits and how it will be exercised. We recommend that guardians and conservators develop a plan for how they will implement the authority given them and that the plan be filed with the court. Some states require a new plan annually, but we do not. Once filed, the plan should be sufficient until there is a significant change in circumstances.

The law should allow modest deviation from the plan. Circumstances are never entirely stable, and filing a new plan for every change, no matter how slight, merely increases the burden on the fiduciary without protecting the respondent. But the law should impose liability on the fiduciary for significant deviations from the plan, and whether the deviation is slight or significant may have to be decided by the judge after the fact.

The plan will provide a baseline against which to evaluate the guardian's or conservator's actions, but the primary purpose of planning is not to trap the fiduciary. Rather, the purpose is to assure the court that the fiduciary knows how s/he will help manage the respondent's life before undertaking to do so. We recommend that a form for the fiduciary's plan be developed by the court and Bar.

### **(b) Annual reports**

The Judicial Council and the district courts have already taken the important step of monitoring and enforcing the annual reporting requirements for guardians and conservators, and the administrative office of the courts has developed forms and an interactive web interview to guide the fiduciaries through that process. We recommend that the district court continue these essential efforts.

If the protected person's parent is the guardian or conservator, current Utah law exempts the parent from annually reporting the protected person's condition or estate.<sup>80</sup> The 1997 Uniform Act does not contain this exception, and we recommend that it be omitted from Utah law. A protected person is no better off for having been abused or defrauded by a parent. We recommend that annual reports be required of all guardians and conservators.

### **(c) Volunteer court visitors**

Annual reporting about the respondent's well-being and estate are a necessary first step to protect the respondent's personal and financial health and safety. But unless someone reviews those reports and follows up as necessary, they are of little value. Current Utah law relies for protection on objections by family members. If anyone objects, the court will conduct proceedings to decide the competing claims. If no one objects, the court is left on its own, which usually means the report will be approved.

Giving those interested in the respondent standing to object is a necessary second step, but it is inadequate. Mistreatment of the respondent or misappropriation of money,

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<sup>80</sup> Utah Code Sections 75-5-312(2)(e)(vi) and 75-5-417(5).

whether by intent or neglect, may occur without it being obvious in the reports. Those who are interested in the respondent may themselves participate to harm or defraud. Perhaps the respondent is without family. We recommend, therefore, as does the 1997 Uniform Act,<sup>81</sup> that the court select reports to be reviewed for errors or fraud and to follow up based on the results. We recommend that the court appoint visitors periodically to review records and interview respondents, fiduciaries and others after the appointment.

Other jurisdictions have successfully established volunteer programs to monitor appointments more closely.<sup>82</sup> The model is very similar to the Court Appointed Special Advocate (CASA) program in the juvenile court, which has been so successful at helping children whose parents are accused of abuse. The courts would hire a coordinator whose job is to recruit and train volunteers to perform the duties of a court visitor. The results can be invaluable to the court.

The model came to light as we investigated methods of monitoring guardians and conservators after appointment, but court visitors should be used in the initial investigation of incapacity as well. An organized volunteer program such as this offers the best hope of also serving that need. The courts can create a volunteer program only over time, but eventually, in a fully developed volunteer program, a court visitor might:

- Before appointment
  - Interview the respondent and proposed fiduciary
  - Interview family members and others as appropriate
  - Visit the respondent's current and proposed residences
  - Report to the court
- After appointment
  - Review inventories, management plans and annual reports of guardians and conservators
  - Review other records
  - Interview the respondent, fiduciary, family members and others as appropriate
  - Report to the court

The role of the coordinator is to build and support the program.

- Develop partnerships (AARP, CPAs, Lawyers, Law students, Law enforcement, social workers, etc.)
- Recruit volunteers from among partners
- Develop training materials
- Develop and conduct training classes for volunteers (initial and continuing)
- Develop and conduct training classes for judges & court staff
- Supervise and recognize volunteers

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<sup>81</sup> 1997 Uniform Act Sections 317 and 420

<sup>82</sup> Volunteer Guardianship Monitoring Programs: A Win-Win Solution, Ellen M. Klem, American Bar Association Commission on Law and Aging (2007); Guarding the Guardians: Promising Practices for Court Monitoring, Naomi Karp and Erica Wood, AARP Public Policy Institute (2007); Guardianship Monitoring: A Demographic Imperative, Hon. Steve M. King, <http://www.ncpj.org/guardianship%20monitoring.htm>.

- Reimburse expenses
- Troubleshoot problems
- Develop checklists, forms, & other aids
- Record and report outcomes

We recommend that the Judicial Council hire a coordinator to build and support a volunteer court visitor program.

**(d) Regulating guardians and conservators – Background checks.**

**(i) Professional conservators**

By a series of statutes, only a handful of financial institutions under permit from the Commissioner of Financial Institutions may be appointed as professional conservators.<sup>83</sup> Professional conservators, therefore, are already highly regulated and nothing further should be needed.

**(ii) Professional guardians**

Professional guardians are regulated by virtue of their credentials in other regulated professions, but they are not regulated as guardians, and they should be. Like most states, Utah lists the priority of a person or institution to be appointed guardian. Last on that list is “a specialized care professional.”<sup>84</sup> A specialized care professional is defined as a person who:

- (i) has been certified or designated as a provider of guardianship services by a nationally recognized guardianship accrediting organization;
- (ii) is licensed by or registered with the Division of Occupational and Professional Licensing as a health care provider including, but not limited to, a registered nurse licensed under Section 58-31b-301, a social service worker, certified social worker, or clinical social worker licensed under Section 58-60-205, a marriage and family therapist licensed under Section 58-60-305, a physician licensed under Title 58, Chapter 67, or a psychologist licensed under Title 58, Chapter 61; or
- (iii) has been approved by the court as one with specialized training and experience in the care of incapacitated persons.

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<sup>83</sup> “Trust business” means ... a business in which one acts in any agency or fiduciary capacity, including that of ... conservator ....” Utah Code Section 7-5-1(1)(b). “Only a trust company may engage in the trust business in this state.” Utah Code Section 7-5-1(2). “Trust company” means an institution authorized to engage in the trust business under this chapter. Only the following may be a trust company....” Utah Code Section 7-5-1(1)(d) (naming four types of depository institutions and any corporation continuously engaged in trust business since 1981). “No trust company shall accept any appointment to act in any agency or fiduciary capacity, such as ... conservator... under order or judgment of any court ... unless and until it has obtained from the commissioner a permit to act under this chapter.” Utah Code Section 7-5-2(1).

Under special circumstances (administration of the estate is supervised by the court and no trust company is willing to act as conservator after notice of the proceedings is given to every trust company doing business in Utah) the court may appoint a certified public accountant (or other listed financial professional) as conservator. Utah Code Section 7-5-1(1)(c)(viii).

<sup>84</sup> Utah Code Section 75-5-311(4)(g).

Utah Code Section 75-5-311(1)(a).

So, Utah law leaves designation as a professional guardian to (1) unnamed organizations with unknown standards; (2) licensure or registration with DOPL as a health care provider, which includes unnamed professions; and (3) the judge on a case-by-case basis with no standards by which to decide.

The most prominent “nationally recognized guardianship accrediting organization” is the National Guardianship Association. According to the National Guardianship Association, “Certification entitles the guardian to represent to the courts and the public that he or she is eligible to be appointed, is not disqualified by prior conduct, agrees to abide by universal ethical standards governing a person with fiduciary responsibilities, submits to a disciplinary process, and can demonstrate through a written test an understanding of basic guardianship principles and laws.”

Certification as either a Registered Guardian or a Master Guardian is administered through the Center for Guardianship Certification (CGC), an “allied foundation” of the National Guardianship Association. According to the Center “CGC has developed a two-tiered certification process, certifying Registered Guardians (RG) at the entry level and Master Guardians (MG) with a higher level of experience and responsibility. The eligibility standards, as well as content and level of difficulty of the core competencies tested, for the Master Guardian certification are much higher. Nevertheless, both the RG and MG must affirm they will abide by the NGA Model Code of Ethics and maintain a high level of conduct to be re-certified. The same process is used to determine if either certificate should be withheld or revoked.”

The health care providers listed in the Code as potential professional guardians are not exclusive.<sup>85</sup> A quick review of the DOPL website shows any number of licensed professions that might be considered health care providers:

- Acupuncture
- Athletic Trainer
- Audiology
- Certified Dietitian
- Certified Medication Aide
- Certified Nurse Midwifery
- Chiropractic
- Dentistry
- Direct-Entry Midwifery
- Genetic Counseling
- Health Facility Administration
- Hearing Instrument
- Marriage and Family Therapy
- Massage Therapy
- Nursing
- Occupational Therapy
- Optometry
- Osteopathy
- Pharmacy
- Physical Therapy
- Physician and Surgeon
- Physician Assistant
- Podiatry
- Professional Counseling
- Psychology
- Radiology
- Recreation Therapy
- Respiratory Care
- Speech Language Pathology
- Substance Abuse Counseling

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<sup>85</sup> Utah Code Section 75-5-311(1)(a)(ii).

All are valuable professions, and many might assist the respondent with his or her incapacity, but none are qualified professional guardians merely because of their other licensure, including those in the more traditional health care professions.

We recommend that the administrative office of the courts begin discussions with the Division of Occupational and Professional Licensing and professional guardians in Utah to draft legislation according to the DOPL model to regulate the professional guardian industry as it does other professions. We recommend that under that legislation only a guardian licensed by DOPL be permitted to be appointed as a professional guardian. Until then, we recommend that only someone certified by the National Guardianship Association be permitted to be appointed as a professional guardian.

### **(iii) Background checks for private fiduciaries**

We recommend that before a person is appointed guardian or conservator, s/he be required to disclose arrests and convictions that may affect the court's decision [and submit to a background check](#). We recommend no automatic disqualifications, but it is important that the judge know the background of the respondent's fiduciary, and whether an alternative might be more appropriate. Background checks are common in employment and volunteer circumstances. In juvenile court cases involving the placement of an abused minor, there is an extensive investigation of the proposed guardian, adoptive parent, foster parent, or even a non-custodial parent.<sup>86</sup>

## **(12) Conservators**

Some states have abandoned the distinctions between a guardian and conservator. If the respondent is incapacitated, the court appoints one or more fiduciaries and grants authority, which may be authority traditionally held by a guardian, authority traditionally held by a conservator, or some combination of the two. We do not recommend going so far.

However, we recommend combining the laws common to both offices in order to isolate and emphasize the laws that create differences. Many of the standards for both officers are or should be the same. Many of the procedures are or should be the same. Many of the policies are or should be the same.

But there are important differences.

- The law should continue to permit protective orders short of appointing a conservator.
- The grounds for appointing a conservator should include because the respondent is missing, detained, or unable to return to the United States.
- The reasons for a conservator or protective order should continue to include because funds are needed for the support, care, and welfare of a person entitled to be supported by the respondent.<sup>87</sup>
- If the reason for a protective proceeding is because the respondent is missing, detained, or unable to return to the United States or the respondent's request, there should be no need for an evaluation or a finding of incapacity.

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<sup>86</sup> Utah Code Sections 78A-6-307 and 78A-6-308.

<sup>87</sup> Utah Code Section 75-5-401(2)(a)

- The authority of a conservator provided by statute is extremely detailed, listing almost 50 permitted acts.<sup>88</sup> So, unlike a guardian's authority, which should be specified in the appointment order, the statutes should continue to identify the conservator's authority which flows to the conservator by reason of being appointed.

### **(13) Training for judges, lawyers, court personnel and volunteers**

Although they can be improved, we have found that the Utah statutes currently provide reasonable due process protections.<sup>89</sup> What seems to be lacking is the sense that this matters. Perhaps the law itself too easily permits its avoidance. Perhaps courts are pressed by contested cases and pay less attention to these in which the parties seem to be in agreement. Perhaps it is a well-meaning but misplaced notion of doing what is thought to be in the respondent's best interest. Whatever the reason, too many short cuts are being taken.

Education programs would seem to be the proverbial "no brainer." For judicial training at least, the work is already done. The American Bar Association Commission on Law and Aging in conjunction with the American Psychological Association and the National College of Probate Judges has prepared a manual entitled *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings*. It serves as a wonderful benchbook, and the administrative office of the courts has already included it on the court's website among the benchbooks available to district court judges.<sup>90</sup> But it is of little value unless it is used. We recommend it to the Judicial Institute as an outline on which to build a curriculum for district court conferences.

The Utah State Bar's Committee on Law and Aging and Estate Planning Section sponsor CLE programs on protective proceedings, and we recommend they continue that important effort focusing on the recommendations in this report.

We recommend that the Judicial Institute develop training programs for clerks and other court personnel on the new concepts, laws and procedures of guardianships and conservatorships and on the special importance of cases in which the court shares responsibility for the care and well being of a person with diminished capacity.

We recommend that the volunteer coordinator work with the Judicial Institute to develop training programs for people who volunteer as court visitors:

- How to draw out evidence of the respondent's capabilities and limitations.
- How to draw out evidence of the respondent's values, preferences and patterns of behavior.
- How to evaluate the respondent's circumstances during a guardianship or conservatorship.
- How to evaluate the guardianship or conservatorship plan and annual reports.
- How to recognize evidence of fraud and abuse.
- And other matters on which the court visitor acts as the judge's surrogate.

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<sup>88</sup> Utah Code Sections 75-5-408 and 424.

<sup>89</sup> Appointment of counsel, medical examination, court visitor, presence at hearing, limits on emergency appointments, and others.

<sup>90</sup> [http://www.utcourts.gov/intranet/dist/docs/guardianship\\_proceedings.pdf](http://www.utcourts.gov/intranet/dist/docs/guardianship_proceedings.pdf)

#### (14) Outreach and assistance for the public

We urge the lawyer who represents the fiduciary to advise his or her client of a fiduciary's responsibilities and good practice standards.<sup>91</sup> Sometimes the fiduciary does not have a lawyer, but often the petitioner, who is more probably represented, will be the fiduciary. A lawyer's representation of the petitioner may end with the appointment, but the lawyer's counseling on the fiduciary's continuing responsibilities is probably the single best opportunity to impress upon the guardian or conservator that they are responsible for someone else's life and that the law imposes many requirements.

The Wingspan Conference recommends that "all guardians receive training and technical assistance in carrying out their duties."<sup>92</sup> We recommend that the Committee on Resources for Self-represented Parties work with the Committee on Law and Aging of the Utah State Bar to develop web-based information and resources about guardianships, conservatorships, and less restrictive alternatives. The manual entitled *Basic Guidelines for Court-Appointed Guardians and Conservators*, developed by the administrative office of the courts and the Bar committee is a start, but more thorough information is needed.

The Committee developed forms for an extensive clinical and social evaluation. Additional forms and information need to be developed. We again recommend that the Committee on Resources for Self-represented Parties work with the Committee on Law and Aging to continue this important work. We suggest to them that the following forms, as well as others that they may identify, be developed for the court's website:

- Acceptance of appointment
- Estimated estate value worksheet
- Findings of fact and conclusions of law
- Letters of guardianship (conservatorship)
- Management plan for guardian (conservator)
- Motion and order directing services for respondent
- Motion and order to appoint a lawyer to represent a respondent
- Motion and order to appoint a court visitor
- Motion and order to evaluate respondent
- Motion and order to withdraw money from a court-guarded account
- Notice of petition and hearing
- Order appointing a guardian (conservator)
- Petition to appoint a guardian (conservator)
- Petition to confirm nomination
- Proof of service
- Report on clinical evaluation of respondent
- Report on social evaluation of respondent
- Special versions of forms adapted for use in protective proceedings for a minor

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<sup>91</sup> Wingspan Conference. Recommendation 66. 31 Stetson L. Rev. 595, 608 (2002).

<sup>92</sup> Wingspan Conference. Recommendation 9. 31 Stetson L. Rev. 595, 597 (2002).

**(15) Information gathering**

As noted in the introduction, Utah, like most states, does not systematically record very much information about guardianships and conservatorships. We believe it would be helpful to distinguish the appointment of a guardian from that of a conservator, to distinguish an appointment for a minor from an appointment for an adult. It would have been helpful in our study to know how many respondents were not represented, were not interviewed by a visitor, not examined by a physician, or not present at the hearing. We recommend that the administrative office of the courts evaluate processing of these casetypes and determine what operational information and management information would help improve processing and help evaluate the success of our recommendations.

**(16) Committee members and staff**

**Kent Alderman**, Attorney at Law

**Kerry Chlarson**, Disability Law Center

**Mary Jane Ciccarello**, Self Help Center Attorney

**Reese Hansen**, J. Reuben Clark Law School

**George Harmond**, Seventh District Court Judge, Chair

**Maureen Henry**, Commission on Aging

**Richard Howe**, Public Representative

**Stephen Mikita**, Assistant Attorney General

**Julie Rigby**, Third District Court Clerk

**Kathy Thyfault**, Second District Court Clerk

**Gary Stott**, Fourth District Court Judge

Committee Staff

**Marianne O'Brien**, Program Manager

**Diana Pollock**, Administrative Assistant

**Timothy Shea**, Staff Attorney

To review the Committee's briefing materials and minutes of discussions, go to:

<http://www.utcourts.gov/committees/adhocprobate/>

### **(17) Utah Protective Proceedings Act**

We used as our drafting model the Uniform Guardianship and Protective Proceedings Act of 1997. Although already more than a decade old, it is the most recent work of the National Conference of Commissioners on Uniform State Laws, and it is a significant improvement over the 1968 Uniform Act, which Utah adopted in 1975.

We have supplemented the Uniform Act with provisions of our own, often influenced by national authorities and the laws of other states. In some of these areas, the Uniform Act is silent. In others, we believe that other sources reflect better policy.

We have not included any of the jurisdictional provisions of the 1997 Uniform Act. Subject matter jurisdiction is granted to the district court under Article VIII, Section 5 of the Utah Constitution and Utah Code Section 78A-5-102. Personal jurisdiction is governed by the Title 75, Chapter 5b, Uniform Adult Guardianship and Protective Proceedings Act, which the Legislature adopted in the 2008 General Session and which did not exist when the Commission approved the 1997 Uniform Act.

We did not include some of the procedural parts of the 1997 Uniform Act because the subjects are sufficiently governed by the Utah Rules of Civil Procedure. We also drafted other procedural parts of the 1997 Uniform Act as rules because in Utah the Supreme Court governs court procedure by rule.

Finally, we substantially reorganized the sections of the 1997 Uniform Act. On several topics, the 1997 Uniform Act includes the same or similar provisions for guardianship of a minor, guardianship of an adult, and conservatorship. We have redrafted these sections in the “general provisions” part of the proposed legislation so that a single statement of the law applies to all three types of cases.



32           **75-5b-302**, as enacted by Laws of Utah 2008, Chapter #  
33           **78B-5-804**, as renumbered by Laws of Utah 2008, Chapter #

34   ENACTS:

- 35           **75-5c-101**, Utah Code Annotated 1953
- 36           **75-5c-102**, Utah Code Annotated 1953
- 37           **75-5c-103**, Utah Code Annotated 1953
- 38           **75-5c-104**, Utah Code Annotated 1953
- 39           **75-5c-105**, Utah Code Annotated 1953
- 40           **75-5c-106**, Utah Code Annotated 1953
- 41           **75-5c-107**, Utah Code Annotated 1953
- 42           **75-5c-108**, Utah Code Annotated 1953
- 43           **75-5c-109**, Utah Code Annotated 1953
- 44           **75-5c-110**, Utah Code Annotated 1953
- 45           **75-5c-111**, Utah Code Annotated 1953
- 46           **75-5c-112**, Utah Code Annotated 1953
- 47           **75-5c-113**, Utah Code Annotated 1953
- 48           **75-5c-114**, Utah Code Annotated 1953
- 49           **75-5c-115**, Utah Code Annotated 1953
- 50           **75-5c-116**, Utah Code Annotated 1953
- 51           **75-5c-117**, Utah Code Annotated 1953
- 52           **75-5c-118**, Utah Code Annotated 1953
- 53           **75-5c-119**, Utah Code Annotated 1953
- 54           **75-5c-120**, Utah Code Annotated 1953
- 55           **75-5c-121**, Utah Code Annotated 1953
- 56           **75-5c-122**, Utah Code Annotated 1953
- 57           **75-5c-123**, Utah Code Annotated 1953
- 58           **75-5c-124**, Utah Code Annotated 1953
- 59           **75-5c-125**, Utah Code Annotated 1953
- 60           **75-5c-201**, Utah Code Annotated 1953
- 61           **75-5c-202**, Utah Code Annotated 1953
- 62           **75-5c-203**, Utah Code Annotated 1953

- 63           **75-5c-204**, Utah Code Annotated 1953
- 64           **75-5c-301**, Utah Code Annotated 1953
- 65           **75-5c-302**, Utah Code Annotated 1953
- 66           **75-5c-303**, Utah Code Annotated 1953
- 67           **75-5c-304**, Utah Code Annotated 1953
- 68           **75-5c-305**, Utah Code Annotated 1953
- 69           **75-5c-306**, Utah Code Annotated 1953
- 70           **75-5c-307**, Utah Code Annotated 1953
- 71           **75-5c-308**, Utah Code Annotated 1953
- 72           **75-5c-401**, Utah Code Annotated 1953
- 73           **75-5c-402**, Utah Code Annotated 1953
- 74           **75-5c-403**, Utah Code Annotated 1953
- 75           **75-5c-404**, Utah Code Annotated 1953
- 76           **75-5c-405**, Utah Code Annotated 1953
- 77           **75-5c-406**, Utah Code Annotated 1953
- 78           **75-5c-407**, Utah Code Annotated 1953
- 79           **75-5c-408**, Utah Code Annotated 1953
- 80           **75-5c-409**, Utah Code Annotated 1953
- 81           **75-5c-410**, Utah Code Annotated 1953
- 82           **75-5c-411**, Utah Code Annotated 1953
- 83           **75-5c-412**, Utah Code Annotated 1953
- 84           **75-5c-413**, Utah Code Annotated 1953
- 85           **75-5c-414**, Utah Code Annotated 1953
- 86           **75-5c-415**, Utah Code Annotated 1953
- 87           **75-5c-416**, Utah Code Annotated 1953
- 88           **75-5c-417**, Utah Code Annotated 1953
- 89           **75-5c-418**, Utah Code Annotated 1953
- 90           **75-5c-419**, Utah Code Annotated 1953
- 91           **75-5c-420**, Utah Code Annotated 1953

92           RENUMBERS AND AMENDS:

- 93           **75-5c-309**, (Renumbered from 75-5-314, as enacted by Laws of Utah #####, Chapter ##)

94           **75-5c-310**, (Renumbered from 75-5-315, as enacted by Laws of Utah #####, Chapter ##)

95           **75-5c-311**, (Renumbered from 75-5-316, as enacted by Laws of Utah #####, Chapter ##)

96           REPEALS:

97           **75-5-101**,

98           **75-5-102**,

99           **75-5-103**,

100          **75-5-104**,

101          **75-5-105**,

102          **75-5-201**,

103          **75-5-202**,

104          **75-5-202.5**,

105          **75-5-203**,

106          **75-5-204**,

107          **75-5-205**,

108          **75-5-206**,

109          **75-5-207**,

110          **75-5-208**,

111          **75-5-209**,

112          **75-5-210**,

113          **75-5-211**,

114          **75-5-212**,

115          **75-5-301**,

116          **75-5-302**,

117          **75-5-303**,

118          **75-5-304**,

119          **75-5-305**,

120          **75-5-306**,

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162 *Be it enacted by the Legislature of the state of Utah:*

163 Section 1. Section **75-1-201** is amended to read:

164 **75-1-201. General definitions.**

165 Subject to additional definitions contained in the subsequent chapters that are applicable to  
166 specific chapters, parts, or sections, and unless the context otherwise requires, in this code:

167 (1) "Agent" includes an attorney-in-fact under a durable or nondurable power of attorney, an  
168 individual authorized to make decisions concerning another's health care, and an individual  
169 authorized to make decisions for another under a natural death act.

170 (2) "Application" means a written request to the registrar for an order of informal probate or  
171 appointment under Title 75, Chapter 3, Part 3, Informal Probate and Appointment Proceedings.

172 (3) "Beneficiary," as it relates to trust beneficiaries, includes a person who has any present or  
173 future interest, vested or contingent, and also includes the owner of an interest by assignment or  
174 other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust;  
175 as it relates to a "beneficiary of a beneficiary designation," refers to a beneficiary of an insurance  
176 or annuity policy, of an account with POD designation, of a security registered in beneficiary  
177 form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other  
178 nonprobate transfer at death; and, as it relates to a "beneficiary designated in a governing  
179 instrument," includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a  
180 beneficiary designation, a donee, appointee, or taker in default of a power of appointment, and a  
181 person in whose favor a power of attorney or a power held in any individual, fiduciary, or  
182 representative capacity is exercised.

183 (4) "Beneficiary designation" refers to a governing instrument naming a beneficiary of an  
184 insurance or annuity policy, of an account with POD designation, of a security registered in  
185 beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or  
186 other nonprobate transfer at death.

187 (5) "Child" includes any individual entitled to take as a child under this code by intestate  
188 succession from the parent whose relationship is involved and excludes any person who is only a  
189 stepchild, a foster child, a grandchild, or any more remote descendant.

190 (6) "Claims," in respect to estates of decedents and protected persons, includes liabilities of  
191 the decedent or protected person, whether arising in contract, in tort, or otherwise, and liabilities  
192 of the estate which arise at or after the death of the decedent or after the appointment of a  
193 conservator, including funeral expenses and expenses of administration. "Claims" does not  
194 include estate or inheritance taxes, or demands or disputes regarding title of a decedent or  
195 protected person to specific assets alleged to be included in the estate.

196 (7) "Conservator" means a person ~~who is~~ appointed by a court to manage the estate of a  
197 protected person.

198 (8) "Court" means any of the courts of record in ~~this state~~Utah having jurisdiction in matters  
199 relating to the affairs of decedents.

200 (9) "Descendant" of an individual means all of his descendants of all generations, with the  
201 relationship of parent and child at each generation being determined by the definition of child  
202 and parent contained in this title.

203 (10) "Devise," when used as a noun, means a testamentary disposition of real or personal  
204 property and, when used as a verb, means to dispose of real or personal property by will.

205 (11) "Devisee" means any person designated in a will to receive a devise. For the purposes of  
206 Title 75, Chapter 3, Probate of Wills and Administration, in the case of a devise to an existing  
207 trust or trustee, or to a trustee in trust described by will, the trust or trustee is the devisee, and the  
208 beneficiaries are not devisees.

209 ~~(12) "Disability" means cause for a protective order as described by Section 75-5-401.~~

210 ~~(13)~~(12) "Distributee" means any person who has received property of a decedent from his  
211 personal representative other than as a creditor or purchaser. A testamentary trustee is a  
212 distributee only to the extent of distributed assets or increment thereto remaining in his hands. A  
213 beneficiary of a testamentary trust to whom the trustee has distributed property received from a  
214 personal representative is a distributee of the personal representative. For purposes of this  
215 provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the  
216 extent of the devised assets.

217 ~~(14)~~(13) "Estate" includes the property of the decedent, trust, or other person whose affairs  
218 are subject to this title as originally constituted and as it exists from time to time during  
219 administration.

220 ~~(15)~~(14) "Exempt property" means that property of a decedent's estate which is described in  
221 Section 75-2-403.

222 ~~(16)~~(15) "Fiduciary" includes a personal representative, guardian, conservator, and trustee.

223 ~~(17)~~(16) "Foreign personal representative" means a personal representative of another  
224 jurisdiction.

225 ~~(18)~~(17) "Formal proceedings" means proceedings conducted before a judge with notice to  
226 interested persons.

227 ~~(19)~~(18) "Governing instrument" means a deed, will, trust, insurance or annuity policy,  
228 account with POD designation, security registered in beneficiary form (TOD), pension, profit-  
229 sharing, retirement, or similar benefit plan, instrument creating or exercising a power of  
230 appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any  
231 similar type.

232 ~~(20)~~(19) "Guardian" means a person who has ~~qualified as a guardian of a minor or~~  
233 ~~incapacitated person pursuant to testamentary or court-accepted an~~ appointment, ~~or by written~~  
234 ~~instrument as provided in Section 75-5-202.5 as guardian~~, but excludes one who is ~~merely~~ a  
235 guardian ad litem.

236 ~~(21)~~(20) "Heirs," except as controlled by Section 75-2-711, means persons, including the  
237 surviving spouse and state, who are entitled under the statutes of intestate succession to the  
238 property of a decedent.

239 ~~(22)~~ "~~Incapacitated person~~" ~~means any person who is impaired by reason of mental illness,~~  
240 ~~mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or~~  
241 ~~other cause, except minority, to the extent of lacking sufficient understanding or capacity to~~  
242 ~~make or communicate responsible decisions.~~(21) "Incapacity" has the same meaning as in  
243 Section 75-5c-103.

244 ~~(23)~~(22) "Informal proceedings" mean those conducted without notice to interested persons  
245 by an officer of the court acting as a registrar for probate of a will or appointment of a personal  
246 representative.

247 ~~(24)~~(23) "Interested person" includes heirs, devisees, children, spouses, creditors,  
248 beneficiaries, and any others having a property right in or claim against a trust estate or the estate  
249 of a decedent, ~~ward,~~ or protected person. It also includes persons having priority for appointment  
250 as personal representative, other fiduciaries representing interested persons, a settlor of a trust, if  
251 living, or the settlor's legal representative, if any, if the settlor is living but incapacitated. The  
252 meaning as it relates to particular persons may vary from time to time and shall be determined  
253 according to the particular purposes of, and matter involved in, any proceeding.

254 ~~(25)~~(24) "Issue" of a person means descendant as defined in Subsection (9).

255 ~~(26)~~(25) "Joint tenants with the right of survivorship" and "community property with the  
256 right of survivorship" includes coowners of property held under circumstances that entitle one or  
257 more to the whole of the property on the death of the other or others, but excludes forms of  
258 coownership registration in which the underlying ownership of each party is in proportion to that  
259 party's contribution.

260 ~~(27)~~(26) "Lease" includes an oil, gas, or other mineral lease.

261 ~~(28)~~(27) "Letters" includes letters testamentary, letters of guardianship, letters of  
262 administration, and letters of conservatorship.

263 ~~(29)~~(28) "Minor" means a person who is under 18 years of age.

264 ~~(30)~~(29) "Mortgage" means any conveyance, agreement, or arrangement in which property  
265 is used as security.

266 ~~(31)~~(30) "Nonresident decedent" means a decedent who was domiciled in another  
267 jurisdiction at the time of his death.

268 ~~(32)~~(31) "Organization" includes a corporation, limited liability company, business trust,  
269 estate, trust, partnership, joint venture, association, government or governmental subdivision or  
270 agency, or any other legal or commercial entity.

271 ~~(33)~~(32) "Parent" includes any person entitled to take, or who would be entitled to take if the  
272 child died without a will, as a parent under this code by intestate succession from the child whose  
273 relationship is in question and excludes any person who is only a stepparent, foster parent, or  
274 grandparent.

275 ~~(34)~~(33) "Payor" means a trustee, insurer, business entity, employer, government,  
276 governmental agency or subdivision, or any other person authorized or obligated by law or a  
277 governing instrument to make payments.

278 ~~(35)~~(34) "Person" means an individual or an organization.

279 ~~(36)~~(35)(a) "Personal representative" includes executor, administrator, successor personal  
280 representative, special administrator, and persons who perform substantially the same function  
281 under the law governing their status.

282 (b) "General personal representative" excludes special administrator.

283 ~~(37)~~(36) "Petition" means a written request to the court for an order after notice.

284 ~~(38)~~(37) "Proceeding" includes action at law and suit in equity.

285 ~~(39)~~(38) "Property" includes both real and personal property or any interest therein and  
286 means anything that may be the subject of ownership.

287 ~~(40)~~(39) "Protected person" means a person for whom a guardian or a conservator has been  
288 appointed or a protective order entered, including a minor. ~~A "minor protected person" means a~~  
289 ~~minor for whom a conservator has been appointed because of minority.~~

290 ~~(41)~~(40) "Protective proceeding" means a proceeding ~~described in Section 75-5-401~~ under  
291 Title 75, Chapter 5c, Utah Protective Proceedings Act.

292 ~~(42)~~(41) "Registrar" refers to the official of the court designated to perform the functions of  
293 registrar as provided in Section 75-1-307.

294 ~~(43)~~(42) "Security" includes any note, stock, treasury stock, bond, debenture, evidence of  
295 indebtedness, certificate of interest, or participation in an oil, gas, or mining title or lease or in  
296 payments out of production under such a title or lease, collateral trust certificate, transferable  
297 share, voting trust certificate, and, in general, any interest or instrument commonly known as a  
298 security, or any certificate of interest or participation, any temporary or interim certificate,  
299 receipt, or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the  
300 foregoing.

301 ~~(44)~~(43) "Settlement," in reference to a decedent's estate, includes the full process of  
302 administration, distribution, and closing.

303 ~~(45)~~(44) "Special administrator" means a personal representative as described in Sections  
304 75-3-614 through 75-3-618.

305 ~~(46)~~(45) "State" means a state of the United States, the District of Columbia, the  
306 Commonwealth of Puerto Rico, any territory or insular possession subject to the jurisdiction of  
307 the United States, or a Native American tribe or band recognized by federal law or formally  
308 acknowledged by a state.

309 ~~(47)-(46)~~ "Successor personal representative" means a personal representative, other than a  
310 special administrator, who is appointed to succeed a previously appointed personal  
311 representative.

312 ~~(48)-(47)~~ "Successors" means persons, other than creditors, who are entitled to property of a  
313 decedent under the decedent's will or this title.

314 ~~(49)-(48)~~ "Supervised administration" refers to the proceedings described in Title 75, Chapter  
315 3, Part 5, Supervised Administration.

316 ~~(50)-(49)~~ "Survive," except for purposes of Part 3 of Article VI, Uniform TOD Security  
317 Registration Act, means that an individual has neither predeceased an event, including the death  
318 of another individual, nor is considered to have predeceased an event under Section 75-2-104 or  
319 75-2-702. The term includes its derivatives, such as "survives," "survived," "survivor," and  
320 "surviving."

321 ~~(51)-(50)~~ "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

322 ~~(52)-(51)~~ "Testator" includes an individual of either sex.

323 ~~(53)-(52)~~ "Trust" includes any express trust, private or charitable, with additions thereto,  
324 wherever and however created. The term also includes a trust created or determined by judgment  
325 or decree under which the trust is to be administered in the manner of an express trust. The term  
326 excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal  
327 representatives, trust accounts as defined in Title 75, Chapter 6, Nonprobate Transfers, custodial  
328 arrangements pursuant to any Uniform Transfers To Minors Act, business trusts providing for  
329 certificates to be issued to beneficiaries, common trust funds, voting trusts, preneed funeral plans  
330 under Title 58, Chapter 9, Funeral Services Licensing Act, security arrangements, liquidation  
331 trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages,  
332 profits, pensions, or employee benefits of any kind, and any arrangement under which a person is  
333 nominee or escrowee for another.

334 ~~(54)-(53)~~ "Trustee" includes an original, additional, and successor trustee, and cotrustee,  
335 whether or not appointed or confirmed by the court.

336 ~~(55) "Ward" means a person for whom a guardian has been appointed. A "minor ward" is a~~  
337 ~~minor for whom a guardian has been appointed solely because of minority.~~

338 ~~(56)-(54)~~ "Will" includes codicil and any testamentary instrument which merely appoints an  
339 executor, revokes or revises another will, nominates a guardian or conservator, or expressly

340 excludes or limits the right of an individual or class to succeed to property of the decedent  
341 passing by intestate succession.

342 Section 2. Section **75-1-401** is amended to read:

343 **75-1-401. Notice -- Method and time of giving.**

344 (1) If notice of a hearing on any petition is required and except for specific notice  
345 requirements as otherwise provided, the petitioner shall cause notice of the time and place of  
346 hearing of any petition to be given to any interested person or his attorney if he has appeared by  
347 attorney or requested that notice be sent to his attorney. Notice shall be given by the clerk  
348 posting a copy of the notice for the ten consecutive days immediately preceding the time set for  
349 the hearing in at least three public places in the county, one of which must be at the courthouse  
350 of the county and one of which may be on the court website; and

351 (a) By the clerk mailing a copy thereof at least ten days before the time set for the hearing by  
352 certified, registered, or ordinary first class mail addressed to the person being notified at the post-  
353 office address given in his demand for notice, if any, or at his office or place of residence, if  
354 known; or

355 (b) By delivering a copy thereof to the person being notified personally at least ten days  
356 before the time set for the hearing; and

357 (c) If the address, or identity of any person is not known and cannot be ascertained with  
358 reasonable diligence, by publishing at least once a week for three consecutive weeks a copy  
359 thereof in a newspaper having general circulation in the county where the hearing is to be held,  
360 the last publication of which is to be at least ten days before the time set for the hearing.

361 (2) The court for good cause shown may provide for a different method or time of giving  
362 notice for any hearing.

363 (3) Proof of the giving of notice shall be made on or before the hearing and filed in the  
364 proceeding.

365 Section 3. Section **75-5-501** is amended to read:

366 **75-5-501. Power of attorney not affected by disability or lapse of time -- Agent**  
367 **responsibilities.**

368 (1) Whenever a principal designates another his attorney-in-fact or agent by a power of  
369 attorney in writing and the writing contains the words "This power of attorney shall not be  
370 affected by disability of the principal," or "This power of attorney shall become effective upon

371 the disability of the principal," or similar words showing the intent of the principal that the  
372 authority conferred shall be exercisable notwithstanding his disability, the authority of the  
373 attorney-in-fact or agent is exercisable by him as provided in the power on behalf of the principal  
374 notwithstanding:

375 (a) later disability or incapacity of the principal at law or later uncertainty as to whether the  
376 principal is dead or alive; or

377 (b) the lapse of time since the execution of the instrument, unless the instrument states a time  
378 of termination.

379 (2) If an attorney-in-fact or agent determines that the principal has become incapacitated or  
380 disabled and the power of attorney by its terms remains in effect or becomes effective as a result  
381 of a principal's incapacity or disability, the attorney-in-fact or agent shall:

382 (a) notify all interested persons of his status as the power of attorney holder within 30 days of  
383 the principal's incapacitation, and provide them with his name and address;

384 (b) provide to any interested persons upon written request, a copy of the power of attorney;

385 (c) provide to any interested persons upon written request, an annual accounting of the assets  
386 to which the power of attorney applies, unless the power of attorney specifically directs that the  
387 attorney-in-fact or agent is not required to do so; and

388 (d) notify all interested persons upon the death of the principal.

389 (3) All interested persons shall be notified within ten days if the attorney-in-fact or agent  
390 changes. The notification shall be made by the new attorney-in-fact or agent who shall then be  
391 accountable to the interested persons in accordance with Subsection (2).

392 (4) All acts done by the attorney-in-fact or agent pursuant to the power during any period of  
393 disability or incompetence or uncertainty as to whether the principal is dead or alive have the  
394 same effect and inure to the benefit of and bind the principal or his heirs, devisees, and personal  
395 representative as if the principal were alive, competent, and not disabled, except as provided in  
396 Section 75-5-503.

397 (5) A conservator may be appointed for a principal even though the principal has a valid  
398 power of attorney in place. If a conservator thereafter is appointed for the principal, the attorney-  
399 in-fact or agent, during the continuance of the appointment, shall account to the conservator  
400 rather than the principal. The conservator, pursuant to court order ~~as provided in Subsection 75-~~

401 ~~5-408(1)(d)~~, has the same power the principal would have had if he were not disabled or  
402 incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency.

403 (6) For the purposes of this section, "interested person" means any person entitled to a part of  
404 the principal's estate from the principal's will or through the intestacy laws, whichever is  
405 applicable.

406 Section 4. Section **75-5b-102** is amended to read:

407 **75-5b-102. Definitions.**

408 In this chapter:

409 (1) "Adult" means an individual who has attained 18 years of age.

410 ~~(2) "Conservator" means a person appointed by the court to administer the property of an~~  
411 ~~adult, including a person appointed under Title 75, Chapter 5, Part 4, Protection of Property of~~  
412 ~~Persons Under Disability and Minors.~~

413 ~~(3)~~~~(2)~~ "Emergency" means circumstances that likely will result in substantial harm to a  
414 respondent's health, safety, or welfare, and in which the appointment of a guardian is necessary  
415 because no other person has authority to and is willing to act on the respondent's behalf.

416 ~~(4) "Guardian" means a person appointed by the court to make decisions regarding the person~~  
417 ~~of an adult, including a person appointed under Title 75, Chapter 5, Part 3, Guardians of~~  
418 ~~Incapacitated Persons.~~

419 ~~(5)~~~~(3)~~ "Guardianship order" means an order appointing a guardian.

420 ~~(6)~~~~(4)~~ "Guardianship proceeding" means a proceeding in which an order for the appointment  
421 of a guardian is sought or has been issued.

422 ~~(7)~~~~(5)~~ "Home state" means the state in which the respondent was physically present for at  
423 least six consecutive months immediately before the filing of a petition for the appointment of a  
424 guardian or protective order. A period of temporary absence counts as part of the six-month  
425 period.

426 ~~(8) "Incapacitated person" means an adult for whom a guardian has been appointed.~~

427 ~~(9)~~~~(6)~~ "Party" means the respondent, petitioner, guardian, conservator, or any other person  
428 allowed by the court to participate in a guardianship or protective proceeding.

429 ~~(10)~~~~(7)~~ "Person," except in the terms "incapacitated person" or "protected person," means an  
430 individual, corporation, business trust, estate, trust, partnership, limited liability company,

431 association, joint venture, government or governmental subdivision, agency or instrumentality,  
432 public corporation, or any other legal or commercial entity.

433 ~~(11) "Protected person" means an adult for whom a protective order has been made.~~

434 ~~(12)~~ (8) "Protective order" means an order appointing a conservator or another court order  
435 related to management of an adult's property.

436 ~~(13) "Protective proceeding" means a judicial proceeding in which a protective order is~~  
437 ~~sought or has been issued.~~

438 ~~(14)~~ (9) "Record" means information that is inscribed on a tangible medium or that is stored  
439 in an electronic or other medium and is retrievable in perceivable form.

440 ~~(15)~~ (10) "Respondent" means an adult for whom a protective order or the appointment of a  
441 guardian or conservator is sought.

442 ~~(16)~~ (11) "Significant-connection state" means a state, other than the home state, with which  
443 a respondent has a significant connection other than mere physical presence and in which  
444 substantial evidence concerning the respondent is available.

445 ~~(17)~~ (12) "State" means a state of the United States, the District of Columbia, Puerto Rico,  
446 the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular  
447 possession subject to the jurisdiction of the United States.

448 Section 5. Section **75-5-302** is amended to read:

449 **75-5b-302. Accepting guardianship or conservatorship transferred from another state.**

450 (1) To confirm transfer of a guardianship or conservatorship transferred to this state under  
451 provisions similar to Section 75-5b-301, the guardian or conservator shall petition the court in  
452 this state to accept the guardianship or conservatorship. The petition shall include a certified  
453 copy of the other state's provisional order of transfer.

454 (2) Notice of a petition under Subsection (1) shall be given by the petitioner to those persons  
455 who would be entitled to notice if the petition were a petition for the appointment of a guardian  
456 or issuance of a protective order in both the transferring state and this state. The notice shall be  
457 given in the same manner as notice is given in this state.

458 (3) On the court's own motion or on request of the incapacitated or protected person, or other  
459 person required to be notified of the proceeding, the court shall hold a hearing on a petition filed  
460 pursuant to Subsection (1).

461 (4) The court shall issue an order provisionally granting a petition filed under Subsection (1)  
462 unless:

463 (a) an objection is made and the objector establishes that transfer of the proceeding would be  
464 contrary to the interests of the incapacitated or protected person; or

465 (b) the guardian or conservator is ineligible for appointment in this state.

466 (5) The court shall issue a final order accepting the proceeding and appointing the guardian  
467 or conservator as guardian or conservator in this state upon its receipt from the court from which  
468 the proceeding is being transferred of a final order issued under provisions similar to Section 75-  
469 5b-301 transferring the proceeding to this state.

470 (6) Not later than 90 days after issuance of a final order accepting transfer of a guardianship  
471 or conservatorship, the court shall determine whether the guardianship or conservatorship needs  
472 to be modified to conform to the law of this state.

473 (7) In granting a petition under this section, the court shall recognize a guardianship or  
474 conservatorship order from the other state, including the determination of the incapacitated or  
475 protected person's incapacity and the appointment of the guardian or conservator.

476 (8) The denial by a court of this state of a petition to accept a guardianship or conservatorship  
477 transferred from another state does not affect the ability of the guardian or conservator to seek  
478 appointment as guardian or conservator in this state under Title 75, Chapter 5c, ~~Part 3, Guardians~~  
479 ~~of Incapacitated Persons~~ Utah Protective Proceedings Act, if the court has jurisdiction to make  
480 an appointment other than by reason of the provisional order of transfer.

481 Section 6. Section **75-5c-101** is enacted to read:

482 **CHAPTER 5c. UTAH PROTECTIVE PROCEEDINGS ACT**

483 **Part 1. General Provisions.**

484 **75-5c-101. Title – Severability.**

485 (1) This Chapter is known as the “Utah Protective Proceedings Act.”

486 (2) If any provision of this Chapter or its application to any person or circumstance is held  
487 invalid, the invalidity does not affect other provisions or applications which can be given effect  
488 without the invalid provision or application, and to this end the provisions of this Chapter are  
489 severable.

490 Section 7. Section **75-5c-102** is enacted to read:

491 **75-5c-102. Definitions.**

492 As used in this Chapter:

493 (1) “Best interest decisionmaking standard” means the guardian or conservator, after  
494 considering the protected person’s expressed wishes, makes the decision that is the least  
495 intrusive, least restrictive, and most normalizing course of action to accommodate the protected  
496 person’s particular functional limitations. Best interest is the standard used when:

497 (a) following the protected person’s wishes would cause the person harm;

498 (b) the guardian or conservator cannot determine the protected person’s wishes; or

499 (c) the protected person has never had capacity.

500 (2) “Court” means the district court.

501 (3) “Health care” and “health care decisions” mean the same as in Section 75-2a-103.

502 (4) “Legal representative” includes a guardian or conservator acting for a protected person in  
503 Utah or elsewhere, a trustee or custodian of a trust or custodianship of which the protected  
504 person is a beneficiary, a lawyer, guardian ad litem, representative payee, and an agent  
505 designated under a power of attorney in which the protected person is the principal.

506 (5) “Professional conservator” means a trust company permitted by the commissioner of  
507 financial institutions under Subsection 7-5-2(1) to accept an appointment to act in an agency or  
508 fiduciary capacity;

509 (6) “Professional guardian” means a person who has been certified as a Registered Guardian  
510 or Master Guardian by the National Guardianship Association;

511 (7) “Respondent” means an individual for whom a guardian, conservator, or protective order  
512 is sought.

513 (8) “Substituted judgment decisionmaking standard” means the guardian or conservator  
514 makes the decision that the protected person would have made when competent. Substituted  
515 judgment is the standard used in all circumstances except those that permit the best interest  
516 decisionmaking standard to be used.

517 Section 8. Section **75-5c-103** is enacted to read:

518 **75-5c-103. Incapacity – Definition – Findings – Factors.**

519 (1) As used in Title 75, Utah Uniform Probate Code, “incapacity” means a judicial  
520 determination that an adult’s ability, even with assistance, to

521 (a) receive and evaluate information,

522 (b) make and communicate decisions,

523 (c) provide for necessities such as food, shelter, clothing, health care or safety,  
524 (d) carry out the activities of daily living, or  
525 (e) manage property  
526 is so impaired that illness or physical or financial harm may occur. Incapacity is a judicial  
527 decision, not a medical decision, and is measured by functional limitations. Incapacity must be  
528 proved by clear and convincing evidence.  
529 (2) The court shall enter findings in which the court identifies the functional limitations that  
530 cause the respondent to be incapacitated. In deciding whether the respondent is incapacitated, the  
531 court should consider and weigh, as appropriate:  
532 (a) whether the respondent's condition, limitations and level of functioning leave the  
533 respondent at risk of:  
534 (i) his or her property being dissipated;  
535 (ii) being unable to provide for his or her support, or for the support of individuals entitled to  
536 the respondent's support;  
537 (iii) being financially exploited;  
538 (iv) being abused or neglected, including self-injurious behavior or self-neglect; or  
539 (v) having his or her rights violated;  
540 (b) whether the respondent has a physical or mental illness, disability, condition, or syndrome  
541 and the prognosis;  
542 (c) whether the respondent is able to evaluate the consequences of alternative decisions;  
543 (d) whether the respondent can manage the activities of daily living through training,  
544 education, support services, mental and physical health care, medication, therapy, assistants,  
545 assistive devices, or other means that the respondent will accept;  
546 (e) the nature and extent of the demands placed on the respondent by the need for care;  
547 (f) the nature and extent of the demands placed on the respondent by his or her property;  
548 (g) the consistency of the respondent's behavior with his or her long-standing values,  
549 preferences and patterns of behavior, and  
550 (h) other relevant factors.  
551 Section 9. Section **75-5c-104** is enacted to read:  
552 **75-5c-104. Transfer of property to or on behalf of a minor.**

553 (1) Unless the person knows that a conservator has been appointed for a minor or that a  
554 proceeding to appoint a conservator is pending, a person required to transfer money or personal  
555 property to a minor may transfer up to \$100,000 per year to:

556 (a) the minor, if the minor is married or emancipated or if payment to the minor is authorized  
557 by statute;

558 (b) the minor's guardian;

559 (c) the minor's custodian under Title 75, Chapter 5a, Uniform Transfers To Minors Act; or

560 (d) a person responsible for the minor's care and custody with whom the minor resides;

561 (e) a financial institution for deposit in an interest-bearing account or certificate in the  
562 minor's sole name and giving notice of the deposit to the minor.

563 (2) A person who transfers money or property in compliance with this Section is not  
564 responsible for its proper application.

565 (3) A custodian, guardian, or a person responsible for the minor's care and custody who  
566 receives money or property for a minor must apply it to the minor's support, care, education,  
567 health, and welfare and may not derive a personal financial benefit, except for reimbursement for  
568 necessary expenses. Any excess must be preserved for the minor's future support, care,  
569 education, health, and welfare. Any balance must be transferred to the minor upon emancipation  
570 or majority.

571 Section 10. Section **75-5c-105** is enacted to read:

572 **75-5c-105. Delegation of authority by parent or guardian.**

573 A parent or guardian of a minor or protected person may delegate to another person any  
574 authority regarding care, custody, or property of the minor or protected person except the  
575 authority to consent to marriage or adoption. The delegation must be by a properly-executed  
576 power of attorney and may not exceed six months.

577 Section 11. Section **75-5c-106** is enacted to read:

578 **75-5c-106. Venue -- Transfer of venue.**

579 (1) Venue for a proceeding under this Chapter is:

580 (a) in the county in which the respondent resides or is present at the time the proceeding is  
581 commenced;

582 (b) in the county in which the will is or could be probated, if the guardian or conservator is  
583 nominated by will;

584 (c) in the county of the court that committed the respondent under Title 62A, Chapter 5, Part  
585 3, Admission to Mental Retardation Facility or under Title 62A, Chapter 15, Part 6, Utah State  
586 Hospital and Other Mental Health Facilities; or

587 (d) in the county in which property of the respondent is located, if the petition is to appoint a  
588 conservator or for a protective order and the respondent does not reside in Utah.

589 (2) If a proceeding is brought in more than one county, the court of the county in which the  
590 proceeding is first brought has the exclusive right to proceed unless that court determines that  
591 venue is proper in another county and that the interests of justice require that the proceeding be  
592 transferred.

593 (3) The court that appoints a guardian or conservator or enters a protective order retains  
594 venue for proceedings after the appointment or order unless that court determines that venue is  
595 proper in another county and that the interests of justice require that the proceeding be  
596 transferred.

597 Section 12. Section **75-5c-107** is enacted to read:

598 **75-5c-107. Appointment and status of guardian or conservator.**

599 (1) A person becomes guardian or a conservator upon acceptance of a court appointment.

600 (2) A guardianship, conservatorship or entry of a protective order continues until terminated.

601 (3) Acceptance of a testamentary appointment as guardian under a will probated in the state  
602 of the testator's domicile is effective in Utah.

603 (4) A document issued by other than a court of law that purports to award guardianship to a  
604 person who is not a legal resident of the jurisdiction in which the guardianship is awarded is not  
605 effective in Utah.

606 Section 15. Section **75-5c-110** is enacted to read:

607 **75-5c-110. Acceptance of appointment.**

608 (1) The guardian or conservator has authority to act upon filing an acceptance of  
609 appointment. A guardian or conservator shall file an acceptance of appointment within 30 days  
610 after the later of:

611 (a) entry of the order of appointment; or

612 (b) the occurrence of a future event designated in the appointment order.

613 (2) By accepting appointment, a guardian or conservator submits personally to the  
614 jurisdiction of the court in any proceeding relating to the guardianship or conservatorship.

615 (3) If a person nominated by will or signed writing timely complies with Section 75-5c-201,  
616 Section 75-5c-301 or Section 75-5c-401, the nominee's acts before acceptance of the  
617 appointment that are beneficial to the respondent have the same effect as those that occur after  
618 acceptance.

619 Section 16. Section **75-5c-111** is enacted to read:

620 **75-5c-111. Letters of office.**

621 (1) Upon filing an acceptance of office and, if required, a bond, the court shall issue  
622 appropriate letters of office to the guardian or conservator. The letters shall state the authority of  
623 the guardian or conservator and the property subject to the guardian's or conservator's  
624 possession, possession, ownership or control.

625 (2) Letters of office are evidence of title to the protected person's property and may be filed  
626 or recorded to give notice of title.

627 Section 17. Section **75-5c-112** is enacted to read:

628 **Section 75-5c-112. Nominating a guardian or conservator.**

629 (1) A person 14 years of age or older may nominate a person to be appointed as guardian or  
630 conservator for oneself, for one's spouse, or for one's child whom the parent has or may have in  
631 the future by will, durable power of attorney, or other signed writing that:

632 (a) identifies the nominee and the office for which the nominee is nominated; and

633 (b) shows that the person is of sound mind and not acting under duress, fraud, or undue  
634 influence.

635 (2) The respondent may nominate someone orally at the hearing if the respondent is 14 years  
636 of age or older and has sufficient capacity to express a preference.

637 (3) The nomination may specify desired limitations on the authority to be given to the  
638 guardian or conservator.

639 (4) The person may revoke or amend the nomination before it is confirmed by the court.

640 Section 18. Section **75-5c-113** is enacted to read:

641 **75-5c-113. Petition to confirm nomination – Notice -- Authority to act.**

642 (1) A person who nominates someone to be appointed as guardian or conservator may  
643 petition to confirm the nomination if the nominator will likely become incapacitated or unable to  
644 care for the respondent within two years.

645 (2) If no objection is filed within the time permitted or if an objection is filed and withdrawn,  
646 the court shall confirm the nomination and cut off the right of others to object if it finds that the  
647 nomination is in the respondent's best interest and the nominator will likely become  
648 incapacitated or unable to care for the respondent within two years.

649 (3) If an objection is filed, the court shall conduct proceedings to hear and determine the  
650 priority of appointment under **Section 75-5c-114**. An objection does not preclude confirmation of  
651 the nominee.

652 (4) An order under this Section appoints a contingent guardian or conservator but does not  
653 determine the respondent's incapacity.

654 Section 19. Section **75-5c-114** is enacted to read:

655 **75-5c-114. Who may be guardian or conservator -- Priority.**

656 (1) The court may appoint as guardian or conservator any person whose appointment would  
657 be in the respondent's best interest.

658 (2) In appointing a guardian or conservator, the court shall consider qualified persons in the  
659 following order of priority, unless the court finds the appointment would be contrary to the  
660 respondent's best interest:

661 (a) a guardian or conservator, other than a substitute or emergency guardian or conservator,  
662 currently acting for the respondent in Utah or elsewhere or a person nominated by that person;

663 (b) respondent's nominee, if the respondent is 14 years of age or older and at the time of the  
664 nomination the respondent had sufficient capacity to express a preference;

665 (c) respondent's agent appointed under Title 75, Chapter 2a, Advance Health Care Directive  
666 Act or Title 75, Chapter 5, Powers of Attorney;

667 (d) respondent's spouse or a person nominated by a deceased spouse;

668 (e) respondent's adult child or a person nominated by a deceased adult child;

669 (f) respondent's parent or a person nominated by a deceased parent;

670 (g) an adult with whom the respondent has resided for more than six months; and

671 (h) a professional guardian or conservator.

672 (3) If a person nominates more than one guardian or conservator, the most recent nomination  
673 controls.

674 (4) If two or more people who have equal priority to nominate a guardian or conservator are  
675 dead or incapacitated, the most recent nomination by the last person to die or to be adjudicated  
676 incapacitated has priority.

677 (5) If two or more people have equal priority, the court may select the one most qualified. In  
678 the best interest of the respondent, the court may decline to appoint a person having a higher  
679 priority and appoint a person having a lower priority or no priority.

680 (6) An owner, operator, or employee of a long-term-care institution at which the respondent  
681 is receiving care may not be appointed guardian or conservator unless related to the respondent  
682 by blood, marriage, or adoption.

683 (7) The nomination of a guardian or conservator by a parent does not supersede the parental  
684 rights of either parent.

685 Section 20. Section **75-5c-115** is enacted to read:

686 **75-5c-115. Successor, additional or contingent guardian or conservator.**

687 The court may appoint more than one guardian or conservator. The court may appoint a  
688 guardian or conservator to serve immediately or upon the occurrence of some future designated  
689 event. The court may appoint a successor guardian or conservator to serve in the event of a  
690 vacancy. A successor succeeds to the predecessor's duties, authority, and title to property.

691 Section 21 Section **75-5c-116** is enacted to read:

692 **75-5c-116. Termination, resignation, or removal.**

693 (1) A guardianship or conservatorship terminates upon the protected person's death or upon  
694 court order.

695 (2) The court may accept the resignation or order the removal of the guardian or conservator  
696 upon finding that resignation or removal would be in the protected person's best interest.

697 (3) The court may terminate the guardianship, conservatorship or protective order upon  
698 sufficient evidence that:

699 (a) the protected person has died;

700 (b) the minor protected person has been adopted, is emancipated, or has attained majority; or

701 (c) the protected person no longer needs the assistance or protection of a guardian,  
702 conservator or protective order.

703 (4) Upon presentation of evidence establishing a prima facie case for termination, the court  
704 shall order termination, unless it is proven by clear and convincing evidence that continuation of  
705 the guardianship or conservatorship is in the protected person's best interest.

706 (5) Termination of the guardianship or conservatorship or death, incapacity, resignation or  
707 removal of the guardian or conservator does not affect the liability of a guardian or conservator  
708 for previous acts or the obligation to account for the protected person's property.

709 (6) Upon termination of the guardianship or conservatorship, title to the protected person's  
710 property passes to the person or to his or her successors. An order terminating the guardianship  
711 or conservatorship may be filed or recorded to give notice of title to the property. The order  
712 terminating the guardianship or conservatorship must provide for expenses of administration and  
713 direct the guardian or conservator to execute appropriate instruments to evidence transfer of title,  
714 to confirm a distribution previously made, and to file a final report.

715 (7) The court shall enter a final discharge order upon the approval of the final report and  
716 satisfaction of any other conditions ordered by the court.

717 Section 22. Section **75-5c-117** is enacted to read:

718 **Section 75-5c-117. Emergency appointment.**

719 (1) The court may appoint an emergency guardian or conservator if the court finds that:

720 (a) following the procedures of this Chapter would likely result in substantial harm to the  
721 respondent's health, safety, or welfare;

722 (b) no other person appears to have authority to act;

723 (c) the welfare of the respondent requires immediate action; and

724 (d) the appointment would be in the respondent's best interest.

725 (2) The court shall hold a hearing on the petition before appointing an emergency guardian or  
726 conservator unless it finds that the respondent will be substantially harmed before a hearing can  
727 be held. Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to  
728 represent the respondent.

729 (3) The petition and notice of the hearing must be served using the method most likely to  
730 give prompt actual notice. If an emergency guardian or conservator is appointed without notice  
731 and hearing, notice of the appointment must be served within 2 days after the appointment and a  
732 hearing on the appropriateness of the appointment must be held within 5 days after the  
733 appointment.

734 (4) Appointment of an emergency guardian or conservator is not a determination of the  
735 respondent's incapacity.

736 (5) After hearing, the court may appoint an emergency guardian or conservator for a  
737 specified period not to exceed 60 days, and the court may remove an emergency guardian or  
738 conservator at any time. The appointment terminates on the date specified by the court.

739 (6) The court may order only the authority justified by the emergency. The emergency  
740 guardian or conservator may exercise only the authority specified in the order. The emergency  
741 guardian or conservator shall make any report the court requires. The provisions of this Chapter  
742 concerning guardians or conservators apply to an emergency guardian or conservator.

743 Section 23. Section **75-5c-118** is enacted to read:

744 **Section 75-5c-118. Substitute appointment.**

745 (1) The court, may appoint a substitute guardian or conservator if it finds that:

746 (a) the guardian or conservator is not effectively exercising authority or performing duties;

747 (b) the protected person's welfare requires immediate action; and

748 (c) the appointment would be in the protected person's best interests.

749 (2) The court shall hold a hearing before appointing a substitute guardian or conservator  
750 unless it finds that the protected person will be substantially harmed before a hearing can be  
751 held. Unless the protected person is represented by a lawyer, the court shall appoint a lawyer to  
752 represent the protected person.

753 (3) The petition and notice of the hearing must be served using the method most likely to  
754 give prompt actual notice. If a substitute guardian or conservator is appointed without notice and  
755 hearing, notice of the appointment must be served within 2 days after the appointment and a  
756 hearing on the appropriateness of the appointment must be held within 5 days after the  
757 appointment.

758 (4) After hearing, the court may appoint a substitute guardian or conservator for a specified  
759 period not to exceed 6 months, and the court may remove a substitute guardian or conservator at  
760 any time.

761 (5) Except as ordered by the court, a substitute guardian or conservator has the authority and  
762 duties in the previous order of appointment. The authority of a previously appointed guardian or  
763 conservator is suspended as long as a substitute guardian or conservator has authority.

764 (6) A substitute guardian or conservator shall make any report the court requires. The  
765 provisions of this Chapter concerning guardians and conservators apply to a substitute guardian  
766 or conservator.

767 Section 24. Section **75-5c-119** is enacted to read:

768 **75-5c-119. Proceedings after appointment.**

769 (1) After appointing a guardian or conservator or entering a protective order, the court may:

770 (a) require, increase, or decrease a bond or collateral;

771 (b) require a report from the guardian or conservator;

772 (c) direct distribution;

773 (d) instruct the guardian or conservator concerning a fiduciary responsibility;

774 (e) modify the authority of the guardian or conservator because authority previously granted  
775 is excessive or insufficient or because of a change in the protected person's incapacity;

776 (f) permit or deny the guardian or conservator to exercise authority requiring a court order;

777 (g) terminate the guardianship or conservatorship;

778 (h) remove a guardian or conservator;

779 (i) accept the resignation of a guardian or conservator;

780 (j) appoint a substitute guardian or conservator;

781 (k) appoint a successor or additional guardian or conservator;

782 (l) find the guardian or conservator in contempt for:

783 (i) violating a fiduciary responsibility imposed by statute, rule or court order; or

784 (ii) decisions and acts by the guardian or conservator that the court finds to be substantially  
785 contrary to the management plan;

786 (m) approve a management plan; or

787 (n) grant other appropriate relief.

788 (3) A protected person or person interested in the welfare of the protected person may file a  
789 petition for an order under this Section.

790 (4) A protected person is entitled to the same rights and procedures in proceedings under this  
791 Section as in an original proceeding, including the appointment of an attorney.

792 (5) Sanctions for contempt of court include removal of the guardian or conservator and  
793 imposing on the guardian or conservator personal responsibility for any financial loss caused by  
794 the guardian's or conservator's wrongful conduct.

795 Section 25. Section **75-5c-120** is enacted to read:

796 **75-5c-120. Guardian ad litem.**

797 At any stage of a protective proceeding, a court may appoint a guardian ad litem if the court  
798 determines that representation of the interests of the respondent or protected person is  
799 inadequate. If not precluded by a conflict of interest, a guardian ad litem may be appointed to  
800 represent several individuals. The court shall state on the record the duties of the guardian ad  
801 litem and its reasons for the appointment.

802 Section 26. Section **75-5c-121** enacted to read:

803 **75-5c-121. Bonds.**

804 (1) Subject to the provisions of Title 7, Financial Institutions Act, relating to the bonding  
805 requirements for corporate fiduciaries, the court may require a guardian or conservator to furnish  
806 a bond with sureties as it may specify conditioned upon faithful discharge of all fiduciary  
807 responsibilities.

808 (2) Unless otherwise directed, the bond must be in the amount of:

809 (a) the aggregate capital value of the protected person's property subject to the guardian's or  
810 conservator's possession, possession, ownership or control; plus

811 (b) one year's estimated income; minus

812 (c) the value of assets deposited under arrangements requiring a court order for removal and  
813 the value of any real property that the guardian or conservator, by express limitation, lacks  
814 authority to sell or convey without court authorization.

815 (3) The court may dispense with the bond for good cause. Instead of sureties, the court may  
816 accept collateral for the performance of the bond, including a pledge of securities or a mortgage  
817 of real property.

818 (4) Unless otherwise provided by the terms of the bond, the sureties and the guardian or  
819 conservator are jointly and severally liable.

820 (5) By executing the bond, the surety consents to the jurisdiction of the court in any  
821 proceeding about the guardian's or conservator's fiduciary responsibilities in which the surety is  
822 named as a party. Notice of the proceeding and a copy of any petition, motion or other paper  
823 shall be served on the surety under Utah Rule of Civil Procedure 5 at the address shown in the  
824 court records and at any other address known to the petitioner.

825 (6) If a proceeding against the primary obligor is not barred, a proceeding may be brought by  
826 a successor conservator or any interested person against a surety for breach of the obligation of  
827 the bond. The bond may be proceeded against until liability under the bond is exhausted.

828 Section 27. Section **75-5c-122** is enacted to read:

829 **75-5c-122. Compensation for services and reimbursement of expenses.**

830 (1) If not otherwise paid and if payment does not deprive the protected person or individuals  
831 entitled to the protected person's support of food, shelter, clothing, and other necessities, the  
832 following are entitled to reasonable payment from the estate for services and expenses:

833 (a) the respondent's or protected person's lawyer, guardian ad litem, guardian and  
834 conservator;

835 (b) the petitioner's lawyer, if the petition results in the appointment of a guardian or  
836 conservator, the entry of a protective order, or the entry of any other order that benefits the  
837 protected person; and

838 (c) any person appointed by the court.

839 (2) To qualify for payment, the petition or service must benefit the respondent or protected  
840 person, and the petition must be filed or the service provided in good faith, must be reasonable  
841 and necessary, and must be conducted responsibly.

842 (3) Claims for compensation and reimbursement must be presented to the conservator, if one  
843 has been appointed. If there is no conservator or if the conservator is the person to be paid,  
844 someone affiliated with the person to be paid, or someone within the third degree of relationship  
845 to the person to be paid, the compensation or reimbursement may be approved by the court. In  
846 allowing the claim, the conservator or court may consider the complexity of the service, the  
847 provider's experience, and any other relevant factor.

848 (4) If the court finds the petition is without merit, the petitioner shall pay for the services and  
849 expenses in Subsection (1).

850 (5) If the court determines that the payments are excessive or inappropriate, the excessive or  
851 inappropriate amount must be repaid to the estate.

852 Section 28. Section **75-5c-123** is enacted to read:

853 **75-5c-123. Fiduciary's personal funds.**

854 A guardian or conservator has no legal obligation to use the guardian's or conservator's  
855 personal funds for the protected person's expenses solely by reason of the guardianship or  
856 conservatorship.

857 Section 29 Section **75-5c-124** is enacted to read:

858 **75-5c-124. Monitoring appointments.**

859 The court shall establish a system for monitoring guardians and conservators, including their  
860 reports. The court may appoint a visitor to review records of or any report filed by a guardian or  
861 conservator. The court may appoint a visitor to interview the protected person, the guardian or  
862 the conservator and to make any other investigation the court directs. The court may order a  
863 guardian or conservator to submit the assets subject to the guardian's or conservator's  
864 possession, ownership or control to an examination made in a manner the court directs.

865 Section 30. Section **75-5c-125** is enacted to read:

866 **75-5c-125. Liability on reported matters.**

867 An order, after notice, allowing an intermediate report of a guardian or conservator  
868 adjudicates liabilities concerning matters adequately disclosed in the report. An order, after  
869 notice, allowing a final report adjudicates all previously unsettled liabilities relating to the  
870 guardianship or conservatorship adequately disclosed in the report.

871 Section 31. Section **75-5c-201** is enacted to read:

872 **Part 2. Appointment of a Guardian for a Minor**

873 **75-5c-201. Petition to appoint a guardian for a minor -- Findings -- Procedures.**

874 (1) A minor or a person interested in the minor's welfare may file a verified petition to  
875 appoint a guardian in the minor's best interests. If the petitioner is nominated by will or signed  
876 writing, the petitioner shall file the petition and a copy of the will or signed writing within 30  
877 days after:

878 (a) the nominator's death;

879 (b) the nominator's adjudicated incapacity; or

880 (c) a written determination by a physician who has examined the nominator that the  
881 nominator is no longer able to care for the minor.

882 (2) Upon receipt of a petition to appoint a guardian, the court shall schedule a hearing on the  
883 petition.

884 (3) The court shall appoint a guardian if it finds that:

- 885 (a) the appointment is in the minor's best interests;  
886 (b) a qualified person seeks appointment;  
887 (c) the court has jurisdiction and venue is proper;  
888 (d) the required notices have been given;  
889 (e)(i) the parents consent to the appointment; or  
890 (ii) all parental rights have been terminated; or  
891 (iii) the parents are unwilling or unable to exercise their parental rights; and  
892 (f) if the minor is not a Utah resident, the primary purpose for the guardianship is not to  
893 avoid paying nonresident school tuition; and  
894 (4) The court may appoint a guardian for a specified time not to exceed the minor's 18<sup>th</sup>  
895 birthday.  
896 (5) In other cases, the court may dismiss the petition or make any other disposition that will  
897 serve the minor's best interests.  
898 (6) If the court determines that the minor's best interests are or may be inadequately  
899 represented, it may appoint a lawyer to represent the minor, giving consideration to the minor's  
900 choice if the minor is 14 years of age or older.
- 901 Section 32. Section **75-5c-202** is enacted to read:
- 902 **75-5c-202. Guardian's authority.**
- 903 (1) Except as otherwise limited by the court, a minor's guardian has the authority of a parent  
904 regarding the minor's support, care, education, health, and welfare.
- 905 (2) A guardian may:
- 906 (a) take custody of the minor and establish the minor's dwelling place, but may establish or  
907 move the minor's dwelling place outside of Utah only if approved by court order;  
908 (b) consent to medical or other care, treatment, or service for the minor;  
909 (c) consent to the minor's marriage;  
910 (d) if reasonable under the circumstances, delegate to the minor responsibility for decisions  
911 affecting the minor's welfare;  
912 (e) if a conservator has not been appointed, apply for, start proceedings for, receive and  
913 compel delivery of property due the protected person or benefits to which the protected person  
914 may be entitled, up to \$100,000 per year; and

915 (f) if a conservator has not been appointed, commence a proceeding, including an  
916 administrative proceeding, or take other appropriate action to compel a person to support the  
917 minor or to pay money for the minor's benefit.

918 (3) The court may expressly authorize the guardian to consent to adoption of the minor.

919 Section 33. Section **75-5c-203** is enacted to read:

920 **75-5c-203. Guardian's duties.**

921 (1) Except as otherwise limited by the court, the minor's guardian has the duties and  
922 responsibilities of a parent regarding the minor's support, care, education, health, and welfare. A  
923 guardian must act at all times in the minor's best interest and exercise reasonable care, diligence,  
924 and prudence.

925 (2) The guardian must:

926 (a) within 14 days after appointment, serve on the minor and all other people entitled to  
927 notice of the petition a copy of the appointment order and notice of the right to request  
928 termination or modification;

929 (b) within 90 days after appointment, file and serve a management plan as required by court  
930 rule or court order, describing the strategies that will be used to implement the court order;

931 (c) file and serve a report on the minor's condition to the satisfaction of the court annually,  
932 upon resignation or removal, upon termination, and as required by court rule or court order;

933 (d) immediately notify the court if the minor dies or changes dwelling place, or if the  
934 guardian changes dwelling place;

935 (e) if reasonable under the circumstances, encourage the minor to participate in decisions and  
936 to act on the minor's own behalf;

937 (f) become and remain personally acquainted with the minor and maintain sufficient contact  
938 with the minor to know of the minor's preferences, values, capabilities, limitations, needs,  
939 opportunities, and physical and mental health;

940 (g) when acting on the minor's behalf, exercise the degree of care, diligence and good faith  
941 that an ordinarily careful person exercises in his or her own affairs;

942 (h) exhibit the utmost trustworthiness, loyalty and fidelity to the minor;

943 (i) take reasonable care of the minor's personal effects, and if necessary to protect the  
944 minor's property, petition for the appointment of a conservator or for a protective order under  
945 Title 75, Chapter 5c, Part 4, Appointment of a Conservator and Other Protective Orders;

946 (j) expend the minor's money for the minor's current needs for support, care, education,  
947 health and welfare;

948 (k) conserve for the minor's future needs any of the estate that exceeds the minor's current  
949 needs or, if a conservator has been appointed, pay the excess to the conservator at least annually;

950 (l) keep the minor's estate separate from the guardian's money and property;

951 (m) keep contemporaneous records and make them available for inspection as directed by the  
952 court;

953 (n) at termination, deliver any of the estate subject to the guardian's possession, ownership or  
954 control and any records as directed by the court;

955 (o) if a conservator has been appointed, account to the conservator for the minor's income  
956 and expenses and for any of the estate subject to the guardian's possession, ownership or control;  
957 and

958 (p) if a conservator has not been appointed:

959 (i) within 90 days after appointment, file and serve a management plan as required by court  
960 rule or court order describing the strategies that will be used to implement the court order;

961 (ii) within 90 days after appointment, file and serve a detailed inventory of the estate subject  
962 to the guardian's possession, ownership or control under an oath or affirmation that the inventory  
963 is believed to be complete and accurate as far as information permits; and

964 (iii) file and serve a report about the administration of the minor's estate to the satisfaction of  
965 the court annually, upon resignation or removal, upon termination, and as required by court rule  
966 or court order.

967 (3) If a minor's parent consents to the minor's adoption, the guardian is entitled to:

968 (a) receive notice of and intervene in the adoption proceeding; and

969 (b) present evidence relevant to the minor's best interests.

970 (4) A parent of a minor retains residual parental rights and duties as defined in Section 78A-  
971 6-105.

972 Section 34. Section **75-5c-204** is enacted to read:

973 **75-5c-204. Guardian's personal liability.**

974 (1) A guardian is not liable to third persons for the minor's acts solely by reason of the  
975 guardianship.

976 (2) If the guardian performs fiduciary responsibilities with the degree of care, diligence, and  
977 good faith that an ordinarily careful person exercises in his or her own affairs, the guardian is not  
978 liable for acts or omissions in performing the fiduciary responsibilities.

979 (3) If the guardian selects a third person to perform a service for the minor with the degree of  
980 care, diligence, and good faith that an ordinarily careful person exercises in his or her own  
981 affairs, the guardian is not liable for injury resulting from the wrongful conduct of the third  
982 person.

983 Section 35. Section **75-5c-301** is enacted to read:

984 **Part 3. Appointment of a Guardian for an Adult**

985 **75-5c-301. Petition to appoint a guardian for an adult.**

986 The person to be protected or any person interested in the respondent's welfare may file a  
987 verified petition to appoint a guardian. If the petitioner is nominated by will or signed writing,  
988 the petitioner shall file the petition and a copy of the will or signed writing within 30 days after:

989 (1) the nominator's death;

990 (2) the nominator's adjudicated incapacity; or

991 (3) a written determination by a physician who has examined the nominator that the  
992 nominator is no longer able to care for the respondent.

993 Section 36. Section **75-5c-302** is enacted to read:

994 **75-5c-302. Procedures before hearing.**

995 (1) Upon receipt of a petition to appoint a guardian, the court shall schedule a hearing on the  
996 petition.

997 (2) Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to  
998 represent the respondent.

999 Section 37. Section **75-5c-303** is enacted to read:

1000 **75-5c-303. Appointment of guardian – Standard of evidence – Petition for protective**  
1001 **order.**

1002 (1) The court may appoint a guardian only if the court finds, based on clear and convincing  
1003 evidence, that:

1004 (a) the person to be protected has knowingly and voluntarily petitioned the court to appoint a  
1005 guardian; or

1006 (b) the respondent is incapacitated and the respondent's particular functional limitations  
1007 cannot be met by less restrictive means.

1008 (2) With appropriate findings, the court may treat the petition as one for a protective order  
1009 and enter an appropriate protective order.

1010 (3) If petitioner does not prove the elements of the petition, the court shall dismiss the  
1011 petition.

1012 (4) Appointment of a guardian based on a request by the person to be protected is not a  
1013 determination of that person's incapacity.

1014 Section 38. Section **75-5c-304** is enacted to read:

1015 **75-5-304. Finding of need for guardian -- Factors.**

1016 The court shall make findings in which the court determines whether appointment of a  
1017 guardian is the least restrictive means of providing for the protected person's incapacity. In  
1018 deciding whether to appoint a guardian, the court should consider and weigh, as appropriate:

1019 (1) whether the protected person can manage the activities of daily living through training,  
1020 education, support services, mental and physical health care, medication, therapy, assistants,  
1021 assistive devices or other means that the person will accept;

1022 (2) whether the protected person has planned for health care and financial decisionmaking,  
1023 such as an advance health care directive, a power of attorney, a trust or jointly held account, and  
1024 whether the alternatives are meeting the respondent's needs;

1025 (3) whether the incapacity is likely to be temporary;

1026 (4) the protected person's long-standing values, preferences and patterns of behavior; and

1027 (5) other relevant factors.

1028 Section 39. Section **75-5c-305** is enacted to read:

1029 **75-5c-305. Guardian's authority limited to court order.**

1030 (1) The protected person retains all rights, power, authority and discretion not expressly  
1031 granted to the guardian by statute or court order. The protected person retains the right to vote in  
1032 governmental elections unless the court finds by clear and convincing evidence that the protected  
1033 person is unable to communicate, with or without accommodation, the specific desire to  
1034 participate in the voting process. The court may not grant to the guardian the authority to vote on  
1035 the protected person's behalf.

1036 (2) The court shall enter findings that the guardian's authority is the least restrictive means of  
1037 accommodating the protected person's particular functional limitations.

1038 (3) The guardian has the duties specified by statute or court order. The guardian has only the  
1039 authority specified by court order. The order shall limit the guardian's authority to what is  
1040 necessary to accommodate the protected person's particular functional limitations.

1041 (4) If supported by the findings, the court may grant to the guardian the authority to:

1042 (a) make health care decisions, except as provided in Section 75-5c-306;

1043 (b) consent to admission of the protected person to a licensed health care facility for short  
1044 term placement for the purpose of assessment, rehabilitative care or respite care;

1045 (c) admit the protected person to a licensed health care facility for long-term custodial  
1046 placement;

1047 (d) make arrangements for the protected person's support, care, comfort, education and  
1048 welfare;

1049 (e) take custody of the protected person and make arrangements for a dwelling place;

1050 (f) take reasonable care of the protected person's personal effects;

1051 (g) file an action for the appointment of a conservator or entry of a protective order; and

1052 (h) make other decisions and give other consents on behalf of the protected person as  
1053 specified in the order and as necessary to accommodate the protected person's particular  
1054 functional limitations.

1055 (5) If the court does not appoint a conservator, and if supported by the findings, the order  
1056 may grant to the guardian the authority to:

1057 (a) take control of and manage a savings account or checking account;

1058 (b) apply for, start proceedings for, receive and compel delivery of property due the protected  
1059 person or benefits to which the protected person may be entitled, up to \$100,000 per year;

1060 (c) commence a proceeding, including an administrative proceeding, or take other  
1061 appropriate action to compel a person to support the protected or to pay money for the protected  
1062 per's benefit;

1063 (d) obtain legal advice and representation on behalf of the protected person;

1064 (e) pay the protected person's debts;

1065 (f) give gifts, donations or contributions on behalf of the protected person within the limits of  
1066 Section 75-5c-408;

1067 (g) file tax returns on behalf of the protected person and pay taxes owed by the protected  
1068 person; and

1069 (g) provide for the support, care, comfort, education and welfare of individuals entitled to the  
1070 protected person's support.

1071 Section 40. Section **75-5c-306** is enacted to read:

1072 **75-5c-306. Restrictions on the guardian's authority.**

1073 (1) The guardian cannot:

1074 (a) consent to commitment of the protected person to a mental retardation facility, but must  
1075 petition the court for an order in accordance with Title 62A, Chapter 5, Part 3, Admission to  
1076 Mental Retardation Facility;

1077 (b) consent to commitment of the protected person to a mental health care institution, but  
1078 must petition the court for an order in accordance with Title 62A, Chapter 15, Part 6, Utah State  
1079 Hospital and Other Mental Health Facilities;

1080 (c) consent to sterilization of the protected person, but must petition the court for an order in  
1081 accordance with Title 62A, Chapter 6, Sterilization of Handicapped Person;

1082 (d) consent to termination of the parental rights in the protected person or of the protected  
1083 person's parental rights in another, but must petition the juvenile court to terminate parental  
1084 rights; or

1085 (e) except as provided in Subsection **75-5c-305(5)**, exercise the duties or authority of a  
1086 conservator unless appointed as a conservator.

1087 (2) Unless permitted by the court, the guardian cannot:

1088 (a) consent to the admission of the protected person to a psychiatric hospital or other mental  
1089 health care facility;

1090 (b) consent to participation in medical research, electroconvulsive therapy or other shock  
1091 treatment, experimental treatment, forced medication with psychotropic drugs, abortion,  
1092 psychosurgery, a procedure that restricts the protected person's rights, or to be a living organ  
1093 donor;

1094 (c) consent to termination of life-sustaining treatment if the protected person has never had  
1095 health care decisionmaking capacity;

1096 (d) consent to name change, adoption, marriage, annulment or divorce of the protected  
1097 person;

1098 (e) prosecute, defend and settle legal actions, including administrative proceedings, on behalf  
1099 of the protected person;

1100 (f) establish or move the protected person's dwelling place outside of Utah; or

1101 (g) restrict the protected person's physical liberty, communications or social activities more  
1102 than reasonably necessary to protect the protected person or others from harm.

1103 (3)(a) The guardian, someone affiliated with the guardian, or someone within the third degree  
1104 of relationship to the guardian cannot purchase the protected person's property unless permitted  
1105 by the conservator, or

1106 (b) if there is no conservator or if the conservator is the guardian, someone affiliated with the  
1107 guardian, or someone within the third degree of relationship to the guardian, unless permitted by  
1108 the court.

1109 Section 41. Section **75-5c-307** is enacted to read:

1110 **75-5c-307. Guardian's duties.**

1111 The guardian shall:

1112 (1) within 14 days after appointment, serve on the protected person and all other people  
1113 entitled to notice of the petition a copy of the appointment order and notice of the right to request  
1114 termination or modification;

1115 (2) within 90 days after appointment, file and serve a management plan as required by court  
1116 rule or court order, describing the strategies that will be used to implement the court order;

1117 (3) file and serve a report on the protected person's condition to the satisfaction of the court  
1118 annually, upon resignation or removal, upon termination, and as required by court rule or court  
1119 order;

1120 (4) immediately notify the court if the protected person dies, becomes capable of exercising  
1121 rights previously removed or changes dwelling place, or if the guardian changes dwelling place;

1122 (5) exercise duties and authority authorized by statute and court order as necessary to  
1123 accommodate the protected person's particular functional limitations;

1124 (6) if reasonable under the circumstances, encourage the protected person to participate in  
1125 decisions, to act on the protected person's own behalf, and to overcome the functional limitations  
1126 that resulted in the protected person's incapacity;

1127 (7) make decisions using the substitute judgment decisionmaking standard or the best interest  
1128 decisionmaking standard, whichever applies in the circumstances;

1129 (8) become and remain personally acquainted with the protected person and maintain  
1130 sufficient contact with the protected person to know of the person's preferences, values,  
1131 capabilities, limitations, needs, opportunities, and physical and mental health;

1132 (8) when acting on behalf of the protected person, exercise the degree of care, diligence, and  
1133 good faith that an ordinarily careful person exercises in his or her own affairs;

1134 (9) exhibit the utmost trustworthiness, loyalty, and fidelity to the protected person;

1135 (10) petition for the appointment of a conservator or for a protective order if necessary to  
1136 protect the protected person's property;

1137 (11) conserve for the protected person's future needs any of the estate that exceeds the  
1138 person's current needs or, if a conservator has been appointed, pay the excess to the conservator  
1139 at least annually;

1140 (12) keep the protected person's estate separate from the guardian's money and property;

1141 (13) keep contemporaneous records and make them available for examination as directed by  
1142 the court;

1143 (15) at termination, deliver any of the estate subject to the guardian's possession, ownership  
1144 or control and any records as directed by law or the court;

1145 (16) if a conservator has been appointed, account to the conservator for the protected  
1146 person's income and expenses and for any of the estate subject to the guardian's possession,  
1147 ownership or control; and

1148 (17) if a conservator has not been appointed:

1149 (a) within 90 days after appointment, file and serve a management plan as required by court  
1150 rule or court order describing the strategies that will be used to implement the court order;

1151 (b) within 90 days after appointment, file and serve a detailed inventory of the estate subject  
1152 to the guardian's possession, ownership or control under an oath or affirmation that the inventory  
1153 is believed to be complete and accurate as far as information permits; and

1154 (c) file and serve a report about the administration of the protected person's estate to the  
1155 satisfaction of the court annually, upon resignation or removal, upon termination, and as required  
1156 by court rule or court order.

1157 Section 42. Section **75-5c-308** is enacted to read:

1158 **75-5c-308. Guardian's personal liability.**

1159 (1) A guardian is not liable to third persons for the protected person's acts solely by reason of  
1160 the guardianship.

1161 (2) If the guardian performs fiduciary responsibilities with the degree of care, diligence, and  
1162 good faith that an ordinarily careful person exercises in his or her own affairs, the guardian is not  
1163 liable for acts or omissions in performing the fiduciary responsibilities.

1164 (3) If the guardian selects a third person to perform a service for the protected person with  
1165 the degree of care, diligence, and good faith that an ordinarily careful person exercises in his or  
1166 her own affairs, the guardian is not liable for injury resulting from the wrongful conduct of the  
1167 third person.

1168 Section 43. Section **75-5-314** is renumbered and amended to read:

1169 **75-5-314. 75-5c-309. Mentally incompetent veteran -- Evidence of necessity for**  
1170 **appointment of guardian.**

1171 ~~Where a petition is filed for the appointment of a guardian for a mentally incompetent ward,~~  
1172 ~~a~~A certificate of the administrator or ~~his~~a duly authorized representative; that ~~such person the~~  
1173 ~~respondent~~ has been rated incompetent by the veterans administration on examination in  
1174 accordance with ~~the veterans administration~~ laws and regulations ~~governing such veterans~~  
1175 ~~administration~~ and that the appointment of a guardian is a condition precedent to the payment of  
1176 any ~~moneys~~money due ~~such ward the respondent~~ by the veterans administration, ~~shall be prima~~  
1177 ~~faeie~~ may be admitted as evidence of the necessity for such appointment.

1178 Section 44. Section **75-5-315** is renumbered and amended to read:

1179 **75-5-315. 75-5c-310. Copies of public records furnished to veterans administration.**

1180 ~~When~~If a copy of ~~any~~a public record is required by the veterans administration to ~~be used in~~  
1181 ~~determining~~determine the eligibility of ~~any person an applicant~~ to participate in veterans  
1182 administration benefits ~~made available by the veterans administration~~, the ~~official~~ custodian of  
1183 ~~such the~~ public record shall without charge provide a certified copy of the record to the applicant  
1184 ~~for such benefits~~ or any person acting on behalf of the ~~authorized representative of the~~ veterans  
1185 administration ~~with a certified copy of such record.~~

1186 Section 45. Section **75-5-316** is renumbered and amended to read:

1187 **75-5-316. Expedited guardianship proceedings. 75-5c-311. Limited authority of**  
1188 **guardian for resident of the Utah State Developmental Center.**

1189 (1)(a) ~~With regard to persons who are residents of the Utah State Developmental Center, the~~  
1190 ~~expedited process provided by this section may be applied to obtain a limited guardianship.~~

1191 (b) ~~For purposes of this section:~~

1192 (i) ~~"Limited guardianship" means a guardianship solely for the purpose of granting consent~~  
1193 ~~for medical care and for participation in approval of the ward's individualized program plan.~~

1194 (ii) ~~"Ward" means a resident of the Utah State Developmental Center who is the subject of~~  
1195 ~~guardianship proceedings under this section.~~

1196 (2) ~~Any person interested in the incapacitated person's welfare may file a petition for a~~  
1197 ~~finding of incapacity and appointment of a guardian. That person may seek the limited~~  
1198 ~~guardianship pro se, using the forms described in this section. Any There is no fee for filing a~~  
1199 ~~petition for a limited guardianship shall be waived if the guardian is proceeding under this~~  
1200 ~~section.~~

1201 (3) ~~Upon filing a petition for limited guardianship under this section, the court shall set a date~~  
1202 ~~for hearing.~~

1203 (4) ~~The ward has the right to be present at the hearing and to see and hear all evidence~~  
1204 ~~relating to his condition.~~

1205 (5) ~~At that hearing the court shall review the affidavit of the superintendent of the Utah State~~  
1206 ~~Developmental Center, described in Subsection (11), and determine whether notice has been~~  
1207 ~~given to the appropriate persons described in Subsection (6).~~

1208 (6) ~~If the proposed guardian is not a parent or relative of the ward, personal notice shall be~~  
1209 ~~given to the ward's spouse, parents, and any adult children of the ward. Personal notice shall also~~  
1210 ~~be given to other persons as the court may direct.~~

1211 (7) ~~The court may, in its discretion, appoint a guardian ad litem to represent the ward in the~~  
1212 ~~hearing, and may request independent evaluation by a physician appointed by the court. The~~  
1213 ~~physician shall submit his findings to the court in writing.~~

1214 (8) ~~The court may grant the petition for a limited guardianship and sign the Order of~~  
1215 ~~Appointment if the court finds that:~~

1216 (a) ~~the appropriate parties have been given notice;~~

1217 (b) ~~the ward is incapacitated, based on the affidavit of the superintendent of the Utah State~~  
1218 ~~Developmental Center and any affidavit or testimony of persons entitled to receive notice or~~  
1219 ~~requested to present evidence under this section; and~~

- 1220 ~~(e) it is necessary and desirable to establish the guardianship.~~
- 1221 ~~(9) Venue for these expedited guardianship proceedings shall be the same as that described in~~
- 1222 ~~Section 75-5-302.~~
- 1223 ~~(10) A petition for a limited guardianship shall include the following information:~~
- 1224 ~~(a) the interest of the petitioner;~~
- 1225 ~~(b) the name, age, residence, and address of the ward;~~
- 1226 ~~(c) verification that the ward is a resident of the Utah State Developmental Center;~~
- 1227 ~~(d) the name and address of the nearest relative of the ward; and~~
- 1228 ~~(e) the reason for appointment of guardianship.~~
- 1229 ~~(11)-(2)~~ The petitioner shall ~~also provide the court with file~~ an affidavit of the superintendent
- 1230 of the Utah State Developmental Center that includes the following information:
- 1231 (a) that the ward-respondent is a resident of the Utah State Developmental Center;
- 1232 (b) the date the ward-respondent was originally admitted to the Utah State Developmental
- 1233 Center;
- 1234 (c) the diagnosis of the ward-respondent, including a description of the ward's-respondent's
- 1235 disabling condition, the level of retardation, and any medical or physical conditions;
- 1236 (d) that the Utah State Developmental Center is certified as an Intermediate Care Facility for
- 1237 the Mentally Retarded under Title XIX of the Social Security Act;
- 1238 (e) that because of that certification, the Utah State Developmental Center receives financial
- 1239 participation from the United States Government for its operation and maintenance costs; and
- 1240 (f) that federal regulations under Title XIX require the ward-respondent to have a guardian
- 1241 appointed for the sole purpose of giving consent for medical and dental care and of participation
- 1242 in and approval of the ward's-respondent's individual program plan.
- 1243 ~~(12)-(3)~~ If in addition to the findings of Section 75-5c-303, the court finds that, ~~under the~~
- 1244 ~~requirements of this section the proposed limited guardian should be appointed, it~~ the respondent
- 1245 is a resident of the Utah State Developmental Center, the court shall enter an order ~~establishing~~
- 1246 ~~that limited guardianship in substantially the following form: appointing the guardian and~~
- 1247 limiting the guardian's authority to:
- 1248 ~~The court finds that:~~
- 1249 ~~(a) appointment of a limited guardianship for (named ward) is necessary and desirable as a~~
- 1250 ~~means of providing continuing care and supervision and to ensure his welfare;~~

1251 ~~(b) the ward is incapacitated;~~  
1252 ~~(c) (named guardian) is appointed as the limited guardian of (named ward); and~~  
1253 ~~(d) the guardianship is a limited guardianship solely for the purpose of:~~  
1254 ~~(i)-(a) granting permission for medical and dental care on behalf of the ward respondent; and~~  
1255 ~~(ii)-(b) participation in the development and approval of the ward's respondent's individual~~  
1256 program plan.

1257 ~~(13)-(4) Appointment of guardianship-guardian under this section places no additional~~  
1258 responsibility or liability on the guardian ~~with regard to the ward. The limited guardianship is~~  
1259 ~~solely for consent for medical care and approval of the ward's individualized program plan, and~~  
1260 ~~shall not be construed to increase or create liability or responsibility for the guardian.~~

1261 Section 46. Section **75-5c-401** is enacted to read:

1262 **Part 4. Appointment of a Conservator and Other Protective Orders**

1263 **75-5c-401. Petition to appoint a conservator or enter a protective order.**

1264 (1) The following may file a verified petition to appoint a conservator or to enter a protective  
1265 order:

- 1266 (a) the person to be protected;  
1267 (b) an individual interested in the respondent's estate, affairs, or welfare; or  
1268 (c) a person who would be adversely affected by lack of effective management of the  
1269 respondent's property and business affairs.

1270 (2) If the petitioner is nominated by will or signed writing, the petitioner shall file the petition  
1271 and a copy of the will or signed writing within 30 days after:

- 1272 (a) the nominator's death;  
1273 (b) the nominator's adjudicated incapacity; or  
1274 (c) a written determination by a physician who has examined the nominator that the  
1275 nominator is no longer able to care for the respondent.

1276 Section 47. Section **75-5c-402** is enacted to read:

1277 **75-5c-402. Jurisdiction over business affairs of respondent.**

1278 Until termination, the court in which the petition is filed has:

- 1279 (1) exclusive jurisdiction to determine the need for a conservatorship or protective order;

1280 (2) exclusive jurisdiction to determine how the respondent's estate that is subject to Utah  
1281 laws will be managed, expended, or distributed to or for the use of the respondent, individuals  
1282 entitled to the respondent's support, or other claimants; and

1283 (3) concurrent jurisdiction to determine the validity of claims against the respondent or the  
1284 respondent's estate and questions of title concerning estate assets.

1285 Section 48. Section **75-5c-403** is enacted to read:

1286 **75-5c-403. Petition to appoint a conservator or enter a protective order for a minor –**  
1287 **Preliminary application of property – Findings – Appointment of counsel.**

1288 (1) Upon receipt of a petition to appoint a conservator or to enter a protective order for a  
1289 minor, the court shall schedule a hearing on the petition.

1290 (2) After preliminary hearing and without notice, the court may issue orders to preserve and  
1291 apply the minor's property as may be required for the minor's support or for individuals entitled  
1292 to the minor's support. The court may appoint a master to assist in the task.

1293 (3) If the court determines that the minor's best interests are inadequately represented, it may  
1294 appoint a lawyer to represent the minor, giving consideration to the minor's choice if the minor  
1295 is 14 years of age or older.

1296 (4) The court shall appoint a conservator or enter a protective order if it finds that:

1297 (a) the minor:

1298 (i) owns money or property requiring management or protection that cannot otherwise be  
1299 provided; or

1300 (ii) has or may have business affairs that may be put at risk or prevented because of the  
1301 minor's age; or

1302 (iii) has property that will be wasted or dissipated unless management is provided; or

1303 (iv) needs money for the support, care, education, health, and welfare of the minor or of  
1304 individuals who are entitled to the minor's support and that protection is necessary or desirable  
1305 to obtain or provide the money; and

1306 (a) the appointment is in the minor's best interests;

1307 (b) a qualified person seeks appointment;

1308 (c) the court has jurisdiction and venue is proper; and

1309 (d) the required notices have been given.

1310 (5) The court may appoint a conservator for a specified time not to exceed the minor's 18<sup>th</sup>  
1311 birthday. In other cases, the court may dismiss the proceeding or make any other disposition that  
1312 will serve the best minor's interests.

1313 Section 49. Section **75-5c-404** is enacted to read:

1314 **75-5c-404. Petition to appoint a conservator or enter a protective order for an adult –**  
1315 **Preliminary application of property – Appointment of counsel.**

1316 (1) Upon receipt of a petition to appoint a conservator or enter a protective order for an adult,  
1317 the court shall schedule a hearing on the petition.

1318 (2) After preliminary hearing and without notice, the court may issue orders to preserve and  
1319 apply the respondent's property as may be required for the support of the respondent or of  
1320 individuals entitled to the respondent's support. The court may appoint a master to assist in the  
1321 task.

1322 (3) Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to  
1323 represent the respondent.

1324 Section 50. Section **75-5c-405** is enacted to read:

1325 **75-5c-405. Petition to appoint a conservator or enter a protective order for an adult –**  
1326 **Findings – Orders.**

1327 (1) If a petition is filed to appoint a conservator or enter a protective order for an adult, the  
1328 court shall appoint a conservator or enter a protective order if it finds:

1329 (a) based on clear and convincing evidence, that the person to be protected has knowingly  
1330 and voluntarily petitioned the court to appoint a conservator or enter a protective order; or:

1331 (b)(i) based on clear and convincing evidence, that the respondent is unable to manage  
1332 property and business affairs because the respondent is incapacitated, missing, detained, or  
1333 unable to return to the United States; and

1334 (b)(ii) by a preponderance of evidence, that the respondent:

1335 (A) has property that will be wasted or dissipated unless management is provided; or

1336 (B) needs money for the support, care, education, health, and welfare of the respondent or of  
1337 individuals who are entitled to the respondent's support and that protection is necessary or  
1338 desirable to obtain or provide the money.

1339 (2) The court shall make the least restrictive order consistent with its findings necessitated by  
1340 the respondent's limitations and demonstrated needs, including appointive and other orders that  
1341 will encourage the development of maximum self-reliance and independence of the respondent.

1342 (3) Appointment of a conservator or entry of a protective order based on a request by the  
1343 person to be protected is not a determination of that person's incapacity.

1344 (4) Appointment of a conservator or entry of a protective order may not be denied solely  
1345 because the respondent has a valid power of attorney.

1346 Section 51. Section **75-5c-406** is enacted to read:

1347 **75-5c-406. Authority of court.**

1348 (1) Upon determining that a basis exists for a conservatorship or protective order, the court  
1349 has the following authority, which may be exercised directly or through a conservator.

1350 (a) The court has all the authority over the estate and business affairs of a minor which may  
1351 be necessary for the best interest of the minor and members of the minor's immediate family.

1352 (b) The court has all the authority over the estate and business affairs of an adult protected  
1353 person, for the benefit of the protected person and individuals entitled to the protected person's  
1354 support that the protected person could exercise if present and not under conservatorship or  
1355 protective order.

1356 (2) The court may limit authority otherwise conferred on a conservator and may remove or  
1357 modify any limitation at any time.

1358 Section 52. Section **75-5c-407** is enacted to read:

1359 **75-5c-407. Protective arrangements and single transactions.**

1360 (1) Upon determining that a basis exists for a protective order, the court, without appointing a  
1361 conservator, may:

1362 (a) authorize, direct, or ratify any transaction necessary or desirable to achieve any  
1363 arrangement for security, service or care meeting the foreseeable needs of the protected person,  
1364 including:

1365 (i) payment, delivery, deposit or retention of funds or property;

1366 (ii) sale, mortgage, lease or other transfer of property;

1367 (iii) purchase of an annuity;

1368 (iv) making a contract for life care, deposit contract, or contract for training and education; or

1369 (v) addition to or establishment of a suitable trust; and

1370 (b) authorize, direct, or ratify any other contract, trust, will, or transaction relating to the  
1371 protected person's property and business affairs, including settlement of a claim, upon  
1372 determining that it is in the protected person's best interest.

1373 (2) In deciding whether to approve a protective arrangement or other transaction under this  
1374 Section, the court shall consider the factors described in **Subsection 75-5c-408(3).**

1375 (3) The court may appoint a master to assist in any transaction or protective arrangement  
1376 authorized under this Section. The master has the authority conferred by the order and shall serve  
1377 until discharged after reporting to the court.

1378 Section 53. Section **75-5c-408** is enacted to read:

1379 **75-5c-408. Action requiring court approval.**

1380 (1) After notice to interested persons and upon express authorization of the court, a  
1381 conservator may:

1382 (a) if an estate is ample to provide for the distributions authorized by Section 75-5c-416, a  
1383 conservator for a protected person other than a minor may give gifts, donations and contributions  
1384 that the protected person might have been expected to give, in amounts that do not exceed in the  
1385 aggregate for any calendar year 20 percent of the estate income in that year;

1386 (b) convey, release or disclaim contingent and expectant interests in property, including  
1387 marital property rights and any right of survivorship incident to joint tenancy or tenancy by the  
1388 entireties;

1389 (c) exercise or release a power of appointment;

1390 (d) create a revocable or irrevocable trust of estate property, whether or not the trust extends  
1391 beyond the duration of the conservatorship, or revoke or amend a trust revocable by the protected  
1392 person;

1393 (e) exercise rights to elect options and change beneficiaries under insurance policies and  
1394 annuities or surrender the policies and annuities for their cash value;

1395 (f) exercise any right to an elective share in the estate of the protected person's deceased  
1396 spouse and to renounce or disclaim any interest by testate or intestate succession or by transfer  
1397 inter vivos; and

1398 (g) make, amend, or revoke the protected person's will.

1399 (2) A conservator, in making, amending, or revoking the protected person's will, must  
1400 comply with Title 75, Chapter 2, Part 5, Wills.

1401 (3) In exercising or in approving a conservator’s exercise of the authority listed in Subsection  
1402 (1), the court shall consider primarily the decision that the protected person would have made, to  
1403 the extent that the decision can be ascertained. The court shall also consider:

1404 (a) the financial needs of the protected person, the needs of individuals entitled to the  
1405 protected person’s support and the interest of creditors;

1406 (b) possible reduction of tax liabilities;

1407 (c) eligibility for governmental assistance;

1408 (d) the protected person’s previous pattern of giving or level of support;

1409 (e) the existing estate plan;

1410 (f) the protected person’s life expectancy and the probability that the conservatorship will  
1411 terminate before the protected person’s death; and

1412 (g) any other relevant factors.

1413 (4) A conservator may revoke or amend a durable power of attorney of which the protected  
1414 person is the principal. If a durable power of attorney is in effect, a decision of the conservator  
1415 takes precedence over that of the agent unless the court orders otherwise.

1416 Section 54. Section **75-5c-409** is enacted to read:

1417 **75-5c-409. Conservator’s duties.**

1418 The conservator shall:

1419 (1) within 14 days after appointment, serve on the protected person and all other people  
1420 entitled to notice of the petition a copy of the appointment order and notice of the right to request  
1421 termination or modification;

1422 (2) within 90 days after appointment, file and serve a management plan as required by court  
1423 rule or court order describing the strategies that will be used to implement the court order;

1424 (3) within 90 days after appointment, file and serve a detailed inventory of the estate subject  
1425 to the conservator’s possession, ownership or control under an oath or affirmation that the  
1426 inventory is believed to be complete and accurate as far as information permits; and

1427 (4) file and serve a report about the administration of the protected person’s estate to the  
1428 satisfaction of the court annually, upon resignation or removal, upon termination, and as required  
1429 by court rule or court order;

1430 (5) immediately notify the court if the protected person dies, becomes capable of exercising  
1431 rights previously removed or changes dwelling place, or if the guardian changes dwelling place;

1432 (6) exercise duties and authority authorized by statute and court order as necessary to  
1433 accommodate the protected person's particular functional limitations;

1434 (7) if reasonable under the circumstances, encourage the protected person to participate in  
1435 decisions, to act on the protected person's own behalf, and to overcome the functional limitations  
1436 that resulted in the protected person's incapacity;

1437 (8) act as a fiduciary and observe the standard of care of a trustee under Title 75, Chapter 7,  
1438 Part 9, Utah Uniform Prudent Investor Act;

1439 (9) keep contemporaneous records of the administration of the estate and make them  
1440 available for examination as directed by the court;

1441 (10) take into account any estate plan of the protected person known to the conservator and  
1442 may examine the will and any other donative, nominative, or other appointive instrument of the  
1443 protected person in investing the estate, selecting assets of the estate for distribution, and  
1444 invoking power of revocation or withdrawal available for the use and benefit of the protected  
1445 person and exercisable by the conservator; and

1446 (11) at termination, deliver any of the estate subject to the conservator's possession,  
1447 ownership or control and any records as directed by law or the court.

1448 Section 55. Section **75-5c-410** is enacted to read:

1449 **75-5c-410. Title by appointment.**

1450 The appointment of a conservator vests title in the conservator as trustee to all property of the  
1451 protected person, or to the part specified in the order, held at the time of appointment or later  
1452 acquired. An order vesting title in the conservator to only part of the property of the protected  
1453 person creates a conservatorship limited to assets specified in the order.

1454 Section 56. Section **75-5c-411** is enacted to read:

1455 **75-5c-411. Protected person's interest inalienable.**

1456 (1) Except as otherwise provided in subsections (3) and (4), the interest of a protected person  
1457 in property vested in a conservator is not transferable or assignable by the protected person. An  
1458 attempted transfer or assignment by the protected person, although ineffective to affect property  
1459 rights, may give rise to a claim against the protected person for restitution or damages which  
1460 may be presented to the conservator.

1461 (2) Property vested in a conservator by appointment and the interest of the protected person  
1462 in that property are not subject to levy, garnishment, or similar process for claims against the  
1463 protected person unless allowed after presentation.

1464 (3) A person without knowledge of the conservatorship who in good faith and for security or  
1465 substantially equivalent value receives delivery of tangible personal property normally  
1466 transferred by delivery is protected as if the protected person or transferee had valid title.

1467 (4) A third party who deals with the protected person with respect to property vested in a  
1468 conservator is entitled to any protection provided in other law.

1469 Section 57. Section **75-5c-412** is enacted to read:

1470 **75-5c-412. Sale, encumbrance, or other transaction involving conflict of interest.**

1471 Any transaction affected by a substantial conflict between the conservator's fiduciary and  
1472 personal interests is voidable unless the transaction is expressly authorized by the court after  
1473 notice to interested persons. A transaction affected by a substantial conflict between fiduciary  
1474 and personal interests includes any sale, encumbrance, or other transaction involving the estate  
1475 entered into by the conservator, the spouse, descendant, agent, or lawyer of a conservator, or a  
1476 corporation or other enterprise in which the conservator has a substantial beneficial interest.

1477 Section 58. Section **75-5c-413** is enacted to read:

1478 **75-5c-413. Protection of person dealing with conservator.**

1479 (1) A person who assists or deals with a conservator in good faith and for value in any  
1480 transaction other than one requiring a court order is protected as though the conservator properly  
1481 exercised the authority. That a person knowingly assists or deals with a conservator does not  
1482 alone require the person to inquire into the conservator's authority or the propriety of its  
1483 exercise, but restrictions on the conservator's authority endorsed on letters of office are effective  
1484 as to third persons. A person who pays or delivers assets to a conservator is not responsible for  
1485 their proper application.

1486 (2) Protection provided by this Section extends to any procedural irregularity or jurisdictional  
1487 defect that occurred in the proceedings leading to the issuance of letters and is not a substitute for  
1488 protection provided to persons assisting or dealing with a conservator by comparable provisions  
1489 in other law relating to commercial transactions or to simplifying transfers of securities by  
1490 fiduciaries.

1491 Section 59. Section **75-5c-414** is enacted to read:

1492 **75-5c-414. Authority of conservator in administration.**

1493 (1) Except as otherwise restricted in the appointment order and endorsed on the letters of  
1494 office, a conservator has all of the authority granted in this Section and any additional authority  
1495 granted by law to a trustee.

1496 (2) A conservator, acting reasonably and in an effort to accomplish the purpose of the  
1497 appointment, and without court authorization, may:

1498 (a) collect, hold, and retain estate assets, including assets in which the conservator has a  
1499 personal interest and real property in another state, until the conservator considers that  
1500 disposition of an asset should be made;

1501 (b) receive additions to the estate;

1502 (c) continue or participate in the operation of a business or other enterprise;

1503 (d) acquire an undivided interest in an estate asset in which the conservator, in a fiduciary  
1504 capacity, holds an undivided interest;

1505 (e) invest estate assets as though the conservator were a trustee;

1506 (f) deposit estate money in a financial institution, including one operated by the conservator;

1507 (g) acquire or dispose of an estate asset, including real property in another state, for cash or  
1508 on credit, at public or private sale, and manage, develop, improve, exchange, partition, change  
1509 the character of, or abandon an estate asset;

1510 (h) make ordinary or extraordinary repairs or alterations in buildings or other structures,  
1511 demolish any improvements, and raze existing or erect new party walls or buildings;

1512 (i) subdivide, develop, or dedicate land to public use, make or obtain the vacation of plats  
1513 and adjust boundaries, adjust differences in valuation or exchange or partition by giving or  
1514 receiving considerations, and dedicate easements to public use without consideration;

1515 (j) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or  
1516 renew, for a term within or extending beyond the term of the conservatorship;

1517 (k) enter into a lease or arrangement for exploration and removal of minerals or other natural  
1518 resources or enter into a pooling or unitization agreement;

1519 (l) grant an option involving disposition of an estate asset and take an option for the  
1520 acquisition of any asset;

1521 (m) vote a security, in person or by general or limited proxy;

- 1522 (n) pay calls, assessments, and any other sums chargeable or accruing against or on account  
1523 of securities;
- 1524 (o) sell or exercise stock subscription or conversion rights;
- 1525 (p) consent, directly or through a committee or other agent, to the reorganization,  
1526 consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
- 1527 (q) hold a security in the name of a nominee or in other form without disclosure of the  
1528 conservatorship so that title to the security may pass by delivery;
- 1529 (r) insure estate assets against damage or loss and the conservator against liability with  
1530 respect to a third person;
- 1531 (s) borrow money, with or without security, to be repaid from the estate or otherwise and  
1532 advance money for the protection of the estate or the protected person and for all expenses,  
1533 losses, and liability sustained in the administration of the estate or because of the holding or  
1534 ownership of any assets, for which the conservator has a lien on the estate as against the  
1535 protected person for advances so made;
- 1536 (t) pay or contest any claim, settle a claim by or against the estate or the protected person by  
1537 compromise, arbitration, or otherwise, and release, in whole or in part, any claim belonging to  
1538 the estate to the extent the claim is uncollectible;
- 1539 (u) pay taxes, assessments, compensation of the conservator and any guardian, and other  
1540 expenses incurred in the collection, care, administration, and protection of the estate;
- 1541 (v) allocate items of income or expense to income or principal of the estate, as provided by  
1542 other law, including creation of reserves out of income for depreciation, obsolescence, or  
1543 amortization or for depletion of minerals or other natural resources;
- 1544 (w) pay any sum distributable to a protected person or to individuals entitled to the protected  
1545 person's support by paying the sum to the distributee or by paying the sum for the use of the  
1546 distributee:
- 1547 (i) to the distributee's guardian or custodian under Title 75, Chapter 5a, Uniform Transfers to  
1548 Minors Act; or
- 1549 (ii) if there is no guardian or custodian, to a relative or other person having physical custody  
1550 of the distributee;
- 1551 (x) prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection  
1552 of estate assets and of the conservator in the performance of fiduciary duties; and

1553 (y) execute and deliver all instruments that will accomplish or facilitate the exercise of the  
1554 conservator's authority.

1555 Section 60. Section **75-5c-415** is enacted to read:

1556 **75-5c-415. Delegation.**

1557 (1) A conservator may not delegate to an agent or another conservator the entire  
1558 administration of the estate, but a conservator may delegate the performance of functions that a  
1559 prudent trustee of comparable skills may delegate under similar circumstances.

1560 (2) The conservator shall exercise reasonable care, skill, and caution in:

1561 (a) selecting an agent;

1562 (b) establishing the scope and terms of a delegation, consistent with the purposes and terms  
1563 of the conservatorship;

1564 (c) periodically reviewing an agent's overall performance and compliance with the terms of  
1565 the delegation; and

1566 (d) redressing an action or decision of an agent which would constitute a breach of trust if  
1567 performed by the conservator.

1568 (3) A conservator who complies with subsections (1) and (2) is not liable to the protected  
1569 person or to the estate for the decisions or actions of the agent to whom a function was delegated.

1570 (4) In performing a delegated function, an agent shall exercise reasonable care to comply  
1571 with the terms of the delegation.

1572 (5) By accepting a delegation from a conservator subject to Utah law, an agent submits to the  
1573 jurisdiction of the Utah courts.

1574 Section 61. Section **75-5c-416** is enacted to read:

1575 **75-5c-416. Principles of distribution by conservator.**

1576 Unless otherwise specified in the appointment order and endorsed on the letters of office or  
1577 contrary to the management plan, a conservator may, without further court authorization or  
1578 confirmation, expend or distribute income or principal of the estate for the support, care,  
1579 education, health, and welfare of the protected person and individuals entitled to the protected  
1580 person's support, including the payment of child support or spousal support, in accordance with  
1581 the following rules:

1582 (1) A conservator shall consider a guardian's recommendations about the appropriate  
1583 standard of support, care, education, health, and welfare for the protected person or individuals

1584 entitled to the protected person's support. If the protected person is a minor, the conservator shall  
1585 consider a parent's recommendations.

1586 (2) A conservator may not be surcharged for money paid to persons furnishing support, care,  
1587 education, or benefits to a protected person or individuals entitled to the protected person's  
1588 support in accordance with the recommendations of the protected person's parent or guardian,  
1589 unless the conservator knows that the parent or guardian derives a personal financial benefit,  
1590 including relief from any personal duty of support, or the recommendations are not in the best  
1591 interest of the protected person.

1592 (3) In making distributions under this Subsection, the conservator shall consider:

1593 (a) the size of the estate, the estimated duration of the conservatorship, and the likelihood that  
1594 the protected person, at some future time, may be fully self-sufficient and able to manage  
1595 business affairs and the estate;

1596 (b) the accustomed standard of living of the protected person and individuals entitled to the  
1597 protected person's support; and

1598 (c) other money or sources used for the support of the protected person and individuals  
1599 entitled to the protected person's support.

1600 (4) Money expended under this Subsection may be paid by the conservator to any person,  
1601 including the protected person, as reimbursement for expenditures that the conservator might  
1602 have made, or in advance for services to be rendered to the protected person if it is reasonable to  
1603 expect the services will be performed and advance payments are customary or reasonably  
1604 necessary under the circumstances.

1605 Section 62. Section **75-5c-417** is enacted to read:

1606 **75-5c-417. Death of protected person.**

1607 (1) Upon the death of a protected person, the conservator shall deliver to the court for  
1608 safekeeping any will of the protected person which may have come into the conservator's  
1609 possession, inform the personal representative or beneficiary named in the will of the delivery,  
1610 and retain the estate for delivery to the decedent's personal representative or to another person  
1611 entitled to it.

1612 (2) Upon the death of a protected person, the conservator shall conclude the administration of  
1613 the estate by distribution to the protected person's successors. The conservator shall file a final  
1614 report and petition for discharge within 30 days after distribution.

1615 Section 63. Section **75-5c-418** is enacted to read:

1616 **75-5c-418. Presentation and allowance of claims.**

1617 (1) A conservator may pay, or secure by encumbering estate assets, claims against the estate  
1618 or against the protected person arising before or during the conservatorship upon their  
1619 presentation and allowance in accordance with the priorities stated in Subsection (5). A claimant  
1620 may present a claim by:

1621 (a) sending or delivering to the conservator a written statement of the claim, indicating its  
1622 basis, the name and address of the claimant, and the amount claimed; or

1623 (b) filing a written statement of the claim, in a form acceptable to the court, with the court  
1624 clerk and sending or delivering a copy of the statement to the conservator.

1625 (2) A claim is deemed presented on receipt of the written statement of claim by the  
1626 conservator or the filing of the claim with the court clerk, whichever occurs first.

1627 (3) A presented claim is allowed if it is not disallowed by written statement sent or delivered  
1628 by the conservator to the claimant within 60 days after its presentation. Before payment, the  
1629 conservator may change an allowance to a disallowance in whole or in part, but not after  
1630 allowance under a court order or judgment or an order directing payment of the claim. The  
1631 presentation of a claim tolls the running of any statute of limitations relating to the claim until 30  
1632 days after its disallowance.

1633 (4) A claimant whose claim has not been paid may petition the court for determination of the  
1634 claim at any time before it is barred by a statute of limitations and, upon proof, procure an order  
1635 for its allowance, payment, or security by encumbering estate assets. If a proceeding is pending  
1636 against a protected person at the time of the conservator's appointment or is later initiated against  
1637 the protected person, the moving party shall give to the conservator notice of any proceeding that  
1638 could result in creating a claim against the estate.

1639 (5) If it appears that the estate is likely to be exhausted before all existing claims are paid, the  
1640 conservator shall distribute the estate in money or in kind in payment of claims in the following  
1641 order:

1642 (a) costs and expenses of administration;

1643 (b) claims of the federal or state government having priority under other law;

1644 (c) claims incurred by the conservator for support, care, education, health, and welfare  
1645 previously provided to the protected person or individuals entitled to the protected person's  
1646 support;

1647 (d) claims arising before the conservatorship; and

1648 (e) all other claims.

1649 (6) Preference may not be given in the payment of a claim over any other claim of the same  
1650 class, and a claim due and payable may not be preferred over a claim not due.

1651 (7) If assets of the conservatorship are adequate to meet all existing claims, the court, acting  
1652 in the best interest of the protected person, may order the conservator to grant a security interest  
1653 in the estate for the payment of any or all claims at a future date.

1654 Section 64. Section **75-5c-419** is enacted to read:

1655 **75-5c-419. Personal liability of conservator.**

1656 (1) Except as otherwise agreed, a conservator is not personally liable on a contract properly  
1657 entered into in a fiduciary capacity in the course of administration of the estate unless the  
1658 conservator fails to reveal in the contract the representative capacity and identify the estate.

1659 (2) A conservator is not personally liable for obligations arising from possession, ownership  
1660 or control of estate property or for other acts or omissions occurring in the course of  
1661 administration of the estate unless the conservator is personally at fault.

1662 (3) Regardless whether the conservator is personally liable, claims based on contracts entered  
1663 into by a conservator in a fiduciary capacity, obligations arising from possession, ownership or  
1664 control of the estate, and claims based on torts committed in the course of administration of the  
1665 estate may be asserted against the estate by proceeding against the conservator in a fiduciary  
1666 capacity.

1667 (4) A question of liability between the estate and the conservator personally may be  
1668 determined in a proceeding for accounting, surcharge, or indemnification, or in another  
1669 appropriate proceeding or action.

1670 (5) A conservator is not personally liable for any environmental condition on or injury  
1671 resulting from any environmental condition on land solely by reason of acquisition of title under  
1672 Section 75-5c-410.

1673 Section 65. Section **75-5c-420** is enacted to read:

1674 75-5c-420. Payment of debt and delivery of property to foreign conservator without  
1675 local proceeding.

1676 (1) A person who is indebted to or has the possession of tangible or intangible property of a  
1677 protected person may pay the debt or deliver the property to a foreign conservator, guardian of  
1678 the estate, or other court-appointed fiduciary of the state in which a protected person resides.

1679 (2) Payment or delivery may be made only upon proof of appointment and presentation of an  
1680 affidavit made by or on behalf of the fiduciary stating that a protective proceeding relating to the  
1681 protected person is not pending in Utah and the foreign fiduciary is entitled to payment or to  
1682 receive delivery.

1683 (3) Payment or delivery in accordance with Subsection (1) discharges the debtor or  
1684 possessor, absent knowledge of a protective proceeding pending in Utah.

1685 Section 66. Section **78B-5-804** is amended to read:

1686 **78B-5-804. Money deposited in court.**

1687 (1)(a) Any person depositing money in court, to be held in trust, shall pay it to the court  
1688 clerk.

1689 (b) The clerk shall deposit the money in a court trust fund or with the county treasurer or city  
1690 recorder to be held subject to the order of the court.

1691 (2) The Judicial Council shall adopt rules governing the maintenance of court trust funds and  
1692 the disposition of interest earnings on those trust funds.

1693 (3)(a) Any interest earned on trust funds in the courts of record that is not required to accrue  
1694 to the litigants by Judicial Council rule or court order shall be deposited in a restricted account.  
1695 Any interest earned on trust funds in the courts not of record that is not required to accrue to the  
1696 litigants by Judicial Council rule or court order shall be deposited in the general fund of the  
1697 county or municipality.

1698 (b) The Legislature shall appropriate funds from the restricted account of the courts of record  
1699 to the Judicial Council to:

1700 (i) offset costs to the courts for collection and maintenance of court trust funds; ~~and~~

1701 (ii) provide accounting and auditing of all court revenue and trust accounts and

1702 (iii) review or audit annual reports and accountings of guardians and conservators and recruit  
1703 court visitors in guardianship and conservatorship proceedings.

1704 Section 67. **Repealer.**

- 1705 This bill repeals:
- 1706 Section **75-5-101, Jurisdiction of subject matter -- Consolidation of proceedings.**
- 1707 Section **75-5-102, Facility of payment or delivery.**
- 1708 Section **75-5-103, Delegation of powers by parent or guardian.**
- 1709 Section **75-5-104, Power of court to appoint guardian ad litem not affected.**
- 1710 Section **75-5-105, Bond of guardian.**
- 1711 Section **75-5-201, Status of guardian of minor -- General.**
- 1712 Section **75-5-202, Appointment of guardian of minor.**
- 1713 Section **75-5-202.5, Appointment of guardian by written instrument.**
- 1714 Section **75-5-203, Objection to appointment.**
- 1715 Section **75-5-204, Court appointment of guardian of minor -- Conditions for**
- 1716 **appointment.**
- 1717 Section **75-5-205, Court appointment of guardian of minor -- Venue.**
- 1718 Section **75-5-206, Court appointment of guardian of minor -- Qualifications -- Priority**
- 1719 **of minor's nominee.**
- 1720 Section **75-5-207, Court appointment of guardian of minor -- Procedure.**
- 1721 Section **75-5-208, Consent to service by acceptance of appointment -- Notice.**
- 1722 Section **75-5-209, Powers and duties of guardian of minor -- Residual parental rights**
- 1723 **and duties -- Adoption of a ward.**
- 1724 Section **75-5-210, Termination of appointment of guardian -- General.**
- 1725 Section **75-5-211, Proceedings subsequent to appointment -- Venue.**
- 1726 Section **75-5-212, Resignation or removal proceedings.**
- 1727 Section **75-5-301, Appointment of guardian for incapacitated person.**
- 1728 Section **75-5-302, Venue.**
- 1729 Section **75-5-303, Procedure for court appointment of a guardian of an incapacitated**
- 1730 **person.**
- 1731 Section **75-5-304, Findings -- Limited guardianship preferred -- Order of appointment.**
- 1732 Section **75-5-305, Acceptance of appointment -- Consent to jurisdiction.**
- 1733 Section **75-5-306, Termination of guardianship for incapacitated person.**
- 1734 Section **75-5-307, Removal or resignation of guardian -- Termination of incapacity.**
- 1735 Section **75-5-308, Visitor in guardianship proceeding.**

- 1736 Section **75-5-309, Notices in guardianship proceedings.**
- 1737 Section **75-5-310, Temporary guardians.**
- 1738 Section **75-5-311, Who may be guardian -- Priorities.**
- 1739 Section **75-5-312, General powers and duties of guardian -- Penalties.**
- 1740 Section **75-5-313, Proceedings subsequent to appointment -- Venue.**
- 1741 Section **75-5-314, Mentally incompetent veteran -- Evidence of necessity for**
- 1742 **appointment of guardian.**
- 1743 Section **75-5-315, Copies of public records furnished to veterans administration.**
- 1744 Section **75-5-316, Expedited guardianship proceedings.**
- 1745 Section **75-5-401, Protective proceedings.**
- 1746 Section **75-5-402, Protective proceedings -- Jurisdiction of affairs of protected persons.**
- 1747 Section **75-5-403, Venue.**
- 1748 Section **75-5-404, Original petition for appointment or protective order.**
- 1749 Section **75-5-405, Notice.**
- 1750 Section **75-5-406, Protective proceedings -- Request for notice -- Interested person.**
- 1751 Section **75-5-407, Procedure concerning hearing and order on original petition.**
- 1752 Section **75-5-408, Permissible court orders.**
- 1753 Section **75-5-409, Protective arrangements and single transactions authorized.**
- 1754 Section **75-5-410, Who may be appointed conservator -- Priorities.**
- 1755 Section **75-5-411, Bond.**
- 1756 Section **75-5-412, Terms and requirements of bonds.**
- 1757 Section **75-5-413, Acceptance of appointment -- Consent to jurisdiction.**
- 1758 Section **75-5-414, Compensation and expenses.**
- 1759 Section **75-5-415, Death, resignation or removal of conservator.**
- 1760 Section **75-5-416, Petitions for orders subsequent to appointment.**
- 1761 Section **75-5-417, General duty of conservator.**
- 1762 Section **75-5-418, Inventory and records.**
- 1763 Section **75-5-419, Accounts.**
- 1764 Section **75-5-420, Conservators -- Title by appointment.**
- 1765 Section **75-5-421, Recording of conservator's letters.**

- 1766 Section **75-5-422, Sale, encumbrance or transaction involving conflict of interest --**  
1767 **Voidable -- Exceptions.**
- 1768 Section **75-5-423, Persons dealing with conservators -- Protection.**
- 1769 Section **75-5-424, Powers of conservator in administration.**
- 1770 Section **75-5-425, Distributive duties and powers of conservator.**
- 1771 Section **75-5-426, Enlargement or limitation of powers of conservator.**
- 1772 Section **75-5-427, Preservation of estate plan.**
- 1773 Section **75-5-428, Claims against protected person -- Enforcement.**
- 1774 Section **75-5-429, Individual liability of conservator.**
- 1775 Section **75-5-430, Termination of proceeding.**
- 1776 Section **75-5-431, Payment of debt and delivery of property to foreign conservator**  
1777 **without local proceedings.**
- 1778 Section **75-5-432, Foreign conservator -- Proof of authority -- Bond -- Powers.**
- 1779 Section **75-5-433, Embezzlement of protected person's estate -- Citation to person**  
1780 **suspected.**
- 1781 Section #. **Effective date.**
- 1782 This bill takes effect on July 1, 2010.
- 1783

**(18) Rules**

1           (a) Rule 14-808. Lawyer qualified to represent a respondent in a protective  
2           proceeding.

3           (a) The executive director shall maintain and publish a roster of lawyers qualified to  
4           represent a respondent in a protective proceeding. The roster shall provide the lawyer's  
5           name, business address, phone, fax and email, and the counties in which the lawyer will  
6           undertake representation, and other information as may be needed. A lawyer will be  
7           added to the roster in the order in which he or she certifies to meeting the minimum  
8           requirements.

9           (b) To qualify for the roster, a lawyer must:

10          (b)(1) have acquired at least four hours of MCLE or four hours of accredited law  
11          school education in the law and procedures or protective proceedings;

12          (b)(2) have observed a mentor representing at least one respondent, which may be  
13          satisfied under Rule 14-807, Law student assistance;

14          (b)(3) have served as co-counsel with a mentor representing at least one  
15          respondent, which may be satisfied under Rule 14-807, Law student assistance;

16          (b)(4) have served as lead counsel with a mentor representing at least one  
17          respondent; and

18          (b)(5) be recommended by one's mentors.

19          (c) To be retained on the roster, the lawyer shall identify in the lawyer's MCLE  
20          compliance report or separately:

21          (c)(1) at least two hours of MCLE in the law and procedures of protective  
22          proceedings; and

23          (c)(2) representation of at least two respondents without charge or at a reduced  
24          charge based on the respondent's ability to pay;

25          (d) The executive director may waive any initial or continuing requirement if the  
26          lawyer demonstrates by education and experience proficiency in the law and  
27          procedures of protective proceedings. The executive director may waive (c)(2) if there  
28          were not at least two respondents to be represented.

29          (e) The executive director shall develop and publish forms to implement this rule.

30 (f) A mentor may charge for the service.

31 (g) A lawyer may be removed or suspended from the roster as part of a sanction  
32 under Article 5, Lawyer Discipline and Disability.

33 **(b) URCP 76. Appointment of lawyer to represent a respondent in a**  
34 **protective proceeding.**

35 (a) If the respondent in a protective proceeding is not represented by a lawyer of the  
36 respondent's own choice, the court shall appoint a lawyer from the roster to represent  
37 the respondent.

38 (b) When a petition in a protective proceeding is filed, the clerk will offer the  
39 appointment to the first lawyer in order on the roster willing to accept appointments in  
40 that county. If the proceeding is after an original proceeding, the clerk should offer the  
41 appointment to the lawyer who represented the respondent in the original proceeding.

42 (c) The lawyer will review the case for conflicts of interest and any other factor that  
43 might impede the lawyer from independent and zealous representation of the  
44 respondent. If the lawyer declines the appointment, the clerk will offer the appointment  
45 to the next lawyer on the roster. Upon accepting the appointment, the judge will enter an  
46 order appointing the lawyer, and the clerk will move the lawyer's name to the bottom of  
47 the roster. If the lawyer represents the respondent without charge or at a reduced  
48 charge based on the respondent's ability to pay, the judge will acknowledge this in the  
49 appointment order. The judge can remove a lawyer from a case.

50 (d) Upon motion of a party or upon the court's own motion, the court may determine  
51 whether the lawyer representing the respondent is a qualified independent advocate. In  
52 making the finding, the judge should consider whether:

53 (d)(1) the lawyer has demonstrated by education and experience proficiency in the  
54 law and procedures of protective proceedings, especially in relation to the complexity of  
55 the case;

56 (d)(2) the lawyer has the knowledge, skill, thoroughness and preparation necessary  
57 to candidly advise and zealously represent the respondent with undivided loyalty under  
58 the Rules of Professional Conduct, including Rule 1.14, Client with Diminished  
59 Capacity;

60 (d)(3) any other relevant factors.

61 **(c) URCP 150. Petition to appoint a guardian for a minor.**

62 (a) To appoint a guardian for a minor, the petitioner must file a verified petition that  
63 identifies:

64 (a)(1) the petitioner, the petitioner's relationship to and interest in the respondent;

65 (a)(2) the respondent;

66 (a)(3) in the order of priority, the people for whom there is a priority for appointment;

67 (a)(4) the proposed guardian and the qualifications of the proposed guardian to  
68 exercise the authority requested;

69 (a)(5) the reasons why appointment of a guardian is necessary; and

70 (a)(6) the relief requested.

71 (b) If the petition is to appoint a guardian for a minor residing out-of-state, the  
72 petitioner shall file with the petition or subsequently:

73 (b)(1) an affidavit signed by the custodial parent or legal guardian stating that:

74 (b)(1)(A) the affiant nominates the proposed guardian, whose appointment is in the  
75 minor's best interest;

76 (b)(1)(B) the minor intends to become a Utah resident;

77 (b)(1)(C) the minor's residence in Utah is not for the primary purpose of avoiding  
78 nonresident tuition;

79 (b)(1)(D) the affiant is aware that appointment of a guardian under this Section is  
80 equivalent to any other court-ordered guardianship;

81 (b)(1)(E) the affiant consents to the appointment of the guardian;

82 (b)(1)(F) the affiant submits to the jurisdiction of the district court in any action  
83 relating to the guardianship; and

84 (b)(1)(G) it is the affiant's intent that the minor reside with and be under the  
85 supervision of the proposed guardian;

86 (b)(2) an affidavit signed by the proposed guardian stating that:

87 (b)(2)(A) the affiant is a resident of the school district in which the minor would  
88 attend school in Utah and desires to be appointed guardian of the minor;

89 (b)(2)(B) the affiant submits to the jurisdiction of the district court in any action  
90 relating to the guardianship;

91 (b)(2)(C) the affiant is aware that appointment of a guardian under this Section is  
92 equivalent to any other court-appointed guardianship and will impose the same powers,  
93 rights, and duties that a parent has for the parent's unemancipated minor child; and

94 (b)(2)(D) the affiant accepts all of the powers, rights, and duties that a parent has for  
95 the parent's unemancipated minor child, including the responsibility to provide adequate  
96 supervision, discipline, food, shelter educational and emotional support, and medical  
97 care for the minor;

98 (b)(3) if the minor is 14 years of age or older, an affidavit signed by the minor stating  
99 that:

100 (b)(3)(A) the affiant nominates the proposed guardian, whose appointment is in the  
101 affiant's best interest;

102 (b)(3)(B) the affiant intends to become a Utah resident;

103 (b)(3)(C) the affiant's residence in Utah is not for the primary purpose of avoiding  
104 nonresident tuition;

105 (b)(3)(D) the affiant intends to reside with and be responsible to the proposed  
106 guardian; and

107 (b)(3)(E) the affiant will abide by all applicable laws and rules of any public school  
108 which the minor attends;

109 (b)(4) an affidavit signed by the superintendent of the school district in which the  
110 minor would attend school in Utah stating whether the school to which the minor would  
111 be assigned can accommodate the minor's needs;

112 (b)(5) an affidavit signed by an official from the courts in the jurisdictions in which the  
113 minor lived during the previous two years describing any adult or juvenile charges filed  
114 against the minor, including truancy and compulsory education allegations, and the  
115 outcome of those charges;

116 (b)(6) an affidavit signed by an official from the law enforcement agencies in the  
117 jurisdictions in which the minor lived during the previous two years describing any  
118 investigations of the minor and the outcome of those investigations;

119 (b)(7) a copy of the release given by or on behalf of the minor to the superintendent  
120 of the school district in which the minor would attend school in Utah allowing the  
121 superintendent full access to all criminal and juvenile records of the minor in those  
122 jurisdictions in which the minor has resided during the previous two years; and

123 (b)(8) any other documents relevant to the appointment of a guardian of a minor  
124 required by the court.

125 **(d) URCP 151. Petition to appoint a guardian for an adult.**

126 To appoint a guardian for an adult, the petitioner must file a verified petition that  
127 identifies:

128 (a) the petitioner, the petitioner's relationship to and interest in the respondent;

129 (b) the respondent;

130 (c) in the order of priority, the people for whom there is a priority for appointment;

131 (d) the proposed guardian and the qualifications of the proposed guardian to  
132 exercise the authority requested;

133 (e) the reasons why appointment of a guardian is necessary;

134 (f) the nature and extent of the respondent's alleged incapacity and functional  
135 limitations;

136 (g) the alternatives less restrictive than a guardianship that have been tried or why it  
137 would be futile to try them;

138 (h) a general description of the respondent's property and an estimate of its value;

139 (i) the relief requested;

140 (j) if unlimited authority is requested, the reason why a limited authority is  
141 inappropriate; and

142 (k) if limited authority is requested, the authority to be granted to the guardian.

143 **(e) URCP 152. Petition to appoint a conservator or enter a protective order.**

144 To appoint a conservator or enter a protective order, the petitioner must file a  
145 verified petition that identifies:

146 (a) the petitioner, the petitioner's relationship to and interest in the respondent;

147 (b) the respondent;

148 (c) in the order of priority, the people for whom there is a priority for appointment;

149 (d) the proposed conservator and the qualifications of the proposed conservator to  
150 exercise the authority requested;

151 (e) the reason why appointment of a conservator or entry of a protective order is  
152 necessary;

153 (f) if the reason for the conservator or protective order is the respondent's minority,

154 (f)(1) the minor's money or property that requires management or protection that  
155 cannot otherwise be provided, or

156 (f)(2) the minor's business affairs that may be put at risk or prevented because of the  
157 minor's age, or

158 (f)(3) the protection that is necessary or desirable to obtain or provide money for the  
159 support, care, education, health, and welfare of the minor or of individuals entitled to the  
160 minor's support;

161 (g) if the petitioner is requesting the court to appoint a conservator or enter a  
162 protective order, the reasons for the appointment or order and that the petitioner is  
163 making the request knowingly and voluntarily.

164 (h) if the reason for a conservator or protective order is other than the respondent's  
165 minority or request, the property and business affairs that the respondent is unable to  
166 manage, and

167 (h)(1) the property that will be wasted or dissipated unless management is provided,  
168 or

169 (h)(2) the protection that is necessary or desirable to obtain or provide money that is  
170 needed for the support, care, education, health, and welfare of the respondent or of  
171 individuals entitled to the respondent's support;

172 (i) if the reason for a conservator or protective order is the respondent's incapacity,  
173 the nature and extent of the alleged incapacity and functional limitations;

174 (j) if the reason for a conservator or protective order is the respondent is missing,  
175 detained, or unable to return to the United States, the relevant circumstances, including  
176 the time and nature of the disappearance or detention and a description of any search  
177 or inquiry concerning the respondent's whereabouts;

178 (k) the alternatives less restrictive than a conservatorship or protective order that  
179 have been tried or why it would be futile to try them;

- 180 (l) a general description of the respondent's property and an estimate of its value;  
181 (m) the relief requested;  
182 (n) if unlimited authority is requested, the reason why limited authority is  
183 inappropriate; and  
184 (o) if limited authority is requested, the authority to be granted to the conservator.

185 **(a) URCP 153. Service in a protective proceeding**

186 **NOTE TO COMMITTEE:**

187 This section ties together in one place all of the service provisions in the  
188 guardianship and conservatorship parts of the current code and the 1997 Act. The pre-  
189 appointment service provisions are essentially the same for guardians and conservators  
190 whether for an adult or a minor, so combining them makes sense.

191 As drafted, this section requires notice of proceedings after the appointment to the  
192 same people as before. Currently, 75-5-309 sort of does that. At least it treats  
193 appointment and removal as equivalent, but it says nothing about other proceedings.  
194 Section 75-5-405 simply says "as the court may direct" for the appointment as well as  
195 for proceedings after the appointment. The 1997 Act says "as the court directs" for all  
196 proceedings after the appointment.

197 Uniform practice, such as is drafted here, usually helps the clerks, but requiring  
198 service on all these people in all circumstances may not be good policy.

199 Current law requires that only notice of the hearing be served. The 1997 act and due  
200 process require a copy of the petition to be served at least on the respondent. As  
201 drafted, this section requires service of the petition on everyone listed. I recommend  
202 relying on the Rules of Civil Procedure 4 and 5 for their service provisions rather than  
203 section 75-1-401.

204 (a) Any petition or notice of hearing in a protective proceeding must be served on:

205 (a)(1) the respondent or protected person who is 14 years of age or older;

206 (a)(2) the spouse of the respondent or protected person, or if none the adult children  
207 of the respondent or protected person, or if none the parents and adult siblings of the  
208 respondent or protected person, or if none at least one adult nearest in kinship to the

209 respondent or protected person who can be found, or if none an adult with whom the  
210 respondent or protected person has resided for more than six months;

211 (a)(3) any proposed guardian or conservator;

212 (a)(4) any person nominated as guardian or conservator by:

213 (a)(4)(A) the respondent, if the respondent is 14 years of age or older;

214 (a)(4)(B) the respondent's deceased spouse; and

215 (a)(4)(C) the respondent's deceased parent;

216 (a)(5) any legal representative of the respondent or protected person;

217 (a)(6) the person who has had the principal care and custody of the respondent or  
218 protected person during the 60 days before the petition is filed;

219 (a)(7) any interested person who has requested notice under subdivision (b) or as  
220 the court may direct; and

221 (a)(8) if the petition is to appoint a guardian under Title 75, Chapter 5c, Part 2,  
222 Appointment of a Guardian for a Minor, the school district in which the guardian resides.

223 (b) An interested person not otherwise entitled to notice who desires to be notified  
224 before an order is entered may file a request for notice with the court. The court clerk  
225 shall send a copy of the request to the guardian and to the conservator if one has been  
226 appointed. A request is not effective unless it contains a statement showing the interest  
227 of the person making it and the address of that person or a lawyer to whom notice is to  
228 be sent. The request is effective only for proceedings conducted after the request is  
229 filed. A governmental agency paying or planning to pay benefits to the respondent or  
230 protected person is an interested person.

231 (c) Pleadings, and other papers, including the estate inventory, management plan,  
232 annual reports and objections must be served as provided in subdivision (a). Service  
233 must include notice of the hearing if one has been scheduled and must include notice of  
234 the right to object if there is such a right.

235 (d) A person required to be served may object to:

236 (d)(1) nomination of a guardian or conservator;

237 (d)(2) priority of appointment, unless the nomination was previously confirmed;

238 (d)(3) the estate inventory;

239 (d)(4) the management plan; and

240 (d)(5) the annual or other reports of a guardian or conservator.

241 (e) An objection must be filed and served within 30 days after service and must  
242 specify in writing the entries to which the person objects and state the reasons for the  
243 objection. If an objection is filed, the judge shall conduct a hearing. The judge may  
244 conduct a hearing even though no objection is filed. If the judge finds that the  
245 nomination, priority, inventory, management plan, or annual report is in order, the judge  
246 shall enter an appropriate order.

247 **(b) URCP 154. Manner of service.**

248 (a) If Rule 153 requires that a person be served, the person must be served in the  
249 following manner.

250 (b)(1) A petition and notice of hearing must be served personally on the respondent  
251 or protected person in accordance with Rule 4 at least 14 days before the hearing.

252 **NOTE TO THE COMMITTEE:** How should petitions subsequent to the original  
253 proceeding be served on the respondent? As drafted this would require personal  
254 service just as in the original petition.

255 (b)(2) The notice must state in plain language the date, time and location of the  
256 hearing, require the respondent or protected person to be present at the hearing unless  
257 excused by the court, inform the respondent or protected person of his or her rights, and  
258 include a description of the nature, purpose, and consequences of an order granting the  
259 petition. The notice must be in plain language and large type. If English is not the  
260 primary language of the respondent or protected person, the notice must be in English  
261 and in the primary language.

262 (b)(3) If a lawyer represents the respondent, pleadings and papers after the petition  
263 must be served on the lawyer, rather than the respondent, in accordance with Rule 5.

264 (b)(4) A respondent or protected person may not waive notice. If the respondent or  
265 protected person is not served in a manner substantially complying with this rule, the  
266 court may not grant the petition.

267 (b)(5) If the petition is to appoint a conservator or enter a protective order, and if the  
268 respondent's whereabouts are unknown or personal service cannot be made, service  
269 on the respondent must be made by substituted service under Rule 4.

270 (c)(1) A petition to appoint a guardian or conservator or enter a protective order and  
271 notice of hearing must be served personally on the respondent's spouse and parents, if  
272 they can be found within Utah, in accordance with Rule 4 at least 14 days before the  
273 hearing.

274 (c)(2) If they cannot be found within Utah, the petition and notice of hearing must be  
275 served on the respondent's spouse and parents in accordance with Rule 5 at least 14  
276 days before the hearing.

277 (c)(3) A petition for any other order and notice of the hearing must be served on the  
278 spouse and parents of the respondent or protected person in accordance with Rule 5 at  
279 least 14 days before the hearing.

280 (d) A petition and notice of hearing must be served on any other person in  
281 accordance with Rule 5 at least 14 days before the hearing.

282 (e) Pleadings, and other papers, including the estate inventory, management plan,  
283 annual reports and objections must be served within 14 days after filing.

284 (f) A person other than the respondent or protected person may waive notice by a  
285 writing signed by the person or the person's attorney and filed with the court.

286 **(c) URCP 155. Court visitor.**

287 (a) If a petition to appoint a guardian or conservator or enter a protective order  
288 claims that the respondent is incapacitated, the court may appoint a visitor, with or  
289 without a request by a party of interested person. The visitor must be an individual with  
290 training or experience in the type of incapacity alleged and must have no conflict of  
291 interest. The visitor must be an individual qualified to evaluate the respondent's alleged  
292 incapacity and functional limitations. The visitor must interview the respondent in  
293 person. If the visitor does not speak and understand the respondent's primary language,  
294 the court must appoint an interpreter. To the extent that the respondent is able to  
295 understand, the visitor must:

296 (a)(1) explain to the respondent the substance of the petition, the nature, purpose,  
297 and effect of the proceeding, the respondent's rights at the hearing, the duties of a  
298 guardian or conservator, and the authority that has been requested;

299 (a)(2) determine the respondent's views about the proposed guardian, conservator,  
300 or protective order, the proposed authority and duties of the guardian or conservator,  
301 and the scope and duration of the appointment or protective order;

302 (a)(3) inform the respondent of the right to employ and consult with a lawyer and the  
303 right to a court-appointed lawyer; and

304 (a)(4) inform the respondent that all costs, attorney fees and expenses of the  
305 proceeding will be paid from the respondent's estate.

306 (b) Unless otherwise directed by the court, the visitor must:

307 (b)(1) interview the petitioner and the proposed guardian;

308 (b)(2) visit the respondent's present dwelling and any dwelling in which the  
309 respondent will live if the appointment is made;

310 (b)(3) obtain information from any physician or other person who is known to have  
311 treated, advised, or assessed the respondent's relevant physical or mental condition;  
312 and

313 **NOTE TO COMMITTEE: The Wingspan Conference recommends that the states**  
314 **pass laws that recognize privilege of treating physician. We have URE 506 that creates**  
315 **the privilege, but it excepts communications relevant to a physical, mental or emotional**  
316 **condition that is the element of a claim or defense.**

317 (b)(4) make any other investigation the court directs.

318 (c) The visitor must promptly file a report in writing with the court. Unless otherwise  
319 directed by the court, the report must include:

320 (c)(1) a summary of functions the respondent cannot manage, can manage without  
321 assistance and, can manage with the assistance of supportive services or benefits,  
322 including appropriate technological assistance;

323 (c)(2) recommendations regarding the appropriateness of an appointment or  
324 protective order, including whether less restrictive means of intervention are available,  
325 and the authority to be granted to the guardian or conservator;

326 (c)(3) a statement of the qualifications of the proposed guardian or conservator;

327 (c)(4) a statement of the respondent's views about the proposed guardian,  
328 conservator, or protective order, the proposed authority and duties of the guardian or  
329 conservator, and the scope and duration of the appointment or protective order;

330 (c)(5) a statement about whether the proposed dwelling meets the respondent's  
331 needs;

332 (c)(6) a recommendation about whether a professional evaluation or further  
333 evaluation is necessary; and

334 (c)(7) any other matters the court directs.

335 **(d) URCP 156. Evaluation of respondent.**

336 (a) If a petition to appoint a guardian or conservator or enter a protective order  
337 claims that the respondent is incapacitated, the court may order a professional  
338 evaluation of the respondent and must order the evaluation if requested by the  
339 respondent. The court should order an evaluation if it is not clear, based on the court's  
340 own assessment or on the visitor's report, that the respondent is incapacitated.

341 (b) If the court orders the evaluation, the respondent must be examined by a  
342 physician, psychiatrist, or other individual appointed by the court who is qualified to  
343 evaluate the respondent's alleged incapacity and functional limitations.

344 (c) The examiner shall promptly file a written report with the court. Unless otherwise  
345 directed by the court, the report must contain:

346 (c)(1) a description of the nature, type, and extent of the respondent's cognitive and  
347 functional limitations;

348 (c)(2) an evaluation of the respondent's mental and physical condition and, if  
349 appropriate, educational potential, adaptive behavior, and social skills;

350 (c)(3) a prognosis for improvement and a recommendation about the appropriate  
351 treatment or habilitation plan;

352 (c)(4) the date of the examination upon which the report is based; and

353 (c)(5) any other matters the court directs.

354 **(e) URCP 157. Presence and rights at hearing**

355 (a) In a protective proceeding, the respondent and the proposed guardian or  
356 conservator shall attend the hearing unless excused by the court for good cause.

357 (b) The respondent may present evidence, subpoena witnesses and documents,  
358 examine witnesses, including the visitor and any court-appointed evaluator, and  
359 otherwise participate in the hearing. The hearing may be held in a location convenient to

360 the respondent and may be closed upon the request of the respondent and a showing  
361 of good cause.

362 (c) Any person may request permission to participate in the proceeding. The court  
363 may grant the request, with or without hearing, upon determining that the respondent's  
364 best interest will be served. The court may attach appropriate conditions to participation.

365 **(f) URCP 158. Minimum qualifications before appointment.**

366 (a) Before an order appointing a guardian or conservator is entered:

367 (a)(1) the proposed guardian or conservator shall declare any felony or  
368 misdemeanor convictions in Utah or elsewhere; and

369 (a)(2) the court shall conduct a nonfingerprint-based background check of the  
370 proposed guardian or conservator, including the records of the Utah Bureau of Criminal  
371 Identification.

372 (b) Before an order appointing a guardian or conservator is entered, the proposed  
373 guardian or conservator must file a statement showing satisfactory completion of a  
374 court-approved examination on the responsibilities of a guardian or conservator.

375 (c) This rule does not apply to a professional guardian, professional conservator, the  
376 Office of Public Guardian, or an emergency appointment.

377 **(g) URCP 159. Guardian's management plan.**

378 (a) Within 90 days after appointment, the guardian shall file a management plan  
379 describing the strategies that will be used to implement the court order. The guardian  
380 shall, to the extent reasonable, involve the protected person in developing the plan.  
381 Even if legal consent is not possible, the opinions of the protected person should be  
382 sought.

383 (b) The management plan shall describe:

384 (b)(1) how the rights retained by the protected person will be ensured;

385 (2)(2) the protected person's religious, moral, conscientious, or cultural values that  
386 will guide decisions;

387 (b)(3) how the guardian will implement any restrictions permitted by court order on  
388 the protected person's physical liberty, communications or social activities;

389 (b)(4) the protected person's dwelling and any recommended changes;

390 (b)(5) the health care, personal care, social, vocational, educational and related  
391 services for the protected person;

392 (b)(6) any physical or mental examinations necessary to determine the protected  
393 person's health care needs;

394 (b)(7) the insurance and any other benefits to which the protected person may be  
395 entitled to meet the costs of health care, personal care, social, vocational, educational  
396 and related services;

397 (b)(8) steps to develop the protected person's capacity;

398 (b)(9) the estimated duration of the guardianship;

399 (b)(10) short term and long term goals;

400 (b)(11) any issues, concerns or unmet needs; and

401 (b)(12) if a conservator or health care agent has been appointed, the planned nature  
402 and frequency of communications and the method to be used for resolving disputes.

403 (c) If there is no conservator, the guardian shall include the management plan  
404 required of a conservator in the guardianship management plan or file it separately.

405 (d) The management plan must contain a certificate of whether the guardian  
406 consulted the protected person in developing the plan. The management plan must  
407 contain a certificate that the guardian will exercise the substituted judgment  
408 decisionmaking standard for all circumstances except where the best interest  
409 decisionmaking standard is permitted.

410 (e) A management plan must be based on the court order. A management plan  
411 takes effect when approved by the court and continues until the court approves a  
412 replacement plan. A management plan may allow for minor changes without court  
413 approval, but the guardian must request court approval of a substantial change.

414 **(h) URCP 160. Conservator's management plan.**

415 (a) Within 90 days after appointment, the conservator, and if there is no conservator,  
416 the guardian, shall file a management plan describing the strategies that will be used to  
417 implement the court order. The conservator shall, to the extent reasonable, involve the  
418 protected person in developing the plan. Even if legal consent is not possible, the  
419 opinions of the protected person should be sought.

420 (b) The management plan shall describe:  
421 (b)(1) current and future expenses and resources;  
422 (b)(2) how to meet the protected person's financial needs;  
423 (b)(3) how to protect, manage, expend, and distribute the estate assets;  
424 (b)(4) whether assets will need to be sold;  
425 (b)(5) the estimated duration of the conservatorship;  
426 (b)(6) short term and long term goals;  
427 (b)(7) any issues, concerns or unmet needs; and  
428 (b)(8) if a guardian or health care agent has been appointed, the planned nature and  
429 frequency of communications and the method to be used for resolving disputes.

430 (c) The management plan must contain a certificate of whether the conservator  
431 consulted the protected person in developing the plan. The management plan must  
432 contain a certificate that the conservator will exercise the substituted judgment  
433 decisionmaking standard for all circumstances except where the best interest  
434 decisionmaking standard is permitted.

435 (d) A management plan must be based on the court order. A management plan  
436 takes effect when approved by the court and continues until the court approves a  
437 replacement plan. A management plan may allow for minor changes without court  
438 approval, but the conservator must request court approval of a substantial change.

439 **(i) URCP 161. Guardian's annual report.**

440 (a) A guardian shall report about the protected person's conditions no later than 60  
441 days after each anniversary of the appointment. The report shall be filed with the court  
442 that made the appointment unless that court orders a change in venue. The reporting  
443 period is yearly from the appointment date unless the court changes the reporting  
444 period. The report may not be filed before the close of the reporting period. For good  
445 cause the court may extend the time for filing the report, but a late filing does not  
446 change the reporting period.

447 (b) The report shall contain sufficient information to put interested persons on notice  
448 of all significant events and transactions during the reporting period. Forms substantially

449 conforming to the forms produced by the Utah court website are acceptable for content  
450 and format. The court may direct that a report contain information it deems necessary.

451 (c) A report must describe for the reporting period:

452 (c)(1) the guardian's visits with the protected person and activities on the protected  
453 person's behalf;

454 (c)(2) the protected person's living arrangements and the guardian's opinion of the  
455 living arrangements and reasons for change;

456 (c)(3) the protected person's mental and physical condition and educational,  
457 vocational, and social activities or services;

458 (c)(4) the protected person's health care treatment and the guardian's opinion of the  
459 health care and reasons for change;

460 (c)(5) the protected person's cognitive, emotional and everyday functioning and  
461 limitations;

462 (c)(6) the protected person's participation in decisionmaking;

463 (c)(7) the guardian's opinion of the need to continue the guardianship or to change  
464 the management plan; and

465 (c)(8) plans for future care.

466 **(j) URCP 162. Conservator's annual report.**

467 (a) A conservator, and if there is no conservator the guardian, shall report about the  
468 protected person's estate no later than 60 days after each anniversary of the  
469 appointment. The report shall be filed with the court that made the appointment unless  
470 that court orders a change in venue. The reporting period is yearly from the appointment  
471 date unless the court changes the reporting period. The report may not be filed before  
472 the close of the reporting period. For good cause the court may extend the time for filing  
473 the report, but a late filing does not change the reporting period.

474 (a) The report shall contain sufficient information to put interested persons on notice  
475 of all significant events and transactions during the reporting period. Forms substantially  
476 conforming to the forms produced by the Utah court website are acceptable for content  
477 and format. A professional conservator may file its internal accounting. If the protected  
478 person's estate is limited to a federal or state program requiring an annual accounting,

479 the conservator may file a copy of that accounting. The court may direct that a report  
480 contain information it deems necessary.

481 (b) A report must describe for the reporting period:

482 (b)(1) the conservator's visits with the protected person;

483 (b)(2) the protected person's participation in decisionmaking;

484 (b)(3) the estate assets under the conservator's control and the receipts,  
485 disbursements, and distributions; and

486 (b)(4) the conservator's opinion of the need to continue the conservatorship or to  
487 change the management plan.

488 **(k) Rule 6-501. Reporting requirements for guardians and conservators.**

489 **(Repeal)**

490 NOTE TO COMMITTEE: My goal is to repeal this rule. All but part of the applicability  
491 section has been transplanted to statutes or other rules. Currently, either by statute or  
492 this rule, annual reporting does not apply to: a parent-guardian/conservator; a guardian  
493 of a minor from out-of-state; and any guardian/conservator if the estate is limited to a  
494 "court protected" account. Do we want to continue these policies? If we continue them,  
495 do we want to extend them to management plans? Inventories?

496 Intent:

497 To establish the requirements sufficient to satisfy the Utah Uniform Probate Code.

498 Applicability:

499 This rule applies to guardians and conservators with the following exceptions:

500 This rule does not apply if the guardian or conservator is the parent of the ward.

501 Paragraph (1) does not apply to the guardian of a minor if the guardianship is limited  
502 to the purpose of attending school.

503 Paragraph (1) does not apply to a conservator licensed under the Title 7, Chapter 5,  
504 Trust Business, to a guardian licensed under §75-5-311(1)(a), or to the Office of Public  
505 Guardian.

506 Paragraphs (6)(A), (6)(B) and (6)(C) do not apply to the guardian of a minor if the  
507 guardianship is limited to the purpose of attending school. A person interested in the  
508 minor may request a report under Utah Code Section 75-5-209.

509 Paragraph (6)(D) does not apply to the guardian of a minor if the minor's estate is  
510 deposited in an account requiring judicial approval for withdrawal or if there is no estate.  
511 A person interested in the minor may request an accounting under Utah Code Section  
512 75-5-209.

513 ~~Statement of the Rule:~~

514 ~~(1) Before entering an order appointing a guardian or conservator, the court shall~~  
515 ~~require the guardian or conservator to file a verified statement showing satisfactory~~  
516 ~~completion of a court-approved examination on the responsibilities of a guardian or~~  
517 ~~conservator.~~

518 ~~(2) The guardian shall keep contemporaneous records of significant events in the life~~  
519 ~~of the ward and produce them if requested by the court. The conservator shall keep~~  
520 ~~contemporaneous receipts, vouchers or other evidence of income and expenses and~~  
521 ~~produce them if requested by the court. The guardian and conservator shall maintain~~  
522 ~~the records until the appointment is terminated and then deliver them to the ward, if~~  
523 ~~there is no successor, to the successor guardian or conservator, or to the personal~~  
524 ~~representative of the ward's estate.~~

525 ~~(3) Definitions.~~

526 ~~(3)(A) "Accounting" means the annual accounting required by Utah Code Section 75-~~  
527 ~~5-312 and Section 75-5-417 and the final accounting required by Utah Code Section 75-~~  
528 ~~5-419.~~

529 ~~(3)(B) "Interested persons" means the ward, if he or she is of an appropriate age and~~  
530 ~~mental capacity to understand the proceedings, the ward's guardian and conservator,~~  
531 ~~the ward's spouse, adult children, parents and siblings and anyone requesting notice~~  
532 ~~under Utah Code Section 75-5-406. If no person is an interested person, then interested~~  
533 ~~person includes at least one of the ward's closest adult relatives, if any can be found.~~

534 ~~(3)(C) "Inventory" means the inventory required by Utah Code Section 75-5-418.~~

535 ~~(3)(D) "Serve" means any manner of service permitted by Utah Rule of Civil~~  
536 ~~Procedure 5.~~

537 ~~(3)(E) "Report" means the annual report on the status of the ward required by Utah~~  
538 ~~Code Section 75-5-209 and Section 75-5-312.~~

539 ~~(3)(F) "Ward" means a minor or an incapacitated person for whom the court appoints~~  
540 ~~a guardian or a protected person for whom the court appoints a conservator.~~

541 ~~(4) Subject to the requirements of Paragraph (5):~~

542 ~~(4)(A) forms substantially conforming to the forms produced by the Utah court~~  
543 ~~website are acceptable for content and format for the report and accounting filed under~~  
544 ~~the Utah Uniform Probate Code;~~

545 ~~(4)(B) a corporate fiduciary may file its internal report or accounting; and~~

546 ~~(4)(C) if the ward's estate is limited to a federal or state program requiring an annual~~  
547 ~~accounting, the fiduciary may file a copy of that accounting.~~

548 ~~(5) The report, inventory and accounting shall contain sufficient information to put~~  
549 ~~interested persons on notice of all significant events and transactions during the~~  
550 ~~reporting period. Compliance with Paragraph (4) is presumed sufficient, but the court~~  
551 ~~may direct that a report or accounting be prepared with content and format as it deems~~  
552 ~~necessary.~~

553 ~~(6)(A) The guardian shall file with the appointing court a report on the status of the~~  
554 ~~ward no later than 60 days after the anniversary of the appointment. The guardian shall~~  
555 ~~file the report with the court that appointed the guardian unless that court orders a~~  
556 ~~change in venue under Utah Code Section 75-5-313. The reporting period is yearly from~~  
557 ~~the appointment date unless the court changes the reporting period on motion of the~~  
558 ~~guardian. The guardian may not file the report before the close of the reporting period.~~  
559 ~~For good cause the court may extend the time for filing the report, but a late filing does~~  
560 ~~not change the reporting period.~~

561 ~~(6)(B) The guardian shall serve a copy of the report on all interested persons with~~  
562 ~~notice that the person may object within 30 days after the notice was served.~~

563 ~~(6)(C) If an interested person objects, the person shall specify in writing the entries~~  
564 ~~to which the person objects and state the reasons for the objection. The person shall file~~  
565 ~~the objection with the court and serve a copy on all interested persons. If an objection is~~  
566 ~~filed, the judge shall conduct a hearing. The judge may conduct a hearing even though~~  
567 ~~no objection is filed. If the judge finds that the report is in order, the judge shall approve~~  
568 ~~it.~~

569 ~~(6)(D) If there is no conservator, the guardian shall file the inventory and accounting~~  
570 ~~required of a conservator.~~

571 ~~(7)(A) Within 90 days after the appointment, the conservator shall file with the~~  
572 ~~appointing court the inventory required by Utah Code Section 75-5-418. For good cause~~  
573 ~~the court may extend the time for filing the inventory.~~

574 ~~(7)(B) The conservator shall serve a copy of the inventory on all interested persons~~  
575 ~~with notice that the person may object within 30 days after the notice was served.~~

576 ~~(7)(C) If an interested person objects, the person shall specify in writing the entries~~  
577 ~~to which the person objects and state the reasons for the objection. The person shall file~~  
578 ~~the objection with the court and serve a copy on all interested persons. If an objection is~~  
579 ~~filed, the judge shall conduct a hearing. The judge may conduct a hearing even though~~  
580 ~~no objection is filed. If the judge finds that the inventory is in order, the judge shall~~  
581 ~~approve it.~~

582 ~~(8)(A) The conservator shall file with the appointing court an accounting of the estate~~  
583 ~~of the ward no later than 60 days after the anniversary of the appointment. The~~  
584 ~~conservator shall file the accounting with the court that appointed the conservator~~  
585 ~~unless that court orders a change in venue under Utah Code Section 75-5-403. The~~  
586 ~~reporting period is yearly from the appointment date unless the court changes the~~  
587 ~~reporting period on motion of the conservator. The conservator may not file the~~  
588 ~~accounting before the close of the reporting period. For good cause the court may~~  
589 ~~extend the time for filing the accounting, but a late filing does not change the reporting~~  
590 ~~period.~~

591 ~~(8)(B) The conservator shall serve a copy of the accounting on all interested persons~~  
592 ~~with notice that the person may object within 30 days after the notice was served.~~

593 ~~(8)(C) If an interested person objects, the person shall specify in writing the entries~~  
594 ~~to which the person objects and state the reasons for the objection. The person shall file~~  
595 ~~the objection with the court and serve a copy on all interested persons. If an objection is~~  
596 ~~filed, the judge shall conduct a hearing. The judge may conduct a hearing even though~~  
597 ~~no objection is filed. If the judge finds that the accounting is in order, the judge shall~~  
598 ~~approve it.~~

599 ~~(9)(A) The conservator shall file with the court a final accounting of the estate of the~~  
600 ~~ward with the motion to terminate the appointment.~~

601 ~~(9)(B) The conservator shall serve a copy of the accounting on all interested persons~~  
602 ~~with notice that the person may object within 30 days after the notice was served.~~

603 ~~(9)(C) If an interested person objects, the person shall specify in writing the entries~~  
604 ~~to which the person objects and state the reasons for the objection. The person shall file~~  
605 ~~the objection with the court and serve a copy on all interested persons. If an objection is~~  
606 ~~filed, the judge shall conduct a hearing. The judge may conduct a hearing even though~~  
607 ~~no objection is filed. If the judge finds that the accounting is in order, the judge shall~~  
608 ~~approve it.~~

609

**(19) Evaluation Report Forms**