

Uniform Guardianship & Conservatorship Analysis

(This is a summary of key provisions only and is provided by Michael A. Jensen. All opinions expressed herein are solely his and do not necessarily reflect the collective or other opinions of his colleagues serving on the ad hoc Legislative Committee for the Estate Planning Section and the Elder Law Section of the Utah State Bar.

August 8, 2018)

| Title 75-5c- | Uniform Act Provisions: legislative draft 7-19-2018 | Contrast to Utah Code | Utah Code Citation |
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| 110 | Co-Guardian/Co-Conservator may serve when a "designated event occurs", but the Act does not articulate just how an "event" is recognized by the courts; <i>i.e.</i> , how is the co-guardian or co-conservator activated? | No Utah provision. | n/a |
| 113 | Notice of Hearing requires 14 days in advance and in 16-point font. | 10 days notice is required with "large font". | 75-1-401(1) and 75-5-309(2) |
| 115 | Allows appointment of a Guardian ad Litem - cannot be the same as Respondent's attorney. | No specific provision, but Utah Code does not prohibit the appointment of a GAL. | n/a |
| 117 | Requires disclosure of bankruptcy or criminal history by prospective G&C. | No requirement. | n/a |
| 119 | Attorney for petitioners entitled to compensation, but approval by the court required prior to payment. | Attorney for petitioners entitled to compensation, but no prior approval by the court is required. | 75-5-303(2)(d) and 75-5-424(4)(w) |

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| 120 | Guardian compensation may be paid by a Conservator w/o court approval. However, it appears that a Conservator's compensation may require prior court approval, but Act is unclear on this issue. | Similar guardian compensation; but no court approval is required for conservator's compensation | 75-5-312(5) 75-5-424(4)(t) |
| 123(4) | No deterrent for third party to not accept G&C authority. | Third parties may be subject to attorney fees if not acting in good faith. | 75-5-312(6) & 75-5-421(2) |
| 125 | Temporary appointments of G&C not to exceed 6 months, but only if a removal proceeding exists or G&C not performing. | No time limit, and court has unconditional authority to appoint temporary G&C. | 75-5-310.5 & 75-5-408(3) |
| 201 et al | Guardianship of Minor - extensive Code | Comparable provisions. | 75-5-201, et seq |
| 301 & 302 | Petition to Appoint G&C with expanded list of "interested persons". | Utah defines "interested persons" in more limited manner | 75-1-201(24) and CJA 6-501(3)(B) |
| 302(b)(4) | Must explain why an alternate "protective arrangement" would not suffice in place of a guardianship. | No comparable requirement; just a "limited" or a "full guardianship" statement by clear and convincing evidence. | 75-5-304(2)(a) |
| 304 | Appointing Court Visitor with a greatly expanded role; will need additional resources for training and compensation. | Court Visitor may be appointed with limited role; currently no compensation for Court Visitor. | 75-5-303(4) |

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| 305 | Appoint attorney for Respondent "regardless of Respondent's ability to pay." | Parents' financial ability to pay is a factor, and may not be required if petitioner is a parent + other conditions. | 75-5-303(2)(b) and -303(5)(d) |
| n/a | No provision. | Representation of the Attorney for Respondent terminates upon appointment of G&C. | 75-5-303(3) & 75-5-407(3) |
| 306 | Professional evaluation by physician, psychologist or social worker generally required with report. | Court "may" appoint physician to examine Respondent. Default is on "may"; default in Act is on "shall" | 75-5-303(4) |
| 307 | Expanded hearing requirements and may require the court to hold the hearing at a location convenient for Respondent. | No comparable provision. | 75-5-303 |
| 308 | Confidentiality of records | Court rules govern and classifies G&C proceedings as "Private". | CJA 4-202.02(4)(B)(iii) |
| 310 | Contents of Order appointing guardian requires a statement whether Respondent may vote and whether Respondent may marry if any restrictions exist on these two issues; Order must also list all persons who are entitled to future notice of and receive copies of the Guardian's Plan, Reports, etc. | No comparable provision except to include limitations of the guardianship. | 75-5-304(2)(a) |

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| 311 | Court's Notice of Rights within 30 days of appointment in 16-point font. | No comparable provision | n/a |
| 312 | Emergency guardians; allowed without notice but limited to 60 days and with hearing required within 5 days | Similar, but Utah limited to 30 days and hearing is required within 14 days only if an interested person requests it. | 75-5-310 |
| 313 | Duties of Guardian; pay excess funds to Conservator at least quarterly; notification of move within 30 days | Similar to Utah Code but no "quarterly" provision to pay Conservator; notification of move is required within 10 days. | 75-5-312(3)(g) 75-5-312(3)(f) |
| 316 | Guardian's "Plan" required within 60 days of appointment | No comparable provision. | n/a |
| 317 | Guardian's Annual Report within 60 days of anniversary of appointment | Similar provision but proscribed by CJA Rules rather than Code. | CJA Rule 6-501 and 75-5-312(3)(f)(i) |
| 401 | Basis of appointment of Conservator: for minor it is preponderance of evidence; for adult it is clear and convincing. | No comparable provision. | n/a |
| 402 | Petition to Appoint Conservator must include why an alternative "protective arrangement" would not suffice in place of a conservatorship. | No comparable provision | n/a |

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| 405 | Appointment of Court Visitor is required unless Respondent has court-appointed attorney. | Limited comparable provision to appoint visitor. | 75-5-407(4) |
| 409 | Confidentiality of records allowed under some circumstances to be "sealed" rather than "private." | CJA Rules govern classification and G&C records are "Private". | CJA 4-202.02(4) (B)(iii) |
| 412 | Court's Notice of Rights within 30 days of appointment similar to Section 311 | No comparable provision | n/a |
| 413 | Emergency Conservator | No comparable provision | n/a |
| 414 | Powers of Conservator; must obtain prior court approval before selling Respondent's primary dwelling, among many other matters. | No such restriction for selling or encumbering Respondent's primary dwelling. | 75-5-424(4) and 75-5-408 |
| 416 & 417 | Bond is required but may be waived if not necessary. However, bond may not be waived if conservator is in the business of serving as a conservator unless it is a regulated institution. There is no provision for payment of the bond by Respondent's estate. | Court may waive the requirement for a bond, which is the normal custom. | 75-5-411 |
| 419 | Conservator's "Plan". | No comparable provision | n/a |

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| 421 | Conservator's powers w/o court approval; no specific provision for paying professionals, CPAs or attorneys | Comparable provisions; however, attorney fees and fees for other professionals specifically allowed. | 75-5-424 & 75-5-424(4)(w) |
| 423 | Conservator's Annual Accountings but requires substantial narratives not currently required. | Similar provision but prescribed by CJA Rules rather than Code. | CJA Rule 6-501 |
| 423(e) | Requires the Court to "establish procedures for monitoring a report". | No comparable provision, although Code provides that a report "shall be examined and approved by the court" and interested persons may object and force a hearing on the report. | CJA Rule 6-501 and 75-5-417(2) |
| 424 | Attempts to transfer property by Respondent void. | No comparable provision. | n/a |
| 426 | Protection of persons dealing in good faith with conservator are protected. | Comparable provision. | 75-5-423 |
| 427 | Death of Respondent and Conservator's application for PR Powers | Comparable provision. | 75-5-425(5) |
| 428 | Presentation and allowance of claims against conservatorship estate. | Comparable provision. | 75-5-428 |
| 430 | Removal of conservator | Comparable provision | 75-5-415 |

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| 431(2) | Conservatorship terminates on death of Respondent or order of the court; which is it? The earlier event? | No comparable provision | n/a |
| 501 | Protective Arrangements in general | Single transactions may be approved without appointing Conservator | 75-5-409 |
| 502 | Basis for protective arrangement instead of guardianship by clear and convincing evidence. | No specific provision for protective arrangement instead of guardianship, except clear and convincing evidence for guardianship. | 75-5-303 |
| 503 | Basis for protective arrangement instead of conservatorship by clear and convincing evidence. | No specific provision for protective arrangement instead of conservatorship. | 75-5-409 |

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**Provisions in Utah Code which apparently are not included in the Act
(may duplicate some entries above)**

| Utah Code Citation | General description of the particular provision |
|--------------------------------|--|
| 75-5-301 | Special provisions by a parent or spouse to appoint a guardian by a will or written instrument |
| 75-5-303(3) and 75-5-407(3) | Representation of Respondent terminates upon appointment of the guardian and/or conservator unless court orders otherwise. |
| 75-5-303(2)(b) | Respondent's parents must also be indigent to have pro bono attorney. |

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|---------------------------------------|--|
| 75-5-307(3) and 75-5-415(2) | Removing or accepting resignation of guardian or conservator, no attorney for Respondent is required if the case is uncontested and the Respondent's incapacity is not at issue. |
| 75-5-309(1)(e) | APS to receive notice for appointment or removal of guardian if APS has received a referral concerning Respondent or the proposed guardian or conservator. |
| 75-5-310.5 and 75-5-408(3) | Court may appoint temporary guardian and/or conservator if court finds good cause. (Act only allows a "temporary substitute guardian" if a guardian has already been appointed.) |
| 75-5-312(e)(ii) and 75-5-424(2) | Guardian and/or Conservator may compel production from third parties copies of Respondent's will, trust, POA, and Advance Health Care Directive. |
| 75-5-418 | Conservatorship estate does not include the assets of a trust. |
| 75-5-421 | Recording Conservator's Letters specifically recognized to protect Respondent's real property. |
| 75-5-312(6) & 75-5-421(2) | Creates penalties for third parties who refuse to accept and honor letters of guardianship or letters of conservatorship. |
| 75-5-314 & 315 | Special provisions regarding Veterans |
| 75-5-316 | Expedited guardianship proceeding for residents of the Utah State Developmental Center |
| 75-5-317 | Special guardianship proceedings for a minor becoming an incapacitated adult. |