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Guardians and Conservators for Adults

1. **General Types of Protections.** There are several tools available for protecting the persons and estates of adults who could use assistance due to reduced abilities or incapacity. These can be used in any number of combinations and include:

- Durable powers of attorney;
- Health care directives;
- Trusts of various kinds, created by the person or by third parties for the person, including support trusts, special needs trusts, etc.;
- Care agreements and arrangements with care facilities or family members;
- Representative payee to receive benefits for a person under the Social Security Act, such as SSI (Supplemental Security Income), SSD (Social Security Disability), and Social Security retirement benefits, or representative payee to receive Veteran's benefits or Railroad Retirement Act benefits;
- Guardianships;
- Conservatorships;
- Voluntary admission to a facility (see UCA § 62A-15-625 and related provisions for a state facility) and involuntary commitment proceedings under UCA § 62A-15-628 ff. and related provisions; and
- Governmental agency and private charity or professional assistance, including Medicaid, Adult Protective Services, and the local police, on the governmental side, and including church groups, health care and social work providers, and the Disability Law Center on the private side.

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Each of these types of protective tools has its place. Although, we will focus here on guardianships and conservatorships, we should not forget the other types of protective tools.

A guardianship can be broad or limited. They place the physical and to some extent financial welfare of the person in the hands of a decision maker other than that person. Since a broad guardianship is a serious deprivation of liberty for the person, the law favors partial guardianships where feasible. UCA § 75-5-304(2). A conservatorship deals with property and money, but (with a limited exception for certain minors) not the person; however, payment for such personal care and welfare would be part of the conservator's responsibility. See UCA § 75-5-401(2). One or the other or both of a guardianship or conservatorship may be used depending on circumstances. A single proceeding could be used to have a court appoint a person in both capacities.

Guardians and conservators may file and sign tax returns for the protected person. Form 1040 is used; the fiduciary signs for the protected person and also files form 56 to indicate the fiduciary status.

2. **Guardianships**. Guardians can be appointed in two ways, by the parent or spouse of a disabled adult by means of a will or of a written statement (UCA § 75-5-301) making the appointment (and not just a nomination for a court appointment), or by the court by means of a court order of appointment (UCA § 75-5-303).

a. Parental or Spousal Appointment. A parental or spousal appointment by will or written statement becomes effective when (i) 7 days' notice of intention to accept the appointment has been provided to the incapacitated person and also either to the person with whom the incapacitated person resides or who is responsible for the incapacitated person's care, or else to at least one adult relative in the nearest degree of kinship, and (ii) the acceptance has been filed with the court where the will has been probated (formally or informally) or the written instrument of appointment has been filed. UCA § 75-5-301. Absent a denial of probate, the order of priority, in case of conflict is:

- Spousal appointment. UCA § 75-5-301(2).
- Appointment by the last to die of the parents. UCA § 75-5-301(1).
- Appointment by the earlier dying parent where the surviving parent is incapacitated. UCA § 75-5-301(1) and (2).
- A parental appointment of a guardian for a minor is not effective for an adult disabled child unless it appears from the will that this is the testator's intent. UCA § 75-5-301(1).
- Appointment by the court is subject to the priority of spousal or parental appointments. UCA § 75-5-304(3).

If any objection is filed (no time limit is specified) in the court where the will was probated or written instrument was filed, the appointment is terminated. UCA § 75-5-301(4). This makes the guardianship effectively terminable at will by the protected person; court appointments are not so terminable at will. Also, if both parents are dead, the appointment by informally probated will of the last to die is terminated by a formal proceeding denying probate. UCA § 75-5-306.

For a written instrument, other than a will, which relates to a parental appointment, there is a cross reference to UCA § 75-5-202.5 which apparently was intended to require the same procedures as apply for written instruments for parental appointments of guardians for minor children. The section referred to calls for filing the instrument with a petition for guardianship in the court with probate jurisdiction in the county of residence of the last parent to die, along with an affidavit of acceptance specifying enumerated elements.

b. Court Appointment Process. The procedure most used is that for a court appointed guardian. This process requires these steps:

i. A petition must be filed by an interested person (see UCA § 75-1-201(24)) requesting the appointment of a guardian. It typically alleges jurisdiction, venue, cause, the identity and location of the parties and persons to receive notice, priority for appointment, property and bond matters (if any property will come to the possession or control of the guardian), and requests relief. There is a filing fee. Where the petitioner is the parent of the prospective ward, the fee is only $35, not the usual $360. UCA § 78A-2-301(1)(b)(vii).

ii. Notice must be given to the alleged incapacitated person, and to his or her spouse, parents, and adult children, or if there are none of these relatives, then to at least one of the closest adult relatives who can be found, and to anyone serving as guardian or conservator or who has care and custody of the person, and to any guardian appointed by the will of the last parent to die or of the spouse of the alleged incapacitated person. The notice must meet certain technical requirements (e.g., large type, plain English, etc. UCA § 75-5-309), and the person and his or her spouse or parents in Utah must be served personally. Any waiver of notice by the alleged incapacitated person must be confirmed in person or by a court visitor. UCA § 75-5-309(3). Notice of the proceeding must be given to Adult Protective Services (APS) if it has received a referral concerning abuse and neglect relating to the protected person or the proposed guardian or conservator. UCA § 75-5-309(1)(e). Deciding whether notice is to be given to APS may create practical problems.

iii. A court must find incapacity after a hearing, which may be after trial by jury or, if requested by the alleged incapacitated person or his or her counsel, a closed session hearing without jury. See UCA § 75-5-303(5)(c). Incapacity is measured by functional limitations, and is shown on proof by clear and convincing evidence (*In re Boyer*, 636 P.2d 1085 (Ut. 1981)) that the adult lacks the ability, even with appropriate technological assistance, to meet the essential requirements for financial protection or physical health, safety, and self-care. These functional limitations are limitations on the person's ability to receive and evaluate information, make and communicate decisions, or provide for necessities such as food, shelter,

clothing, healthcare, or safety. UCA § 75-1-201(22). This requires findings of fact and conclusions of law.

iv. The appointment of counsel for the alleged incapacitated person is required if that person does not have counsel of his or her choice. UCA § 75-5-303(2). We will discuss further below the role of counsel and some exceptions to the requirement for counsel.

v. The alleged incapacitated person may be examined by a physician appointed by the court who must submit a written report (this is generally required) and may be interviewed by a court appointed visitor. The visitor may also interview the person seeking appointment and may visit the person's existing or proposed abode. The visitor would submit a written report to the court.

vi. The alleged incapacitated person must personally appear in court or, if a waiver of presence is requested, the court may appoint a visitor to investigate matters with authority to interview the physician and the person seeking guardianship, to visit any residence of, or proposed for, the alleged incapacitated person, and to otherwise investigate and make observations. The visitor must file a written report with the court. A visitor is an official, employee, or special appointee of the court, and needs to have training in law, nursing, or social work. UCA § 75-5-308. A visitor's investigation may be waived only on clear and convincing evidence from a physician that the alleged incapacitated person has fourth degree Alzheimer's disease, extended comatosis, or an intellectual disability or an I.Q. score below 20 to 25. The courts have a program for pro-bono court visitors.

vii. The appointed person must file an acceptance of the guardianship and consent to jurisdiction. UCA § 75-5-305.

viii. If the guardian comes to possess or control property of the ward, the bond requirements applicable to conservators will need to be met. UCA § 75-5-105. These requirements are described in the section on conservatorships, below.

ix. A certificate of taking a test about guardianships by the proposed guardian must be filed. The test covers guardian duties, reports, accountings, etc.

x. An order of appointment specifying the terms of the guardianship needs to be entered. As already mentioned, limited guardianships are preferred unless no alternatives exists, in which case a specific finding that nothing less than a full guardianship is adequate must be made by the court. UCA § 75-5-304. See also UCA § 75-5-312 (guardian only has powers, rights, and duties granted in the order of appointment).

xi. A contact information sheet may be required by the court.

xii. Letters of guardianship are issued to evidence the appointment. Certified copy fees will apply. Until 2017 (H.B. 214), the statute was silent on letters in an adult guardianship, but now letters are specified in the statute. UCA § 75-5-304(2)(b). Limitations on the authority of a limited guardian are to be described in the order of appointment and in the

letters, too, unless the court for good cause finds that a limitation should not be listed in the letters. UCA § 75-3-304(2)(b).

c. Who May Be Appointed by the Court? Assuming no disqualification, and subject to a special rule for someone just turning age 18, the priority is:

i. Parental or spousal appointments (discussed above) by will or written instrument have priority under UCA § 75-5-304(13) (as described above). However, if before disability the alleged incapacitated person has nominated in a signed writing, someone to serve, that person serves absent good cause. UCA § 75-5-311(2). Presumably, this supersedes the parental or spousal nomination.

ii. A person nominated under another form of nomination by the alleged incapacitated person when over age 14 with sufficient capacity to make the nomination.

iii. The spouse of the person comes next. Note that although a spouse may make an appointment by will (UCA § 75-5-301), the spouse, unlike a parent, as described under (v) below, cannot nominate a person for court appointment by will.

iv. An adult child of the person.

v. A parent, or a person nominated by will or written instrument of a deceased parent.

vi. Any relative with whom the person has resided for more than six months.

vii. A person nominated by the person who is caring for the person or paying benefits to the alleged incapacitated person.

viii. A specialized care professional (as certified - see UCA § 75-5-311(1)(a)) serving without profit or compensation except for direct costs of providing guardianship or conservatorship services.

ix. Any competent person or suitable institution. Such an institution is a business or non-profit organization employing a specialized care professional. See UCA § 75-5-311(1)(b).

x. The Office of Public Guardian has priority for appointment if there is no one else able to serve. UCA § 75-5-311(3)(i).

d. Turning Age 18. UCA § 75-5-317 (effective in 2018) gives priority for serving as guardian to the person or persons (e.g., where there is joint decision making) with custody of the child at age 17 ½ unless the petition is filed more than 2 years after the ward turns 18 or the court finds the appointment contrary to the ward's best interest. This section allows proceedings to commence at age 17 ½ and become effective immediately on the ward reaching

age 18. It also requires a written evaluation report from a physician or psychologist about the ward's diagnosis, functional impairments, capacity to perform functions of daily living, medications, and prognosis.

e. Temporary Appointments. A temporary guardian may be appointed in an emergency or where an appointed guardian is not effectively performing its duties.

i. A temporary appointment suspends the powers of the prior court appointed guardian. The suspension of appointed personal guardians only applies to court appointed guardians, not those appointed by will; in cases of an appointment by will, the guardian may need to be removed by the filing of an objection by the protected person, or may need to be removed or suspended by order of the court. There is an exception to notice for an emergency guardian appointment or for a temporary suspension of a guardian. UCA § 75-5-309(i). To make the temporary emergency appointment, the court must find that the welfare of the incapacitated person requires immediate action and may without notice appoint an official for up to a 30 day period pending notice and hearing within 14 days if an interested person requests a hearing after the emergency appointment. UCA § 75-5-310(2) (amended in 2017, H.B. 214). The court may also appoint a temporary guardian after notice and a hearing. At the final hearing an appointed attorney represents the person if the person does not already have counsel. The hearing is a full hearing under UCA § 75-5-303, which may include court appointed visitors, trial by jury, and so on. UCA §§ 75-5-310 and 310.5.

Also, Adult Protective Services can obtain an emergency order from a court to provide specifically designated emergency services, such as custodial care, hospitalization, or change of residence, and may do so without notice where an emergency exists, the vulnerable adult has no guardian or conservator or the guardian or conservator is not effectively performing, and the welfare, safety, or best interests of the vulnerable adult requires emergency protective services. UCA § 62A-3-320(2), (3), and (4). Although services are generally voluntary, a court can order emergency services where the vulnerable adult does not consent or lacks capacity to consent. UCA § 62A-3-315(3). The emergency order can be issued without notice under the circumstances described above, but it expires in five business days unless a person applies for a temporary guardian under UCA § 75-5-310 (described above), or the division files a new petition for an emergency services order. UCA § 62A-3-320(5). The court may extend the order for up to an additional 15 business days where either such petitions are filed, in order to allow a hearing. The order may authorize forcible entry by a peace officer. UCA § 62A-3-320(7). The Division of Occupational and Professional Licensing may have access to the protection case file and database. UCA § 62A-3-312(1).

f. The Role of Counsel. The statute contemplates that the allegedly incapacitated person will be represented by his or her own counsel or by counsel appointed by the court. This is necessary particularly where personal freedom is at stake. Such counsel, of course, must not be the same as the counsel for the petitioner seeking the appointment of the guardian or any attorney in the same firm as that counsel, under general conflicts of interest principles. Utah Rules of Professional Conduct ("URPC") Rules 1.7 and 1.10.

i. In 2016 the legislature amended UCA§ 75-5-303 to create an exception to the rule that a potential ward in an adult guardianship proceeding without his or her own counsel must have separate counsel appointed by the court. The exception was to sunset in 2018 but was repassed with some changes in 2018. Under the exception, the prospective ward need not have counsel where the ward is the child of the person seeking the guardianship appointment, the ward has less than $20,000, a volunteer attorney under the guardian signature program does not take the case within 60 days, the person appears in court and is given an opportunity to communicate to the extent possible, and the court is satisfied counsel is not needed. A court visitor must investigate. The 2018 changes specify that not just the protected person but his or her parents must be indigent before excusing the requirement that the protected person pay for the attorney appointed for the protected person (e.g., under the guardianship signature program). UCA § 75-5-303(2)(b) and (5)(d). This exception to the requirement for counsel now will sunset automatically July 1, 2028 if not re-passed.[2]

ii. The Court has authority to appoint such counsel, but who will be such counsel? To help in cases of impecunious persons, the courts have developed a program for recruiting and training a roster of attorneys who may take on such representation initially as a pro-bono engagement, but possibly as a paid or partially paid engagement should the alleged incapacitated person turn out to have adequate assets (something not likely to be fully known at the commencement of the representation). This roster provides the court with one possible place to look for an attorney to appoint. Otherwise, the court may need to look elsewhere, including to counsel nominated by the counsel for the person seeking the guardianship. The idea of a petitioner's counsel nominating his or her own opponent will give the court pause, and should give such nominated counsel pause as well, because there is no excuse for such counsel not to do his or her duty by the allegedly incapacitated person. See, e.g., URPC 1.1 (competence), 1.2 (scope of representation), 1.3 (diligence), 1.4 (communication), 1.7 (conflicts of interest), etc. Among other things, nominated counsel in such circumstances should consider whether the representation will be materially limited by a personal interest of the lawyer. URPC § 1.7(a)(2). Among other things, nominated counsel may be looking to the petitioner ultimately for payment of his or her fees. See comments (10), (11), and (13) to that rule. In such cases, informed consent by the client, i.e., the alleged incapacitated person, may not be a satisfactory cure, since the client's very capacity to give such informed consent may be at issue. It would be best to inform the appointing court of any such compensation arrangement. Although a court may not have a lot of choice under the circumstances in making such an appointment (other than to deny the application), it does have the opportunity to closely monitor the lawyer's performance.

[2] When an individual's liberty is at risk, he or she should be represented by counsel. Legal counsel can help explain the significance of guardianship and advise on other alternatives that might be more appropriate under the circumstances. Having counsel for the allegedly incapacitated individual is especially important when the parents are also without counsel and unlikely to know that options, such as a limited guardianship, are also available and preferred. Without counsel, the protected person, who likely suffers some extent of disability, will be unable to request a limited guardianship where appropriate. The exception denies access to counsel based on the individual's wealth, or lack thereof ($20,000 or less). The exception also assumes that counsel is important, but if the person can't get free or low cost counsel through the guardianship signature program, then counsel isn't important enough to be needed. Since there is already an exception to annual reports where a guardian is a parent, the bill would leave the person without formal protection both at the time of appointment and afterwards, too.

iii. The job of counsel for the allegedly incapacitated person is to be an advocate to protect the liberty of the person by defeating or limiting the guardianship. If such counsel believes the proposed guardianship is justified in fact and law, the attorney should make a record of the analysis; an analytical brief is a good way to do this. Unlike the original version of the Uniform Probate Code, the appointed counsel does not in Utah have the powers of a guardian ad litem who acts as the eyes and ears of the court, and thus counsel does not make a report to the court with recommendations as to what is in the allegedly incapacitated person's best interests. Cf. 53 Am Jur. 2d Mentally Impaired Persons § 16.4.

iv. Taking instructions from a person whose capacity may be reduced or questionable can be quite difficult for counsel. What is counsel to do? Counsel should first read URPC Rule 1.14 which deals with clients with diminished capacity. Generally, the lawyer maintains a normal attorney-client relationship to the extent reasonably possible. Rule 1.14(a). However, the lawyer may take protective action, including seeking appointment of a guardian ad litem (see UCA §§ 75-5-104 on power of court to appoint guardian ad litem for minor, and 75-1-103 on supplementary principles of law), a conservator, or a guardian where the lawyer reasonably believes the client has diminished capacity, cannot adequately act in the clients' own interest, and the client is at risk of substantial physical, financial, or other harm unless action is taken. This allows such action in the case of an emergency or an immediate problem, but this does not allow the lawyer to cease seeking the least restrictive alternatives. Comments (7), (9), and (10) to Rule 1.14. Absent exigent circumstances which would make matters even more difficult, representing persons with diminished capacity often requires a good deal of patience and persistence.

v. Generally, the representation of the incapacitated person ends if a guardian is appointed. But there are exceptions: a conservatorship proceeding is still pending, there is an appeal of the court's decision, or the court orders continuation of the representation for good cause. UCA § 75-5-303(3).

vi. Counsel representing the allegedly incapacitated person is entitled to be paid for the service (unless the representation is wholly pro-bono). The fees of counsel defending against the petition are paid by the allegedly incapacitated person. If the petition is successful, the petitioner's fees and costs also are paid by the incapacitated person. However, if the court determines the petition is without merit, fees and costs are paid by the petitioner seeking the guardianship. UCA § 75-5-303(2). If a person other than the potentially incapacitated person attempts to prevent a guardianship or to assert that he or she should be guardian without the best interest of the incapacitated person at heart, the frivolous position statute could be a ground for awarding attorney's fees against the person challenging the guardianship. UCA § 78B-5-825; *In re Sheville*, 71 P.3d 179 (Ut. App. 2003).

vii. Once a guardian (or conservator) is appointed for a client, generally the lawyer takes instruction from the person appointed fiduciary because that person is entitled to act for the client, but there are exceptions where the lawyer represents the client in a matter against the interests of that person or that person instructs the lawyer to act in a manner that the lawyer knows will violate the person's legal duties toward the client. Restatement (Third) of the Law Governing Lawyers § 24 (2000).

viii. Under what circumstances may an attorney who has represented a party in conjunction with a proceeding to appoint a guardian for an adult incapacitated person represent the guardian that is subsequently appointed as a result of that proceeding? UT Eth. Op. 08-02 (Utah St. Bar.), 2008 WL 2110963, answers this question by saying, in the context of a contentious proceeding where the guardian and the party earlier represented are not the same person: "The representation of a court-appointed guardian by an attorney who has also represented one of the parties to the proceeding for the appointment of the guardian must be analyzed under Rules of Professional Conduct, Rules 1.7 and 1.9, the same way an attorney would analyze any conflict of interest between two current clients or between a current and former client….[T]he attorney should either avoid the joint representation or exercise great care in obtaining the informed written consent of both affected clients. If there is an on-going proceeding involving both the former client and the prospective new client (the guardian), the conflict may not be waived and the representation of the guardian must be avoided."

g. Special Procedures. There are some special procedures applicable to veterans and to the Utah State Developmental Center.

i. For veterans, a Veterans Administration rating of incompetency so that a guardian appointment is necessary for veteran's benefits to be paid, acts as prima facie evidence of the necessity for an appointment. UCA § 75-5-314. Also, certified copies of public records are to be provided without charge to the applicant for veteran's benefits or to the Veterans Administration. UCA § 75-5-315.

ii. There are expedited limited guardianship procedures for granting consent to medical care and participation in the approval of the individualized program plan for a resident of the Utah Development Center. The appointment is mostly based on the affidavit of the Superintendent of the Center, although the court has discretion to appoint a guardian ad litem and to request an independent evaluation by a physician appointed by the court. If the proposed guardian is not a parent or relative, notice is given to the spouse, parents, and adult children of the ward. UCA § 75-5-316.

h. What Court Decides? The district courts in Utah have subject matter jurisdiction under the Utah Uniform Probate Code. UCA §§ 75-5-101, 75-1-302(1)(b). That Code applies, among other things, to the affairs and estates and affairs of persons to be protected domiciled in Utah, and to incapacitated persons in Utah. UCA § 75-1-301(1) and (3).

i. A court where the ward resides has concurrent jurisdiction with the appointing court with respect to proceedings after appointment. (See, however, UCA 75-5b-204 on exclusive jurisdiction of appointing jurisdiction except for some limited special jurisdiction. Thus it appears that the special jurisdiction is what is concurrent.) If the place of appointment or residence is not the same, the court in which post-appointment proceedings are started, in appropriate cases is to notify the other court in Utah or another state and consult to determine whether to retain or transfer the proceedings, in the best interest of the ward. A copy of a resignation or of a removal order is to be sent to the appointing court (i.e., in which the

acceptance of appointment is filed. UCA § 75-5-211.) However, these provisions are subject to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, described below.

ii. Venue for guardianship proceedings is where the incapacitated person resides or is present. UCA § 75-5-302. See also the venue rules of UCA § 75-1-303 (if more than one place applies, the venue is in the first place a proceeding is commenced; the court has authority to transfer venue in the interest of justice; where there is no contest or where all consent, a hearing may be held anywhere in the judicial district).

i. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Utah also has adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA"), applicable to both guardianship and conservatorship proceedings involving more than one state or another country. UCA § 75-5b-101 *et seq*. This Act encourages a Utah court to communicate with the other court and allow party participation. A record of the communication or just the fact of communication is to be made except as to purely administrative matters (scheduling, court records, and the like). UCA § 75-5b-104. The Act also encourages cooperation between courts and authorizes the Utah court to request the other court to do a number of things, and if requested by the other court to itself do those things, such as hold an evidentiary hearing, compel testimony or evidence, order investigations, and so on. UCA § 75-5b-105. The court may allow testimony to be taken in the other jurisdiction and may allow testimony by electronic means and may accept document copies without objection based on the best evidence rule. UCA § 75-5b-106.

j. Obtaining Jurisdiction and UAGPPJA. The jurisdiction of the Utah court in appointment proceedings applies in these circumstances:

i. Utah has jurisdiction where Utah is the respondent's (i.e., the alleged incapacitated person's) home state. The home state is the one in which the person was physically present for at least 6 consecutive months before the filing of the petition for appointment of a guardian or protective order (i.e., for a conservatorship or order relating to property management). UCA § 75-5b-102 (7) ("home state"), (12) ("protective order"), and (15) ("respondent").

ii. For the other bases for jurisdiction described in (iii) and (iv) below, Utah must be a significant-connection state. This is a state other than the home state with significant connections, other than physical presence, in which substantial evidence concerning the person is available. UCA §§ 75-5b-102(16) (definition) and 75-5b-201(2) (factors for connection). Assuming Utah is a significant-connection state, the following two bases for jurisdiction become available.

iii. The person does not have a home state or the home state court has declined jurisdiction in favor of Utah as a more appropriate forum. UCA § 75-5b-202(2)(a).

iv. The person has a home state elsewhere than Utah and (i) no petition is pending in the home state or any other significant connection state, and (ii) before the Utah court makes the appointment or issues the order, no competing petition is filed in the home

state, and (iii) no objection to the Utah court's jurisdiction is filed by a person entitled to notice of the proceeding (both in Utah and in the different home state; UCA §75-5b-207), and (iv) the Utah court concludes it is an appropriate forum taking into account various factors listed in the Act (at UCA § 75-5b-205). UCA § 75-5b-202(2)(b).

v. If no Utah jurisdiction results under the foregoing, Utah nevertheless may have jurisdiction if the home state and all significant connection states decline to exercise jurisdiction in favor of Utah and Utah's jurisdiction is consistent with the Utah and U.S. Constitutions.

vi. If still there is no Utah jurisdiction under the foregoing bases, Utah will nevertheless have limited special jurisdiction to make an emergency 90 day guardian appointment for a person physically present, issue protective orders for real or personal property located in Utah, or make an appointment of a guardian or conservator for a person for whom a provisional order of transfer of the proceedings has been issued. Any emergency appointment will be dismissed on request of a court in the home state. UCA §§ 75-5b-202 and 203.

vii. Once a court (in Utah or elsewhere) has issued an appointment or order it retains exclusive and continuing jurisdiction (except as provided for the exercise of special jurisdiction). UCA § 75-5b-204.

viii. Where there are proceedings in more than one jurisdiction, if Utah has jurisdiction it may continue to exercise it unless another state acquires jurisdiction before the appointment or order is issued; but if Utah does not have jurisdiction or loses it prior to the appointment, the Utah court is to stay proceedings, communicate with the other court, and ultimately dismiss the matter unless the other court determines Utah is the more appropriate forum. UCA § 75-5b-208.

k. Declining Jurisdiction Under UAGPPJA. The Utah court which may otherwise have jurisdiction may decline to exercise it and defer to a more appropriate jurisdiction by dismissing or staying the proceeding, and may condition that action as the court deems proper including by requiring the prompt filing of a petition in another state.

i. The Utah court considers numerous factors listed in the Act including the preference of the person to be the protected, any abuse, the time the person was located in a jurisdiction, distance, financial concerns, the nature and location of evidence, a court's familiarity with the facts and issues, and the ability to monitor the guardian or conservator, etc. UCA § 75-5b-205(3).

ii. The court may also decline jurisdiction where it finds it acquired jurisdiction by reason of unjustifiable conduct. It may, however, exercise jurisdiction in such cases to craft an appropriate remedy (which could include stays or the assessment of costs, attorneys' fees, etc.) or it may continue to exercise jurisdiction after considering various circumstances. UCA § 75-56-206.

l. Transfer of Jurisdiction. Under the UAGPPJA the Utah court may entertain a petition to transfer a guardian or conservator appointment in Utah to another jurisdiction. This is done through notice and a hearing. UCA § 75-5b-301(1), (2), and (3). The Utah court then may issue a conditional transfer where:

i. A petition must be made in the other jurisdiction to allow the transfer. As to a conservator, the Utah court must be satisfied the other court will accept the conservatorship; as to a guardianship, the Utah court must receive a provisional order accepting the proceeding.

ii. As to a conservatorship, the court also needs to find that the person is or is reasonably expected to be in the other jurisdiction or has a significant contact with it, no objection has been made or the objection has not shown the transfer to be contrary to the interests of the protected person, and adequate arrangements have been made for management of the protected person's property.

iii. As to either a guardianship or conservatorship, the order is conditioned on the receipt by the Utah court of documents to terminate the guardianship or conservatorship in Utah. UCA § 75-5b-301(4), (5), and (6).

m. Foreign Appointees. Appointees in other states may seek to transfer the appointment to Utah or may register the appointment in Utah to exercise powers in Utah.

i. There are reciprocal provisions for a Utah court, on petition, notice, and hearing, to accept from other jurisdictions conservatorships and guardianships and issue a final order on the matter. Within 90 days of the final order of acceptance, the court is to determine whether the guardianship or conservatorship needs to be modified to conform to Utah law. UCA § 75-5b-302.

ii. In addition, an appointee from another jurisdiction may register its appointment in Utah as if it were a foreign judgment, if there is no pending proceeding or protective order in Utah and notice is given to the appointing court. Such a registration allows the exercise of powers not prohibited by Utah law, including the power to maintain actions and proceedings subject to any conditions imposed on non-resident parties where the conservator or guardian is not a Utah resident. Also, the Utah court may grant relief to enforce such a registered order. UCA §§ 75-5b-401, 402, and 403.

n. Termination of Guardianship. As we have already seen, a guardian appointed by the will or written statement of a spouse or parent is terminable at will by the ward filing an objection to it at any time (UCA § 75-5-301(4)), and a formal denial of probate terminates such an appointment under an informally probated will, as well (UCA § 75-5-306). On petition by the ward or any person interested in the welfare of the ward, the court may remove and replace a guardian if it is in the best interests of the ward. Also, on petition of the guardian, the court may accept the guardian's resignation and make any order which may be appropriate. UCA § 75-5-307(1). The ward or any person interested in the ward's welfare may petition for a termination of the guardianship on the basis that the ward is no longer

incapacitated; such a termination request may be quite informal, such as by a letter to the court, and interference with making the request can be a contempt of court. However, the original order may specify a time not exceeding one year during which no such petition may be filed based on regained capacity without special leave of the court. UCA § 75-5-307(2).

i. Any of these petitions require the same procedures and protections for the ward as with the initial appointment. UCA § 75-5-307(3) referring to § 75-5-303. These protections include counsel for the ward and presence of the ward at the hearing. However, where capacity is not in issue and the petition is uncontested, the ward need not have appointed counsel. UCA § 75-5-307(3). Notice is given as described in UCA § 75-5-309. Presumably where circumstances have changed, the guardianship will be terminated or limited unless an interested person can demonstrate by clear and convincing evidence that the need for the guardianship with the existing restrictions continues to exist.

ii. The resignation, death, or incapacity of the guardian, or the death of the ward, ends the guardian's authority but not the guardianship itself. Resignation does not terminate the guardianship until it has been approved by the court. UCA § 75-5-306. The guardian remains obligated for prior acts and to account for the ward's assets.

o. Powers and Duties of Guardian. The guardian's powers and duties may be limited by the court; this is consistent with the concept of using a limited guardianship where possible. UCA §§ 75-5-312(1); 75-5-304(2). However, absent a limiting order, the guardian generally has the powers, rights, and duties of a parent over a minor child, but without liability to third persons arising solely from that relationship. UCA § 75-5-312(2); UCA § 75-5-312(4)(c). The court may in the order of appointment place specific limitations on the powers of a guardian. UCA § 75-5-312(4)(a). The guardian is to encourage the ward to exercise self determination. UCA § 75-5-312(7).

i. Note that the parental relationship provides very little authority to deal with the ward's (child's) property. See UCA §§ 75-5-209 and 75-5-102. However, the guardian of an adult has some authority, where there is no conservator, to compel support or welfare payments and receive money and tangible property (clothes, vehicles, furniture, personal effects) and apply it to the support of the ward. UCA § 75-5-312(3)(b) and(e)(i) and (iii). This is a rather narrow power. If more power is needed, a conservatorship should be sought. The guardian may commence protective proceedings for property; this includes seeking a conservator. UCA § 75-5-312(3)(b).

ii. Also, the guardian cannot, without court approval, use the ward's funds for paying for room and board furnished by the guardian or his or her close family – spouse, parent, or child. Court approval for such payments requires notice to at least one adult nearest in kinship to the ward. UCA § 75-5-312(3)(e)(iii). Without a conservator, the guardian receives no compensation for services and (absent court approval) no amounts or for room and board, but with a conservator, the guardian is entitled to reasonable sums for service and for room and board, and may request the conservator to expend funds for the ward's care and maintenance. UCA § 75-5-312(5).

iii. The guardian must, however, care for any funds or property of the ward in excess of current needs in order to fund the ward's future needs, or must turn them over to a conservator if there is one. If property is held by the guardian, the bond and accountings required of conservators would apply. The guardian is required by court rule to file within 90 days of appointment an inventory like that of a conservator and serve copies on interested persons, who may object to it within 30 days. Rules of Judicial Administration ("RJA") 6-501(6)(D) and (7).

iv. By court rule, for purposes of the reporting requirements, the inventory, accountings, and status report are to be served also on interested persons which include persons in addition to those specified by the conservatorship provisions of the statute; under the rule, these are the protected person or ward (as in the statute) but also the person's spouse, adult children, parents (not limited to parents or guardians with whom the ward resides), siblings, and anyone requesting notice under UCA § 75-5-406, and if there are none of these, at least one of the person's closest adult relatives if any can be found. RJA 6-501(3)(B). See also the general definition of "interested person" at UCA § 75-1-201(24). "Serve" under RJA 6-501(3)(D), for purposes of the reporting requirements, means any manner of service under Utah Rule of Civil Procedure ("URCP") 5.

v. The guardian must report with a full accounting to the court at least annually where no conservator has been appointed. UCA § 75-5-312(3)(f)(v) (amended 2017, H.B. 214). An accounting review fee applies. (There is an exception to the annual accounting and reports where the guardian or a co-guardian is the parent of the ward. UCA § 75-5-312(3)(f)(ix) (amended 2017, H.B. 214)). Where, however, the amount is less than $50,000 exclusive of any residence owned by the ward, the report and accounting is informal and mailed to the court. UCA §75-5-312(3)(f)(v) and (f)(i) and (ii). Where the ward's income is limited to a federal or state program requiring an annual accounting report, that report suffices. UCA § 75-5-312(3)(f)(v); RJA 6-501(4)(c). Also, corporate fiduciaries need not petition the court but may submit their internal reports annually to the court. UCA § 75-5-312(3)(f)(vi); RJA 6-501(4)(B). The court retains the power to require more where these reporting exceptions apply. RJA 6-501(5). Unless the court changes the reporting period on motion by the guardian, it is an annual period, and the annual report is due 60 days after the anniversary of the guardian's appointment (but not before the end of the annual reporting period; RJA 6-501(6)(A)) and must be served on the interested persons described above who then have 30 days to object to it in writing specifying the specific entries to which objection is made. RJA 6-501(6). Also, the accounting requirements of a conservator which fall on the guardian if there is no conservator, appear to include the requirement for a final accounting, too. RJA 6-501(6)(D) and (9). It too is served on interested persons who have 30 days to object in writing to specific entries.

vi. The annual report also must describe the ward's personal status. UCA § 75-5-312(3)(f)(i), (ii), and (iv). The guardian is also required by court rule to keep contemporaneous records of significant events in the ward's life and produce them if requested by the court. RJA 6-501(2). The personal care of the ward is, of course, the key function of the guardian. The annual report is made with the accounting petition or informal accounting and covers the ward's physical condition, place of residence, and the persons living with the ward in the same household. These reports (financial and personal) are to be examined and approved by

the court. UCA § 75-5-312(3)(f)(v) and (vi). The court must hold a hearing if there is an objection and may hold a hearing even without one. RJA 6-501(6)(C). There are penalties of up to $5,000 for failures to properly report and account or for gross improprieties. UCA § 75-5-312(3)(f)(viii). These are not exclusive, and other remedies for improper conduct may apply as well. However, the reporting and penalty rules don't apply where the guardian is a parent of the ward. UCA § 75-5-312(3)(f)(ix); RJA 6-501 (under the heading "applicability").

vii. The guardian, naturally, provides for the ward's place of abode, custody, care, comfort, maintenance, training, and education, and provides consents to medical and professional care, counsel, treatment, or service. UCA § 75-5-312(3)(a), (b), and (c). The guardian is required to serve notice on all interested persons and file with the court a notice of the guardian's intent to move the ward at least 10 days before the move, absent an emergency. In any event, the guardian must take reasonable steps to provide the notice to interested persons and file it with the court as soon as practical following the earlier of the move date or when the guardian's intention to move the ward has been made known to anyone. UCA § 75-5-312(3)(f)(iv).

viii. In addition to the general requirement under UCA § 75-5-312(3)(d) not to unreasonably restrict visitation by family, relatives, or friends, under UCA § 75-5-312.5 and UCA § 75-5-312(4), the discretion of a guardian to prevent a person deemed unsuitable from visiting an adult ward is removed if the person desiring to visit is within broad categories of persons. Without a court order a guardian now will not be able to prevent a person in the defined categories from visiting. The categories are "qualified acquaintances," meaning significant mutual friends and clergy, and "relatives," meaning most all blood relatives from grandparents and their descendants to the level of first cousin, and also step children and step siblings, and half siblings. UCA § 75-5-312.5(1)(b) and (c). UCA § 75-5-312.5(4) allows a guardian to file an emergency petition to restrict visitation.

ix. The guardian must report to all to persons requesting notice who are not restricted from associating with the ward if the ward is expected to die in 30 days or if the ward does die. In addition to death, notification to such requesting persons must be made of admission of the ward to a hospital for more than 3 days, of admission to a hospice program, and of arrangements for the disposal of the ward's remains. UCA § 75-5-312(3)(f)(ii) and (iii).

x. A guardian may delegate its powers regarding care, custody, or property of the ward for up to 6 months by a power of attorney. UCA § 75-5-103.

xi. A person who not in good faith refuses to accept the guardian's authority after receiving certified copies of the letters is liable for costs, expenses, attorney's fees, and damages. UCA § 75-5-312(6).

3. **Conservatorships**. Conservators may be appointed by the court to handle money and property for adults who are unable to do so. The court also has authority to issue other protective orders relating to property, including claims. See UCA §§ 75-5-401 and 409.

a. Appointment Process. In order to obtain an appointment of a conservator for a person, the following are needed:

i. A petition is filed by the person to be protected or by an interested person. UCA § 75-5-404(1). The petition will typically allege jurisdiction and venue, the identity of parties and person entitled to notice, and location for giving notice. The petition needs to set forth, to the extent known, a general description of the protected person's property, and information about the proposed conservator, (including priority to appointment), and about the protected person. UCA § 75-5-404(2). It should deal with bond matters (requests to dispense with bond, alternatives to bonds, etc.). The petition should also specify the cause for the petition which would be that the person is unable to manage the person's property and affairs by reason of such things as mental illness or deficiency, physical illness or disability, chronic intoxication, confinement, disappearance, etc., and should state that property will be wasted or dissipated or that funds are needed for support of the person or the person's dependents and protection is necessary or desirable to obtain the funds. UCA §75-5-401(2). The list of causes is not exclusive but is only suggestive.

ii. Notice needs to be given to the person to be protected and his or her spouse, or if none, his or her parents. The notice must be served personally if these people to be served are in Utah, otherwise the general notice provisions under the probate code (UCA § 75-1-401) apply. A waiver of notice by the person is not effective unless the person attends the hearing or the waiver is confirmed by a court appointed visitor. UCA § 75-5-405(1). Also, any interested person may file a request for notice before a protective order is made. UCA § 75-5-406. A copy of the request is sent as well by the court to any serving conservator and must state the interest in the matter of the requesting person. Notice of proceedings is given to such persons requesting it, and to any interested or other persons as the court may direct. UCA § 75-5-405(2).

iii. The court holds a hearing and must find grounds for the appointment. UCA § 75-5-407. This requires findings of fact and conclusions of law. The standard of proof is not specified to be clear and convincing evidence as with a guardianship, but is a preponderance of the evidence. The statute does not itself create a right to trial by jury.

iv. The court may (not must) appoint counsel to represent the person to be protected. If appointed, the attorney has the powers of a guardian ad litem, and thus may make recommendations to the court as to the best interests of the person to be protected. UCA § 75-5-407(2). This is quite different from the duties of counsel for the person to be protected in a guardianship matter. Counsel in a combined proceeding involving both a guardianship and a conservatorship will thus be different in the two parts of the case. The representation, however, terminates at the appointment of the conservator unless there are pending guardianship proceedings, the appointment is appealed, or the court finds good cause for continuing the representation. UCA§ 75-5-407(3).

v. If the cause for the conservator relates to mental or physical issues, the court may direct the person be examined by a physician. A visitor may be sent to visit the person; the visitor may be a guardian ad litem or an officer or employee of the court. UCA § 75-

5-407(4). There is no requirement for the person to personally appear. Again, this is quite different from the procedure for appointing a guardian.

vi. Anyone appointed in the proceeding such as a visitor, attorney, physician, conservator, etc., is entitled to reasonable fees from the estate. See also UCA § 75-5-424(4)(t) and (w) (powers of conservator to pay compensation to conservator and other expenses and to hire advisors). Further, if the petition is successful, the petitioner's fees and costs also are paid by the estate of the incapacitated person. UCA § 75-5-414. Presumably the protected person pays his or her own fees to oppose a petition; the statute is silent on this point and also on who pays if the court determines the petition is without merit. Perhaps the court has general equitable power either to award fees against an unsuccessful petitioner, by analogy to UCA § 75-5-303(2), or to award fees in favor of an unsuccessful petitioner, by analogy to UCA § 75-3-719 (a person nominated as personal representative is entitled to fees in an appointment proceeding even if unsuccessful). See UCA § 75-1-103 (supplemental principles of equity may apply) and *Hughes v. Cafferty*, 89 P.3d 148 (Ut. 2004) (equitable power of court to award reasonable attorney fees when it deems it appropriate in the interest of justice and equity). The court has general authority under the probate code to award costs of a proceeding. UCA §75-1-310. The frivolous position statute could potentially justify an attorney's fee award where an action or defense to the action is without merit and not brought or asserted in good faith. UCA § 78B-5-825.

vii. The appointed conservator needs to accept the appointment and consent to the jurisdiction of the court by a writing filed with the court. UCA § 75-5-413.

viii. The conservator needs to post a bond (unless it is an exempt corporate fiduciary) in the amount of the aggregate capital value of the estate plus a year's estimated income. However, the court may dispense with the bond for good cause shown. Also, the bond amount is reduced by property which requires court approval to remove (as to cash or securities) or to sell or convey (as to real estate). Other security may be accepted by the court in lieu of bond. UCA §§ 75-5-411 and 412. To the extent a guardian comes to hold or control property, these same bond provisions apply. UCA § 75-5-105.

ix. Conservators need to certify completion of a test about conservatorships (covering duties, accountings, etc.).

x. The court issues an order of appointment with any special restrictions on the withdrawal or sale of property or other protective provisions. UCA § 75-5-407(5).

xi. A contact information sheet may be required by the court.

xii. After appointment, the conservator will receive letters of conservatorship which evidence the transfer of title as to all assets of the protected person to the conservator as a fiduciary. These are recordable in real property records and may be filed in other property records. UCA §§ 75-5-420 and 421. Any limitation on powers must be included in the letters. UCA § 75-5-426.

b. Who May Be Appointed. An individual or a corporation with authority to act as trustee may be appointed. The order of priority for consideration under UCA § 75-5-410, is:

i. Any person already appointed or recognized by any court in which the person resides, as a guardian, conservator, or the like, or person nominated by such an appointed or recognized fiduciary to take its place;

ii. A nominee of the person if the person is age 14 or older with sufficient mental capacity to make an intelligent choice; the statue prescribes a non-exclusive form for making the nomination;

iii. The spouse of the protected person or a person nominated by the spouse;

iv. An adult child of the person or a person nominated by such an adult child;

v. A parent of the person, or a person nominated in a will by a deceased parent (note, the spouse and others with nomination powers have no similar nominating power by Will; rather the others with nomination powers must exercise them while alive in order that the nominated person will take the place of the nominating person), or a person nominated by a (living) parent to take his or her place;

vi. A relative of the person with whom the person has resided for more than 6 months prior to the filing of the petition or a person nominated by such a relative;

vii. "A person nominated by the person who is caring for him or paying benefits to him." Presumably the "him" is the protected person.

c. Other Protective Orders. The court has considerable authority to issue other sorts of protective orders in addition to appointing a conservator. The court may, for example, act itself for the person instead of making an appointment, and may approve single transactions. UCA §§ 75-5-408 and 409. A typical single transaction is the settlement of a lawsuit. The non-exclusive list of possible court orders is broad and includes the powers to make gifts, establish trusts, make the spousal elective share, etc. UCA § 75-5-408(1)(c). Temporary conservatorships with full power are authorized. UCA § 75-5-408(3).

d. What Court Appoints. Utah District courts have jurisdiction over conservatorship matters. UCA § 75-5-101. The Uniform Adult Guardianship and Protective Proceedings Act (UCA § 75-5b-101 *et seq*.) applies to conservatorship and protective proceedings as well as guardianship proceedings. That Act is described above in the section dealing with guardianship jurisdiction.

e. Termination of Conservatorship. The court may remove a conservator for good cause, on petition from any person interested in the welfare of the protected person (UCA § 75-5-416(1)(d), and after notice and hearing, or may accept the resignation of the conservator. A new conservator may be appointed on the death, removal, or resignation of the conservator. UCA § 75-5-415. The procedure on removal, resignation, or finding that the protected person's incapacity has ended, is the same, and provides the same safeguards for the protected person, as the procedure for the initial appointment. UCA § 75-5-415(2) (referring to UCA § 75-5-407).

f. Powers and Duties of Conservator. The conservator has the powers described in the conservatorship provisions (see UCA § 75-5-424) and also in the trustee provisions (see UCA § 75-7-814 and related provisions). The powers are rather broad and extensive, but do not include the power to make a will. See *Estate of Anderson*, 671 P.2d 165 (Ut. 1985). The powers may be expanded to anything the court could do, or may be contracted or limited, by order of the court and any limits need to be endorsed on the letters of appointment. UCA § 75-5-426. The conservator is a fiduciary subject to the standards of care of a trustee. UCA §§ 75-5-417(1) and 75-7-902. See also, UCA § 75-7-703 on the authority of cotrustees to act by majority when the decision is not unanimous and on the duty to prevent a cotrustee from committing a serious breach of trust and to compel redress of such a breach.

i. The focus of a conservator is on property administration, but a conservator for an unmarried minor as to whom no one has parental rights also has the duties and powers of a guardian of a minor (see UCA § 75-5-209) until the minor attains majority or marries or a guardian is appointed. UCA § 75-5-424(1).

ii. The conservator, on appointment, takes title to the protected person's property, including any held for the person by custodians or attorneys-in-fact, but not property held under any uniform gifts to minor's provisions. UCA § 75-5-420(1). The title transfer is not, however, a transfer or alienation under any general restriction or penalty on transfer under the law or any instrument. UCA § 75-5-420(2).

iii. The existence of a power of attorney does not prevent the appointment of a conservator. Any pre-existing attorney-in-fact or agent accounts to the conservator after appointment, and the conservator may suspend, terminate, or revoke all or any part of the power of attorney or agency pursuant to court order. UCA § 75-9-108 (generally applicable to powers of attorney created prior to its effective date). Disability alone does not terminate the power of attorney if it is a durable power. UCA § 75-9-110.

iv. The conservator makes an inventory and files it with the court within 90 days of appointment and provides a copy to the protected person (if over 14 and with sufficient mental capacity) and any parent or guardian with whom the protected person resides. Also, records must be kept and provided to any interested person on request. UCA § 75-5-418.

v. By court rule, for conservatorships as with guardianships, the inventory and accountings are to be served also on other interested persons who include the protected person or ward (as in the statute) but also the person's spouse, adult children, parents, siblings, and anyone requesting notice under UCA § 75-5-406, and if there are none of these, at

least one of the person's closest adult relatives if any can be found. RJA 6-501(3)(B). See also the general definitions of "interested person" at UCA § 75-1-201(24). As with guardianships, to "serve" means, for this purpose, in a manner under URCP 5.

vi. The conservator also accounts annually to the court; if less than $50,000, excluding the residence of the ward, the report is more informal. Accounting review fees apply. A corporate fiduciary need not fully petition the court but submits its internal report to the court. Also, if the estate is limited to federal or state benefits under a program requiring an annual report, that report is sufficient. The inventory and accounting reports are served on the interested persons described above. The annual reports are due 60 days after the anniversary of the conservator's appointment. The interested persons have 30 days to object in writing to specific entries. RJA 6-501(7) and (8). The inventory and reports are examined and approved by the court. UCA § 75-5-417(2) and (3); RJA 6-501(7), (8), and (9); RJA 6-501(4). A $5,000 penalty for substantial misstatements, willful failures, and gross impropriety may apply. UCA § 75-5-417(4). The annual report and penalty provisions do not apply to a conservator who is also a parent of the ward. UCA § 75-5-417(5); RJA 6-501, first exception to applicability. These provisions are analogous to those applicable to guardians.

vii. In addition, any conservator needs to account to the court on resignation or removal or other times as the court directs. However, on termination of disability the conservator may account to the former protected person or his or her personal representative. UCA § 75-5-419. A final accounting appears always to be required to be filed with the court under court rules, however. RJA 6-501(9)(A). A court accounting, whether intermediate or final, with notice and a hearing will adjudicate matters related to the accounting and, on a final accounting all unsettled liabilities of the conservator to the protected person or the person's successors. The court may require a physical check of the estate. UCA § 75-5-419. As with the inventory and annual reports, the final accounting is served on the class of interested person, who have 30 days to object in writing to specific entries in the final accounting. RJA 6-501(9).

viii. The court has the power to cite and require the appearance of persons suspected of taking or concealing property of the protected person and may require the turnover of wrongfully possessed property to the conservator or guardian. UCA § 75-5-433.

ix. The conservatorship provisions provide some guidance about the use of the conservator's powers for the benefit of the protected person and his or her dependents. UCA § 75-5-425. Preservation of the estate plan of the protected person is an important consideration and the conservator may examine the will of the protected person. UCA § 75-5-427. However, where assets are ample and the protected person might have been expected to make gifts (including to charity) the conservator may make gifts up to 20% of the estate's income. UCA § 75-5-425(2).

x. The court has power to allow the conservator to make estate planning changes in addition to gifts, such as creating revocable or irrevocable trusts, exercising powers of appointment, make insurance elections, release or renounce interests, make a spousal share election, etc. This includes exercising or releasing the person's powers as personal representative, custodian for minors, or conservator of another. The court can also allow other

transactions such as entering contracts, exercising options, etc. These permissible court orders to grant these powers can be made either with direct court approval in the particular use of the power or the court could in the appointment of the conservator confer such a power. See § 75-5-426 (enlargement or limitation of powers of conservator can be done at time of appointment) and see § 75-5-408(c)(iii) and (d) (permissible court orders). It takes court action to make estate planning changes and to use these special powers and they are not part of the automatic authority of the conservator.

xi. There is a process for the payment of claims against the protected person. A claim can be filed with the conservator or with the court along with a copy to the conservator. Notice to the conservator of any proceedings pending at the time of appointment must be provided to be treated as a claim against the estate. If the claim is not disallowed in 60 days it is deemed allowed. Presenting the claim tolls any limitations period until 30 days after the claim's disallowance. Prior claims for the care of the protected person have priority in case estate assets are likely to be exhausted before all claims are paid. UCA § 75-5-428.

xii. On the death of the protected person, the conservator may account to the personal representative (or to the court) (UCA § 75-5-419; however, RJA 6-501(9)(A) appears to contemplate a final accounting always being filed with the court and served on interested persons). Moreover, if no one is appointed personal representative and no application is pending within 40 days of death, the conservator may apply for the powers of a personal representative; if the powers are granted the conservator's letters are endorsed to note that these powers and duties have been acquired. UCA § 75-5-425(5).

xiii. The conservator generally is liable only in a fiduciary capacity unless otherwise provided by contract or unless the conservator does not disclose the representative capacity or is personally at fault for torts. UCA § 75-5-429.

xiv. A person who not in good faith refuses to accept the conservator's authority after receiving certified copies of the letters is liable for costs, expenses, attorney's fees, and damages. UCA § 75-5-421(2).

4. **HIPAA Concerns**. Under the Health Insurance Portability and Accountability Act of 1996, known as HIPAA, 42 USC § 1320d et seq., there are restrictions on access to private health information of an individual other than by the individual. State privacy law may apply as well. See, e.g., UCA §§ 78B-5-618 (patient and third party access to medical records), 26-45-104 (genetic testing privacy), and 58-60-114 (general mental health confidentiality). Among the exceptions for the use of protected health information generally is the use and disclosure for treatment, payment, or health care operations. Psychotherapy notes, however, are subject to further, more restrictive rules.

a. Personal Representative During Life. However, under the HIPAA rules, a "personal representative" of an individual during the individual's life must be treated as the individual. A personal representative for this purpose is a person authorized by applicable law such as those with authority under a power of attorney or health directive or under an appointment as guardian or conservator. 45 CFR § 164.502(g)(1) and (2).

b. Other Than Personal Representative. In addition, during the life of the individual, the health care provider is authorized (not mandated) to share certain directly relevant information with family members, relatives, close personal friends, or others identified by the individual who are involved in the health care or the payment for such care, of the individual. 45 CFR § 164.510(b). This could, in the health care provider's professional judgment as to the best interests of the individual, extend to times when the individual is incapacitated and thus not available to give consent. 45 CFR § 164.510(b)(3). There are also rules which allow in certain circumstances and under specified guidelines, disclosures to appropriate authorities or persons for certain particular purposes such as reporting abuse, neglect, or domestic violence (45 CFR § 164.512(c)), judicial or administrative proceedings (45 CFR § 164.512(e)), law enforcement (45 CFR § 164.510(f)), and workers' compensation compliance (45 CFR § 164.512(l)).

c. Psychotherapy Notes. Even the individual patient cannot have access to psychotherapy notes. 45 CFR § 165.624(a)(1)(i). However, under the few specific exceptions allowing use or disclosure of such notes, such notes can be used or disclosed for treatment by the originator of the notes, for the entity's training purposes, for defense in a legal proceeding brought by the individual (45 CFR § 4.508(a)(2)(i)), to avert an imminent threat to public health or safety, to a health oversight agency (e.g., Health and Human Services, licensing officials) for lawful oversight of the originator of the notes, or as required by law (e.g., duty to warn statute). 45 CFR §§ 164.508(a)(2)(C)(ii) and 164.512(d). The exceptions are narrow. For example, authorization by the individual is required prior to disclosure of the notes to any other health care provider other than the originator of the notes. Presumably the guardian could give this consent for treatment.