

PROBATE CODE AMENDMENTS

2017 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Kelly B. Miles

Senate Sponsor: Lyle W. Hillyard

LONG TITLE

General Description:

This bill amends probate related provisions.

Highlighted Provisions:

This bill:

- ▶ modifies how letters upon estates jointly may be granted;
- ▶ modifies guardian and conservator provisions, including:
 - modifying provisions related to limited guardianships;
 - addressing emergency guardians;
 - modifying powers and duties of guardians;
 - addressing reporting requirements of conservators; and
 - providing sanctions for not honoring a conservator's or guardian's authority; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

75-3-109, as enacted by Laws of Utah 1977, Chapter 194

75-3-402, as last amended by Laws of Utah 2013, Chapter 364

75-5-304, as last amended by Laws of Utah 1988, Chapter 104

75-5-309, as last amended by Laws of Utah 1988, Chapter 104

30 **75-5-310**, as last amended by Laws of Utah 2014, Chapter 142

31 **75-5-312**, as last amended by Laws of Utah 2016, Chapter 293

32 **75-5-418**, as last amended by Laws of Utah 2012, Chapter 274

33 **75-5-421**, as enacted by Laws of Utah 1975, Chapter 150

34 **75-5-424**, as last amended by Laws of Utah 2014, Chapter 142

35 **75-5-425**, as last amended by Laws of Utah 2012, Chapter 274

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

38 Section 1. Section **75-3-109** is amended to read:

39 **75-3-109. Letters upon several estates jointly.**

40 (1) Upon application or petition by any person interested in two or more estates, the
41 registrar may, in an informal proceeding without a hearing, or the court may, in a formal
42 proceeding after notice and hearing, grant letters upon these estates jointly if administration has
43 not commenced with respect to [~~any such~~] the estate and if:

44 (a) [~~All~~] all or any part of the estate of one decedent has descended from another
45 decedent; or

46 (b) [~~Two~~] two or more decedents held any property during their lifetimes as
47 tenants-in-common and if the persons entitled under the wills of these decedents or under the
48 law of intestate succession to receive the estates of these decedents are the same.

49 (2) If letters are granted upon two or more estates jointly under this section, these
50 estates shall be administered the same as if they were but one estate except that claims may be
51 enforced only against the estate to which they relate.

52 Section 2. Section **75-3-402** is amended to read:

53 **75-3-402. Formal testacy or appointment proceedings -- Petition -- Contents.**

54 (1) Petitions for formal probate of a will, or for adjudication of intestacy with or
55 without request for appointment of a personal representative, shall be directed to the court,
56 request a judicial order after notice and hearing, and contain further statements as indicated in
57 this section. A petition for formal probate of a will:

(a) requests an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs;

(b) contains the statements required for informal applications as stated in Subsection 75-3-301(2) and the statements required by Subsections 75-3-301(3)(b) and (c), and, if the petition requests appointment of a personal representative, the statements required by Subsection 75-3-301(4); and

(c) states whether the original of the last will of the decedent is in the possession of the court, accompanies the petition, or was presented to the court for electronic storage or electronic filing and is [not] in the possession of the petitioner or the petitioner's attorney.

(2) If the original will is not in the possession of the court, has not been presented to the court for electronic storage or electronic filing, does not accompany the petition, and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also shall state the contents of the will and indicate that it is lost, destroyed, or otherwise unavailable.

(3) A petition for adjudication of intestacy and appointment of an administrator in intestacy shall request a judicial finding and order that the decedent left no will and, determining the heirs, contain the statements required by Subsections 75-3-301(2) and 75-3-301(5) and indicate whether supervised administration is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case, the statements required by Subsection 75-3-301(5)(b) may be omitted.

Section 3. Section 75-5-304 is amended to read:

75-5-304. Findings -- Limited guardianship preferred -- Order of appointment.

(1) The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person.

(2) (a) The court shall prefer a limited guardianship and may only grant a full guardianship if no other alternative exists. If the court does not grant a limited guardianship, a

specific finding shall be made that nothing less than a full guardianship is adequate.

(b) An order of appointment of a limited guardianship shall state the limitations of the guardianship. Letters of guardianship for a limited guardianship shall state the limitations of the guardianship unless the court determines for good cause shown that a limitation should not be listed in the letters.

(3) A guardian appointed by will or written instrument, under Section 75-5-301, whose appointment has not been prevented or nullified under Subsection 75-5-301(4), has priority over any guardian who may be appointed by the court, but the court may proceed with an appointment upon a finding that the testamentary or instrumental guardian has failed to accept the appointment within 30 days after notice of the guardianship proceeding. Alternatively, the court may dismiss the proceeding or enter any other appropriate order.

Section 4. Section 75-5-309 is amended to read:

75-5-309. Notices in guardianship proceedings.

(1) In a proceeding for the appointment or removal of a guardian of an incapacitated person other than the appointment of ~~a temporary~~ an emergency guardian or temporary suspension of a guardian, notice of hearing shall be given to each of the following:

(a) the ward or the person alleged to be incapacitated and spouse, parents, and adult children of the ward or person;

(b) any person who is serving as guardian or conservator or who has care and custody of the ward or person;

(c) in case no other person is notified under Subsection (1)(a), at least one of the closest adult relatives, if any can be found; and

(d) any guardian appointed by the will of the parent who died later or spouse of the incapacitated person.

(2) The notice shall be in plain language and large type and the form shall have the final approval of the Judicial Council. The notice shall indicate the time and place of the hearing, the possible adverse consequences to the person receiving notice of rights, a list of rights, including the person's own or a court appointed counsel, and a copy of the petition.

(3) Notice shall be served personally on the alleged incapacitated person and the person's spouse and parents if they can be found within the state. Notice to the spouse and parents, if they cannot be found within the state, and to all other persons except the alleged incapacitated person shall be given as provided in Section 75-1-401. Waiver of notice by the person alleged to be incapacitated is not effective unless the person attends the hearing or the person's waiver of notice is confirmed in an interview with the visitor appointed pursuant to Section 75-5-303.

Section 5. Section 75-5-310 is amended to read:

75-5-310. Emergency guardians.

(1) If an incapacitated person has no guardian and an emergency exists or if an appointed guardian is not effectively performing the guardian's duties and the court further finds that the welfare of the incapacitated person requires immediate action, it may, without notice, appoint an emergency guardian for the person for a specified period not to exceed 30 days pending notice and hearing.

(2) ~~[The]~~ Upon request by an interested person after the appointment of an emergency guardian, the court shall~~[, in all cases in which an emergency guardian is appointed,]~~ hold a hearing within 14 days pursuant to Section 75-5-303.

Section 6. Section 75-5-312 is amended to read:

75-5-312. General powers and duties of guardian -- Penalties.

(1) A guardian of an incapacitated person has only the powers, rights, and duties respecting the ward granted in the order of appointment under Section 75-5-304.

(2) Except as provided in Subsection (4), a guardian has the same powers, rights, and duties respecting the ward that a parent has respecting the parent's unemancipated minor child.

(3) In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court:

(a) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, the guardian is entitled to custody of the person of the ward and may establish the ward's place of abode within or

without this state.

(b) If entitled to custody of the ward the guardian shall provide for the care, comfort, and maintenance of the ward and, whenever appropriate, arrange for the ward's training and education. Without regard to custodial rights of the ward's person, the guardian shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of the ward is in need of protection.

(c) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service.

(d) A guardian may not unreasonably restrict visitation with the ward by family, relatives, or friends.

(e) If no conservator for the estate of the ward has been appointed, the guardian may:

(i) institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform that duty;

(ii) compel the production of the ward's estate documents, including the ward's will, trust, power of attorney, and any advance health care directive; and

(iii) receive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward; but the guardian may not use funds from the ward's estate for room and board which the guardian, the guardian's spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one adult relative in the nearest degree of kinship to the ward in which there is an adult. The guardian shall exercise care to conserve any excess for the ward's needs.

(f) (i) A guardian is required to report the condition of the ward and of the estate which has been subject to the guardian's possession or control, as required by the court or court rule.

(ii) A guardian is required to immediately notify all interested persons if the guardian reasonably believes that the ward's death is likely to occur within the next 30 days, based on:

(A) the guardian's own observations; or

(B) information from the ward's physician or other medical care providers.

(iii) A guardian is required to immediately notify all interested persons of the ward's death.

(iv) Unless emergency conditions exist, a guardian is required to file with the court a notice of the guardian's intent to move the ward and to serve the notice on all interested persons at least 10 days before the move. The guardian shall take reasonable steps to notify all interested persons and to file the notice with the court as soon as practicable following the earlier of the move or the date when the guardian's intention to move the ward is made known to the ward, the ward's care giver, or any other third party.

(v) ~~[The]~~ (A) If no conservator for the estate of the ward has been appointed, the guardian shall, for all estates in excess of \$50,000, excluding the residence owned by the ward, send a report with a full accounting to the court on an annual basis.

(B) For estates less than \$50,000, excluding the residence owned by the ward, the guardian shall fill out an informal annual report and mail the report to the court.

(C) ~~[The]~~ A report under Subsection (3)(f)(v)(A) or (B) shall include ~~[the following:]~~ a statement of assets at the beginning and end of the reporting year, income received during the year, disbursements for the support of the ward, and other expenses incurred by the estate. The guardian shall also report the physical conditions of the ward, the place of residence, and a list of others living in the same household. The court may require additional information.

(D) The forms for both the informal report for estates under \$50,000, excluding the residence owned by the ward, and the full accounting report for larger estates shall be approved by the Judicial Council. ~~[This]~~

(E) An annual report shall be examined and approved by the court.

(F) If the ward's income is limited to a federal or state program requiring an annual accounting report, a copy of that report may be submitted to the court in lieu of the required annual report.

(vi) Corporate fiduciaries are not required to petition the court, but shall submit their internal report annually to the court. The report shall be examined and approved by the court.

(vii) The guardian shall also render an annual accounting of the status of the person to

the court which shall be included in the petition or the informal annual report as required under Subsection (3)(f). If a fee is paid for an accounting of an estate, no fee shall be charged for an accounting of the status of a person.

(viii) If a guardian:

(A) makes a substantial misstatement on filings of annual reports;

(B) is guilty of gross impropriety in handling the property of the ward; or

(C) willfully fails to file the report required by this subsection, after receiving written notice from the court of the failure to file and after a grace period of two months has elapsed, the court may impose a penalty in an amount not to exceed \$5,000. The court may also order restitution of funds misappropriated from the estate of a ward. The penalty shall be paid by the guardian and may not be paid by the estate.

(ix) ~~[These]~~ The provisions and penalties in this Subsection (3)(f) governing annual reports do not apply if the guardian or a coguardian is the parent of the ward.

(x) For the purposes of Subsections (3)(f)(i), (ii), (iii), and (iv), "interested persons" means those persons required to receive notice in guardianship proceedings as set forth in Section 75-5-309.

(g) If a conservator has been appointed[;]:

(i) all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward shall be paid to the conservator for management as provided in this code; and

(ii) the guardian shall account to the conservator for funds expended.

(4) (a) A court may, in the order of appointment, place specific limitations on the guardian's power.

(b) A guardian may not prohibit or place restrictions on association with a relative or qualified acquaintance of an adult ward, unless permitted by court order under Section 75-5-312.5.

(c) A guardian is not liable to a third person for acts of the guardian's ward solely by reason of the relationship described in Subsection (2).

(5) Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward and is entitled to receive reasonable sums for services and for room and board furnished to the ward as agreed upon between the guardian and the conservator, if the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to third persons or institutions for the ward's care and maintenance.

(6) A person who refuses to accept the authority of a guardian with authority over financial decisions to transact business with the assets of the protected person after receiving a certified copy of letters of guardianship is liable for costs, expenses, attorney fees, and damages if the court determines that the person did not act in good faith in refusing to accept the authority of the guardian.

Section 7. Section **75-5-418** is amended to read:

75-5-418. Inventory and records.

(1) Within 90 days after appointment of a conservator, the conservator shall prepare and file with the appointing court a complete inventory of the estate of the protected person together with an oath or affirmation that it is complete and accurate so far as the conservator is informed. The estate of the protected person does not include the assets of a trust.

(2) The conservator shall provide a copy of the inventory to the protected person if the person:

- (a) can be located;
- (b) has attained the age of 14 years; and
- (c) has sufficient mental capacity to understand these matters, and to any parent or guardian with whom the protected person resides.

(3) The conservator shall keep suitable ~~administrative~~ financial records and produce them upon the request of any interested person.

Section 8. Section **75-5-421** is amended to read:

75-5-421. Recording of conservator's letters.

(1) (a) Letters of conservatorship are evidence of transfer of ~~all~~ the assets of a

protected person to the conservator.

(b) An order terminating a conservatorship is evidence of transfer of ~~all~~ the assets of the estate from the conservator to the protected person or ~~his~~ the protected person's successors.

(c) Subject to the requirements of general statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship and orders terminating conservatorships may be filed or recorded to give record notice of title as between the conservator and the protected person.

(2) A person who refuses to accept the authority of a conservator to transact business with the assets of the protected person after receiving a certified copy of letters of conservatorship is liable for costs, expenses, attorney fees, and damages if the court determines that the person did not act in good faith in refusing to accept the authority of the conservator.

Section 9. Section **75-5-424** is amended to read:

75-5-424. Powers of conservator in administration.

(1) A conservator has all of the powers conferred in this chapter and any additional powers conferred by law on trustees in this state. In addition, a conservator of the estate of an unmarried minor as to whom no one has parental rights, has the duties and powers of a guardian of a minor described in Section **75-5-209** until the minor attains majority or marries, but the parental rights so conferred on a conservator do not preclude appointment of a guardian as provided by Part 2, Guardians of Minors.

(2) (a) A conservator has the power to compel the production of the protected person's estate documents, including the protected person's will, trust, power of attorney, and any advance health care directives.

(b) If a guardian is also appointed for the ward, the conservator shall share with the guardian the estate documents the conservator receives.

(3) A conservator has power without court authorization or confirmation to invest and reinvest funds of the estate as would a trustee.

(4) A conservator, acting reasonably in efforts to accomplish the purpose for which the

conservator was appointed, may act without court authorization or confirmation, to:

(a) collect, hold, and retain assets of the estate, including land in another state, until, in [his] the conservator's judgment, disposition of the assets should be made, and the assets may be retained even though they include an asset in which ~~he~~ the conservator is personally interested;

(b) receive additions to the estate;

(c) continue or participate in the operation of any business or other enterprise;

(d) acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest;

(e) invest and reinvest estate assets in accordance with Subsection ~~[(2)]~~ (3);

(f) deposit estate funds in a bank including a bank operated by the conservator;

(g) acquire or dispose of an estate asset, including land in another state, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(h) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, and raze existing or erect new party walls or buildings;

(i) subdivide, develop, or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; adjust differences in valuation on exchange or partition by giving or receiving considerations; and dedicate easements to public use without consideration;

(j) enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship;

(k) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(l) grant an option involving disposition of an estate asset or take an option for the acquisition of any asset;

(m) vote a security, in person or by general or limited proxy;

(n) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

- 310 (o) (i) sell or exercise stock subscription or conversion rights; and
311 (ii) consent, directly or through a committee or other agent, to the reorganization,
312 consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
- 313 (p) hold a security in the name of a nominee or in other form without disclosure of the
314 conservatorship so that title to the security may pass by delivery, but the conservator is liable
315 for any act of the nominee in connection with the stock so held;
- 316 (q) insure the assets of the estate against damage or loss and the conservator against
317 liability with respect to third persons;
- 318 (r) (i) borrow money to be repaid from estate assets or otherwise; and
319 (ii) advance money for the protection of the estate or the protected person, and for all
320 expenses, losses, and liabilities sustained in the administration of the estate or because of the
321 holding or ownership of any estate assets, and the conservator has a lien on the estate as against
322 the protected person for advances so made;
- 323 (s) (i) pay or contest any claim;
324 (ii) settle a claim by or against the estate or the protected person by compromise,
325 arbitration, or otherwise; and
- 326 (iii) release, in whole or in part, any claim belonging to the estate to the extent that the
327 claim is uncollectible;
- 328 (t) pay taxes, assessments, compensation of the conservator, and other expenses
329 incurred in the collection, care, administration, and protection of the estate;
- 330 (u) allocate items of income or expense to either estate income or principal, as
331 provided by law, including creation of reserves out of income for depreciation, obsolescence,
332 or amortization, or for depletion in mineral or timber properties;
- 333 (v) pay any sum distributable to a protected person or dependent without liability to the
334 conservator, by paying the sum to the distributee or by paying the sum for the use of the
335 distributee either to the distributee's guardian, or if none, to a relative or other person with
336 custody of the person;
- 337 (w) (i) employ persons, including attorneys, auditors, investment advisors, or agents,

even though they are associated with the conservator, to advise or assist in the performance of administrative duties;

(ii) act upon ~~their~~ a recommendation made by a person listed in Subsection (4)(w)(i) without independent investigation; and

(iii) instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;

(x) prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of the conservator's duties;

(y) act as a qualified beneficiary of any trust in which the protected person is a qualified beneficiary; and

(z) execute and deliver ~~all~~ the instruments ~~which~~ that will accomplish or facilitate the exercise of the powers vested in the conservator.

Section 10. Section ~~75-5-425~~ is amended to read:

75-5-425. Distributive duties and powers of conservator.

(1) A conservator may expend or distribute income or principal of the estate without court authorization or confirmation for the support, education, care, or benefit of the protected person and ~~his~~ the protected person's dependents in accordance with the following principles:

(a) The conservator is to consider recommendations relating to the appropriate standard of support, education, and benefit for the protected person made by a parent or guardian, if any. ~~He~~ A conservator may not be surcharged for sums paid to persons or organizations actually furnishing support, education, or care to the protected person pursuant to the recommendations of a parent or guardian of the protected person unless ~~he~~ the conservator knows that the parent or guardian is deriving personal financial benefit therefrom, including relief from any personal duty of support, or unless the recommendations are clearly not in the best interests of the protected person.

(b) The conservator is to expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person with due regard to:

(i) the size of the estate, the probable duration of the conservatorship and the likelihood

that the protected person, at some future time, may be fully able to manage the protected person's affairs and the estate which has been conserved for the protected person;

(ii) the accustomed standard of living of the protected person and members of the protected person's household; and

(iii) other funds or sources used for the support of the protected person.

(c) The conservator may expend funds of the estate for the support of persons legally dependent on the protected person and others who are members of the protected person's household who are unable to support themselves and who are in need of support.

(d) Funds expended under this Subsection (1) may be paid by the conservator to any person, including the protected person to reimburse for expenditures which the conservator might have made, or in advance for services to be rendered to the protected person when it is reasonable to expect that they will be performed and where advance payments are customary or reasonably necessary under the circumstances.

(2) If the estate is ample to provide for the purposes implicit in the distributions authorized by Subsection (1), a conservator for a protected person other than a minor has power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year 20% of the income from the estate.

(3) When a person who is a minor and who has not been adjudged to have a disability under Subsection 75-5-401(2)(a) attains the age of majority, the person's conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(4) When the conservator is satisfied that a protected person's disability~~[(f)]~~₂ other than minority~~[(j)]~~₂ has ceased, the conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(5) If a protected person dies, the conservator:

(a) shall:

(i) deliver to the court for safekeeping any will of the deceased protected person that

may have come into the conservator's possession;

(ii) inform the [~~executor~~] personal representative or a beneficiary named in the will that the conservator has done so; and

(iii) retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled to it;

(b) may continue to pay the obligations lawfully due against the estate and to protect the estate from waste, injury, or damages that might reasonably be foreseeable; and

(c) may apply to exercise the powers and duties of a personal representative so that the conservator may proceed to administer and distribute the decedent's estate without additional or further appointment, provided that at least 40 days from the death of the protected person no other person has been appointed personal representative and no application or petition for appointment is before the court.

(6) Upon application for an order granting the powers of a personal representative to a conservator as provided in Subsection (5)(c) and after notice as provided in Section 75-3-310, the court may order the conferral of the power upon determining that there is no objection and endorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative. The making and entry of an order under this section shall have the effect of an order of appointment of a personal representative as provided in Section 75-3-308 and Chapter 3, Part 6, Personal Representative - Appointment, Control, and Termination of Authority, Part 7, Duties and Powers of Personal Representatives, Part 8, Creditors' Claims, Part 9, Special Provisions Relating to Distribution, and Part 10, Closing Estates, except that the estate in the name of the conservator, after administration, may be distributed to the decedent's successors without prior retransfer to the conservator as personal representative.