

HB0116S01 compared with HB0116

~~{deleted text}~~ shows text that was in HB0116 but was deleted in HB0116S01.

inserted text shows text that was not in HB0116 but was inserted into HB0116S01.

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Senator Todd Weiler proposes the following substitute bill:

PROBATE CODE AMENDMENTS

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: V. Lowry Snow

Senate Sponsor: ~~{~~ Todd Weiler

LONG TITLE

General Description:

This bill makes amendments regarding guardians, conservators, trustees, and advance directions regarding funeral and burial arrangements.

Highlighted Provisions:

This bill:

- ▶ provides that advance directions regarding funeral and burial directions executed in the same manner as a will are acceptable;
- ▶ adds a personal representative to the list of persons who may provide directions regarding disposition of a deceased person;
- ▶ clarifies attorney fees in a will contest for the personal representative if the will was filed in good faith;
- ▶ allows for attorney fees in an action for a guardianship or conservatorship under

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specific circumstances;

- ▶ clarifies that a conservatorship estate does not include the assets of a trust, but the conservator is considered a qualified beneficiary of a trust in which the protected person is a qualified beneficiary; and
- ▶ makes technical corrections.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

- 58-9-601**, as enacted by Laws of Utah 2003, Chapter 49
- 58-9-602**, as last amended by Laws of Utah 2010, Chapter 251
- 75-3-719**, as enacted by Laws of Utah 1975, Chapter 150
- 75-5-303**, as last amended by Laws of Utah 2011, Chapter 366
- 75-5-307**, as last amended by Laws of Utah 1988, Chapter 104
- 75-5-407**, as enacted by Laws of Utah 1975, Chapter 150
- 75-5-408**, as last amended by Laws of Utah 2011, Chapter 366
- 75-5-414**, as enacted by Laws of Utah 1975, Chapter 150
- 75-5-415**, as enacted by Laws of Utah 1975, Chapter 150
- 75-5-418**, as enacted by Laws of Utah 1975, Chapter 150
- 75-5-419**, as enacted by Laws of Utah 1975, Chapter 150
- 75-5-420**, as last amended by Laws of Utah 1977, Chapter 194
- 75-5-424**, as last amended by Laws of Utah 1977, Chapter 194
- 75-5-425**, as last amended by Laws of Utah 2011, Chapter 366
- 75-5-501**, as last amended by Laws of Utah 2011, Chapter 366

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

Section 1. Section **58-9-601** is amended to read:

58-9-601. Advance directions.

- (1) A person may provide written directions [~~meeting the requirements of Subsection~~

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~~(2)~~, executed with the same formalities required of a will under Section 75-2-502, to direct the preparation, type, and place of the person's disposition, including:

- (a) designating a funeral service establishment;
- (b) providing directions for burial arrangements; or
- (c) providing directions for cremation arrangements.

~~[(2) The written directions described in Subsection (1) shall contain:]~~

~~[(a) the name and address of the decedent;]~~

~~[(b) written directions regarding the decedent's disposition;]~~

~~[(c) the signature of the decedent;]~~

~~[(d) the signatures of at least two unrelated individuals, each of whom signed within a reasonable time after witnessing the signing of the form by the decedent; and]~~

~~[(e) the date or dates the written directions were prepared and signed.]~~

~~[(3)]~~ (2) A funeral service director shall carry out the written directions of the decedent prepared under this section to the extent that:

- (a) the directions are lawful; and
- (b) the decedent has provided resources to carry out the directions.

~~[(4)]~~ (3) Directions for disposition contained in a will shall be carried out pursuant to Subsection ~~[(3)]~~ (2) regardless of:

- (a) the validity of other aspects of the will; or
- (b) the fact that the will may not be offered or admitted to probate until a later date.

~~[(5)]~~ (4) A person may change or cancel written directions prepared under this section at any time prior to the person's death by providing written notice to all applicable persons, including:

(a) if the written directions designate a funeral service establishment or funeral service director, the funeral service establishment or funeral service director designated in the written directions; and

(b) if the written directions are contained in a will, the personal representative as defined in Section 75-1-201.

Section 2. Section **58-9-602** is amended to read:

58-9-602. Determination of control of disposition.

The right and duty to control the disposition of a deceased person, including the

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location, manner and conditions of the disposition, and arrangements for funeral goods and services to be provided vest in the following degrees of relationship in the order named, provided the person is at least 18 and is mentally competent:

(1) ~~[a]~~ the person designated:

(a) in a written instrument, excluding a power of attorney that terminates at death under Sections 75-5-501 and 75-5-502, if the written instrument ~~[contains:]~~ is executed with the same formalities required of a will under Section 75-2-502; or

~~[(i) the name and address of the decedent;]~~

~~[(ii) the name and address of the person designated under this Subsection (1)(a);]~~

~~[(iii) directions that the person designated in this Subsection (1) is authorized to carry out the disposition of the decedent's remains;]~~

~~[(iv) the signature of the decedent;]~~

~~[(v) the signatures of at least two unrelated individuals who are not the person designated under this Subsection (1), each of whom signed within a reasonable time after witnessing the signing of the form by the decedent; and]~~

~~[(vi) the date or dates the written instrument was prepared and signed; or]~~

(b) by a service member while serving in a branch of the United States Armed Forces as defined in 10 U.S.C. Sec. 1481 in a federal Record of Emergency Data, DD Form 93 or subsequent form;

(2) the surviving, legally recognized spouse of the decedent[?], unless a personal representative was nominated by the decedent subsequent to the marriage, in which case the personal representative shall take priority over the spouse;

(3) the person nominated to serve as the personal representative of the decedent's estate in a will executed with the formalities required in Section 75-2-502;

~~[(3)]~~ (4) (a) the sole surviving child of the decedent, or if there is more than one child of the decedent, the majority of the surviving children;

(b) less than one-half of the surviving children are vested with the rights of this section if they have used reasonable efforts to notify all other surviving children of their instructions and are not aware of any opposition to those instructions on the part of more than one-half of all surviving children;

~~[(4)]~~ (5) the surviving parent or parents of the decedent, and if one of the surviving

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parents is absent, the remaining parent is vested with the rights and duties of this section after reasonable efforts have been unsuccessful in locating the absent surviving parent;

~~[(5)]~~ (6) (a) the surviving brother or sister of the decedent, or if there is more than one sibling of the decedent, the majority of the surviving siblings;

(b) less than the majority of surviving siblings are vested with the rights and duties of this section if they have used reasonable efforts to notify all other surviving siblings of their instructions and are not aware of any opposition to those instructions on the part of more than one-half of all surviving siblings;

~~[(6)]~~ (7) the person in the classes of the next degree of kinship, in descending order, under the laws of descent and distribution to inherit the estate of the decedent, and if there is more than one person of the same degree, any person of that degree may exercise the right of disposition;

~~[(7)]~~ (8) any public official charged with arranging the disposition of deceased persons; and

~~[(8)]~~ (9) in the absence of any person under Subsections (1) through ~~[(7)]~~ (8), any other person willing to assume the responsibilities to act and arrange the final disposition of the decedent's remains, including the personal representative of the decedent's estate or the funeral service director with custody of the body, after attesting in writing that a good faith effort has been made to no avail to contact the individuals referred to in Subsections (1) through ~~[(7)]~~ (8).

Section 3. Section **75-3-719** is amended to read:

75-3-719. Expenses in estate litigation.

If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, ~~[he]~~ the personal representative is entitled to receive from the estate ~~[his]~~ all necessary expenses and disbursements, including reasonable ~~[attorneys']~~ attorney fees incurred. This provision expressly applies in a will contest to any person nominated as a personal representative in a testamentary instrument submitted in good faith.

Section 4. Section **75-5-303** is amended to read:

75-5-303. Procedure for court appointment of a guardian of an incapacitated person.

(1) The incapacitated person or any person interested in the incapacitated person's

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welfare may petition for a finding of incapacity and appointment of a guardian.

(2) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity~~[; and unless]~~. Unless the allegedly incapacitated person has **already obtained** counsel ~~[of the person's own choice, ~~{}~~ it] ~~{}~~~~, the court shall appoint an attorney to represent the person in the proceeding the cost of which shall be paid by the person alleged to be incapacitated~~[, unless]~~. If the court determines that the petition is without merit, ~~[in which case]~~ the attorney fees and court costs shall be paid by the person filing the petition. If the court appoints the petitioner or the petitioner's nominee as guardian of the incapacitated person, regardless of whether the nominee is specified in the moving petition or nominated during the proceedings, the petitioner ~~{shall be entitled to}~~ **may** receive from the incapacitated person reasonable attorney fees and court costs incurred in bringing and defending the petition.

(3) The legal representation of the incapacitated person by an attorney ~~{shall}~~ **may** terminate upon the appointment of a guardian~~{, unless}~~ **based on the court finding whether:**

(a) there are separate conservatorship proceedings pending before the court;

(b) the appointed guardian elects at the time to maintain the attorney's representation of the incapacitated person; **or**

(c) there is a timely filed appeal of the appointment of the guardian or the determination of incapacity~~{, or}~~.

~~{ — (d) the court orders otherwise.~~

~~{ (3)}~~ (4) The person alleged to be incapacitated may be examined by a physician appointed by the court who shall submit a report in writing to the court and may be interviewed by a visitor sent by the court. The visitor also may interview the person seeking appointment as guardian, visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that the person will be detained or reside if the requested appointment is made, and submit a report in writing to the court.

~~{ (4)}~~ (5) (a) The person alleged to be incapacitated shall be present at the hearing in person and see or hear all evidence bearing upon the person's condition. If the person seeking the guardianship requests a waiver of presence of the person alleged to be incapacitated, the court shall order an investigation by a court visitor, the costs of which shall be paid by the person seeking the guardianship.

(b) The investigation by a court visitor is not required if there is clear and convincing

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evidence from a physician that the person alleged to be incapacitated has:

- (i) fourth stage Alzheimer's Disease;
- (ii) extended comatosis; or
- (iii) (A) an intellectual disability; and
(B) an intelligence quotient score under 20 to 25.

(c) The person alleged to be incapacitated is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or the person's counsel so requests.

Section 5. Section **75-5-307** is amended to read:

75-5-307. Removal or resignation of guardian -- Termination of incapacity.

(1) On petition of the ward or any person interested in the ward's welfare, the court may remove a guardian and appoint a successor if in the best interests of the ward. On petition of the guardian, the court may accept the guardian's resignation and make any other order which may be appropriate.

(2) An order adjudicating incapacity may specify a minimum period, not exceeding one year, during which no petition for an adjudication that the ward is no longer incapacitated may be filed without special leave. Subject to this restriction, the ward or any person interested in the ward's welfare may petition for an order that the ward is no longer incapacitated and for removal or resignation of the guardian. A request for this order may be made by informal letter to the court or judge and any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.

(3) Before removing a guardian, accepting the resignation of a guardian, or ordering that a ward's incapacity has terminated, the court shall follow the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian as provided ~~[under]~~ in Section 75-5-303. The court is not required to appoint an attorney to represent the ward if the case is uncontested and the ward's incapacity is not at issue.

Section 6. Section **75-5-407** is amended to read:

75-5-407. Procedure concerning hearing and order on original petition.

(1) Upon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for the hearing on the matters alleged in the

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petition. If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if 14 years of age or older. ~~[A lawyer]~~ An attorney appointed by the court to represent a minor has the powers and duties of a guardian ad litem.

(2) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected has already retained counsel ~~[of his own choice]~~, the court may appoint ~~[a lawyer]~~ an attorney to represent ~~[him]~~ the person to be protected who then has the powers and duties of a guardian ad litem.

(3) The legal representation of the protected person by an attorney ~~{shall}~~ may terminate upon the appointment of a conservator ~~{, unless}~~ based on the court finding whether:

(a) there are separate guardianship proceedings pending before the court;

(b) the appointed conservator elects at the time to maintain the attorney's representation of the protected person; or

(c) there is a timely filed appeal of the appointment of the conservator or the determination of the incapacity ~~{, or}~~;

~~{ ——— (d) the court orders otherwise.~~

~~{~~ (4) If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician designated by the court, preferably a physician who is not connected with any institution in which the person is a patient or is detained. The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the court.

~~[(3)]~~ (5) After hearing, upon finding that a basis for the appointment of a conservator or other protective order has been established, the court shall make an appointment or other appropriate protective order.

Section 7. Section **75-5-408** is amended to read:

75-5-408. Permissible court orders.

(1) The court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons:

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(a) While a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice to others, the court has power to preserve and apply the property of the person to be protected as may be required for the person's benefit or the benefit of the person's dependents.

(b) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and affairs of the minor which are or might be necessary for the best interests of the minor, the minor's family, and the members of the minor's household.

(c) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has, for the benefit of the person and members of the person's household, all the powers over the person's estate and affairs that the person could exercise if present and not under disability, except the power to make a will. These powers include the power to:

(i) make gifts~~[-to]~~;

(ii) convey or release the person's contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety~~[-to]~~;

(iii) exercise or release the person's powers as ~~[trustee]~~ personal representative, custodian for minors, conservator, or donee of a power of appointment~~[-to]~~;

(iv) enter into contracts~~[-to]~~;

(v) create revocable or irrevocable trusts of property of the estate that may extend beyond the person's disability or life~~[-to]~~;

(vi) exercise options of the person with a disability to purchase securities or other property~~[-to]~~;

(vii) exercise the person's rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value~~[-to]~~;

(viii) exercise the person's right to an elective share in the estate of the person's deceased spouse~~[-]~~; and ~~[to]~~

(ix) renounce any interest by testate or intestate succession or by inter vivos transfer.

(d) The court may exercise, or direct the exercise of, its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make

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gifts in trust or otherwise exceeding 20% of any year's income of the estate, or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is in the best interests of the protected person, and that the person either is incapable of consenting or has consented to the proposed exercise of power.

(2) An order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists has no effect on the capacity of the protected person.

Section 8. Section **75-5-414** is amended to read:

75-5-414. Compensation and expenses.

If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate. If the court appoints the petitioner or the petitioner's nominee as conservator over the protected person, regardless of whether the nominee is specified in the moving petition or nominated during the proceedings, the petitioner ~~is entitled to~~ may receive from the estate reasonable attorney fees and court costs incurred in bringing and defending the petition.

Section 9. Section **75-5-415** is amended to read:

75-5-415. Death, resignation, or removal of conservator.

(1) The court may remove a conservator for good cause, upon notice and hearing, or accept the resignation of a conservator. After ~~[his] the~~ death, resignation, or removal ~~of a conservator~~, the court may appoint another conservator. A conservator so appointed succeeds to the title and powers of ~~[his predecessor] the preceding conservator~~.

(2) An order adjudicating incapacity may specify a minimum period, not exceeding one year, during which no petition for an adjudication that the protected person is no longer incapacitated may be filed without special leave. Subject to this restriction, the protected person or any person interested in the protected person's welfare may petition for an order that the protected person is no longer incapacitated and for removal or resignation of the conservator. A request for this order may be made by informal letter to the court or judge ~~and any person who knowingly interferes with transmission of the request to the court or judge may be found guilty of contempt of court~~.

(3) Before removing a conservator, accepting the resignation of a conservator, or

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ordering that a protected person's incapacity has terminated, the court shall follow the same procedures to safeguard the rights of the protected person as apply to a petition for appointment of a conservator as provided in Section 75-5-407.

Section 10. Section **75-5-418** is amended to read:

75-5-418. Inventory and records.

(1) Within 90 days after [his] appointment~~[, every]~~ 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 [his] an oath or affirmation that it is complete and accurate so far as [he] 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 ~~[thereof]~~ of the inventory to the protected person if ~~[he] 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 records ~~[of his administration]~~ and ~~[exhibit the same on]~~ produce them upon the request of any interested person.

Section 11. Section **75-5-419** is amended to read:

75-5-419. Accounts.

(1) Every conservator must account to the court for [his] the administration of the ~~[trust] estate~~ upon [his] resignation or removal and at any other times ~~[as]~~ the court may direct.

(2) On termination of the protected person's minority or disability, a conservator may account to the court, ~~[or he may account to]~~ the former protected person, or [his] the personal representative of the protected person.

(3) Subject to appeal or vacation within the time permitted, an order, made upon notice and hearing, allowing an intermediate account of a conservator, adjudicates as to [his] any liabilities concerning the matters considered in connection with ~~[this]~~ the protected person's account, and an order, made upon notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected person or [his] the protected person's successors relating to the conservatorship.

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(4) In connection with any account, the court may require a conservator to submit to a physical check of the estate in [his] the conservator's control, to be made in any manner the court may specify.

Section 12. Section **75-5-420** is amended to read:

75-5-420. Conservators -- Title by appointment.

(1) The appointment of a conservator vests in [him] the conservator title as [trustee] fiduciary to all property of the protected person, presently held or thereafter acquired, not including the assets of a trust, including title to any property previously held for the protected person by custodians or attorneys-in-fact, except for property held pursuant to any uniform gifts to minors act or provisions.

(2) The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will, or trust instrument imposing restrictions upon or penalties for transfer or alienation by the protected person of [his] any rights or interest, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator.

Section 13. 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 of this chapter.

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

(3) A conservator, acting reasonably in efforts to accomplish the purpose for which [he] 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 judgment, disposition of the assets should be made, and the assets may be retained even though they include an asset in which he is personally interested;

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- (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) [~~above~~];
- (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;
- (o) sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
- (p) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery, but the conservator is liable for any act of the nominee in connection with the stock so held;
- (q) insure the assets of the estate against damage or loss and the conservator against liability with respect to third persons;

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(r) borrow money to be repaid from estate assets or otherwise; and advance money for the protection of the estate or the protected person, and for all expenses, losses, and liabilities sustained in the administration of the estate or because of the holding or ownership of any estate assets, and the conservator has a lien on the estate as against the protected person for advances so made;

(s) pay or contest any claim; settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible;

(t) pay taxes, assessments, compensation of the conservator, and other expenses incurred in the collection, care, administration, and protection of the estate;

(u) allocate items of income or expense to either estate income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(v) pay any sum distributable to a protected person or [~~his~~] dependent without liability to the conservator, by paying the sum to the distributee or by paying the sum for the use of the distributee either to [~~his~~] the distributee's guardian, or if none, to a relative or other person with custody of [~~his~~] the person;

(w) employ persons, including attorneys, auditors, investment advisors, or agents, even though they are associated with the conservator, to advise or assist [~~him~~] in the performance of [~~his~~] administrative duties; act upon their recommendation without independent investigation; and 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 [~~his~~] the conservator's duties; [~~and~~]

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

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

Section 14. Section **75-5-425** is amended to read:

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

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(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 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 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 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

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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 (other than minority) 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 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[. ~~If after 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, the conservator~~];

(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

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3, Parts 6 through 10, 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.

Section 15. Section **75-5-501** is amended to read:

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

(1) Whenever a principal designates another as the principal's attorney-in-fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not be affected by disability of the principal," or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's disability, the authority of the attorney-in-fact or agent is exercisable by the attorney-in-fact or agent as provided in the power on behalf of the principal notwithstanding:

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

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

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

(a) notify all interested persons of the attorney-in-fact's or agent's status as the power of attorney holder within 30 days of the principal's incapacitation, and provide them with the attorney-in-fact's or agent's name and address;

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

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

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

(3) All interested persons shall be notified within 10 days if the attorney-in-fact or

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agent changes. The notification shall be made by the new attorney-in-fact or agent who shall then be accountable to the interested persons in accordance with Subsection (2).

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

(5) A conservator may be appointed for a principal even though the principal has a valid power of attorney in place. If a conservator thereafter is appointed for the principal, the attorney-in-fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator, pursuant to court order [~~as provided in Subsection 75-5-408(1)(d)~~], has the same power the principal would have had, if the principal did not have a disability or was not incompetent, to revoke, suspend, or terminate all or any part of the power of attorney or agency.

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

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Legislative Review Note

~~as of 1-26-12 8:10 AM~~

~~Office of Legislative Research and General Counsel~~