

SB0111S01 compared with SB0111

~~deleted text~~ shows text that was in SB0111 but was deleted in SB0111S01.

inserted text shows text that was not in SB0111 but was inserted into SB0111S01.

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Senator Todd Weiler proposes the following substitute bill:

GUARDIANSHIP - RIGHT OF ASSOCIATION

2016 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Todd Weiler

House Sponsor: _____

LONG TITLE

General Description:

This bill amends the Utah Uniform Probate Code in relation to association between an adult ward and a relative of the adult ward or certain other individuals.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ places limitations on the power of a guardian to prohibit association between an adult ward and a relative of the adult ward or certain other individuals;
- ▶ provides for proceedings to alter or enforce the limitations described in this bill;
- ▶ provides for the award of attorney fees and sanctions; and
- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

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None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

75-5-312, as last amended by Laws of Utah 2014, Chapter 142

ENACTS:

75-5-312.5, Utah Code Annotated 1953

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

Section 1. 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) [~~Absent a specific limitation on the guardian's power in the order of appointment, the~~] 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 [~~except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship~~].

(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

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ward to receive medical or other professional care, counsel, treatment, or service.

(d) 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.

(e) (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 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. 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. The report shall include the

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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. 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 annual report shall be examined and approved by the court. 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 [~~(2)~~] (3)(e). 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 provisions and penalties governing annual reports do not apply if the guardian is the parent of the ward.

(x) For the purposes of Subsections [~~(2)~~] (3)(e)(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.

(f) If a conservator has been appointed, 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 the

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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).

~~(3)~~ (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.

Section 2. Section **75-5-312.5** is enacted to read:

75-5-312.5. Association between an adult ward and a relative of the adult ward.

(1) As used in this section:

(a) "Associate" or "association" means:

(i) visitation of an adult ward by a relative **or qualified acquaintance**; or

(ii) communication between an adult ward and a relative **or qualified acquaintance** in any form, including by telephone, mail, or electronic communication.

(b) **"Qualified acquaintance" means an individual, other than a relative of the adult ward, who:**

(i) **has established a significant, mutual friendship with the adult ward; or**

(ii) **is clergy in the adult ward's religion or religious congregation.**

~~(b)(c)~~ "Relative" means an adult ward's spouse, parent, step-parent, child, ~~sibling~~ **step-child, sibling, step-sibling**, half-sibling, grandparent, grandchild, uncle, aunt, nephew, niece, or first cousin.

(2) (a) Except as otherwise provided by court order, a guardian may not restrict or prohibit the right of an adult ward to associate with a relative **or qualified acquaintance** of the adult ward.

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(b) If an adult ward is unable to express consent to visitation by a relative or a qualified acquaintance of the adult ward, the consent of the adult ward is presumed based on evidence of a prior relationship between the adult ward and the relative or qualified acquaintance of the adult ward.

(~~f~~~~b~~c) A guardian may not permit a relative or qualified acquaintance of an adult ward to associate with the adult ward:

(i) if a court order prohibits the association;

(ii) in a manner prohibited by court order; or

(iii) if the adult ward expresses a desire to not associate with the relative or qualified acquaintance.

(3) A guardian may, as part of the initial guardianship proceeding, petition the court to issue an order:

(a) prohibiting or placing conditions on association between an adult ward and a relative or qualified acquaintance of the adult ward; or

(b) granting the guardian the authority to prohibit or place conditions on association between an adult ward and a relative or qualified acquaintance of the adult ward.

(4) A guardian may, at any time after the initial guardianship proceeding, petition the court to issue an order described in Subsection (3) or to rescind or modify an order described in Subsection (3).

(5) An adult ward ~~f~~~~or~~, a relative of an adult ward, or a qualified acquaintance of an adult ward may, at any time after the initial guardianship proceeding, petition the court to rescind or modify an order described in Subsection (3).

(6) If a guardian violates Subsection (2), the adult ward ~~f~~~~or~~, a relative of the adult ward, or a qualified acquaintance of the adult ward may do one or more of the following, as applicable:

(a) petition the court to issue an order to show cause why the guardian should not be held in contempt of court;

(b) seek an injunction to enforce compliance by the guardian with the law and any applicable court order; or

(c) petition the court to have the guardian removed as guardian of the adult ward.

(7) For a hearing on a petition filed under this section, a court:

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(a) may appoint a court visitor to meet with the adult ward to determine the wishes of the adult ward regarding association;

(b) shall give notice and an opportunity to be heard to the guardian, the adult ward, and the relative; ~~and~~

~~(c) or qualified acquaintance;~~

(c) shall preserve the right of the adult ward to be present at the hearing; and

(d) may order supervised visitation by the relative or qualified acquaintance before the hearing.

(8) A court may not enter an order prohibiting or placing restrictions on association between an adult ward and a relative or qualified acquaintance, unless the court finds by a preponderance of the evidence that:

(a) the adult ward desires the prohibition or restriction;

(b) if the adult ward had the capacity to make a knowing and intelligent decision regarding the association, the adult ward would prohibit the association or impose the restriction; or

(c) the prohibition or restriction is the least restrictive means necessary to protect the health or welfare of the adult ward.

(9) In making the determination described in Subsection (8), the court may consider any relevant evidence, including:

(a) the wishes of the adult ward, expressed during or before the guardianship;

(b) the history of the relationship between the adult ward and the relative or qualified acquaintance;

(c) any history of criminal activity, abuse, neglect, or violence by the relative or qualified acquaintance; or

(d) whether a protective order was ever issued against the relative or qualified acquaintance with respect to the adult ward.

(10) Except as provided in Subsection (11), the guardian shall have the burden of proof when:

(a) seeking an order prohibiting association or placing restrictions on association with a relative or qualified acquaintance of the adult ward;

(b) modifying an order to place additional prohibitions or restrictions on association

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with a relative ~~or qualified acquaintance of the adult ward~~; or

(c) opposing an action described in Subsection (6)(a) or (b).

(11) The relative ~~or qualified acquaintance~~ shall have the burden of proof if the relative ~~or qualified acquaintance~~ is seeking to modify an order previously entered by a court under this section.

(12) (a) If, in a proceeding under this section, the court finds that the petition was filed frivolously or in bad faith, the court shall award attorney fees to a party opposing the petition.

(b) If, in a proceeding under this section, the court finds that the guardian is in contempt of court or has acted frivolously or in bad faith in prohibiting or restricting association, the court:

(i) ~~shall~~ may award attorney fees to the prevailing party; and

(ii) may impose a sanction, not to exceed \$1,000, against the guardian.

(c) A court shall prohibit attorney fees awarded under this section from being paid by the adult ward or the adult ward's estate.

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Legislative Review Note

Office of Legislative Research and General Counsel†