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INCAPACITATED PERSON REVISIONS

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Mike Winder

Senate Sponsor: Lyle W. Hillyard

LONG TITLE

General Description:

This bill modifies provisions related to guardianship of an incapacitated person.

Highlighted Provisions:

This bill:

- ▶ extends the repeal date related to appointment of counsel in a guardianship proceeding;
- ▶ addresses notices in guardianship proceedings;
- ▶ addresses appointment of counsel as part of the procedure for court appointment of a guardian;
- ▶ addresses priorities in appointment of a guardian; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

- 63I-2-275**, as enacted by Laws of Utah 2016, Chapter 400
- 75-5-303**, as last amended by Laws of Utah 2016, Chapter 400
- 75-5-309**, as last amended by Laws of Utah 2017, Chapter 403
- 75-5-311**, as last amended by Laws of Utah 2013, Chapter 364

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

31 Section 1. Section **63I-2-275** is amended to read:

32 **63I-2-275. Repeal dates -- Title 75.**

33 Subsection **75-5-303**(5)(d) is repealed on July 1, [~~2018~~] 2028.

34 Section 2. Section **75-5-303** is amended to read:

35 **75-5-303. Procedure for court appointment of a guardian of an incapacitated**
36 **person.**

37 (1) [~~The~~] An incapacitated person or any person interested in the incapacitated person's
38 welfare may petition for a finding of incapacity and appointment of a guardian.

39 (2) (a) Upon the filing of a petition, the court shall set a date for hearing on the issues
40 of incapacity.

41 (b) Unless the allegedly incapacitated person has counsel of the person's own choice,
42 the court shall appoint an attorney to represent the person in the proceeding the cost of which
43 shall be paid by the person alleged to be incapacitated, unless the allegedly incapacitated
44 person and the allegedly incapacitated person's parents are indigent.

45 (c) If the court determines that the petition is without merit, the attorney fees and court
46 costs shall be paid by the person filing the petition.

47 (d) If the court appoints the petitioner or the petitioner's nominee as guardian of the
48 incapacitated person, regardless of whether the nominee is specified in the moving petition or
49 nominated during the proceedings, the petitioner shall be entitled to receive from the
50 incapacitated person reasonable attorney fees and court costs incurred in bringing, prosecuting,
51 or defending the petition.

52 (3) The legal representation of the incapacitated person by an attorney shall terminate
53 upon the appointment of a guardian, unless:

54 (a) there are separate conservatorship proceedings still pending before the court
55 subsequent to the appointment of a guardian;

56 (b) there is a timely filed appeal of the appointment of the guardian or the
57 determination of incapacity; or

58 (c) upon an express finding of good cause, the court orders otherwise.

59 (4) The person alleged to be incapacitated may be examined by a physician appointed
60 by the court who shall submit a report in writing to the court and may be interviewed by a
61 visitor sent by the court. The visitor also may interview the person seeking appointment as
62 guardian, visit the present place of abode of the person alleged to be incapacitated and the place
63 it is proposed that the person will be detained or reside if the requested appointment is made,
64 conduct other investigations or observations as directed by the court, and submit a report in
65 writing to the court.

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

71 (b) The investigation by a court visitor is not required if there is clear and convincing
72 evidence from a physician that the person alleged to be incapacitated has:

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

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

81 (d) Counsel for the person alleged to be incapacitated, as defined in Subsection
82 [75-1-201\(22\)](#), is not required if:

- 83 (i) the person is the biological or adopted child of the petitioner;
- 84 (ii) the value of the person's entire estate does not exceed \$20,000 as established by an
85 affidavit of the petitioner in accordance with Section [75-3-1201](#);

86 (iii) the person appears in court with the petitioner;

87 (iv) the person is given the opportunity to communicate, to the extent possible, the
88 person's acceptance of the appointment of petitioner; [~~and~~]

89 (v) no attorney from the state court's list of attorneys who have volunteered to represent
90 respondents in guardianship proceedings is able to provide counsel to the person within 60
91 days of the date of the appointment described in Subsection (2);

92 [~~(v)~~] (vi) the court is satisfied that counsel is not necessary in order to protect the
93 interests of the person[-]; and

94 (vii) the court appoints a visitor under Subsection (4).

95 Section 3. Section **75-5-309** is amended to read:

96 **75-5-309. Notices in guardianship proceedings.**

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

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

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

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

106 (d) any guardian appointed by the will of the parent who died later or spouse of the
107 incapacitated person[-]; and

108 (e) Adult Protective Services if Adult Protective Services has received a referral under
109 Title 62A, Chapter 3, Part 3, Abuse, Neglect, or Exploitation of a Vulnerable Adult, concerning
110 the welfare of the ward or person alleged to be incapacitated or concerning the guardian or
111 conservator or proposed guardian or conservator.

112 (2) The notice shall be in plain language and large type and the form shall have the
113 final approval of the Judicial Council. The notice shall indicate the time and place of the

114 hearing, the possible adverse consequences to the person receiving notice of rights, a list of
115 rights, including the person's own or a court appointed counsel, and a copy of the petition.

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

123 Section 4. Section 75-5-311 is amended to read:

124 **75-5-311. Who may be guardian -- Priorities.**

125 (1) As used in this section:

126 (a) "Specialized care professional" means a person who is certified as a National
127 Certified Guardian or National Master Guardian by the Center for Guardianship Certification
128 or similar organization.

129 (b) "Suitable institution" means any nonprofit or for profit corporation, partnership,
130 sole proprietorship, or other type of business organization that is owned, operated by, or
131 employs a specialized care professional.

132 (2) The court shall appoint a guardian in accordance with the incapacitated person's
133 most recent nomination, unless that person is disqualified or the court finds other good cause
134 why the person should not serve as guardian. That nomination shall have been made prior to
135 the person's incapacity, shall be in writing and shall be signed by the person making the
136 nomination. The nomination shall be in substantially the following form:

137 **Nomination of Guardian by an Adult**

138 I, (Name), being of sound mind and not acting under duress, fraud, or other undue
139 influence, do hereby nominate (Name, current residence, and relationship, if any, of the
140 nominee) to serve as my guardian in the event that after the date of this instrument I become
141 incapacitated.

142 Executed at _____ (city, state)

143 on this _____ day of _____

144 _____

145 (Signature)

146 (3) Except as provided in Subsection (2), persons who are not disqualified have
147 priority for appointment as guardian in the following order:

148 (a) a person who has been nominated by the incapacitated person, by any means other
149 than that described in Subsection (2), if the incapacitated person was 14 years of age or older
150 when the nomination was executed and, in the opinion of the court, that person acted with
151 sufficient mental capacity to make the nomination;

152 (b) the spouse of the incapacitated person;

153 (c) an adult child of the incapacitated person;

154 (d) a parent of the incapacitated person, including a person nominated by will, written
155 instrument, or other writing signed by a deceased parent;

156 (e) any relative of the incapacitated person with whom he has resided for more than six
157 months prior to the filing of the petition;

158 (f) a person nominated by the person who is caring for him or paying benefits to him;

159 (g) a specialized care professional, so long as the specialized care professional does
160 not:

161 (i) profit financially or otherwise from or receive compensation for acting in that
162 capacity, except for the direct costs of providing guardianship or conservatorship services; or

163 (ii) otherwise have a conflict of interest in providing those services; [or]

164 (h) any competent person or suitable institution[?]; or

165 (i) the Office of Public Guardian under Title 62A, Chapter 14, Office of Public
166 Guardian Act.