

**UNIFORM GUARDIANSHIP AND PROTECTIVE  
PROCEEDINGS ACT (1998)**

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT  
IN ALL THE STATES

at its

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By

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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## **UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT (1997)**

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1 **Prefatory Note**

2 The Uniform Guardianship and Protective Proceedings Act (1997) replaces the  
3 previous Act of the same name, which was approved by the National Conference of  
4 Commissioners on Uniform State Laws in 1982. The 1997 Act may be enacted  
5 either as a free-standing Act or as part of the Uniform Probate Code (U.P.C.).  
6 States that wish to enact the Act as part of the U.P.C. should consult Article 5, Parts  
7 1-4 of the U.P.C. for the official text of the Act as conformed to the Code’s  
8 definitions and general provisions.  
9

10 The topics covered in this Act include minors’ guardianships, adults’  
11 guardianships, and conservatorships of minors and adults. The Act is divided into  
12 five articles. Article 1 contains definitions and general provisions applicable to both  
13 guardianships and conservatorships, including provisions that relate to the office of  
14 guardian and conservator and to the jurisdiction of the courts, many of which were  
15 scattered in different sections of the prior Act. Article 2 contains provisions on  
16 guardianships for minors, whether by the court or the parent. Article 3 contains  
17 provisions for guardianships for incapacitated persons, who will most often be  
18 adults, but who may also be minors whose need for guardianship is unrelated to their  
19 age. Article 4 covers conservatorships and other protective arrangements for both  
20 minors and adults, including the procedures for appointment of conservators and the  
21 process for implementing a protective arrangement. Article 5 contains boilerplate  
22 provisions common to Uniform Acts.  
23

24 The revisions to the Uniform Guardianship and Protective Proceedings Act were  
25 precipitated by a two year study by the A.B.A. Senior Lawyers Division Task Force  
26 on Guardianship Reform. The Task Force consisted of representatives not only of  
27 the Senior Lawyers Division, but also of other A.B.A. entities, including the Real  
28 Property Probate and Trust Law Section and the Commissions on Legal Problems of  
29 the Elderly and Mental and Physical Disability Law, as well as a variety of other  
30 groups interested in guardianship, such as AARP and the National Senior Citizens  
31 Law Center. The Task Force generated a report that served as the starting point for  
32 the redrafting of the Uniform Guardianship and Protective Proceedings Act. The  
33 drafting committee of the Uniform Law Commissioners began the drafting of the  
34 revision in 1995. The revised Act was approved at the 1997 Annual Meeting of the  
35 National Conference of Commissioners on Uniform State Laws, with technical  
36 amendments offered at the 1998 Annual Meeting of the National Conference of  
37 Commissioners on Uniform State Laws, and offered to the A.B.A. for the approval  
38 of its House of Delegates at its annual meeting in 1998.  
39

40 Significant developments in the areas of guardianship and conservatorship  
41 occurred in the late 1980s and early 1990s, as states revised their guardianship and  
42 conservatorship statutes. The 1982 Act, with its emphasis on limited guardianship  
43 and conservatorship, was groundbreaking in its support of autonomy. This revised  
44 Act builds on this and the revisions occurring in the states, by providing that  
45 guardianship and conservatorship should be viewed as a last resort, that limited

1 guardianships or conservatorships should be used whenever possible, and that the  
2 guardian or conservator should always consult with the ward or protected person, to  
3 the extent feasible, when making decisions.  
4

5 Many other substantial changes are contained in the revised Act. The following  
6 summarize some of the more significant ones.  
7

8 The definition of incapacitated person is based on functional abilities, recognizing  
9 that a person may have the capacity to do some things while needing help with  
10 others. Before a guardian may be appointed for an adult or a minor for reasons  
11 other than age, the individual must be determined to be incapacitated, that is, the  
12 individual is “unable to receive and evaluate information or make or communicate  
13 decisions to such an extent that the individual lacks the ability to meet essential  
14 requirements for physical health, safety, or self-care, even with appropriate  
15 technological assistance.” (Section 102(5)). If assistive technology is available that  
16 may enable the individual to receive and evaluate information or to make or  
17 communicate decisions, then the individual may not be an “incapacitated person.”  
18

19 A parent or spouse may appoint a guardian to take office immediately upon the  
20 need. In both Articles 2 and 3 are provisions for a parental or spousal appointment  
21 of a “standby” guardian: by a parent for a minor child under Article 2 and by a  
22 parent for an adult disabled child or by a spouse for an incapacitated spouse under  
23 Article 3. The addition of these provisions was spurred by the increasing number of  
24 single-parent families in the United States as well as by the recognition that adults  
25 are living longer and may need assistance in their later lives. The standby provisions  
26 are available in a wide variety of situations where there is a need for a guardian to  
27 step in immediately upon the occurrence of an event, without seeking prior court  
28 approval. The appointment may be used by all parents of minor children as well as  
29 for the spouse of an incapacitated adult or the parent of an adult disabled child.  
30

31 A guardian or a conservator should be appointed only if there are no other lesser  
32 restrictive alternatives that will meet the respondent’s needs. The Act encourages  
33 the use of alternatives to guardianship or conservatorship and views the appointment  
34 of a guardian or a conservator as a last resort. The court may not appoint a guardian  
35 for an incapacitated person unless the court makes a finding that the respondent’s  
36 needs cannot be met by any less restrictive means. (Section 311(a)(1)(B)). The  
37 visitor appointed by the court to investigate the appropriateness of the guardianship  
38 or conservatorship requested for an adult, must investigate whether alternatives are  
39 available and report this to the court. (Sections 305(e), 406(e)).  
40

41 Additionally, the Act specifies procedural steps which must be met before a  
42 guardian for an incapacitated person or conservator may be appointed or a  
43 protective order entered. Specific information is required in the petition (Sections  
44 304, 403), the respondent must be personally served with the notice of the hearing  
45 and the petition at least fourteen days in advance of the hearing and others must  
46 receive copies (Sections 113, 309, 404), and the court must appoint a visitor

1 (Sections 305, 406). Enacting jurisdictions must choose between requiring counsel  
2 only if requested by the respondent, recommended by the visitor, or if the court  
3 otherwise orders (Alternative 1 to Sections 305(b) and 406(b)), or requiring counsel  
4 for the respondent in all cases (Alternative 2 to Sections 305(b) and 406(b)). In  
5 guardianships, the court must order a professional evaluation of the respondent if the  
6 respondent requests one or the court determines one to be appropriate (Section  
7 306), while in a conservatorship proceeding, the court may order a professional  
8 evaluation. (Section 406(f)). The respondent and proposed guardian or conservator  
9 must attend the hearing unless excused by the court for good cause. (Sections  
10 308(a), 408(a)).  
11

12 Emphasized throughout the Act are the concepts of limited guardianship and  
13 limited conservatorship. Only when no alternative to guardianship or  
14 conservatorship is available should the court create a guardianship or  
15 conservatorship. Courts are directed to tailor the guardianship or conservatorship to  
16 fit the needs of the incapacitated person and only remove those rights that the  
17 incapacitated person no longer can exercise or manage. (Sections 311(b), 409(b)). If  
18 an unlimited guardianship or conservatorship is requested, the petition must state  
19 why a limited guardianship or conservatorship is not being sought. (Sections  
20 304(b)(8), 403(c)(3)). The guardian or conservator must take the views of the ward  
21 or protected person into account when making decisions. The guardian must  
22 maintain sufficient contact with the ward so that the guardian knows of the  
23 capabilities, limitations, needs and opportunities of the ward (Sections 207(b)(1),  
24 314(b)(1)). The guardian or conservator must encourage the ward or protected  
25 person to participate in decisions, to act on his or her own behalf, and to develop or  
26 regain capacity to manage personal or financial affairs. (Sections 314(a), 418(b)).  
27 The guardian must consider the ward's expressed desires and personal values when  
28 making decisions (Section 314(a)), while the conservator, in making decisions with  
29 respect to the protected person's estate plan, or the court, in deciding on a  
30 protective arrangement, must rely, when possible, on the decision the protected  
31 person would have made. (Sections 411(c), 412(b)).  
32

33 The position of the drafting committee is that appointment of counsel should not  
34 be mandated in every guardianship under Article 3 or every conservatorship under  
35 Article 4. The Act instead provides alternative provisions on whether counsel will  
36 be required in guardianship proceedings for incapacitated persons and in  
37 conservatorship proceedings. Sections 305(b) and 406(b). The enacting jurisdiction  
38 chooses between requiring counsel only when requested by the respondent,  
39 recommended by the visitor, or otherwise ordered by the court, or requiring counsel  
40 for the respondent in all cases. The appointment of counsel is in addition to the  
41 requirement that a visitor be appointed, a requirement in all proceedings where a  
42 guardian for an incapacitated person is requested or where the appointment of a  
43 conservator is sought. Sections 305(a) and 406(a).  
44

45 The committee which drafted this Act prefers Alternative 1 to sections 305(b)  
46 and 406(b). Under the committee's preferred process, a visitor is appointed in every

1 proceeding for appointment of a guardian under Article 3, with counsel appointed on  
2 the respondent's request, the visitor's recommendation, or the court's determination  
3 that counsel is needed. (See Section 305). Concomitantly, in Article 4, a visitor is  
4 appointed in every case where a petition for appointment of conservator is filed and  
5 may be appointed when a protective arrangement is sought and the respondent is not  
6 already represented by counsel. (See Section 406). Alternative 2 for sections 305(b)  
7 and 406(b) is included at the request of the American Bar Association (A.B.A.)  
8 Commission on Legal Problems of the Elderly.  
9

10 The burden of proof in establishing a guardianship or conservatorship is clear  
11 and convincing evidence, (See Sections 311, 401) while the burden of proof for  
12 terminating a guardianship or conservatorship is prima facie evidence. (See Sections  
13 318(c), 431(d)). This distinction was made in recognition that a guardianship or  
14 conservatorship, as vehicles that take away from individuals their rights, should  
15 require a higher burden of proof (and thus more protections) to establish than should  
16 be required to restore rights to an individual.  
17

18 Monitoring of guardianships and conservatorships is critical, and the Act requires  
19 guardians to present a written report to the court within thirty days of appointment  
20 and annually thereafter (Section 317), while the conservator is required to file a plan  
21 and an inventory with the court within sixty days of appointment and annual reports  
22 thereafter. (Sections 418(c), 419, 420). Both the guardian and the conservator, in  
23 their reports, make recommendations as to whether the guardianship or  
24 conservatorship should be continued or modified. The court is required to establish  
25 a monitoring system. (Sections 317(c), 420(d)). The court may use visitors as part  
26 of the monitoring system. (Sections 317(b), 420(c)). Suggestions on what an  
27 effective monitoring system should contain can be found in Sally Balch Hurme,  
28 STEPS TO ENHANCE GUARDIANSHIP MONITORING (A.B.A. 1991)

1  
2  
3 **UNIFORM GUARDIANSHIP AND**  
4 **PROTECTIVE PROCEEDINGS ACT (1997)**  
5

6 **ARTICLE 1**  
7 **GENERAL PROVISIONS**  
8

9 **SECTION 101. SHORT TITLE.** This [Act] may be cited as the Uniform  
10 Guardianship and Protective Proceedings Act.  
11

12 **SECTION 102. DEFINITIONS.** In this [Act]:

13 (1) "Claim," with respect to a protected person, includes a claim against an  
14 individual, whether arising in contract, tort, or otherwise, and a claim against an  
15 estate which arises at or after the appointment of a conservator, including expenses  
16 of administration.

17 (2) "Conservator" means a person who is appointed by a court to manage  
18 the estate of a protected person. The term includes a limited conservator.

19 (3) "Court" means the [designate appropriate court].

20 (4) "Guardian" means a person who has qualified as a guardian of a minor or  
21 incapacitated person pursuant to appointment by a parent or spouse, or by the court.  
22 The term includes a limited, emergency, and temporary substitute guardian but not a  
23 guardian ad litem.

24 (5) "Incapacitated person" means an individual who, for reasons other than  
25 being a minor, is unable to receive and evaluate information or make or  
26 communicate decisions to such an extent that the individual lacks the ability to meet  
27 essential requirements for physical health, safety, or self-care, even with appropriate  
28 technological assistance.

29 (6) "Legal representative" includes a representative payee, a guardian or  
30 conservator acting for a respondent in this State or elsewhere, a trustee or custodian  
31 of a trust or custodianship of which the respondent is a beneficiary, and an agent

1 designated under a power of attorney, whether for health care or property, in which  
2 the respondent is identified as the principal.

3 (7) "Letters" includes letters of guardianship and letters of conservatorship.

4 (8) "Minor" means an unemancipated individual who has not attained [18]  
5 years of age.

6 (9) "Parent" means a parent whose parental rights have not been terminated.

7 (10) "Person" means an individual, corporation, business trust, estate, trust,  
8 partnership, limited liability company, association, joint venture, government,  
9 governmental subdivision, agency, or instrumentality, or any other legal or  
10 commercial entity.

11 (11) "Protected person" means a minor or other individual for whom a  
12 conservator has been appointed or other protective order has been made.

13 (12) "Respondent" means an individual for whom the appointment of a  
14 guardian or conservator or other protective order is sought.

15 (13) "State" means a State of the United States, the District of Columbia,  
16 Puerto Rico, the United States Virgin Islands, or any territory or insular possession  
17 subject to the jurisdiction of the United States.

18 (14) ["Tribe" means an Indian tribe or band, or Alaskan Native village, which  
19 is recognized by federal law or formally acknowledged by a State.

20 (15)] "Ward" means an individual for whom a guardian has been appointed.

#### 21 Comment

22 The concepts of limited guardian and limited conservator, embraced in this  
23 Act, are reflected in the definitions of "guardian" (see paragraph (4)) and  
24 "conservator" (see paragraph (2)).

25  
26 While the Act authorizes the appointment of a conservator with limited powers,  
27 no provision is made in the Act for the appointment of an emergency or temporary  
28 conservator, a type of conservatorship usually denoting an appointment of limited  
29 duration. In situations where other statutes might permit the appointment of a  
30 temporary, emergency or special conservator, the Act allows instead the court to  
31 appoint a "master." See Sections 405(a), 406(g) and 412(c). This is a departure  
32 from the 1982 Act, which provided for the appointment of special conservators, but  
33 not of temporary or emergency conservators. See, e.g., U.P.C. Section 5-408(c)  
34 (1982).  
35



1 Like the 1982 Act, the 1997 revision allows the appointment of a guardian by a  
2 parent or spouse by will or other signed writing, but subjects the appointment to  
3 significantly different requirements. See Sections 202 and 302. The definition of  
4 guardian (see paragraph (4)) includes a limited guardian, an emergency guardian, or  
5 a temporary substitute guardian. See Sections 204, 311, 312, and 313. There is a  
6 distinction between an emergency guardian and a temporary substitute guardian.  
7 Compare Sections 312 and 313. Guardian ad litem is specifically excluded from the  
8 definition of guardian, as a guardian ad litem is generally viewed as having a separate  
9 and limited role in the proceedings.

10  
11 A finding that a person is an “incapacitated person” is required before a guardian  
12 may be appointed for reasons other than that the respondent is a minor. The  
13 definition of “incapacitated person” (see paragraph (5)) requires that the respondent  
14 have an inability to receive and evaluate information or to make or communicate  
15 decisions to the point that the person’s ability to care for his or her health, safety or  
16 self is compromised. This definition emphasizes the importance of functional  
17 assessment and recognizes that the more appropriate measure of a person’s  
18 incapacity is a measurement of the person’s abilities. Like other areas of the law  
19 where the concept of capacity is used, the required incapacity for the appointment of  
20 a guardian is no longer considered an all or nothing proposition but instead it is  
21 recognized as having varying degrees. This definition is designed to work with the  
22 concepts of least restrictive alternative and limited guardianship or conservatorship-  
23 only removing those rights that the incapacitated person cannot exercise, and not  
24 establishing a guardianship or conservatorship if a lesser restrictive alternative exists.  
25 See Sections 311 and 409 for examples. These concepts are carried throughout the  
26 Act.

27  
28 The definition of incapacitated person differs significantly from the definition in  
29 the 1982 version of the Act. The requirement that the person be unable to make  
30 “responsible” decisions is deleted, as is the requirement that the person have an  
31 impairment by reason of a specified disability or other cause, a requirement which  
32 may have led the trier of fact to focus unduly on the type of the respondent’s  
33 disabling condition, as opposed to the respondent’s actual ability to function. The  
34 revised definition is based on recommendations of the 1988 Wingspread conference  
35 on guardianship reform, the report of which should be referred to for additional  
36 background. See GUARDIANSHIP: AN AGENDA FOR REFORM 15 (A.B.A. 1989). See  
37 also Stephen J. Anderer, DETERMINING COMPETENCY IN GUARDIANSHIP  
38 PROCEEDINGS (A.B.A. 1990). Courts seeking guidance on particular factors to  
39 consider should also consult the California Due Process in Competency  
40 Determination Act, California Probate Code Section 811.

41  
42 The definition of “legal representative” (see paragraph [6]) expands beyond the  
43 traditional lawyer to include as well those who act in a legally recognized  
44 representative capacity, such as a representative payee, trustee, custodian, and agent,  
45 as well as those who hold court appointments, such as the traditional guardian and  
46 conservator. This definition serves to identify those persons who must receive

1 notice of both guardianship and protective proceedings, the lawyer, if any, as well as  
2 those others holding nominated positions. See Sections 304, 403.

3  
4 Under the Act, a “minor” is defined to exclude a minor who has been  
5 emancipated. See paragraph (8). The effect of this definition is to preclude the  
6 appointment of either a guardian or conservator for an emancipated minor unless the  
7 appointment is made for reasons other than the minor’s age. Under the Act, a  
8 guardianship or conservatorship for a minor also terminates upon the minor’s  
9 emancipation. See Sections 210, 431. Under the 1982 Act, the appointment of a  
10 guardian terminated upon the minor’s marriage but not other emancipation, and the  
11 appointment of a conservator could continue until the minor attained age 21, without  
12 regard to marriage or other emancipating event.

13  
14 The drafters of the 1997 revision intentionally chose not to define parent (other  
15 than as those whose parental rights have not been terminated), instead leaving the  
16 definition up to the enacting state’s probate code. Thus, the definition of “parent”  
17 (see paragraph (9)) may or may not include a step-parent. A parent whose parental  
18 rights have been terminated, however, would not be parent under this Act even if the  
19 parent were allowed to inherit from the child under the enacting state’s probate  
20 code. Because such a parent has been found to be unfit, the Act denies that parent a  
21 continued role in determining the child’s custody, including the appointment of a  
22 guardian, whether by parental or court appointment. See Sections 202, 204, 205  
23 and 403.

24  
25 The person who is the subject of a proceeding is referred to in this Act as the  
26 “respondent.” See paragraph (12). Once a guardianship is established, the  
27 incapacitated person or minor is referred to as the “ward.” See paragraph (15).  
28 Once the conservatorship is established or other protective order entered, the  
29 respondent who was the subject of the proceeding is referred to as the “protected  
30 person.” See paragraph (11). A person for whom a guardian and a conservator has  
31 been appointed or other protective order made is both a ward and a protected  
32 person.

33  
34 For states that enact this Act, paragraph (14) gives the enacting State a  
35 process for a state court to certify questions to, and answer questions from, a tribal  
36 court, but this paragraph does not authorize a tribal court to certify or answer  
37 questions which are determined by tribal law. If a Tribe wishes to enact this Act,  
38 references to “this State” would be replaced by “this Tribe.” The definition of  
39 “Tribe” in this paragraph is broad and is intended to include Native American Tribes  
40 as well as other Native American governmental units that perform functions similar  
41 to a tribe.  
42



1 (c) A guardian or other person who receives money or property for a minor  
2 under subsection (a)(1) or (2) may only apply it to the support, care, education,  
3 health, and welfare of the minor, and may not derive a personal financial benefit  
4 except for reimbursement for necessary expenses. Any excess must be preserved for  
5 the future support, care, education, health, and welfare of the minor, and any balance  
6 must be transferred to the minor upon emancipation or attaining majority.

7 Comment

8  
9 Where a minor annually receives property of [\$5,000] or a relatively small sum  
10 that in all likelihood will be expended for the ward's support within one year from a  
11 specific payor, it would be cumbersome and unnecessarily expensive to require the  
12 establishment of a conservatorship to handle the payments. This Section allows the  
13 person required to transfer the property to do so in a more expeditious way.  
14

15 The person required to transfer the property has the option of making the  
16 transfer to the person having care and custody of the minor when the minor resides  
17 with that person, or may instead make payments to the minor's guardian, a custodian  
18 under the Uniform Transfers to Minors Act or the custodial trustee under the  
19 Uniform Custodial Trust Act, or to a financial institution where an interest-bearing  
20 account or certificate in only the minor's name is located.  
21

22 The protections of this Section do not apply if the person required to make the  
23 transfer knows that a conservator has been appointed or that there is a proceeding  
24 pending for the appointment of a conservator. Consequently, the fact that a  
25 guardian has been appointed does not require that payment be made to that  
26 guardian. A guardian of a minor may receive payments but has no power to compel  
27 payment from a third person. See Section 208. Should a guardian desire such  
28 authority, the appropriate course is for the guardian to petition the court to be  
29 appointed as conservator.  
30

31 Although the person making the transfer has no duty or obligation to see that  
32 the money or property is properly applied, this Section is a default statute and does  
33 not override any specific provisions in a will or trust instrument relating to monies to  
34 be paid to a minor. In those cases, the duty of the person making the transfer would  
35 be dictated by the terms of the instrument. This section also does not override the  
36 provisions of other statutes in the enacting jurisdiction such as the Uniform Transfers  
37 to Minors Act, which allow payment by alternative means based on the size of the  
38 minor's estate as opposed to this section, which allows payment based on the annual  
39 payment obligation of the person making the payment.  
40

1 The section limits the use of the money or property to the minor’s support, care,  
2 education, health or welfare. Only necessary expenses may be reimbursed from this  
3 money or property, with the balance being preserved for the minor’s future  
4 education, health, support, care or welfare. This section is not applicable to child  
5 support payments made pursuant to a court order because child support payments  
6 are made to another for the minor’s benefit.  
7

8 While a recipient of funds is not a fiduciary in the normally understood sense of a  
9 person appointed by the court or by written instrument, a recipient under this section  
10 is subject to fiduciary obligations. Under subsection (c), the recipient may not derive  
11 any personal benefit from the transfer and must preserve funds not used for the  
12 minor’s benefit and transfer any balance to the minor upon emancipation or  
13 attainment of majority. Should the recipient misapply the funds or property  
14 transferred, the recipient, given this fiduciary role, would be liable for breach of  
15 trust.  
16

17 The person receiving the monies may consider, in appropriate cases, the  
18 purchase of an annuity or some other financial arrangement whereby payout occurs  
19 at a time subsequent to the minor’s attainment of majority. But to provide more  
20 certainty for the transaction the recipient should consider petitioning the court under  
21 Section 412 for approval of the purchase as a protective arrangement.  
22

23 This section is derived from the Section 1-106 of the 1982 Act (U.P.C. Section  
24 5-101 (1982)).  
25

26 **SECTION 105. DELEGATION OF POWER BY PARENT OR**

27 **GUARDIAN.** A parent or guardian of a minor or incapacitated person, by a power  
28 of attorney, may delegate to another person, for a period not exceeding six months,  
29 any power regarding care, custody, or property of the minor or ward, except the  
30 power to consent to marriage or adoption.

31 **Comment**  
32

33 This section provides for a temporary delegation of powers by the parent or  
34 guardian. This section does *not* create a guardianship or grant a parent powers not  
35 previously possessed-it merely allows delegation of the powers that the individual  
36 *already* has. Thus, the ability to make a delegation under this section may be quite  
37 limited for a divorced parent without day-to-day custody of a child and, depending  
38 on the state’s other laws, may not exist at all for a parent of an adult child. But this  
39 section could be useful, for example, in other types of situations when a parent or a  
40 guardian becomes ill or has to be away from home for less than six months. The  
41 parent or guardian under this section could execute a power of attorney delegating

1 to another some or all of the powers of the parent or guardian. For example, a  
2 single parent in the military who has to go on a tour of duty that will not exceed six  
3 months could use this section to grant a power of attorney relating to the care of the  
4 parent's minor children. Should the tour of duty exceed six months, the parent  
5 would then need to renew the power. Also, this section may be used when consent  
6 to emergency treatment is needed.

7  
8 This section does not supersede the rights of persons, prior to their incapacity, to  
9 delegate powers relating to their own financial or health-care decisions. This section  
10 only authorizes the delegation of powers that are held by other persons, and then  
11 only powers held by parents or guardians.

12  
13 In appropriate circumstances, a parent may wish to use a delegation under this  
14 section in lieu of a standby appointment of a guardian under Sections 202 and 302.  
15 Because no preconditions are imposed, a delegation under this section is easier to  
16 accomplish, although a renewal every six months will be required. A parent with a  
17 potential personal incapacity may conclude that it is better to secure the more  
18 permanent appointment of a guardian under Articles 2 or 3 rather than to rely on a  
19 temporary delegation to an agent under this section.

20  
21 Although this section refers to a delegation of power over property, the  
22 application of this section to management of property is in fact quite limited.  
23 Articles 2 and 3 of the Act grant a guardian only limited powers over a ward's  
24 property, and the powers of a parent are similarly restricted. Should it become  
25 necessary to secure powers over a minor's or ward's property, the appropriate step  
26 is to petition the court for appointment of a conservator. In particular, this section  
27 does not grant a guardian appointed in the enacting jurisdiction authority to manage  
28 the property of a ward located in another state. A conservator would have such  
29 authority, however. See Sections 425(b)(1) and 433.

30  
31 This provision is based on Section 5-107 of the 1982 Act (U.P.C. Section 5-102  
32 (1982)).

33  
34 **SECTION 106. SUBJECT-MATTER JURISDICTION.** This [Act] applies  
35 to, and the court has jurisdiction over, guardianship and related proceedings for  
36 individuals domiciled or present in this State, protective proceedings for individuals  
37 domiciled in or having property located in this State, and property coming into the  
38 control of a guardian or conservator who is subject to the laws of this State.

39 Comment  
40

1 This section provides a clear delineation of jurisdiction over guardianships and  
2 protective proceedings. Under the Act, jurisdiction over an individual's person is  
3 based on the person's domicile or person's physical location while jurisdiction over a  
4 person's property is based on the person's domicile or the property's location.  
5 Consequently, location of property alone does not grant a court the authority to  
6 appoint a guardian for the person who owns the property. The person must also be  
7 domiciled or physically located in the jurisdiction. Nor does the physical location of a  
8 person alone grant the court authority to appoint a conservator or enter another  
9 protective order. The person must also be domiciled in or have property located in  
10 the jurisdiction.  
11

12 This section should be read in conjunction with Sections 107 and 108 of the Act.  
13 Section 107 allows for transfer of jurisdiction to a court in another state or foreign  
14 country, whether or not the court in the other governmental unit originally had  
15 jurisdiction to appoint a guardian or conservator or make another protective order.  
16 Section 108, which contains the rules on venue, acts as a restraint on the expansive  
17 jurisdiction granted under this section. While the presence of property alone grants  
18 the courts of a particular state the jurisdiction to appoint a conservator, should the  
19 respondent be a resident of a particular county within that state, only that county has  
20 authority to make the appointment. Also, while physical presence alone generally  
21 grants the courts of a particular place jurisdiction to appoint a guardian, only the  
22 place where an incapacitated person permanently resides has authority to appoint a  
23 guardian on other than an emergency or temporary basis. Physical presence alone  
24 merely grants the court of the person's location the authority to appoint an  
25 emergency or temporary guardian.  
26

27 This section is pre-empted in part by the Parental Kidnaping Prevention Act  
28 (PKPA) which, despite its name, is a comprehensive federal statute regulating all  
29 types of interstate custody issues for minors, including appointment of guardians.  
30 Under PKPA, the court supervising a minor's guardianship will normally lose  
31 jurisdiction six months after the minor's removal from the state, even if the court  
32 was not consulted about the transfer. The federal statute, however, does not apply  
33 with respect to proceedings relating to property or to any proceeding involving an  
34 adult. For a discussion of the impact of PKPA and related legislation on minors'  
35 guardianships, see David M. English, *Minors' Guardianship in an Age of Multiple*  
36 *Marriage*, 29 INST. ON EST. PLAN. ¶ 500 *et seq* (1995).  
37

### 38 **SECTION 107. TRANSFER OF JURISDICTION.**

39 (a) After the appointment of a guardian or conservator or entry of another  
40 protective order, the court making the appointment or entering the order may  
41 transfer the proceeding to a court in another [county] in this State or to another

1 State if the court is satisfied that a transfer will serve the best interest of the ward or  
2 protected person.

3 (b) If a guardianship or protective proceeding is pending in another state or  
4 a foreign country and a petition for guardianship or protective proceeding is filed in  
5 a court in this State, the court in this State shall notify the original court and, after  
6 consultation with the original court, assume or decline jurisdiction, whichever is in  
7 the best interest of the ward or protected person.

8 (c) A guardian, conservator, or like fiduciary appointed in another State may  
9 petition the court for appointment as a guardian or conservator in this State if venue  
10 in this State is or will be established. The appointment may be made upon proof of  
11 appointment in the other State and presentation of a certified copy of the portion of  
12 the court record in the other State specified by the court in this State. Notice of  
13 hearing on the petition, together with a copy of the petition, must be given to the  
14 ward or protected person, if the ward or protected person has attained 14 years of  
15 age, and to the persons who would be entitled to notice if the regular procedures for  
16 appointment of a guardian or conservator under this [Act] were applicable. The  
17 court shall make the appointment in this State unless it concludes that the  
18 appointment would not be in the best interest of the ward or protected person.  
19 Upon the filing of an acceptance of office and any required bond, the court shall  
20 issue appropriate letters of guardianship or conservatorship. Within 14 days after an  
21 appointment, the guardian or conservator shall send or deliver a copy of the order of  
22 appointment to the ward or protected person, if the ward or protected person has



1 attained 14 years of age, and to all persons given notice of the hearing on the  
2 petition.

3 Comment

4 This section is based on the South Dakota Codified Laws, Sections 29A-5-  
5 109 and 29A-5-114. This section sets out the process for transferring cases to  
6 another county, state, or foreign country and the procedures by which a case  
7 transferred in from another state or foreign country is to be received. In the case of  
8 a guardianship for a minor under Article 2, the Uniform Child Custody Jurisdiction  
9 and Enforcement Act should be consulted for additional rules on when a case may be  
10 transferred and the procedures to be used when more than one court is involved in  
11 making these determinations.

12  
13 This section, and Section 108, which addresses the appropriate venue for the  
14 appointment of a guardian or conservator, are designed to limit forum shopping in  
15 which some guardians and conservators have engaged and also assist the courts in  
16 keeping track of guardianships and conservatorships. Some guardians and  
17 conservators have attempted to thwart a court's authority by moving the ward or  
18 protected person to another county, state, or foreign country. The standard for  
19 transferring a guardianship or protective proceeding under this section is always the  
20 best interest of the ward or protected person.

21  
22 The use of a best interest of the ward or protected person standard may be  
23 differentiated for adults and minors. When dealing with an adult, the personal values  
24 and current and past expressed desires of the ward or protected person should be  
25 considered. To the extent that these personal values and expressed desires are  
26 unknown, the guardian or conservator should make an effort to learn the ward's or  
27 protected person's values and ask about the ward's or protected person's desires.  
28 Considering the personal values and expressed desires of the ward or protected  
29 person is also a priority consideration under this Act for decision making by  
30 guardians and conservators in general. See Sections 314(a), 411(c), and 418(b).

31  
32 Once the guardianship is established, the court does not lose jurisdiction because  
33 of a change in location of the guardian or the ward. See Section 201 and Section  
34 301.

35  
36 In the case of intra-state transfer of proceedings, transfers should be made only  
37 when the best interest of the ward or protected person will be advanced, and care  
38 should be used by the court to determine that this is not an attempt to secure more  
39 favorable venue for other reasons. Under subsection (a), courts should be  
40 particularly cognizant in minors' guardianships of attempts to use such transfers to  
41 circumvent school district assignments or tuition payment rules.

42  
43 When a guardianship or protective proceeding is started in one state and a  
44 guardianship or conservatorship already exists in another state, the courts from those

1 two states should communicate with each other. For purposes of subsection (b), the  
2 original court is the court where the petition is first filed, not necessarily where the  
3 appointment was first made. The second court, only after consultation with the first  
4 court, should take or decline jurisdiction only if doing so is in the best interest of the  
5 ward or protected person. The burden is on the second court to contact the original  
6 court because the second court would be informed of the existence of the  
7 guardianship or conservatorship as well as the contents of the petition and have  
8 access to other information of which the original court most likely would be  
9 unaware. In making this determination, the second court would ordinarily grant  
10 deference to the determination of the original court, but the granting of such  
11 deference is not specifically required by this section nor should such deference be  
12 given when the determination of the original court is clearly contrary to the current  
13 best interest of the ward or protected person.  
14

15 Should a transfer of jurisdiction be appropriate, subsection (c) provides a  
16 simplified procedure for transferring the case. The subsection assumes that the  
17 appointment in the prior jurisdiction is appropriate and that there is consequently no  
18 need to duplicate the documentation and evaluations required in the original  
19 proceeding. The establishment of the new guardianship or protective proceeding is  
20 not automatic, however. In addition to the authority to decide that jurisdiction  
21 should not be transferred, the court may also determine that the appointment is no  
22 longer in the best interest of the ward or protected person. The procedure made  
23 available in subsection (c) will most often be used for the appointment of a guardian  
24 when both the guardian and ward no longer reside in the state of the original  
25 appointment. The procedure will also prove useful when the appointment of an  
26 ancillary conservator is needed to administer property located in a state other than  
27 the state of the protected person's domicile. The appointment of a guardian in the  
28 second state would be ineffective in such circumstances because a guardian does not  
29 have general authority to manage the ward's property. Should a guardian discover  
30 that the ward has property located in another state, the guardian should explore the  
31 possibility of being appointed conservator in that state.  
32  
33

34 **SECTION 108. VENUE.**

35 (a) Venue for a guardianship proceeding for a minor is in the [county] of this  
36 State in which the minor resides or is present at the time the proceeding is  
37 commenced.

38 (b) Venue for a guardianship proceeding for an incapacitated person is in the  
39 [county] of this State in which the respondent resides and, if the respondent has been  
40 admitted to an institution by order of a court of competent jurisdiction, in the

1 [county] in which the court is located. Venue for the appointment of an emergency  
2 or a temporary substitute guardian of an incapacitated person is also in the [county]  
3 in which the respondent is present.

4 (c) Venue for a protective proceeding is in the [county] of this State in  
5 which the respondent resides, whether or not a guardian has been appointed in  
6 another place or, if the respondent does not reside in this State, in any [county] of  
7 this State in which property of the respondent is located.

8 (d) If a proceeding under this [Act] is brought in more than one [county] in  
9 this State, the court of the [county] in which the proceeding is first brought has the  
10 exclusive right to proceed unless that court determines that venue is properly in  
11 another court or that the interests of justice otherwise require that the proceeding be  
12 transferred.

#### 13 Comment

14 This section consolidates but otherwise generally follows the venue  
15 provisions of the 1982 Act except that it allows for the appointment of a permanent  
16 guardian for an incapacitated person only in the place where the incapacitated person  
17 resides. A court in the place where the incapacitated person is currently located but  
18 not a resident is not prohibited from taking action, however, such action is limited to  
19 the appointment of an emergency or temporary substitute guardian. This revision of  
20 the Act was made in direct response to the growing number of cases where older  
21 individuals have been moved across state lines and a guardianship then used to  
22 confirm custody rights in the new state. The drafters concluded that while it is  
23 always appropriate for a court on the scene to issue temporary orders to protect the  
24 person's welfare, only the court in the place where the person has the most  
25 significant contacts should be allowed to make what could turn out to be a  
26 permanent custody order. This requirement that only a court in the place where the  
27 respondent resides may appoint a permanent guardian applies not only to  
28 proceedings brought in different states, but also to multiple proceedings brought in  
29 different counties within a particular state. Subsection (d) provides that when there  
30 is more than one proceeding brought within a state, the first court decides where  
31 venue is appropriate. The first court does not automatically proceed; it should  
32 decide where proper venue lies and enter an order accordingly. See subsection (d).  
33

1 While the venue provision of the Act are generally consolidated in this section,  
2 there is one exception. The venue provisions for the appointment of a guardian by a  
3 parent or spouse without prior court approval are contained in Sections 202 and  
4 303. However, the subsequent petition to the court to confirm the parental or  
5 spousal appointment is subject to the venue requirements of this section.  
6

7 **SECTION 109. PRACTICE IN COURT.**

8 (a) Except as otherwise provided in this [Act], the rules of civil procedure,  
9 including the rules concerning appellate review, govern proceedings under this [Act].

10 (b) If guardianship and protective proceedings as to the same individual are  
11 commenced or pending in the same court, the proceedings may be consolidated.

12 **Comment**

13 This section incorporates the enacting states' rules of procedure. It is critical  
14 when separate petitions for guardianship and conservatorship are filed that the  
15 separate proceedings be consolidated into the same proceeding in order to protect  
16 the respondent's rights and to provide continuity and consistency.  
17

18 The source of this section is Sections 1-302(d) and 1-304 of the 1982 Act.

19 **SECTION 110. LETTERS OF OFFICE.** Upon the guardian's filing of an  
20 acceptance of office, the court shall issue appropriate letters of guardianship. Upon  
21 the conservator's filing of an acceptance of office and any required bond, the court  
22 shall issue appropriate letters of conservatorship. Letters of guardianship must  
23 indicate whether the guardian was appointed by the court, a parent, or the spouse.  
24 Any limitation on the powers of a guardian or conservator or of the assets subject to  
25 a conservatorship must be endorsed on the guardian's or conservator's letters.

26 **Comment**

27 A guardian must file an acceptance of office while a conservator must file an  
28 acceptance of office as well as any required bond. Any limits on the powers of the  
29 guardian or conservator must be stated in the letters. This requirement helps to  
30 secure the recognition and honoring of limited guardianships and conservatorships.

1 Under Section 424(a), third persons are charged with knowledge of the restrictions  
2 endorsed on the letters of office and are subject to possible liability for failing to act  
3 in accordance with those restrictions. Either a certified or authenticated copy of the  
4 letters may serve as proof of authority by appointment.  
5

6 **SECTION 111. EFFECT OF ACCEPTANCE OF APPOINTMENT.** By  
7 accepting appointment, a guardian or conservator submits personally to the  
8 jurisdiction of the court in any proceeding relating to the guardianship or  
9 conservatorship. The petitioner shall send or deliver notice of any proceeding to the  
10 guardian or conservator at the guardian's or conservator's address shown in the  
11 court records and at any other address then known to the petitioner.

12 **Comment**

13 Once the guardian or conservator accepts the appointment, the court has  
14 jurisdiction over the guardian or conservator in any proceeding relating to the  
15 guardianship or conservatorship. Regardless of where the guardian or conservator  
16 may move, jurisdiction over the guardian or conservator continues. See Sections  
17 201 and 301. For purposes of giving notice of proceedings to a guardian or  
18 conservator, petitioners may use the address of the guardian or conservator that is in  
19 the court file, any other address known to the petitioner, or any other procedure  
20 available under the enacting state's rules of civil procedure. It is incumbent on the  
21 guardian and the conservator to keep their current addresses in the court file.  
22

23 **SECTION 112. TERMINATION OF OR CHANGE IN GUARDIAN'S OR**  
24 **CONSERVATOR'S APPOINTMENT.**

25 (a) The appointment of a guardian or conservator terminates upon the death,  
26 resignation, or removal of the guardian or conservator or upon termination of the  
27 guardianship or conservatorship. A resignation of a guardian or conservator is  
28 effective when approved by the court. [A parental or spousal appointment as  
29 guardian under an informally probated will terminates if the will is later denied  
30 probate in a formal proceeding.] Termination of the appointment of a guardian or

1 conservator does not affect the liability of either for previous acts or the obligation  
2 to account for money and other assets of the ward or protected person.

3 (b) A ward, protected person, or person interested in the welfare of a ward  
4 or protected person may petition for removal of a guardian or conservator on the  
5 ground that removal would be in the best interest of the ward or protected person or  
6 for other good cause. A guardian or conservator may petition for permission to  
7 resign. A petition for removal or permission to resign may include a request for  
8 appointment of a successor guardian or conservator.

9 (c) The court may appoint an additional guardian or conservator at any time,  
10 to serve immediately or upon some other designated event, and may appoint a  
11 successor guardian or conservator in the event of a vacancy or make the  
12 appointment in contemplation of a vacancy, to serve if a vacancy occurs. An  
13 additional or successor guardian or conservator may file an acceptance of  
14 appointment at any time after the appointment, but not later than 30 days after the  
15 occurrence of the vacancy or other designated event. The additional or successor  
16 guardian or conservator becomes eligible to act on the occurrence of the vacancy or  
17 designated event, or the filing of the acceptance of appointment, whichever last  
18 occurs. A successor guardian or conservator succeeds to the predecessor's powers,  
19 and a successor conservator succeeds to the predecessor's title to the protected  
20 person's assets.

#### 21 Comment

22 Although a guardian or conservator may submit a resignation at any time, the  
23 resignation is not effective until the court has approved it. A guardian or  
24 conservator, regardless of how the appointment ended, is still liable for previous acts  
25 as well as the duty to account for the money and assets of the ward or protected

1 person. In the event of a termination of appointment due to the guardian's or  
2 conservator's death, the duty to account is normally performed by the personal  
3 representative of the guardian or conservator. In the event of the removal of a  
4 guardian or conservator due to the guardian's or conservator's own incapacity, the  
5 duty to account will normally be performed by the guardian's or conservator's own  
6 guardian, conservator or other legal representative.  
7

8 Those who may petition for removal of the guardian or conservator are the  
9 incapacitated person, the protected person or a person interested in the welfare of  
10 the incapacitated or protected person. Under subsection (b), the grounds for  
11 removal include the best interest of the ward or the protected person. In  
12 determining whether it is in the best interest of the ward or protected person for the  
13 guardian or conservator to be removed, the use of a best interest of the ward or  
14 protected person standard in relation to an adult may be differentiated from that used  
15 in reference to minors. When dealing with an adult, every effort should be made to  
16 determine the wishes of the ward or protected person regarding the removal of the  
17 guardian or conservator. In determining the best interest of the adult ward or  
18 protected person, the ward's or protected person's personal values and expressed  
19 desires, past or present, should be considered. Considering the personal values and  
20 expressed desires of the ward or protected person is also a priority consideration  
21 under this Act for decision making by guardians and conservators in general. See  
22 Sections 314(a), 411(c) and 418(b).  
23

24 While the section adopts a best interest of the ward or protected person  
25 standard, courts seeking more precisely stated reasons for removal may wish to  
26 consult their state's law on removal of a trustee. For a statutory list of reasons  
27 directed specifically at removal of guardians or conservators, see South Dakota  
28 Codified Laws Section 29A-5-504. Among the reasons justifying removal under the  
29 South Dakota statute are: (1) securing of the letters by material misrepresentation or  
30 mistake; (2) incapacity or illness, including substance abuse, affecting fitness for  
31 office; (3) conviction of a crime reflecting on fitness; (4) wasting or mismanagement  
32 of the estate; (5) neglecting the care and custody of the ward, protected person or  
33 legal dependents; (6) having an adverse interest that poses a substantial risk that the  
34 guardian or conservator will fail to properly perform duties; (7) failure to timely file  
35 a required account or report or otherwise comply with a court order; and (8)  
36 avoidance of service of process or notice.  
37

38 Under subsection (c), the court can appoint an additional guardian or  
39 conservator, effective either upon appointment or upon a future contingency. A  
40 court can also appoint a successor guardian or conservator to fill an existing or  
41 potential vacancy. In either case, eligibility to act occurs on the last to occur of the  
42 vacancy, the occurrence of the contingency or the filing of the acceptance of  
43 appointment. The ability to appoint a guardian or conservator to act upon some  
44 specified future event will usually be used to preplan the filling of a vacancy in office.  
45 This provision, in the states that have enacted it, has proven useful in situations  
46 involving adults with developmental disabilities. The initial guardian or conservator

1 appointed will usually be a parent of the ward or protected person, but the child's  
2 need for guardianship or conservatorship is likely to be lifelong. The ability to  
3 appoint a successor guardian or conservator at the time of the initial appointment  
4 therefore provides the parent with assurance of mind that upon the parent's death  
5 someone will be available to step in and assure continuity of care.  
6

7 The ability to appoint a successor or additional guardian to take office in the  
8 future is different from the type of standby appointments authorized in Sections 202  
9 and 302. Those types of appointments permit a guardian to be appointed to take  
10 office in the future even though no guardian is currently in office. Under this section,  
11 only the appointment of a successor or additional guardian or conservator is  
12 allowed.  
13

### 14 **SECTION 113. NOTICE.**

15 (a) Except as otherwise ordered by the court for good cause, if notice of a  
16 hearing on a petition is required, other than a notice for which specific requirements  
17 are otherwise provided, the petitioner shall give notice of the time and place of the  
18 hearing to the person to be notified. Notice must be given in compliance with [insert  
19 the applicable rule of civil procedure], at least 14 days before the hearing.

20 (b) Proof of notice must be made before or at the hearing and filed in the  
21 proceeding.

22 (c) A notice under this [Act] must be given in plain language.

#### 23 **Comment**

24 Notice may be provided by mail as well as by private courier or delivery service.  
25 If the adopting state's rules allow, a faxed copy of the notice may be an appropriate  
26 method of providing notice. This section does not supersede specific notice  
27 requirements provided elsewhere in the Act. Special notice requirements apply to a  
28 petition for the appointment of an emergency guardian and to service on the  
29 respondent of a petition for the appointment of a guardian or conservator or other  
30 protective order. See Sections 309, 312, and 404. The requirement of at least  
31 fourteen days' prior notice is copied from the 1982 Act. A fourteen day prior notice  
32 provision has also been part of the Uniform Probate Code, including its provisions  
33 on guardianships and protective proceedings, since the inception of the Code. Under  
34 subsection (a), the adopting state should use its applicable rule of civil procedure to



1 give notice, but the time for notice contained in subsection (a) should be used, even  
2 if different from that in the state's applicable rule.  
3

4 Subsection (c) provides that the notice be in plain language. The requirement  
5 that all notices be given in plain language is based on a recommendation of the  
6 Wingspread conference on guardianship reform. See GUARDIANSHIP: AN AGENDA  
7 FOR REFORM 9 (A.B.A. 1989). Although this section does not require it, if English  
8 is not the respondent's primary language, best practice and due process would direct  
9 that a copy of the notice in the respondent's primary language be provided.  
10

11 **SECTION 114. WAIVER OF NOTICE.** A person may waive notice by a  
12 writing signed by the person or the person's attorney and filed in the proceeding.  
13 However, a respondent, ward, or protected person may not waive notice.

14 **Comment**

15 Waivers in this section include both specific and general waivers. Under no  
16 circumstances may the respondent, ward, or protected person waive notice. The  
17 protection provided by this section applies to all petitions brought under this Act but  
18 is particularly pertinent to original petitions for appointment of a guardian or  
19 conservator or other protective order. See Sections 309 and 404. In consequence,  
20 except as ordered by the court under Section 113 for good cause, a period of at least  
21 fourteen days must elapse between the filing of the petition and the hearing  
22 whenever notice to a respondent, ward, or protected person is required. The source  
23 of this section is Section 1-402 of the 1982 Act.  
24

25 **SECTION 115. GUARDIAN AD LITEM.** At any stage of a proceeding, a  
26 court may appoint a guardian ad litem if the court determines that representation of  
27 the interest otherwise would be inadequate. If not precluded by a conflict of  
28 interest, a guardian ad litem may be appointed to represent several individuals or  
29 interests. The court shall state on the record the duties of the guardian ad litem and  
30 its reasons for the appointment.

31 **Comment**

32  
33 Appointments under this section will be infrequent. If the respondent is  
34 currently represented, the attorney representing the respondent should not be  
35 appointed as the guardian ad litem because of the conflict of interest, since there is a

1 distinct difference between the role of the attorney as an advocate and as a guardian  
2 ad litem. It is important that the court, when appointing a guardian ad litem, advise  
3 the guardian ad litem of his or her role. This section encourages the giving of such  
4 advice by requiring that the court record the duties of the guardian ad litem and its  
5 reasons for the appointment. The source of this section is Section 1-403 of the 1982  
6 Act. (U.P.C. Section 1-403(4)(1969)).  
7

8 **SECTION 116. REQUEST FOR NOTICE; INTERESTED PERSONS.** An  
9 interested person not otherwise entitled to notice who desires to be notified before  
10 any order is made in a guardianship proceeding, including a proceeding after the  
11 appointment of a guardian, or in a protective proceeding, may file a request for  
12 notice with the clerk of the court in which the proceeding is pending. The clerk shall  
13 send or deliver a copy of the request to the guardian and to the conservator if one  
14 has been appointed. A request is not effective unless it contains a statement showing  
15 the interest of the person making it and the address of that person or a lawyer to  
16 whom notice is to be given. The request is effective only as to proceedings  
17 conducted after its filing. A governmental agency paying or planning to pay benefits  
18 to the respondent or protected person is an interested person in a protective  
19 proceeding.

20 **Comment**

21 This section allows an interested person not otherwise entitled to notice to file a  
22 request for special notice with the guardian or conservator. For purposes of this  
23 section, an interested person in a protective proceeding includes a creditor, secured  
24 or otherwise. The section also specifically provides that an interested person in a  
25 protective proceeding includes a governmental agency that is or will be paying  
26 benefits to the respondent or protected person. Whether a creditor, governmental  
27 agency or other person is an interested person as the term is used elsewhere in the  
28 Act must be determined according to the particular issue involved. For example,  
29 under certain circumstances an interested person could include a member of the  
30 media or a “watch-dog” agency. For a request for special notice to be effective, a  
31 statement of the person’s interest must be contained in the request.  
32

1 This section is based on Section 1-404 of the 1982 Act (U.P.C. Section  
2 5-104 (1982)).

3  
4 **SECTION 117. MULTIPLE APPOINTMENTS OR NOMINATIONS.** If a  
5 respondent or other person makes more than one written appointment or nomination  
6 of a guardian or a conservator, the most recent controls.

7 Comment

8 The most recent appointment or nomination would be the one with the most  
9 recent date during the period when the respondent had capacity to make the  
10 appointment or nomination. If the most recent appointment is determined invalid  
11 due to the respondent's lack of capacity, the prior appointment would control.  
12

## 13 **ARTICLE 2**

### 14 **GUARDIANSHIP OF MINOR**

15 **SECTION 201. APPOINTMENT AND STATUS OF GUARDIAN.** A  
16 person becomes a guardian of a minor by parental appointment or upon appointment  
17 by the court. The guardianship continues until terminated, without regard to the  
18 location of the guardian or minor ward.

19 Comment

20 This Article provides for the creation and administration of guardianship over  
21 minors. The court's ability to appoint a guardian for a minor under this part is in  
22 certain cases partially or wholly superseded by special legislation relating to custody  
23 of minors. Reference should also be made to the Uniform Child Custody Jurisdiction  
24 and Enforcement Act, the Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A,  
25 and the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* For a discussion of the  
26 jurisdictional limitations, see David M. English, *Minors' Guardianship in an Age of*  
27 *Multiple Marriage*, 29 INST. ON EST. PLAN. ¶¶ 500, 502 (1995).  
28

29 This section recognizes the creation of a guardianship by parental appointment  
30 under Section 202 as well as those created by the court under Section 205. A  
31 guardian or the ward can move from the jurisdiction in which the court is located,  
32 yet the guardianship will continue until terminated and remains under the court's  
33 jurisdiction. See Section 107 regarding transfers of jurisdiction and Section 111  
34 regarding the effect of acceptance of appointment.  
35

1 This section is the same as Section 2-101 of the 1982 Act (U.P.C. Section 5-201  
2 (1982)).  
3

4 **SECTION 202. PARENTAL APPOINTMENT OF GUARDIAN.**

5 (a) A guardian may be appointed by will or other signed writing by a parent  
6 for any minor child the parent has or may have in the future. The appointment may  
7 specify the desired limitations on the powers to be given to the guardian. The  
8 appointing parent may revoke or amend the appointment before confirmation by the  
9 court.

10 (b) Upon petition of an appointing parent and a finding that the appointing  
11 parent will likely become unable to care for the child within [two] years, and after  
12 notice as provided in Section 205(a), the court, before the appointment becomes  
13 effective, may confirm the parent's selection of a guardian and terminate the rights of  
14 others to object.

15 (c) Subject to Section 203, the appointment of a guardian becomes effective  
16 upon the appointing parent's death, an adjudication that the parent is an  
17 incapacitated person, or a written determination by a physician who has examined  
18 the parent that the parent is no longer able to care for the child, whichever first  
19 occurs.

20 (d) The guardian becomes eligible to act upon the filing of an acceptance of  
21 appointment, which must be filed within 30 days after the guardian's appointment  
22 becomes effective. The guardian shall:

23 (1) file the acceptance of appointment and a copy of the will with the  
24 court of the [county] in which the will was or could be probated or, in the case of

1 another appointing instrument, file the acceptance of appointment and the appointing  
2 instrument with the court of the [county] in which the minor resides or is present;  
3 and

4 (2) give written notice of the acceptance of appointment to the  
5 appointing parent, if living, the minor, if the minor has attained 14 years of age, and  
6 a person other than the parent having care and custody of the minor.

7 (e) Unless the appointment was previously confirmed by the court, the  
8 notice given under subsection (d)(2) must include a statement of the right of those  
9 notified to terminate the appointment by filing a written objection in the court as  
10 provided in Section 203.

11 (f) Unless the appointment was previously confirmed by the court, within 30  
12 days after filing the notice and the appointing instrument, a guardian shall petition  
13 the court for confirmation of the appointment, giving notice in the manner provided  
14 in Section 205(a).

15 (g) The appointment of a guardian by a parent does not supersede the  
16 parental rights of either parent. If both parents are dead or have been adjudged  
17 incapacitated persons, an appointment by the last parent who died or was adjudged  
18 incapacitated has priority. An appointment by a parent which is effected by filing the  
19 guardian's acceptance under a will probated in the State of the testator's domicile is  
20 effective in this State.

21 (h) The powers of a guardian who timely complies with the requirements of  
22 subsections (d) and (f) relate back to give acts by the guardian which are of benefit  
23 to the minor and occurred on or after the date the appointment became effective the

1 same effect as those that occurred after the filing of the acceptance of the  
2 appointment.

3 (i) The authority of a guardian appointed under this section terminates upon  
4 the first to occur of the appointment of a guardian by the court or the giving of  
5 written notice to the guardian of the filing of an objection pursuant to Section 203.

#### 6 Comment

7 This section enables a parent to make an advance appointment of a “standby”  
8 guardian whose powers become effective upon the occurrence of certain specified  
9 contingencies. The standby appointment procedure under this section is available to  
10 all parents, but is particularly beneficial for parents with pending incapacities which  
11 will likely render them unable to care for their children at some point prior to their  
12 deaths. The section, like Section 2-102 of the 1982 Act and U.P.C. Section 5-202  
13 (1982), allows for the appointment of a guardian effective upon a parent’s death or  
14 adjudication of incapacity. Additionally, following the lead of a growing number of  
15 free-standing standby guardianship statutes enacted in the states, it allows for an  
16 appointment to become effective upon a determination that the parent is no longer  
17 able to provide care. For analysis of these state statutes, see Joshua S. Rubenstein,  
18 *Standby Guardianship Legislation: Preparing Before the Tidal Wave Hits*, 22  
19 ACTEC NOTES 60 (1996). The parent can make either type of appointment in a will  
20 or other signed writing, including a power of attorney, a trust or a document  
21 executed for the sole purpose of appointing the guardian.  
22

23 Under subsection (c), the contingencies upon which the authority of the standby  
24 guardian will become effective are the parent’s death, adjudication of incapacity or  
25 written determination by a physician who has examined the parent that the parent is  
26 no longer able to care for a minor child. The physician making the written  
27 determination should be the parent’s treating physician whenever possible, to avoid  
28 the possibility of the other parent manipulating this process in a custody battle.  
29

30 In the case of a parent who has disappeared, the appointment of an  
31 emergency guardian should be sought under Section 204(e). Under that section,  
32 preference will be given to the nominated guardian absent a showing that it is not in  
33 the best interest of the minor child for that person to be appointed.  
34

35 Subsection (a) recognizes that the appointing parent may have additional  
36 children after making the appointment, so the provision allows a parent to appoint a  
37 guardian for children who may later be born, adopted or whose custody may be  
38 given to the appointing parent, without the need to re-execute the nomination.  
39

1           The appointment of a person as guardian under this section creates a  
2 rebuttable presumption that the appointed person should be appointed as guardian  
3 and that the court should not disregard the appointment without good cause. A  
4 person who chooses not to accept the appointment is not liable for failing to act.  
5

6           Under subsection (b), the appointing parent may petition the court prior to  
7 the triggering event for advance confirmation of the appointment. Advance court  
8 confirmation terminates both the right of others to object, including an objection by  
9 the child's other parent, and the right of the appointing parent to revoke the  
10 appointment. Subsection (b) provides that a petition for advance court confirmation  
11 may be made at anytime within the recommended two years from the date of the  
12 likely need, but this time limit is placed in brackets to indicate that the enacting  
13 jurisdiction is free to select a different time period. Depending on the length of time  
14 set by the enacting states, courts may need to show flexibility regarding the time  
15 limit. It may be difficult for the appointing parent to prove with absolute certainty  
16 that the appointing parent will become unable to care for the child within the  
17 specified period of time. Courts should liberally construe this provision in favor of  
18 the appointing parent. For this reason, subsection (b) does not require absolute  
19 certainty, and instead uses the standard that it is "likely" that the guardian will be  
20 needed within the time period. If the court confirms the guardian in advance and the  
21 stated deadline (e.g., two years) has passed without the guardian's filing the  
22 acceptance of appointment required under subsection (d), the court should hold a  
23 hearing to determine the appointing parent's status and whether the advance  
24 confirmation should continue.  
25

26           While this section allows the court to confirm an appointment in advance,  
27 more typically the guardian will assume duties based solely on the parent's written  
28 appointment. A guardian so appointed must then seek court confirmation, thereby  
29 turning the standby appointment into a regular guardianship. Allowing the  
30 guardian's appointment to become effective immediately upon the triggering event  
31 avoids gaps in the care and custody of the child. The purpose of the confirmation of  
32 appointment process contained in subsections (d)-(f) is to convert a nominated  
33 guardianship into a regular guardianship as soon as possible. The court should  
34 develop procedures to monitor the conversions.  
35

36           The section does not specifically enumerate the contents of the petition for  
37 confirmation of appointment to be filed by the guardian. In order for the court to  
38 make an informed review, the petition should include the name and address of the  
39 minor; the identity and whereabouts of all persons having parental rights or serving  
40 as guardian; the petitioner's name and address, relationship to the parent and child,  
41 interest in the appointment, and a statement of the petitioner's willingness to serve;  
42 information about any custody orders; any limitations the appointing parent has  
43 placed on the powers of the appointed guardian, the powers to be given the  
44 guardian, and if an unlimited guardianship, a statement why a limited guardianship  
45 would not work; and reasons why the appointment should be confirmed. The  
46 petition should be accompanied by a death certificate, an order of adjudication of

1 incapacity or a written statement by the physician who has examined the appointing  
2 parent that the appointing parent is no longer able to care for the minor child. In this  
3 last case, the written statement should include the prognosis and diagnosis of the  
4 parent's condition, as well as the date of the doctor's examination of the parent.  
5 The petition should be accompanied by a copy of the appointing instrument, as well  
6 as any other relevant documents, such as a custody order or an order terminating  
7 parental rights. If the selection as guardian was previously confirmed pursuant to  
8 subsection (b), a copy of the order of confirmation should accompany the required  
9 notice.

10  
11 Under subsection (g), the appointment of a guardian by a parent does not  
12 supersede the parental rights of either parent. Until the appointment is confirmed by  
13 the court, the rights of the parent and the rights of the guardian coexist. While  
14 parental rights are not terminated, at least in theory, the guardian will often  
15 supersede the parental rights in fact. The parent making the appointment will no  
16 longer be able to provide care for the child, even though not yet legally  
17 incapacitated, and the other parent may be uninterested or unable to provide care for  
18 the child. To provide more certainty to the situation, the appointee should seek  
19 court confirmation of the parental appointment as soon as possible.

20  
21 At the hearing on the petition for confirmation, if the court finds that the  
22 appointing parent will not regain the ability to care for the minor child, the court  
23 should enter an order confirming the appointment, absent evidence rebutting the  
24 presumption that the appointment is in the child's best interest. If the court finds  
25 that the parent may regain ability to care for the minor child, the court should enter  
26 an order confirming the appointment for a period of time deemed appropriate by the  
27 court. An order of confirmation cuts off the right to object of the minor, the other  
28 parent, or a person other than a parent having care and custody of the minor. The  
29 confirmation also supersedes the rights of the non-appointing parent.

30  
31 Until the parental appointment is confirmed by the court, the minor, the other  
32 parent or the person other than the parent having care and custody of the minor may  
33 file an objection to the appointment under Section 203. See subsections (c) and (e).  
34 If an objection is filed, the appointed guardian has no authority to act and instead  
35 must petition the court for appointment as guardian under Section 205.

36  
37 Section (h) provides that the timely performance of the requirements for the  
38 guardian's acceptance of office relate back to give any acts performed between the  
39 appointment becoming effective and the guardian's filing of the notice of acceptance  
40 the same effect as those occurring after the filing of the notice of acceptance, as long  
41 as the prior acts are beneficial to the minor. In the event of a dispute regarding  
42 whether a guardian's prior act should be validated, the court first determines  
43 whether the act was beneficial to the minor, and if the court determines the act was  
44 beneficial, then subsection (h) will apply.  
45



1 Unless stated to the contrary in this section, the other provisions of this Act  
2 apply to a guardian appointed under this section, including the provisions relating to  
3 the duties and powers of guardians.  
4

5 **SECTION 203. OBJECTION BY MINOR OR OTHERS TO PARENTAL**  
6 **APPOINTMENT.** Until the court has confirmed an appointee under Section 202, a  
7 minor who is the subject of an appointment by a parent and who has attained 14  
8 years of age, the other parent, or a person other than a parent or guardian having  
9 care or custody of the minor may prevent or terminate the appointment at any time  
10 by filing a written objection in the court in which the appointing instrument is filed  
11 and giving notice of the objection to the guardian and any other persons entitled to  
12 notice of the acceptance of the appointment. An objection may be withdrawn, and if  
13 withdrawn is of no effect. The objection does not preclude judicial appointment of  
14 the person selected by the parent. The court may treat the filing of an objection as a  
15 petition for the appointment of an emergency or a temporary guardian under Section  
16 204, and proceed accordingly.

17 **Comment**

18 This section works with Section 202 to provide a mechanism for a listed  
19 group of individuals to object to a parental appointment made under Section 202 and  
20 to turn the appointment into a contested proceeding. The individuals who may  
21 object include the minor, if at least fourteen years old, as well as the other parent or  
22 a person other than a parent or guardian who has care or custody of the minor. The  
23 objection must be in writing and can be filed at any time prior to the court's  
24 confirmation of the appointment.  
25

26 If an objection is filed, the appointee has no authority to act and instead must file  
27 a petition for appointment as guardian under Section 205. Although the minor, the  
28 other parent, or the person who has care or custody of the minor may object to the  
29 appointment, the court still may appoint the person selected by the parent over the  
30 objection. An objection that is not timely filed will not prevent the appointment.  
31

1           When an objection is filed, the court may choose to treat the objection as a  
2 petition for the appointment of an emergency (or in appropriate cases, temporary)  
3 guardian under Section 204, and use the expedited process contained therein.  
4

5           This section is based on Section 2-103 of the 1982 Act (U.P.C. Section 5-203  
6 (1982)).  
7

8                           **SECTION 204. JUDICIAL APPOINTMENT OF GUARDIAN:**  
9                           **CONDITIONS FOR APPOINTMENT.**

10                          (a) A minor or a person interested in the welfare of a minor may petition for  
11 appointment of a guardian.

12                          (b) The court may appoint a guardian for a minor if the court finds the  
13 appointment is in the minor's best interest, and:

14    (i) the parents consent;

15    (ii) all parental rights have been terminated; or

16    (iii) the parents are unwilling or unable to exercise their parental rights.

17                          (c) If a guardian is appointed by a parent pursuant to Section 202 and the  
18 appointment has not been prevented or terminated under Section 203, that appointee  
19 has priority for appointment. However, the court may proceed with another  
20 appointment upon a finding that the appointee under Section 202 has failed to  
21 accept the appointment within 30 days after notice of the guardianship proceeding.

22                          (d) If necessary and on petition or motion and whether or not the conditions  
23 of subsection (b) have been established, the court may appoint a temporary guardian  
24 for a minor upon a showing that an immediate need exists and that the appointment  
25 would be in the best interest of the minor. Notice in the manner provided in Section  
26 113 must be given to the parents and to a minor who has attained 14 years of age.

1 Except as otherwise ordered by the court, the temporary guardian has the authority  
2 of an unlimited guardian, but the duration of the temporary guardianship may not  
3 exceed six months. Within five days after the appointment, the temporary guardian  
4 shall send or deliver a copy of the order to all individuals who would be entitled to  
5 notice of hearing under Section 205.

6 (e) If the court finds that following the procedures of this [article] will likely  
7 result in substantial harm to a minor's health or safety and that no other person  
8 appears to have authority to act in the circumstances, the court, on appropriate  
9 petition, may appoint an emergency guardian for the minor. The duration of the  
10 guardian's authority may not exceed [30] days and the guardian may exercise only  
11 the powers specified in the order. Reasonable notice of the time and place of a  
12 hearing on the petition for appointment of an emergency guardian must be given to  
13 the minor, if the minor has attained 14 years of age, to each living parent of the  
14 minor, and a person having care or custody of the minor, if other than a parent. The  
15 court may dispense with the notice if it finds from affidavit or testimony that the  
16 minor will be substantially harmed before a hearing can be held on the petition. If  
17 the guardian is appointed without notice, notice of the appointment must be given  
18 within 48 hours after the appointment and a hearing on the appropriateness of the  
19 appointment held within [five] days after the appointment.

20 Comment

21 The court, in order to make an informed decision on a petition for appointment,  
22 must have as much information as possible. The court should require that the  
23 following specific information be contained in a petition filed under subsection (a):  
24 the name, age and address of the minor; the name and address of the petitioner and  
25 the petitioner's relationship to the minor; the name and address of the proposed  
26 guardian, the proposed guardian's relationship to the minor and the proposed

1 guardian's qualifications to serve as guardian; whether the minor's school district  
2 would change if a guardian is appointed; and information about the parents of the  
3 minor, their whereabouts, and if missing or absent, the circumstances surrounding  
4 their absence and whether any court has entered any order regarding their parental  
5 rights. The petition should also include information about the minor's property and,  
6 if the guardian is appointed, where the minor would live, as well as any other  
7 information that the court would deem relevant. The court should examine the  
8 petition to make sure this information has been supplied as fully as possible and  
9 should reject any petitions that provide insufficient information.

10  
11 Subsection (a) allows a petition to be filed either by the minor or by any person  
12 interested in the minor's welfare. A person interested in the minor's welfare is any  
13 person with a serious interest or concern for the minor's welfare, including both  
14 relatives and non-relatives having knowledge of the circumstances, as well as public  
15 officials from relevant agencies. Should the court determine that the petitioner's  
16 concerns stem from interests other than the welfare and best interest of the minor,  
17 the court may dismiss the petition.

18  
19 Under this section, the appointment can be made in one of three situations:  
20 when the parents consent, when all parental rights have been terminated or when the  
21 parents are unable or unwilling to exercise their parental rights. In the last situation,  
22 the court must decide whether a parent is unwilling or unable to act. See David M.  
23 English, *Minors' Guardianship in an Age of Multiple Marriage*, 29 INST. ON EST.  
24 PLAN. ¶¶ 500, 503 (1995), for a discussion of criteria applied in determining  
25 unwillingness or unfitness of a parent to care for a minor child. This section is not to  
26 be used to resolve custody disputes between parents that are more appropriately  
27 resolved in a family law proceeding. See comments to Section 2-104 of the 1982  
28 Act and to U.P.C. Section 5-204 (1982).

29  
30 If the parent has made an appointment pursuant to Section 202, this section  
31 provides the parental appointee with priority for appointment if a petition for  
32 appointment of guardian of the minor is subsequently filed. Where, however, the  
33 appointee failed to timely accept the appointment as required in Section 202, the  
34 court can appoint another to serve as the guardian. The parental appointee has  
35 priority for appointment by the court even over the nominee of a minor age fourteen  
36 or older.

37  
38 On occasion, parents have established a guardianship for their minor child in  
39 order to change the child's school district. Allowing for such use of guardianship is  
40 inconsistent with the intent of this section. For that reason, the recommended  
41 information to be contained in the petition includes a statement as to whether the  
42 child's school district will change. This information puts the court on notice that the  
43 parents may be attempting to use a guardianship to manipulate a school assignment.  
44 The court should inquire whether there will be a change in the minor's school  
45 assignment if a guardian is appointed. Even when a change of school districts is not

1 mentioned, the court should inquire whether there will be a change in the minor's  
2 school district if a guardian is appointed.

3  
4 Subsection (d) provides for the appointment of a temporary guardian on  
5 appropriate petition or motion, when the court finds that an immediate need exists  
6 and it is in the minor's best interest for a temporary guardian to be appointed. The  
7 temporary guardianship provision is based on South Dakota Codified Laws Section  
8 29A-5-210. Notice is required as provided in Section 113. The temporary guardian  
9 has the same authority as an unlimited guardian, but the guardianship may not last  
10 for more than six months. If the need for a guardian continues beyond six months,  
11 then the temporary guardian should file a petition under Section 205 to be appointed  
12 as unlimited guardian.

13  
14 All individuals listed in Section 205(a) are required to receive notice in a  
15 temporary guardianship proceeding under subsection (d). The six month limitation  
16 on the temporary guardianship does not prevent the renewal or extension of the  
17 guardianship by court order at the expiration of the six months. However, if the  
18 duration needs to be extended, the court should examine whether a regular  
19 guardianship of the minor would be more appropriate.

20  
21 Under subsection (e), in emergencies, where following the procedures specified  
22 in Section 205 would result in serious harm to the minor's health or safety and  
23 where there is no one with authority or who is willing to act, the court, on petition,  
24 may appoint an emergency guardian for up to thirty days. Prior notice is required  
25 unless the court finds from affidavit or testimony that the minor will be seriously  
26 harmed during the time needed to give notice. Only then may the court act without  
27 notice. A court should have a process established to provide notice on an  
28 emergency basis. Proceedings without prior notice should be the *rare exception*  
29 rather than the rule. However, subsection (e) recognizes that occasionally there will  
30 be situations where giving prior notice on an emergency guardianship petition is  
31 simply not feasible. Thus, when an emergency guardianship is established without  
32 notice, notice has to be given within forty-eight hours of the appointment and a  
33 return hearing held within five days of the appointment. Although the five days is  
34 bracketed, giving states the option of adopting a different time limit, five days is the  
35 minimum notice requirement in most states for an ex parte hearing. If the enacting  
36 states choose to enact a time limit other than five days, the time chosen should be  
37 relatively short, to adequately protect the minor. The procedures under this  
38 subsection are similar to that for emergency appointments for adults, found in  
39 Section 312.

40  
41 For both temporary and emergency guardianships, it is possible that one or both  
42 parents may have authority to act but are absent, refusing to act or unable to act.  
43 The emergency provision may be used when the minor is having a health care crisis  
44 and the parents are absent or dead. In cases where the parents are missing and  
45 presumed dead, a temporary guardianship might be used, although this is a situation  
46 where the conditions for a permanent appointment of a guardian would likely be

1 met. Use of a temporary or emergency appointment may also be appropriate where  
2 the parents are absent for a set period of time. In some jurisdictions, it may be more  
3 appropriate to get an order of custody through the juvenile court rather than  
4 establishing a temporary guardianship.

5 **SECTION 205. JUDICIAL APPOINTMENT OF GUARDIAN:**

6 **PROCEDURE.**

7 (a) After a petition for appointment of a guardian is filed, the court shall  
8 schedule a hearing, and the petitioner shall give notice of the time and place of the  
9 hearing, together with a copy of the petition, to:

10 (1) the minor, if the minor has attained 14 years of age and is not the  
11 petitioner;

12 (2) any person alleged to have had the primary care and custody of the  
13 minor during the 60 days before the filing of the petition;

14 (3) each living parent of the minor or, if there is none, the adult nearest in  
15 kinship that can be found;

16 (4) any person nominated as guardian by the minor if the minor has  
17 attained 14 years of age;

18 (5) any appointee of a parent whose appointment has not been prevented  
19 or terminated under Section 203; and

20 (6) any guardian or conservator currently acting for the minor in this  
21 State or elsewhere.

22 (b) The court, upon hearing, shall make the appointment if it finds that a  
23 qualified person seeks appointment, venue is proper, the required notices have been  
24 given, the conditions of Section 204(b) have been met, and the best interest of the  
25 minor will be served by the appointment. In other cases, the court may dismiss the

1 proceeding or make any other disposition of the matter that will serve the best  
2 interest of the minor.

3 (c) If the court determines at any stage of the proceeding, before or after  
4 appointment, that the interests of the minor are or may be inadequately represented,  
5 it may appoint a lawyer to represent the minor, giving consideration to the choice of  
6 the minor if the minor has attained 14 years of age.

7 Comment

8 If the conditions for appointment set out in subsection (b) have not been met, or  
9 if the appointment is not in the minor's best interest, the court should dismiss the  
10 petition or make any other order that serves the minor's best interest, including,  
11 where appropriate, treating the petition as one for the appointment of a conservator  
12 or other protective order under Article 4.

13  
14 Under subsection (a)(3), if both parents are dead, notice and a copy of the  
15 petition must be given to the adult nearest in kinship. Where there is more than one  
16 adult in the same class, notice to one is sufficient.

17  
18 The court may, at any stage of the proceeding, appoint a lawyer to represent the  
19 minor if the conditions in subsection (c) are met. If the minor is at least fourteen  
20 years old, the minor's preference for a lawyer must be considered by the court in  
21 appointing counsel.

22  
23 This section is based on Section 2-106 of the 1982 Act (U.P.C. Section 5-206  
24 (1982)).  
25

26 **SECTION 206. JUDICIAL APPOINTMENT OF GUARDIAN:**  
27 **PRIORITY OF MINOR'S NOMINEE; LIMITED GUARDIANSHIP.**

28 (a) The court shall appoint as guardian a person whose appointment will be  
29 in the best interest of the minor. The court shall appoint a person nominated by the  
30 minor, if the minor has attained 14 years of age, unless the court finds the  
31 appointment will be contrary to the best interest of the minor.

1 (b) In the interest of developing self-reliance of a ward or for other good  
2 cause, the court, at the time of appointment or later, on its own motion or on motion  
3 of the minor ward or other interested person, may limit the powers of a guardian  
4 otherwise granted by this [article] and thereby create a limited guardianship.  
5 Following the same procedure, the court may grant additional powers or withdraw  
6 powers previously granted.

7 Comment

8 Absent a parental appointment, the only preference for the appointment of the  
9 guardian contained in this section is given to the person nominated by a minor age  
10 fourteen or older, as long as that person's appointment would be in the minor's best  
11 interest. The priority granted under this section does not override the preference  
12 given to the parental appointee under Section 204(c). Regardless of the preference  
13 granted, the standard used by the court in determining whom to appoint as guardian  
14 is the minor's best interest.

15  
16 Subsection (b) applies the concept of limited guardianship to minors. A court,  
17 whenever possible, should only grant to the guardian those powers actually needed.  
18 The court should be specific about identifying the powers of the guardian regarding  
19 the minor's education, care, health, safety, and welfare. This section gives the court  
20 flexibility to design the guardianship in a way to empower the minor as much as  
21 possible to make the minor's own decisions, either at the time of appointment or at a  
22 later date. This section can expand or limit the guardian's powers. Although the  
23 court can grant additional powers, the court can not grant powers beyond those  
24 provided in Article 2.

25  
26 Subsection (a) is based on Section 2-107 of the 1982 Act (U.P.C. Section 5-207  
27 (1982)). Subsection (b) is based on Section 2-109(e) of the 1982 Act (U.P.C.  
28 Section 5-209(e) (1982)).  
29

30 **SECTION 207. DUTIES OF GUARDIAN.**

31 (a) Except as otherwise limited by the court, a guardian of a minor ward has  
32 the duties and responsibilities of a parent regarding the ward's support, care,  
33 education, health, and welfare. A guardian shall act at all times in the ward's best  
34 interest and exercise reasonable care, diligence, and prudence.



1 (b) A guardian shall:

2 (1) become or remain personally acquainted with the ward and maintain  
3 sufficient contact with the ward to know of the ward's capacities, limitations, needs,  
4 opportunities, and physical and mental health;

5 (2) take reasonable care of the ward's personal effects and bring a  
6 protective proceeding if necessary to protect other property of the ward;

7 (3) expend money of the ward which has been received by the guardian  
8 for the ward's current needs for support, care, education, health, and welfare;

9 (4) conserve any excess money of the ward for the ward's future needs,  
10 but if a conservator has been appointed for the estate of the ward, the guardian shall  
11 pay the money at least quarterly to the conservator to be conserved for the ward's  
12 future needs;

13 (5) report the condition of the ward and account for money and other  
14 assets in the guardian's possession or subject to the guardian's control, as ordered  
15 by the court on application of any person interested in the ward's welfare or as  
16 required by court rule; and

17 (6) inform the court of any change in the ward's custodial dwelling or  
18 address.

19 Comment

20 A guardian of a minor is basically a substitute parent, but without the personal  
21 financial responsibility for the minor's support. The standard of care for the  
22 guardian is contained in subsection (a). As provided in subsection (a), the duties of  
23 a parent to which the guardian succeeds are those relating to the minor's support,  
24 care, education, health, and welfare. A guardian also has certain fiduciary  
25 responsibilities. A guardian must at all times act in the minor's best interest and  
26 exercise reasonable care, diligence, and prudence. Subsection (b) of this section, and  
27 Sections 208 and 209 are in substantial part expansions on these underlying

1 responsibilities, specifying subsidiary duties and the powers and immunities  
2 necessary to properly implement this role.

3  
4 A guardian is more than a caretaker. To properly perform the office of guardian,  
5 it is essential that the guardian, as required by subsection (b)(1), become or remain  
6 personally acquainted with the ward and maintain sufficient contact with the ward to  
7 know of the capacities, limitations, needs, opportunities, and physical and mental  
8 health of the ward. Such contact is also essential if the guardian is to act in the best  
9 interest of the ward.

10  
11 The development of the self-reliance of the ward is one of the major themes of  
12 the Act, as demonstrated by the emphasis on limited guardianship, both for minors  
13 and adults. See Section 206(b). To develop the self-reliance of the minor, whether  
14 the guardianship for the minor ward is limited or unlimited, it is essential that the  
15 minor be involved in decision making, that the guardian ascertain the minor's views  
16 and that the guardian, whenever appropriate, make decisions in line with the minor's  
17 expressed preferences. In line with this philosophy, Section 208(b)(6) permits the  
18 guardian, if reasonable under all of the circumstances, to delegate to the ward certain  
19 responsibilities for decisions affecting the ward's well-being.

20  
21 A guardian's powers with respect to the property of the ward are very limited. If  
22 the ward has significant property that requires management, the guardian should  
23 petition the court for the appointment of a conservator or other protective order as  
24 provided in subsection (b)(2). However, subsection (b)(3) requires that the guardian  
25 use the ward's funds, including government benefits received for the ward, for the  
26 ward's support, care, education, health, and welfare. The guardian must conserve  
27 any excess funds not expended for the ward's future needs, and periodically turn  
28 over the excess to the conservator, if one has been appointed. See subsection (b)(4).  
29 A guardian may also be required to report the ward's condition to the court as well  
30 as to account for money and other assets in the guardian's possession or subject to  
31 the guardian's control. See subsection (b)(5).

32  
33 Subsection (b)(6), which is new to the Act, requires that the court be informed  
34 whenever there is a change in the custodial dwelling or address of the ward.  
35 Temporary absences, such as for vacations, need not be reported. This required  
36 reporting to the court is consistent with the recommendation in NATIONAL PROBATE  
37 COURT STANDARDS, Standard 3.3.14 "Reports by the Guardian" (1993). Keeping  
38 the court informed of the minor ward's location will enable the court to exercise  
39 appropriate oversight of the guardianship. If the ward is removed to another state, it  
40 will also prevent the court from losing jurisdiction over the case without the court's  
41 knowledge. See also Section 208(b)(2), which requires the permission of the court  
42 before the ward may be relocated to another state.

43  
44 This section is based on subsections (a) and (b) of Section 2-109 of the 1982 Act  
45 (subsections (a) and (b) of U.P.C. Section 5-209 (1982)).  
46

1                                   **SECTION 208. POWERS OF GUARDIAN.**

2                                   (a) Except as otherwise limited by the court, a guardian of a minor ward has  
3 the powers of a parent regarding the ward’s support, care, education, health, and  
4 welfare.

5                                   (b) A guardian may:

6                                   (1) apply for and receive money for the support of the ward otherwise  
7 payable to the ward’s parent, guardian, or custodian under the terms of any statutory  
8 system of benefits or insurance or any private contract, devise, trust,  
9 conservatorship, or custodianship;

10                                  (2) if otherwise consistent with the terms of any order by a court of  
11 competent jurisdiction relating to custody of the ward, take custody of the ward and  
12 establish the ward’s place of custodial dwelling, but may only establish or move the  
13 ward’s custodial dwelling outside the State upon express authorization of the court;

14                                  (3) if a conservator for the estate of a ward has not been appointed with  
15 existing authority, commence a proceeding, including an administrative proceeding,  
16 or take other appropriate action to compel a person to support the ward or to pay  
17 money for the benefit of the ward;

18                                  (4) consent to medical or other care, treatment, or service for the ward;

19                                  (5) consent to the marriage of the ward; and

20                                  (6) if reasonable under all of the circumstances, delegate to the ward  
21 certain responsibilities for decisions affecting the ward’s well-being.

22                                  (c) The court may specifically authorize the guardian to consent to the  
23 adoption of the ward.

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Comment

This section should be read with Section 207. Section 207 sets out the duties of the guardian: those responsibilities which a guardian may not ignore. This section sets out the guardian's powers, the grant of which are necessary in order for the guardian to carry out the duties specified in Section 207.

Section 207(a) imposes on the guardian certain of the duties of a parent. To enable the guardian to properly carry out those duties, subsection (a) of this section grants the guardian corresponding powers of a parent with regard to the support, care, education, health, and welfare of the ward. Subsection (b) then lays out specific applications of the general powers granted in subsection (a).

Subsections (b)(1) and (b)(3) enable the guardian to carry out the guardian's limited duties with respect to the management of the property of the ward. For these duties, see subsections (b)(2)-(5) of Section 207. The powers of the guardian over the minor ward's property are quite limited, recognizing that a conservator should be appointed or other protective order sought for the minor in appropriate circumstances. The guardian is authorized under subsection (b)(1) to apply for government benefits to which the ward is entitled. Under Section 207(b)(3), the guardian must use those benefits for the ward's support, care, education, health, and welfare. Upon appointment, a guardian should also investigate whether proper application has been made for all governmental benefits to which the ward may be entitled. It may also be necessary for the guardian to seek appointment as a representative payee, should the governmental agency in question use a representative payee mechanism for making payments on behalf of beneficiaries without legal capacity.

Subsection (b)(2) recognizes that other courts may have a role in determining the custody of the ward. While a guardian generally has a right to take custody of the ward, the guardian is denied this power if to assume custody would be inconsistent with the custody order of a court of competent jurisdiction. Such an order may have been entered by a juvenile court, by a court responsible for making involuntary mental health commitments, or even by the court supervising the guardianship.

Subsection (b)(2) also prevents the guardian from moving the minor out of state without the court's prior approval. The court must determine whether such move would be in the best interest of the minor ward. The court should make certain that this provision is not used to circumvent a custody order or to avoid a determination of custody by an appropriate court. Under the Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A, the courts of the former state will generally lose jurisdiction over custody of a minor six months following the minor's removal from the state. If there is no conservator, subsection (b)(3) authorizes the guardian to file a proceeding to collect child support. In implementing this power, the guardian should consult the state's applicable child support statutes, which should be read as if incorporated into this section.

1 Under subsection (b)(4), the guardian may consent to the medical or other care,  
2 treatment or service for the ward. The guardian may ordinarily make health-care  
3 decisions for the ward without prior court authorization, but for certain types of  
4 health-care decisions, prior court approval may be required or at least be considered.  
5 For example, a guardian may ordinarily consent to elective surgery for the ward, but  
6 the guardian is strongly advised to consider seeking prior court authorization before  
7 consenting to experimental medical treatment. While this Act does not specifically  
8 require that a guardian seek prior court approval before making a particular health-  
9 care decision, such prior court approval may be required by other statute, especially  
10 when the minor's constitutional rights are in question. For example, a guardian may  
11 not be able to place a minor ward in a mental health care facility or consent to  
12 electroconvulsive therapy (ECT) or other types of shock therapy without the court's  
13 order. State statutes may require that specific procedures be followed before a  
14 guardian can consent to an abortion or certain medical treatment for the minor ward.  
15 Because of the important and competing interests at stake, a guardian should at least  
16 consult with, and may need to obtain an order from, the court if the guardian plans  
17 to refuse medical treatment on behalf of the minor ward on the grounds of the minor  
18 ward's religious beliefs.

19  
20 Under subsection (c), the court may specifically authorize the guardian to  
21 consent to the ward's adoption. This section conforms to the requirements of the  
22 Uniform Adoption Act that the guardian be given specific authority from a court in  
23 order to consent to the minor ward's adoption. The applicable section of the  
24 Uniform Adoption Act, Section 2-101 provides:

- 25  
26 (a) The only persons who may place a minor for adoption are:  
27 ...  
28 (2) a guardian expressly authorized by the court to place the  
29 minor for adoption....,

30  
31 which the comment to that section of the Uniform Adoption Act then notes is  
32 intended to refer to the court supervising the guardianship. This court is chosen  
33 because under Section 210 of this Act the adoption of the ward will have the effect  
34 of terminating the guardianship. If the enacting jurisdiction has not enacted the  
35 Uniform Adoption Act, the state should verify that subsection (c) is in harmony with  
36 the state's existing adoption laws.

37  
38 Like the adoption of the minor ward, a guardianship also terminates upon the  
39 marriage of the ward. But unlike an adoption, the guardian's consent and the court's  
40 approval is not necessarily required. Whether such consent is required will depend  
41 on the state's laws on the requirements of marriage. But to the extent that the  
42 guardian's consent may be necessary, subsection (b)(5) does allow a guardian to  
43 consent to the marriage of the ward.

44  
45 This section is based on Section 2-109(c) of the 1982 Act (U.P.C. Section 5-  
46 209(c) (1982)).



1 would be liable in the same circumstances. The guardian is not liable, just by reason  
2 of being the guardian, if the ward harms a third person. The guardian is liable only if  
3 personally at fault.  
4

5 This section is based on subsections (a) and (d) of Section 2-109 of the 1982 Act  
6 (subsection (a) and (d) of U.P.C. Section 5-209 (1982)).  
7

8 **SECTION 210. TERMINATION OF GUARDIANSHIP; OTHER**  
9 **PROCEEDINGS AFTER APPOINTMENT.**

10 (a) A guardianship of a minor terminates upon the minor's death, adoption,  
11 emancipation or attainment of majority or as ordered by the court.

12 (b) A ward or a person interested in the welfare of a ward may petition for  
13 any order that is in the best interest of the ward. The petitioner shall give notice of  
14 the hearing on the petition to the ward, if the ward has attained 14 years of age and  
15 is not the petitioner, the guardian, and any other person as ordered by the court.

16 **Comment**

17 Subsection (a) lists the traditional grounds for terminating a guardianship for a  
18 minor created by reasons of the minor's age. Guardianships created because the  
19 minor is also an incapacitated person are governed by Article 3 and may last well  
20 into adulthood. While a guardianship terminates upon emancipation of a minor, the  
21 grounds of emancipation are left to the state's law on the subject, but in many states  
22 a minor is emancipated by marriage, military service, or order of emancipation.  
23 Even though the guardianship is terminated, the guardian is still liable for previous  
24 acts and the obligation to account for the funds of the ward within the guardian's  
25 possession or control. See Section 112.  
26

27 Subsection (b) can be used to seek termination of the guardianship or to  
28 expand or restrict the guardian's powers, in furthering the ward's self-reliance. See  
29 Section 206.  
30

31 Subsection (a) is based on Section 2-210 of the 1982 Act (U.P.C. Section 5-210  
32 (1982)), but has been broadened to allow termination by any act of emancipation,  
33 not merely marriage. Subsection (b) is based on U.P.C. Section 5-212 (1982).  
34

35 **ARTICLE 3**

36 **GUARDIANSHIP OF INCAPACITATED PERSON**





1 person, specify desired limitations on the powers to be given to the guardian, and  
2 revoke or amend the appointment before confirmation by the court.

3 (c) The incapacitated person, the person having care or custody of the  
4 incapacitated person if other than the appointing parent or spouse, or the adult  
5 nearest in kinship to the incapacitated person may file a written objection to an  
6 appointment, unless the court has confirmed the appointment under subsection (d).  
7 The filing of the written objection terminates the appointment. An objection may be  
8 withdrawn and, if withdrawn, is of no effect. The objection does not preclude  
9 judicial appointment of the person selected by the parent or spouse. Notice of the  
10 objection must be given to the guardian and any other person entitled to notice of  
11 the acceptance of the appointment. The court may treat the filing of an objection as  
12 a petition for the appointment of an emergency guardian under Section 312 or for  
13 the appointment of a limited or unlimited guardian under Section 304 and proceed  
14 accordingly.

15 (d) Upon petition of the appointing parent or spouse, and a finding that the  
16 appointing parent or spouse will likely become unable to care for the incapacitated  
17 person within [two] years, and after notice as provided in this section, the court,  
18 before the appointment becomes effective, may confirm the appointing parent's or  
19 spouse's selection of a guardian and terminate the rights of others to object.

20 Comment

21 This section enables a parent or spouse to make an advance appointment of a  
22 "standby" guardian whose powers become effective upon the occurrence of certain  
23 specified contingencies. The appointment can be made by will or other instrument,  
24 which can include a durable power of attorney, a trust instrument or a specific  
25 document for the spousal or parental appointment of the guardian. The appointment  
26 is temporary. Section 303(e) requires that a guardian appointed under this section

1 seek court confirmation no more than thirty days following the filing of notice of  
2 acceptance of office.

3  
4 Sections 302 and 303 together are comparable to the standby guardianship  
5 provisions for minors in Section 202. The provisions for incapacitated persons are  
6 more tentative, since adults, unlike minors, are presumed to have the legal capacity  
7 to make their own decisions. For this reason, an appointment under this section is  
8 easily terminable. See subsection (c). Also, an appointment under this section is not  
9 a determination of the person's incapacity. See Section 303(g).

10  
11 Despite these limitations, this section is very useful, especially for parents of  
12 developmentally disabled children. For such parents, the need for a guardian for the  
13 developmentally disabled child often arises only on the parent's death or other event  
14 that necessitates that care be transferred to another. This section, by allowing a  
15 guardian of the parent's selection to step in immediately upon the necessitating  
16 event, can provide the parents with assurance of mind that care of their children will  
17 not be neglected. This section is also useful for a spouse of an individual stricken by  
18 Alzheimer's disease, when the spouse no longer is able to care for the Alzheimer's  
19 victim.

20  
21 A parent of an adult unmarried child who the parent believes is incapacitated  
22 may make an appointment under this section as may a spouse for the other spouse  
23 whom the appointing spouse believes to be incapacitated. Under subsection (c), the  
24 adult disabled child or the incapacitated spouse as well as the person having care or  
25 custody of the child or spouse or the adult nearest in kinship have the right to object  
26 to the guardian's appointment. If an objection is filed, the guardian's authority  
27 terminates, and the guardian must file a petition for appointment of guardian by the  
28 court under Section 304. If an objection is withdrawn, it has no effect. An objection  
29 does not prohibit the court from appointing the parental or spousal appointee as the  
30 guardian.

31  
32 The appointing spouse or parent may petition the court prior to the triggering  
33 event for advance confirmation of the appointment. Advance court confirmation  
34 terminates the right to object and the right of the appointing spouse or parent to  
35 revoke the appointment. Advance court confirmation is available in situations where  
36 the appointment is needed due to the pending incapacity of the appointing spouse or  
37 parent. This process provides appointing spouses and parents with peace of mind,  
38 knowing that the court has confirmed their selection of guardian.

39  
40 A petition for advance court confirmation may be made at any time within a  
41 recommended two years from the date of likely need, but this time limit is placed in  
42 brackets to indicate that the enacting jurisdiction is free to select a different period.  
43 Depending on the length of time set by the enacting states, courts may need to show  
44 flexibility regarding the time limit. It may be difficult for the appointing spouse or  
45 parent to prove with absolute certainty that the appointing spouse or parent will  
46 likely become unable to care for the incapacitated spouse or the adult disabled child

1 within the stated period of time. Courts should liberally construe this provision in  
2 favor of the appointing spouse or parent. For this reason, subsection (d) does not  
3 require absolute certainty, only that the need for a guardian within the specified time  
4 frame is “likely.” If the court confirms the guardian in advance and the stated  
5 deadline (two years) has passed without the guardian’s filing the acceptance of  
6 appointment required under Section 303(b), the court should hold a hearing to  
7 determine the status of the appointing spouse or parent and whether the advance  
8 confirmation should continue.  
9

10 Unless otherwise specified in this section, the other provisions of this Act,  
11 including the provisions relating to the duties and powers of guardians, apply to a  
12 guardian appointed by a will or other writing.  
13

14 This section is based on Section 2-201 of the 1982 Act (U.P.C. Section 5-301  
15 (1982)). However, the 1982 Act did not require court confirmation of the  
16 appointment.  
17

18 **SECTION 303. APPOINTMENT OF GUARDIAN BY WILL OR OTHER**  
19 **WRITING: EFFECTIVENESS; ACCEPTANCE; CONFIRMATION.**

20 (a) The appointment of a guardian under Section 302 becomes effective upon  
21 the death of the appointing parent or spouse, the adjudication of incapacity of the  
22 appointing parent or spouse, or a written determination by a physician who has  
23 examined the appointing parent or spouse that the appointing parent or spouse is no  
24 longer able to care for the incapacitated person, whichever first occurs.

25 (b) A guardian appointed under Section 302 becomes eligible to act upon the  
26 filing of an acceptance of appointment, which must be filed within 30 days after the  
27 guardian’s appointment becomes effective. The guardian shall:

28 (1) file the notice of acceptance of appointment and a copy of the will  
29 with the court of the [county] in which the will was or could be probated or, in the  
30 case of another appointing instrument, file the acceptance of appointment and the  
31 appointing instrument with the court in the [county] in which the incapacitated  
32 person resides or is present; and

1 (2) give written notice of the acceptance of appointment to the  
2 appointing parent or spouse if living, the incapacitated person, a person having care  
3 or custody of the incapacitated person other than the appointing parent or spouse,  
4 and the adult nearest in kinship.

5 (c) Unless the appointment was previously confirmed by the court, the  
6 notice given under subsection (b)(2) must include a statement of the right of those  
7 notified to terminate the appointment by filing a written objection as provided in  
8 Section 302.

9 (d) An appointment effected by filing the guardian's acceptance under a will  
10 probated in the State of the testator's domicile is effective in this State.

11 (e) Unless the appointment was previously confirmed by the court, within 30  
12 days after filing the notice and the appointing instrument, a guardian appointed under  
13 Section 302 shall file a petition in the court for confirmation of the appointment.  
14 Notice of the filing must be given in the manner provided in Section 309.

15 (f) The authority of a guardian appointed under Section 302 terminates upon  
16 the appointment of a guardian by the court or the giving of written notice to the  
17 guardian of the filing of an objection pursuant to Section 302, whichever first  
18 occurs.

19 (g) The appointment of a guardian under this section is not a determination  
20 of incapacity.

21 (h) The powers of a guardian who timely complies with the requirements of  
22 subsections (b) and (e) relate back to give acts by the guardian which are of benefit  
23 to the incapacitated person and occurred on or after the date the appointment

1 became effective the same effect as those that occurred after the filing of the  
2 acceptance of appointment.

3 Comment

4 The appointment of a guardian for an incapacitated person by will or other  
5 writing becomes effective on the first to occur of: the death of the appointing parent  
6 or spouse; adjudication of incapacity of that parent or spouse; or a written  
7 determination by a doctor who has examined the appointing parent or spouse that  
8 the appointing parent or spouse can no longer care for the adult disabled child or the  
9 incapacitated spouse.

10  
11 The guardian's authority terminates upon the timely filing of an objection or  
12 upon the appointing parent or spouse regaining the ability to care for the  
13 incapacitated person, or if a guardian is appointed for the incapacitated person.  
14

15 Within thirty days of the contingency giving rise to the guardianship, the  
16 guardian must file a notice of acceptance of appointment along with the appointing  
17 instrument. If the appointment was not previously confirmed by the court, the  
18 guardian also must give written notice of the acceptance and of the right to file an  
19 objection to the appointing parent or spouse, if living, the incapacitated person for  
20 whom the appointment was made, the person having care or custody of the  
21 incapacitated person, if other than the appointing parent or spouse, and to an adult  
22 nearest in kinship.  
23

24 Subsection (e) requires that the guardian file for confirmation of the appointment  
25 no more than thirty days following the filing of the notice of acceptance. Also,  
26 because an appointment under Sections 302 and 303 is based on a belief as to the  
27 person's incapacity, in seeking confirmation of the appointment by the court, the  
28 regular procedures for the appointment of a guardian will apply. See Sections 304-  
29 310.  
30

31 The petition for confirmation of appointment to be filed by a guardian must  
32 comply with the requirements of Section 304 but should be tailored to reflect the  
33 special circumstances of the prior parental or spousal appointment. The petition  
34 should include: the name and address of the incapacitated spouse or the adult  
35 disabled child, the identity and whereabouts of the adult children of the incapacitated  
36 spouse, if any, or if none, then the living parents of the incapacitated spouse, if any,  
37 or if none, then the living siblings of the incapacitated spouse; the living parents, if  
38 any, or if none, the living siblings of the adult disabled child; all persons serving as  
39 guardian; the petitioner's name and address, relationship to the married couple or to  
40 the parent and the adult disabled child, interest in the appointment, and a statement  
41 of the petitioner's willingness to serve; any limitations placed by the appointing  
42 spouse or parent on the powers of the appointed guardian; information about the  
43 petitioner; and reasons why the appointment should be confirmed.

1  
2 The petition should also indicate any limitations placed on the appointed  
3 guardian and the powers to be given to the guardian, and if an unlimited  
4 guardianship, why a limited guardianship would not work. The petition should be  
5 accompanied by a death certificate, an order of adjudication of incapacity or a  
6 written statement by the physician who has examined the appointing spouse or  
7 parent that the appointing spouse or parent is no longer able to care for the  
8 incapacitated spouse or the adult disabled child. The written statement should be  
9 made by the treating physician of the appointing parent or spouse and the statement  
10 should include the prognosis and diagnosis for the spouse or parent as well as the  
11 date of the physician's examination of the appointing parent or spouse. The petition  
12 should be accompanied by a copy of the appointing instrument, as well as any other  
13 relevant documents. If the selection as guardian was previously confirmed pursuant  
14 to Section 302(d), a copy of the order of confirmation should accompany the  
15 required notice.  
16

17 In the hearing on the petition for confirmation, if the court finds that the  
18 appointing spouse or parent will not regain the ability to care for the incapacitated  
19 spouse or adult disabled child, the court should enter an order confirming the  
20 appointment, absent evidence rebutting the presumption of appointment. If the  
21 court finds that the appointing spouse or parent may regain ability to care for the  
22 incapacitated spouse or adult disabled child, the court should enter an order  
23 confirming the appointment for a period of time deemed appropriate by the court.  
24 An order of confirmation cuts off the rights of others, including the incapacitated  
25 adult or the adult disabled child, to object.  
26

27 The determination of whether the parental or spousal appointment should be  
28 converted into a regular guardianship should be made as soon as possible. The court  
29 should develop procedures for monitoring the conversions.  
30

31 Subsection (h) provides that the timely performance of the requirements for the  
32 guardian's acceptance of office relate back to give any acts performed between the  
33 appointment becoming effective and the guardian's filing of the notice of acceptance  
34 the same effect as those occurring after the filing of the notice of acceptance, as long  
35 as those prior acts are beneficial to the incapacitated person. In the event of a  
36 dispute regarding whether a guardian's prior act should be validated, the court first  
37 determines whether the act was beneficial to the incapacitated person, and if the  
38 court determines that the act was beneficial, then subsection (h) will apply.  
39

40 **SECTION 304. JUDICIAL APPOINTMENT OF GUARDIAN:**  
41 **PETITION.**

1 (a) An individual or a person interested in the individual's welfare may  
2 petition for a determination of incapacity, in whole or in part, and for the  
3 appointment of a limited or unlimited guardian for the individual.

4 (b) The petition must set forth the petitioner's name, residence, current  
5 address if different, relationship to the respondent, and interest in the appointment  
6 and, to the extent known, state or contain the following with respect to the  
7 respondent and the relief requested:

8 (1) the respondent's name, age, principal residence, current street  
9 address, and, if different, the address of the dwelling in which it is proposed that the  
10 respondent will reside if the appointment is made;

11 (2) the name and address of the respondent's:

12 (A) spouse, or if the respondent has none, an adult with whom the  
13 respondent has resided for more than six months before the filing of the petition; and

14 (B) adult children or, if the respondent has none, the respondent's  
15 parents and adult brothers and sisters, or if the respondent has none, at least one of  
16 the adults nearest in kinship to the respondent who can be found;

17 (3) the name and address of any person responsible for care or custody of  
18 the respondent;

19 (4) the name and address of any legal representative of the respondent;

20 (5) the name and address of any person nominated as guardian by the  
21 respondent;

22 (6) the name and address of any proposed guardian and the reason why  
23 the proposed guardian should be selected;

1 (7) the reason why guardianship is necessary, including a brief description  
2 of the nature and extent of the respondent’s alleged incapacity;

3 (8) if an unlimited guardianship is requested, the reason why limited  
4 guardianship is inappropriate and, if a limited guardianship is requested, the powers  
5 to be granted to the limited guardian; and

6 (9) a general statement of the respondent’s property with an estimate of  
7 its value, including any insurance or pension, and the source and amount of any  
8 other anticipated income or receipts.

9 Comment

10 This section lists the information that must be contained in the petition for  
11 appointment of a guardian. Although the section allows a prospective ward to  
12 petition for appointment of a guardian, the court should scrutinize such a petition  
13 closely to confirm that the petition is truly voluntary, and that the petitioner has the  
14 requisite capacity to file a petition. Normally, in such a case it would be better for  
15 the individual to execute a durable power of attorney.

16  
17 Specifying the required contents of the petition is in accordance with the  
18 recommendations of both the Wingspread conference on guardianship reform and  
19 the Commission on National Probate Court Standards. See GUARDIANSHIP: AN  
20 AGENDA FOR REFORM 9 (A.B.A. 1989); NATIONAL PROBATE COURT STANDARDS,  
21 Standard 3.3.1, “Petition” (1993)

22  
23 Subsections (b)(2)-(6) require the listing in the petition of family members and  
24 others who may have information useful to the court and to whom notice of the  
25 proceeding must be given under Section 309(b). These persons will likely have the  
26 greatest interest in protecting the respondent and in making certain that the proposed  
27 guardianship is appropriate.

28  
29 Subsection (b)(2)(A) requires that the petition contain the name and address of  
30 the spouse or, if none, then an adult with whom the respondent has resided for more  
31 than six months before the petition is filed. Included among the persons with whom  
32 the respondent may have resided are domestic partners and companions. Note that  
33 there is no requirement that the respondent have resided for more than six months  
34 *immediately prior* to the filing of the petition, just that the requirement have been  
35 met at some point in time before the petition was filed. In applying this provision,  
36 the court should focus on the purpose of this provision—*i.e.* to obtain a list of  
37 persons who likely have a significant interest in the respondent’s welfare. Courts



1 should use a reasonableness standard so that the petitioner does not have to give the  
2 name of every person with whom the respondent has resided in the respondent's  
3 entire life and whose current interest in the respondent's welfare may be quite  
4 remote. Also, in interpreting what is meant by "resided," the closeness of the  
5 relationship to the respondent should be taken into account—for example, the on-site  
6 manager of a 50-apartment complex whose contact with the respondent was limited  
7 to collecting the rent should not be considered as fitting within the definition.  
8 However, for a nursing home resident, the term might include her best friend who  
9 resides on the next floor.

10  
11 Courts should consider whether they wish to exclude persons providing care for  
12 a fee from the class of persons with whom it is considered that the respondent  
13 resided. This would limit the application of subsection (b)(2)(A) to individuals with  
14 whom the respondent has a close personal relationship, a relative, or to a domestic  
15 partner or companion, and would eliminate a professional relationship such as that of  
16 a housekeeper, landlord, or owner of a board and care facility. The committee that  
17 drafted the Act originally used the language "domestic partner or companion," and  
18 intended to limit the application of this section to the spouse, domestic partner or  
19 companion, but at the 1997 Annual Meeting of the Uniform Law Commissioners,  
20 where this Act was approved, this phrase was replaced by the phrase "with whom  
21 the respondent has resided for more than six months." The intent behind this  
22 amendment was not to substantially broaden the concept but only to expand it to  
23 include other individuals who have had an enduring relationship with the respondent  
24 for at least a six-month period and who, because of this relationship, should be given  
25 notice.

26  
27 Subsection (b)(2)(B) requires that the petition contain the names and addresses  
28 of the respondent's adult children or, if none, parents and adult brothers and sisters  
29 or, if none, a relative of the nearest degree in which a relation can be found.  
30 However, if there are several adults of equal degree of kinship to the respondent,  
31 the name and address of one is all that is required, not the names and addresses of  
32 the members of the entire class.

33  
34 Under subsection (b)(4), if the respondent has a legal representative, the  
35 representative's name and address must be included in the petition. A "legal  
36 representative" is defined in Section 102(6). Notice to such representative, as  
37 required by Section 309(b), is especially critical for ascertaining whether a  
38 guardianship is really necessary. For example, the court may conclude that there is  
39 no need to appoint a guardian if a guardian has already been appointed elsewhere or  
40 the respondent has executed a durable power of attorney with authority in the agent  
41 to make health and personal care decisions.

42  
43 Subsection (b)(8) emphasizes the importance of limited guardianship, the  
44 encouragement of which is a major theme of the Act. The petitioner, when  
45 requesting an unlimited guardianship, must state in the petition why a limited

1 guardianship would not work. If a limited guardianship is requested, the petition  
2 must set out the recommended powers to be granted to the guardian.

3  
4 Subsection (b)(9) requires the petitioner to include a general statement of the  
5 respondent's property, including an estimated value, insurance and pension  
6 information and information about other anticipated income or receipts. This  
7 information should be as detailed as possible to enable the visitor to expeditiously  
8 complete the required report, see Section 305, and to enable the court to determine  
9 whether a protective order will be needed. See Section 311.

10 **SECTION 305. JUDICIAL APPOINTMENT OF GUARDIAN:**

11 **PRELIMINARIES TO HEARING.**

12 (a) Upon receipt of a petition to establish a guardianship, the court shall set  
13 a date and time for hearing the petition and appoint a [visitor]. The duties and  
14 reporting requirements of the [visitor] are limited to the relief requested in the  
15 petition. The [visitor] must be an individual having training or experience in the type  
16 of incapacity alleged.

17 **ALTERNATE PROVISIONS ON APPOINTMENT OF A LAWYER**

18 **[ALTERNATIVE 1]**

19 [(b) The court shall appoint a lawyer to represent the respondent in the  
20 proceeding if:

- 21 (1) requested by the respondent;  
22 (2) recommended by the [visitor]; or  
23 (3) the court determines that the respondent needs representation.]

24 **[ALTERNATIVE 2]**

25 **[(b) Unless the respondent is represented by a lawyer, the court shall**  
26 **appoint a lawyer to represent the respondent in the proceeding.]**

27 **END OF ALTERNATE PROVISIONS**

1 (c) The [visitor] shall interview the respondent in person and, to the extent  
2 that the respondent is able to understand:

3 (1) explain to the respondent the substance of the petition, the nature,  
4 purpose, and effect of the proceeding, the respondent's rights at the hearing, and the  
5 general powers and duties of a guardian;

6 (2) determine the respondent's views about the proposed guardian, the  
7 proposed guardian's powers and duties, and the scope and duration of the proposed  
8 guardianship;

9 (3) inform the respondent of the right to employ and consult with a  
10 lawyer at the respondent's own expense and the right to request a court-appointed  
11 lawyer; and

12 (4) inform the respondent that all costs and expenses of the proceeding,  
13 including respondent's attorney's fees, will be paid from the respondent's estate.

14 (d) In addition to the duties imposed by subsection (c), the [visitor] shall:

15 (1) interview the petitioner and the proposed guardian;

16 (2) visit the respondent's present dwelling and any dwelling in which the  
17 respondent will live if the appointment is made;

18 (3) obtain information from any physician or other person who is known  
19 to have treated, advised, or assessed the respondent's relevant physical or mental  
20 condition; and

21 (4) make any other investigation the court directs.

22 (e) The [visitor] shall promptly file a report in writing with the court, which  
23 must include:

1 (1) a recommendation as to whether a lawyer should be appointed to  
2 represent the respondent;

3 (2) a summary of daily functions the respondent can manage without  
4 assistance, could manage with the assistance of supportive services or benefits,  
5 including use of appropriate technological assistance, and cannot manage;

6 (3) recommendations regarding the appropriateness of guardianship,  
7 including as to whether less restrictive means of intervention are available, the type  
8 of guardianship, and, if a limited guardianship, the powers to be granted to the  
9 limited guardian;

10 (4) a statement of the qualifications of the proposed guardian, together  
11 with a statement as to whether the respondent approves or disapproves of the  
12 proposed guardian, and the powers and duties proposed or the scope of the  
13 guardianship;

14 (5) a statement as to whether the proposed dwelling meets the  
15 respondent's individual needs;

16 (6) a recommendation as to whether a professional evaluation or further  
17 evaluation is necessary; and

18 (7) any other matters the court directs.

19 Legislative Note

20 Those states that enact Alternative 2 of subsection (b) which requires  
21 appointment of counsel for the respondent in all proceedings for appointment of a  
22 guardian should not enact subsection (e)(1).

23 Comment

24  
25 Alternative provisions are offered for subsection (b). Alternative 1 is the drafting  
26 committee's position, and the one adopted by the NCCUSL. Alternative 1 relies on

1 an expanded role for the “visitor,” who can be chosen or selected to provide the  
2 court with advice on a variety of matters other than legal issues. Appointment of a  
3 lawyer, nevertheless, is *required* under Alternative 1 when the court determines that  
4 the respondent needs representation, or counsel is requested by the respondent or  
5 recommended by the visitor.  
6

7 Alternative 2 is derived from Section 2-203 of the 1982 Act (U.P.C. Section 5-  
8 303). It is expected that in states enacting Alternative 1 of subsection (b), counsel  
9 will be appointed in virtually all of the cases. However, the A.B.A. Commission on  
10 Legal Problems of the Elderly attached great significance to expressly making  
11 appointment of counsel “mandatory.” Therefore, for states which wish to provide  
12 for “mandatory appointment” of counsel, Alternative 2 should be enacted.  
13

14 In Alternative 1 for subsection (b), then, appointment of counsel for an  
15 unrepresented respondent is mandated when requested by the respondent, when  
16 recommended by the visitor, or when the court determines the respondent needs  
17 representation. This requirement is in accord with the National Probate Court  
18 Standards. NATIONAL PROBATE COURT STANDARDS, Standard 3.3.5 “Appointment  
19 of Counsel” (1993), which provides:  
20

21 (a) Counsel should be appointed by the probate court to represent the  
22 respondent when:

- 23 (1) requested by an unrepresented respondent;
- 24 (2) recommended by a court visitor;
- 25 (3) the court, in the exercise of its discretion, determines that  
26 the respondent is in need of representation; or
- 27 (4) otherwise required by law.  
28

29 (b) The role of counsel should be that of an advocate for the  
30 respondent.  
31

32 Alternative 1 of subsection (b) follows the National Probate Court Standards,  
33 Standard 3.3.5(a)(1) through (a)(3). Alternative 2 perhaps may be said to be in  
34 accord with the National Probate Court Standards, Standard 3.3.5(a)(4).  
35

36 The drafting committee for this Act debated at length whether to mandate  
37 appointment of counsel or to expand the role of the visitor. The drafting committee  
38 concluded that as between the two, the visitor may be more helpful to the court in  
39 providing information on a wider variety of issues and concerns, by acting as the  
40 eyes and ears of the court as well as determining the respondent’s wishes and  
41 conveying them to the court. The committee was concerned that including  
42 mandatory appointment of counsel would cause many to view this Act as a “lawyer’s  
43 bill” and thus severely handicap the Act’s acceptance and adoption. It is the intent  
44 of the committee that counsel for respondent be appointed in all but the most clear  
45 cases, such as when the respondent is clearly incapacitated.  
46

1 For jurisdictions enacting Alternative 1 under subsection (b), the visitor needs to  
2 be especially sensitive to the fact that if the respondent is incapacitated, then the  
3 respondent may not have sufficient capacity to intelligently and knowingly waive  
4 appointment of counsel. A court should err on the side of protecting the  
5 respondent’s rights and appoint counsel in most cases.  
6

7 Appointment of a visitor is mandatory (subsection (a)), regardless of which  
8 alternative enacted under subsection (b). The visitor serves as the information  
9 gathering arm of the court. The visitor can be a physician, psychologist, or other  
10 individual qualified to evaluate the alleged impairment, such as a nurse, social  
11 worker, or individual with pertinent expertise. It is imperative that the visitor have  
12 training or experience in the type of incapacity alleged. The visitor must individually  
13 meet with the respondent, the petitioner and the proposed guardian. The visitor’s  
14 report must contain information and recommendations to the court regarding the  
15 appropriateness of the guardianship, whether lesser restrictive alternatives might  
16 meet the respondent’s needs, recommendations about further evaluations, powers to  
17 be given the guardian, and the appointment of counsel. If the petition is withdrawn  
18 prior to the appointment of the visitor, no appointment of the visitor is necessary.  
19

20 NATIONAL PROBATE COURT STANDARDS, Standard 3.3.4 “Court Visitor” (1993)  
21 provides:  
22

23 The probate court should require a court appointee to visit with the  
24 respondent in a guardianship petition to (1) explain the rights of the  
25 respondent; (2) investigate the facts of the petition; and (3) explain  
26 the circumstances and consequences of the action. The visitor should  
27 investigate the need for additional court appointments and should file  
28 a written report with the court promptly after the visit.  
29

30 The visitor must visit the respondent in person and explain to the respondent a  
31 number of items, to the extent the respondent can understand. If the respondent  
32 does not have a good command of the English language, then the visitor should be  
33 accompanied by an interpreter. The drafters did not mandate that the visitor be able  
34 to speak the respondent’s primary language, but good practice and due process  
35 protections dictate the use of interpreters where needed for the respondent to  
36 understand. The phrase “to the extent that the respondent is able to understand” is a  
37 recognition that some respondents may be so impaired that they are unable to  
38 understand. If assistive devices are needed in order for the visitor to explain to the  
39 respondent in a manner necessary so that the respondent can understand, then the  
40 visitor should use those assistive devices. The visitor is also charged with  
41 confirming compliance with the Americans With Disabilities Act when visiting the  
42 respondent’s dwelling and the proposed dwelling in which it is expected that the  
43 respondent will reside.  
44

45 Subsection (c)(4) puts the respondent on notice that if the respondent has an  
46 estate, costs and expenses are paid from the estate, including attorney’s fees and

1 visitor’s fees. If there is an estate, those entitled to compensation would be paid  
2 from the estate. If there is no estate, those entitled to compensation will ordinarily  
3 be compensated by whatever process the enacting state has for indigent proceedings,  
4 such as from the county general fund, unless the enacting jurisdiction has made other  
5 arrangements. If a conservatorship exists, payment is made pursuant to the  
6 procedures provided in Section 417, otherwise the guardian must file a fee petition.  
7 See Section 316.  
8

9 The visitor must talk with the physician or other person who is known to have  
10 assessed, treated or advised about the respondent’s relevant physical or mental  
11 condition. This information is crucial to the court in making a determination of  
12 whether to grant the petition, since a professional evaluation will no longer be  
13 required in every case. See Section 306. If the doctor refuses to talk to the visitor,  
14 the visitor may need to seek an order from the appointing court authorizing the  
15 release of the information.  
16

17 The visitor’s report must be in writing and include a list of recommendations or  
18 statements. For states enacting Alternative 1 to subsection (b), if the visitor does  
19 not recommend that a lawyer be appointed, the visitor should include in the report  
20 the reasons why a lawyer should not be appointed. States enacting this Act should  
21 consider developing a checklist for the items enumerated in subsection (e).

22 “Visitor” is bracketed in recognition that states use different words to refer to  
23 this position. States adopting this Act should insert the term used in their states.  
24

25 **SECTION 306. JUDICIAL APPOINTMENT OF GUARDIAN:**

26 **PROFESSIONAL EVALUATION.** At or before a hearing under this [article], the  
27 court may order a professional evaluation of the respondent and shall order the  
28 evaluation if the respondent so demands. If the court orders the evaluation, the  
29 respondent must be examined by a physician, psychologist, or other individual  
30 appointed by the court who is qualified to evaluate the respondent’s alleged  
31 impairment. The examiner shall promptly file a written report with the court.  
32 Unless otherwise directed by the court, the report must contain:

- 33 (1) a description of the nature, type, and extent of the respondent’s specific  
34 cognitive and functional limitations;

1 (2) an evaluation of the respondent's mental and physical condition and, if  
2 appropriate, educational potential, adaptive behavior, and social skills;

3 (3) a prognosis for improvement and a recommendation as to the appropriate  
4 treatment or habilitation plan; and

5 (4) the date of any assessment or examination upon which the report is  
6 based.

7 Comment

8 Under the 1982 Act, a professional evaluation was mandatory. See Section  
9 2-203(b) of the 1982 Act (U.P.C. Section 5-303(b) (1982)). This section is a major  
10 departure. The court *may* order a professional evaluation but *shall* order the  
11 evaluation *only* if the respondent demands it. If an evaluation is ordered, then it  
12 must be performed by a professional who is qualified to evaluate the alleged  
13 impairment of the respondent. When counsel is appointed, the respondent may  
14 demand the evaluation through counsel. If the respondent is truly incapacitated and  
15 not represented by counsel, it is unlikely that the respondent will demand an  
16 evaluation. The court still has the ability to order a professional evaluation either on  
17 the visitor's recommendation or on its own motion. Although a reading of this  
18 section may leave the impression that a professional evaluation will be ordered  
19 sparingly, the converse is true. A court should order a professional evaluation any  
20 time it is not absolutely clear, based on its own assessment or on the visitor's report,  
21 that the respondent is incapacitated. Further, by providing the court with an expert  
22 evaluation of the respondent's abilities and limitations, the professional evaluation  
23 will be crucial to the court in establishing a limited guardianship.

24  
25 The evaluation of the respondent's physical and mental condition referred to in  
26 paragraph (2) should include a summary of the consultation with the respondent's  
27 treating physician. Even though the visitor's report required by Section 305 may  
28 contain information from the treating physician, it is crucial for the accuracy of the  
29 evaluation that the professional evaluator consult about the respondent's treatment,  
30 and include in the evaluation a summary of the information received and relied upon  
31 and the date of the consultation.

32  
33 **SECTION 307. CONFIDENTIALITY OF RECORDS.** The written report  
34 of a [visitor] and any professional evaluation are confidential and must be sealed  
35 upon filing, but are available to:

36 (1) the court;



1 (2) the respondent without limitation as to use;

2 (3) the petitioner, the [visitor], and the petitioner's and respondent's lawyers,  
3 for purposes of the proceeding; and

4 (4) other persons for such purposes as the court may order for good cause.

5 **Comment**

6 This section is new to the Act, although a number of states have a comparable  
7 provision. This section is designed to protect the respondent's privacy, but still  
8 make records accessible when needed, to any of the involved parties or to others on  
9 a showing of good cause. The drafting committee recognized that the media and  
10 "watch-dog" groups perform essential functions of deterring abuse and facilitating  
11 reform, and in drafting this provision balanced the need to protect the respondent's  
12 privacy with the need to access to the information.

13 **SECTION 308. JUDICIAL APPOINTMENT OF GUARDIAN:**

14 **PRESENCE AND RIGHTS AT HEARING.**

15 (a) Unless excused by the court for good cause, the proposed guardian shall  
16 attend the hearing. The respondent shall attend and participate in the hearing, unless  
17 excused by the court for good cause. The respondent may present evidence and  
18 subpoena witnesses and documents; examine witnesses, including any court-  
19 appointed physician, psychologist, or other individual qualified to evaluate the  
20 alleged impairment, and the [visitor]; and otherwise participate in the hearing. The  
21 hearing may be held in a location convenient to the respondent and may be closed  
22 upon the request of the respondent and a showing of good cause.

23 (b) Any person may request permission to participate in the proceeding.  
24 The court may grant the request, with or without hearing, upon determining that the  
25 best interest of the respondent will be served. The court may attach appropriate  
26 conditions to the participation.  
27

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Comment

The proposed guardian is required to attend the hearing, although the court may excuse the proposed guardian's attendance on a showing of good cause. This provision is based on a recommendation from NATIONAL PROBATE COURT STANDARDS, Standard 3.3.8(c), "Hearing" (1993). The guardian's presence at the hearing gives the court the opportunity to determine the guardian's appropriateness for appointment and to make any other inquiry of the guardian that the court deems to be appropriate and well as to emphasize to the guardian the gravity of the guardian's responsibilities.

Also new to the Act is the requirement that the respondent must attend the hearing unless excused by the court on a showing of good cause. The respondent has the right to take an active role in the hearing. There may be instances where circumstances dictate that the court hold the hearing where the respondent is located.

The respondent can request that the hearing be closed, but good cause must again be shown for this to occur. Others may make a request to participate, which can be granted by the court without a hearing, if the court finds that the respondent's best interest is served by the participation. The court's order granting the request to participate should indicate the extent to which participation will be allowed.

This section has some components of subsections (c) and (d) of Section 2-303 of the 1982 Act (subsections (c) and (d) of U.P.C. Section 5-303 (1982)).

**SECTION 309. NOTICE.**

(a) A copy of a petition for guardianship and notice of the hearing on the petition must be served personally on the respondent. The notice must include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and include a description of the nature, purpose, and consequences of an appointment. A failure to serve the respondent with a notice substantially complying with this subsection precludes the court from granting the petition.

(b) In a proceeding to establish a guardianship, notice of the hearing must be given to the persons listed in the petition. Failure to give notice under this

1 subsection does not preclude the appointment of a guardian or the making of a  
2 protective order.

3 (c) Notice of the hearing on a petition for an order after appointment of a  
4 guardian, together with a copy of the petition, must be given to the ward, the  
5 guardian, and any other person the court directs.

6 (d) A guardian shall give notice of the filing of the guardian's report,  
7 together with a copy of the report, to the ward and any other person the court  
8 directs. The notice must be delivered or sent within 14 days after the filing of the  
9 report.

10 Comment.

11  
12 Personal service of the petition and notice of hearing on the respondent is  
13 required. A failure to personally serve the respondent is jurisdictional, as is a notice  
14 that does not substantially comply with the requirements of subsection (a). Notice  
15 of hearing must be given to the persons who are listed in the petition but failing to  
16 give notice to those listed (other than the respondent) is not jurisdictional.  
17

18 Subsection (c) addresses the notice requirements on hearings on petitions for  
19 orders subsequent to the appointment of a guardian-the ward and the guardian, as  
20 well as anyone else the court directs, must be given copies of any notice of hearing  
21 and a copy of any petition. This provision, along with subsection (d), requiring that  
22 the ward receive a copy of the guardian's report and a copy of the notice of filing of  
23 the report, ensures that the ward is kept informed of developments in the  
24 guardianship.  
25

26 The NATIONAL PROBATE COURT STANDARDS, Standard 3.3.7 "Notice" (1993),  
27 provides that the respondent should receive timely notice prior to the hearing and  
28 that written notice should be in both plain language and in large type, indicating, at  
29 a minimum, the place and time of the hearing, the nature and possible consequences of  
30 the hearing, and the respondent's rights. Similar recommendations are contained in  
31 the report of the Wingspread conference on guardianship reform, which also  
32 recommends, in line with Section 113 of this Act, that the respondent be given at  
33 least fourteen days notice of hearing on a petition for the appointment of a guardian.  
34 See GUARDIANSHIP: AN AGENDA FOR REFORM 9-12 (A.B.A. 1989).  
35

36 This section is based on Section 2-204 of the 1982 Act (U.P.C. Section 5-304  
37 (1982)).

1                                   **SECTION 310. WHO MAY BE GUARDIAN: PRIORITIES.**

2                                   (a) Subject to subsection (c), the court in appointing a guardian shall  
3 consider persons otherwise qualified in the following order of priority:

4                                   (1) a guardian, other than a temporary or emergency guardian, currently  
5 acting for the respondent in this State or elsewhere;

6                                   (2) a person nominated as guardian by the respondent, including the  
7 respondent's most recent nomination made in a durable power of attorney, if at the  
8 time of the nomination the respondent had sufficient capacity to express a  
9 preference;

10                                  (3) an agent appointed by the respondent under [a durable power of  
11 attorney for health care] [the Uniform Health-Care Decisions Act];

12                                  (4) the spouse of the respondent or a person nominated by will or other  
13 signed writing of a deceased spouse;

14                                  (5) an adult child of the respondent;

15                                  (6) a parent of the respondent, or an individual nominated by will or  
16 other signed writing of a deceased parent; and

17                                  (7) an adult with whom the respondent has resided for more than six  
18 months before the filing of the petition.

19                                  (b) With respect to persons having equal priority, the court shall select the  
20 one it considers best qualified. The court, acting in the best interest of the  
21 respondent, may decline to appoint a person having priority and appoint a person  
22 having a lower priority or no priority.

1 (c) An owner, operator, or employee of [a long-term-care institution] at  
2 which the respondent is receiving care may not be appointed as guardian unless  
3 related to the respondent by blood, marriage, or adoption.

4 Comment

5 This section gives top priority to existing guardians appointed elsewhere, to the  
6 respondent's nominee for the position, and to the respondent's agent, in that order.  
7 Existing guardians are granted a first priority for two reasons. First, many of these  
8 cases will involve transfers of a guardianship from another state. To assure a  
9 smooth transition, the currently appointed guardian appointed in this state or another  
10 should have the right to the appointment at the new location. Second, other cases  
11 will involve situations where a guardianship appointment is sought despite the  
12 appointment in another place. Granting the existing guardian priority will deter such  
13 forum shopping. If the existing guardian is inappropriate for some reason,  
14 subsection (b) permits the court to pass over the existing guardian and appoint  
15 another with or without priority. While an existing guardian is generally granted a  
16 first priority for appointment, a temporary substitute and an emergency guardian are  
17 excluded from priority because of the short-term nature of their involvement.  
18

19 A guardian or individual nominated by the respondent or the agent named in the  
20 respondent's health care power of attorney has priority for appointment over the  
21 respondent's relatives. The nomination may include anyone nominated orally at the  
22 hearing, if the respondent has sufficient capacity at the time to express a preference.  
23 The nomination may also be made by a separate document. While it is generally  
24 good practice for an individual to nominate as the guardian the agent named in a  
25 durable power of attorney, the section grants such an agent a preference even in the  
26 absence of a specific nomination. The agent is granted a preference on the theory  
27 that the agent is the person the respondent would most likely prefer to act. The  
28 nomination of the agent will also make it more difficult for someone to use a  
29 guardianship to thwart the authority of the agent. To assure that the agent will be in  
30 a position to assert this priority, Section 304(b)(4) requires that the agent receive  
31 notice of the proceeding. Also, until the court has acted to approve the revocation  
32 of that authority, Section 316(c) provides that the authority of an agent for health-  
33 care decisions takes precedence over that of the guardian.  
34

35 Subsection (a)(7) gives a seventh-level preference to a domestic partner or  
36 companion or an individual who has a close, personal relationship with the  
37 respondent. Note that there is no requirement that the respondent had resided for  
38 more than six months *immediately prior* to the filing of the petition, just that the  
39 requisite residency have occurred at some point in time before the petition is filed.  
40 Courts should use a reasonableness standard in applying this subsection so that  
41 priority is given to someone with whom the respondent has had a close, enduring  
42 relationship. For factors to consider in making this determination, see the comment

1 to Section 304, which discusses the interpretation of the phrase “an adult with whom  
2 the respondent has resided for more than six months before the filing of the petition”  
3 within the context of the persons required to be listed in the petition for  
4 appointment. Note that although the phrase can be interpreted quite broadly, it is  
5 intended to be descriptive of those individuals who have had an enduring relationship  
6 with the respondent for at least a six month period and who, because of this  
7 relationship, should be given a priority for consideration as guardian.  
8

9 Subsection (c) prohibits anyone affiliated with a long-term care institution at  
10 which the respondent is receiving care from being appointed as guardian absent a  
11 blood, marital or adoptive relationship. Strict application of this subsection is crucial  
12 to avoid a conflict of interest and to protect the ward. Each state enacting the Act  
13 needs to insert the particular term or terms used in the state for those facilities  
14 considered to be long-term care institutions.  
15

16 A professional guardian, including a public agency or nonprofit corporation,  
17 was specifically not given priority for appointment as guardian under this Act as  
18 those given priority are limited to individuals with whom the ward has a close  
19 relationship. The committee which drafted the Act recognized the valuable service  
20 that a professional guardian, a public agency or nonprofit corporation provides. A  
21 professional guardian can still be appointed guardian if no one else with priority is  
22 available and willing to serve or if the court, acting in the respondent’s best interest,  
23 declines to appoint a person having priority. A public agency or nonprofit  
24 corporation is eligible to be appointed guardian as long as it can provide an active  
25 and suitable guardianship program and is not otherwise providing substantial  
26 services or assistance to the respondent, but is not entitled to statutory priority in  
27 appointment as guardian.

28 This section is based on Section 2-205 of the 1982 Act (U.P.C. Section 5-305  
29 (1982)).

### 30 **SECTION 311. FINDINGS; ORDER OF APPOINTMENT.**

31 (a) The court may:

32 (1) appoint a limited or unlimited guardian for a respondent only if it  
33 finds by clear and convincing evidence that:

34 (A) the respondent is an incapacitated person; and

35 (B) the respondent’s identified needs cannot be met by less restrictive  
36 means, including use of appropriate technological assistance; or

1 (2) with appropriate findings, treat the petition as one for a protective  
2 order under Section 401, enter any other appropriate order, or dismiss the  
3 proceeding.

4 (b) The court, whenever feasible, shall grant to a guardian only those powers  
5 necessitated by the ward's limitations and demonstrated needs and make appointive  
6 and other orders that will encourage the development of the ward's maximum self-  
7 reliance and independence.

8 (c) Within 14 days after an appointment, a guardian shall send or deliver to  
9 the ward and to all other persons given notice of the hearing on the petition a copy  
10 of the order of appointment, together with a notice of the right to request  
11 termination or modification.

#### 12 Comment

13  
14 A guardian may be appointed only when no less restrictive alternative will meet  
15 the respondent's identified needs. The clear and convincing evidence standard for  
16 the appointment of a guardian is new to the Act, but mandated by the Constitution  
17 and strongly recommended by many commentators on guardianship. See, e.g.,  
18 *Sabrosky v. Denver Dep't Social Services*, 781 P.2d 106 (Colo. Ct. App. 1989); *In*  
19 *re Guardianship of Reyes*, 731 P.2d 130 (Ariz. Ct App. 1986); *In re Estate of*  
20 *Boyer*, 636 P.2d 1085 (Utah 1981), all three of which involve the interpretation of  
21 the predecessor version of this Act. See also GUARDIANSHIP: AN AGENDA FOR  
22 REFORM 16 (A.B.A. 1989).

23  
24 The use of limited guardianship is emphasized in this section. If a guardian is to  
25 be appointed, the guardian shall be given only those powers needed to meet the  
26 ward's needs and limitations. The court must specify the powers granted to the  
27 guardian and the limits on the incapacitated person's rights. The Act's emphasis on  
28 less restrictive alternatives, a high evidentiary standard and the use of limited  
29 guardianship is consistent with the Act's philosophy that a guardian should be  
30 appointed only when necessary, only for as long as necessary, and with only those  
31 powers as are necessary. The concept of limited guardianship is also emphasized in  
32 the NATIONAL PROBATE COURT STANDARDS, Standard 3.3.10, "Less Intrusive  
33 Alternatives" (1993), requiring a finding of no less intrusive alternative before  
34 appointing a guardian and mandating the consideration and utilization of limited  
35 guardianships.

1           If appropriate technological assistance is available to meet the respondent’s  
2 needs, then the respondent is not an “incapacitated person” within the meaning of  
3 Section 102(5) and no guardianship may be established. The drafting committee  
4 discussed whether to put any modification or limitation on the technological  
5 assistance, such as that which is reasonably available or a limitation on availability  
6 based on cost. Given the importance of the respondent’s rights, the committee  
7 decided to reject any modification or limitation whatsoever on required  
8 consideration of technological assistance. Therefore, if appropriate technological  
9 assistance exists that can meet the respondent’s needs, regardless of the cost, then  
10 that assistance must be treated by the court as meeting the respondent’s identified  
11 needs by a less restrictive means, and the guardianship petition must be denied.  
12

13           Subsection (a)(2) allows the court to consider the petition as a petition for a  
14 protective order and either proceed appropriately under Article 4 or dismiss the  
15 Article 3 proceeding. To guarantee the respondent the maximum possible personal  
16 liberty, the court should proceed under this subsection whenever it concludes that  
17 the respondent’s needs can be met by the entry of orders with respect to the  
18 respondent’s property without the need to limit the respondent’s freedom.  
19

20           In keeping with the concept of limited guardianship, subsection (c) requires the  
21 guardian to provide the ward and all those persons given notice of the hearing a  
22 copy of the order of appointment along with a notice of the right to request a  
23 termination or a modification of the guardianship. The reason for requiring notice to  
24 persons other than the ward is to make certain that those who were originally  
25 notified of the petition will also be notified of the results because they are the ones  
26 most likely to have a continuing interest in the ward’s welfare. The modification  
27 contemplated by this subsection only applies to reduction of the guardian’s powers  
28 from those originally granted, not their enlargement.  
29

30           **SECTION 312. EMERGENCY GUARDIAN.**

31           (a) If the court finds that compliance with the procedures of this [article]  
32 will likely result in substantial harm to the respondent’s health, safety, or welfare,  
33 and that no other person appears to have authority and willingness to act in the  
34 circumstances, the court, on petition by a person interested in the respondent’s  
35 welfare, may appoint an emergency guardian whose authority may not exceed [60]  
36 days and who may exercise only the powers specified in the order. Immediately  
37 upon receipt of the petition for an emergency guardianship, the court shall appoint a  
38 lawyer to represent the respondent in the proceeding. Except as otherwise provided



1 in subsection (b), reasonable notice of the time and place of a hearing on the petition  
2 must be given to the respondent and any other persons as the court directs.

3 (b) An emergency guardian may be appointed without notice to the  
4 respondent and the respondent's lawyer only if the court finds from affidavit or  
5 testimony that the respondent will be substantially harmed before a hearing on the  
6 appointment can be held. If the court appoints an emergency guardian without  
7 notice to the respondent, the respondent must be given notice of the appointment  
8 within 48 hours after the appointment. The court shall hold a hearing on the  
9 appropriateness of the appointment within [five] days after the appointment.

10 (c) Appointment of an emergency guardian, with or without notice, is not a  
11 determination of the respondent's incapacity.

12 (d) The court may remove an emergency guardian at any time. An  
13 emergency guardian shall make any report the court requires. In other respects, the  
14 provisions of this [Act] concerning guardians apply to an emergency guardian.

#### 15 Comment

16 There are limited circumstances where there is no one else willing or able to act  
17 when following the normal process for appointment of a guardian would, due to the  
18 time involved to follow the procedures, likely lead to substantial harm to the  
19 respondent's health, safety or welfare when. The classic example of when an  
20 emergency guardianship is needed is when the respondent needs a medical  
21 procedure, lacks capacity to consent, has no health care power of attorney, and no  
22 one else is willing or in a position to make the health-care decision. This section of  
23 the Act requires appointment of counsel for the respondent.

24  
25 An emergency guardian may only be appointed without prior notice when there  
26 is testimony that the respondent would be immediately and substantially harmed  
27 before the hearing on the appointment. In such case, notice must be given within  
28 forty-eight hours and a hearing held within five days. (Section 113 provides the  
29 procedures for giving notice.)  
30

1 States enacting this Act should look at their requirements for an ex parte hearing  
2 and determine whether to adopt the time limit contained in this section or whether to  
3 impose different time limits. Five days seems to be the most common time period  
4 for a return hearing following an ex parte appointment. If the enacting state uses a  
5 different time period for a hearing following an ex parte appointment of a guardian,  
6 the time period used should be relatively short.

7  
8 The NATIONAL PROBATE COURT STANDARDS, Standard 3.3.6 “Emergency  
9 Appointment of a Temporary Guardian” (1993), provides:

10  
11 (a) Ex parte appointment of a temporary guardian by the probate court  
12 should occur only:

- 13  
14 (1) upon the showing of an emergency;  
15 (2) in connection with the filing of a petition for a permanent guardianship;  
16 (3) where the petition is set for hearing on the proposed permanent  
17 guardianship on an expedited basis; and  
18 (4) when notice of the temporary appointment is promptly provided to the  
19 respondent.

20 This Act deviates from the above standard by permitting an emergency guardian  
21 to be appointed without the need of filing a petition for a permanent appointment.  
22 The drafting committee was concerned that requiring the filing of a petition for a  
23 permanent appointment would lend an air of inevitability that a permanent guardian  
24 should be appointed. Frequently, the need for an emergency guardian is temporary  
25 only and the respondent’s long-term needs can be met by mechanisms other than  
26 guardianship. Consistent with this, subsection (c) provides that the appointment of  
27 an emergency guardian is in no way a finding of incapacity. For purposes of  
28 appointing a regular guardian, the same quantum of proof is required whether or not  
29 an emergency guardian has been appointed.

30  
31 Unless stated to the contrary in this section, other sections of this Act apply to an  
32 emergency guardian appointed under this section, including the provisions relating to  
33 the duties of guardians.  
34

35  
36 **SECTION 313. TEMPORARY SUBSTITUTE GUARDIAN.**

37 (a) If the court finds that a guardian is not effectively performing the  
38 guardian’s duties and that the welfare of the ward requires immediate action, it may  
39 appoint a temporary substitute guardian for the ward for a specified period not  
40 exceeding six months. Except as otherwise ordered by the court, a temporary  
41 substitute guardian so appointed has the powers set forth in the previous order of

1 appointment. The authority of any unlimited or limited guardian previously  
2 appointed by the court is suspended as long as a temporary substitute guardian has  
3 authority. If an appointment is made without previous notice to the ward or the  
4 affected guardian, the court, within five days after the appointment, shall inform the  
5 ward or guardian of the appointment.

6 (b) The court may remove a temporary substitute guardian at any time. A  
7 temporary substitute guardian shall make any report the court requires. In other  
8 respects, the provisions of this [Act] concerning guardians apply to a temporary  
9 substitute guardian.

10 Comment

11 This section differs from Section 312 since this section is used when there is a  
12 guardian, but the guardian is not discharging the functions of office. The role of the  
13 temporary substitute guardian, as the name implies, is to literally fill in for the regular  
14 guardian, whose powers are suspended for the duration of the appointment. This  
15 section also differs from Section 204(d). A temporary guardian for a minor is  
16 appointed under Section 204(d) in situations where there is no guardian, whereas  
17 under this section, the temporary substitute guardian is temporarily substituted for  
18 another non-performing guardian.

19  
20 The standard for appointment under this section is that the ward's welfare  
21 requires immediate action and that the appointed guardian is not effectively  
22 performing the duties of office. This is not the same as the best interest standard  
23 applied in the selection of the original guardian. The standard instead invokes the  
24 sense of urgency usually involved in these cases, most of which involve possible  
25 abuse by the regularly-appointed guardian.

26  
27 If, at the end of the six months, the ward still needs a guardian, the court should  
28 appoint a permanent guardian rather than granting an extension to the temporary  
29 substitute guardian. A temporary substitute guardian does not automatically have  
30 preference to be appointed as guardian in such cases.

31  
32 In some cases, circumstances may dictate the appointment of the temporary  
33 substitute guardian without notice being given to the ward or current guardian. If  
34 that occurs, within five days of the appointment of the temporary substitute  
35 guardian, the court must inform either the ward or the guardian. Since the authority  
36 of the regularly-appointed guardian is suspended by the appointment of the

1 temporary substitute guardian, the court should make every effort to inform the  
2 guardian of the appointment. In keeping with the concept of limited guardianship  
3 and empowerment of the ward, the court should also notify the ward of the  
4 appointment of the temporary substitute guardian if the ward has the ability to  
5 understand.  
6

7 States adopting this Act are free to enact a notice period of less than five days  
8 but are encouraged to not enact a notice period of more than five days.  
9

10 This section is based on Section 2-208(b) of the 1982 Act (U.P.C. Section 5-  
11 308(b) (1982)).  
12

13 **SECTION 314. DUTIES OF GUARDIAN.**

14 (a) Except as otherwise limited by the court, a guardian shall make decisions  
15 regarding the ward's support, care, education, health, and welfare. A guardian shall  
16 exercise authority only as necessitated by the ward's limitations and, to the extent  
17 possible, shall encourage the ward to participate in decisions, act on the ward's own  
18 behalf, and develop or regain the capacity to manage the ward's personal affairs. A  
19 guardian, in making decisions, shall consider the expressed desires and personal  
20 values of the ward to the extent known to the guardian. A guardian at all times shall  
21 act in the ward's best interest and exercise reasonable care, diligence, and prudence.

22 (b) A guardian shall:

23 (1) become or remain personally acquainted with the ward and maintain  
24 sufficient contact with the ward to know of the ward's capacities, limitations, needs,  
25 opportunities, and physical and mental health;

26 (2) take reasonable care of the ward's personal effects and bring  
27 protective proceedings if necessary to protect the property of the ward;

28 (3) expend money of the ward that has been received by the guardian for  
29 the ward's current needs for support, care, education, health, and welfare;

1 (4) conserve any excess money of the ward for the ward's future needs,  
2 but if a conservator has been appointed for the estate of the ward, the guardian shall  
3 pay the money to the conservator, at least quarterly, to be conserved for the ward's  
4 future needs;

5 (5) immediately notify the court if the ward's condition has changed so  
6 that the ward is capable of exercising rights previously removed; and

7 (6) inform the court of any change in the ward's custodial dwelling or  
8 address.

9 **Comment**

10 Under Section 2-209 of the 1982 Act (U.P.C. Section 5-309 (1982)), the  
11 guardian of an incapacitated person was simply granted the powers of guardian of a  
12 minor, provisions of which were located in the counterpart provisions in Article 2  
13 (Part 2 of Article 5). While this section remains the adult counterpart to Section  
14 207, the duties of the guardian are now set out in detail in this section, rather than  
15 cross-referencing to Section 207. The general duty of the guardian of an  
16 incapacitated person, as expressed in subsection (a), also differs significantly from  
17 that for a guardian of a minor.  
18

19 Subsection (a) sets out the guardian's reasonable standard of care. Subsection  
20 (b) of this Section, and Sections 315 and 316 are in substantial part expansions on  
21 the fundamental responsibilities stated in subsection (a), specifying subsidiary duties  
22 and the powers and immunities necessary to properly implement this role. For a  
23 discussion of the duties listed in subsection (b), see the comment to Section 207.  
24

25 Subsection (a) emphasizes the importance of the concept of limited guardianship  
26 by directing that the guardian only exercise the authority needed due to the ward's  
27 limitations. In the 1982 Act, the phrase "encourage the development of maximum  
28 self-reliance and independence of the incapacitated person and make appointive and  
29 other orders only to the extent necessitated by the incapacitated person's mental and  
30 adaptive limitations" was used as a standard to encourage the use of limited  
31 guardianships. That phrase may still be useful for courts in tailoring a guardianship  
32 to the needs of the incapacitated person. The guardian is admonished to encourage  
33 the ward's participation in decisions and in developing or regaining capacity to act  
34 without a guardian. The ward's personal values and expressed desires, whether past  
35 or present, are to be considered when making decisions. Although the guardian only  
36 need consider the ward's desires and values "to the extent known to the guardian,"  
37 that phrase should not be read as an escape or excuse for the guardian. Instead, the

1 guardian needs to make an effort to learn the ward’s personal values and ask the  
2 ward about the ward’s desires before the guardian makes a decision. Subsection (a)  
3 requires the guardian to act in the ward’s best interest. In determining the best  
4 interest of the ward, the guardian should again consider the ward’s personal values  
5 and expressed desires.  
6

7 In furtherance of the limited guardianship and least restrictive alternative  
8 concepts, subsection (b)(5) requires the guardian to immediately notify the court if  
9 the ward’s condition has improved, so that the ward may have rights restored. The  
10 guardian is *not* to wait until the next reporting period.  
11

12 **SECTION 315. POWERS OF GUARDIAN.**

13 (a) Except as otherwise limited by the court, a guardian may:

14 (1) apply for and receive money payable to the ward or the ward’s guardian  
15 or custodian for the support of the ward under the terms of any statutory system of  
16 benefits or insurance or any private contract, devise, trust, conservatorship, or  
17 custodianship;

18 (2) if otherwise consistent with the terms of any order by a court of  
19 competent jurisdiction relating to custody of the ward, take custody of the ward and  
20 establish the ward’s place of custodial dwelling, but may only establish or move the  
21 ward’s place of dwelling outside this State upon express authorization of the court;

22 (3) if a conservator for the estate of the ward has not been appointed with  
23 existing authority, commence a proceeding, including an administrative proceeding,  
24 or take other appropriate action to compel a person to support the ward or to pay  
25 money for the benefit of the ward;

26 (4) consent to medical or other care, treatment, or service for the ward;

27 (5) consent to the marriage[or divorce] of the ward; and

28 (6) if reasonable under all of the circumstances, delegate to the ward certain  
29 responsibilities for decisions affecting the ward’s well-being.

1 (b) The court may specifically authorize the guardian to consent to the adoption  
2 of the ward.

3 Comment

4 Subsection (a)(1) authorizes the guardian to apply for or receive the ward's  
5 government benefits. Subsection (a)(2) prohibits the guardian from moving the  
6 ward out of state without the court's prior express authorization. This provision  
7 should be strictly applied for the protection of the ward and to prevent forum  
8 shopping.

9  
10 Although subsection (a)(4) gives the guardian the power to consent to medical  
11 treatment, the guardian must ascertain whether a health care directive is in effect. If  
12 there is a valid health-care power of attorney, the decision of the health care agent  
13 takes precedence over that of the guardian, absent a court order to the contrary.  
14 Further, the guardian may not revoke a health-care power of attorney except on  
15 court order. See Section 316(c). If the health-care directive does not appoint an  
16 agent, the guardian may proceed to make a health-care decision but must follow the  
17 ward's wishes as expressed in the directive.

18  
19 Additionally, statutes in many states prohibit a guardian from consenting to  
20 certain procedures without prior court order or without first complying with detailed  
21 statutory requirements, especially procedures which implicate the incapacitated  
22 person's constitutional rights. For example, a guardian may not commit a ward to a  
23 mental health-care institution without following the state's statute on civil  
24 commitment. See Section 316(d). There may be similar requirements regarding a  
25 guardian's consent to electroconvulsive therapy (ECT) or other shock treatment,  
26 experimental treatment, sterilization, forced medication with psychotropic drugs, or  
27 abortion.

28  
29 The phrase "or divorce" in subsection (a)(5) is placed in brackets in recognition  
30 of the split among the jurisdictions over whether a guardian has power to initiate a  
31 divorce for the ward. Jurisdictions that do not allow the guardian to initiate a  
32 divorce generally base that policy on the very personal nature of marriage. Enacting  
33 states which have not yet addressed this issue should decide whether to give the  
34 guardian the power. Statutes dealing with the dissolution of marriage should be  
35 reviewed to determine whether this issue is addressed.

36  
37 Consistent with the Act's encouragement of limited guardianship, subsection  
38 (a)(6) gives the guardian the power, if reasonable under the circumstances, to  
39 delegate certain decision making responsibility to the ward.

40  
41 Subsection (b) provides the guardian with the authority to consent to the ward's  
42 adoption only on express authorization of the court. There may be circumstances

1 when it would be appropriate for the ward, even though an adult, to be adopted by  
2 another.

3  
4 **SECTION 316. RIGHTS AND IMMUNITIES OF GUARDIAN;**  
5 **LIMITATIONS.**

6 (a) A guardian is entitled to reasonable compensation for services as  
7 guardian and to reimbursement for room, board, and clothing provided to the ward,  
8 but only as approved by order of the court. If a conservator, other than the guardian  
9 or one who is affiliated with the guardian, has been appointed for the estate of the  
10 ward, reasonable compensation and reimbursement to the guardian may be approved  
11 and paid by the conservator without order of the court.

12 (b) A guardian need not use the guardian's personal funds for the ward's  
13 expenses. A guardian is not liable to a third person for acts of the ward solely by  
14 reason of the relationship. A guardian who exercises reasonable care in choosing a  
15 third person providing medical or other care, treatment, or service for the ward is  
16 not liable for injury to the ward resulting from the wrongful conduct of the third  
17 party.

18 (c) A guardian, without authorization of the court, may not revoke a power  
19 of attorney for health care [made pursuant to the Uniform Health-Care Decisions  
20 Act] of which the ward is the principal. If a power of attorney for health care [made  
21 pursuant to the Uniform Health-Care Decisions Act] is in effect, absent an order of  
22 the court to the contrary, a health-care decision of the agent takes precedence over  
23 that of a guardian.



1 (d) A guardian may not initiate the commitment of a ward to a [mental  
2 health-care] institution except in accordance with the State’s procedure for  
3 involuntary civil commitment.

4 Comment

5  
6 Subsection (a) recognizes that a guardian has a right to reasonable  
7 compensation. The amount determined to be reasonable may vary from state to  
8 state and from one geographical area to another within a state. In addition, factors  
9 to be considered by the court in setting compensation will vary. See the comments  
10 to Section 417 for a thorough discussion on the factors to be considered by the court  
11 in determining compensation.  
12

13 If there is a conservator appointed, the conservator, without the necessity of  
14 prior court approval, may pay the guardian reasonable compensation as well as  
15 reimburse the guardian for room, board and clothing the guardian has provided to  
16 the ward. However, if the court determines that the compensation paid to the  
17 guardian is excessive or the expenses reimbursed were inappropriate, the court may  
18 order the guardian to repay the excessive or inappropriate amount to the estate. See  
19 Section 417. If there is no conservator, the guardian must file a fee petition.  
20

21 Under subsection (b), the guardian has no duty to use the guardian’s personal  
22 funds for the ward. Nor is a guardian liable for the acts of a third person, including  
23 negligent medical care, treatment or service provided to the ward except if a parent  
24 would be liable in the same circumstances. The guardian is not liable, just by reason  
25 of being guardian, if the ward harms a third person. The guardian is liable only if  
26 personally at fault.  
27

28 If the ward had made a power of attorney for health care, the guardian cannot  
29 revoke it without court order. Further, the agent’s decision takes priority over that  
30 of the guardian unless the power of attorney has been revoked. For states which  
31 have enacted the Uniform Health-Care Decisions Act, a “mental health-care  
32 institution” includes those institutions or treatment facilities defined in the state’s  
33 version of that Act. Commitment by a guardian to a mental health-care institution  
34 may not occur without following the State’s procedures for civil commitment.  
35 Although a guardian may not commit a ward to a mental health-care institution, the  
36 guardian may initiate proceedings only in accordance with the State’s applicable  
37 mental health care statutes for civil commitment, outpatient treatment, or involuntary  
38 medication for mental health treatment.  
39

40 **SECTION 317. REPORTS; MONITORING OF GUARDIANSHIP.**

1 (a) Within 30 days after appointment, a guardian shall report to the court in  
2 writing on the condition of the ward and account for money and other assets in the  
3 guardian's possession or subject to the guardian's control. A guardian shall report at  
4 least annually thereafter and whenever ordered by the court. A report must state or  
5 contain:

6 (1) the current mental, physical, and social condition of the ward;

7 (2) the living arrangements for all addresses of the ward during the  
8 reporting period;

9 (3) the medical, educational, vocational, and other services provided to  
10 the ward and the guardian's opinion as to the adequacy of the ward's care;

11 (4) a summary of the guardian's visits with the ward and activities on the  
12 ward's behalf and the extent to which the ward has participated in decision-making;

13 (5) if the ward is institutionalized, whether the guardian considers the  
14 current plan for care, treatment, or habilitation to be in the ward's best interest;

15 (6) plans for future care; and

16 (7) a recommendation as to the need for continued guardianship and any  
17 recommended changes in the scope of the guardianship.

18 (b) The court may appoint a [visitor] to review a report, interview the ward  
19 or guardian, and make any other investigation the court directs.

20 (c) The court shall establish a system for monitoring guardianships, including  
21 the filing and review of annual reports.

22 Comment

23 Under subsection (a), the report must contain the current mental, physical and  
24 social condition of the ward. Letters from the treating physician should accompany

1 the report. Emphasizing the importance of limited guardianship, even if no limited  
2 guardian was appointed, subsections (a)(4), (6), and (7) require the guardian to  
3 report information regarding the ward’s participation in decisions, future care plans  
4 and the need for continuing the guardianship. Compliance with subsection (a)(7)  
5 should not be read as relieving the guardian of the duty under Section 314(b)(5) to  
6 immediately notify the court that the ward’s condition has changed.  
7

8 Each state enacting the Act should establish a system for monitoring  
9 guardianships, which would include, but not be limited to, mechanisms for assuring  
10 that annual reports are timely filed and reviewed. An independent monitoring system  
11 is crucial for a court to adequately safeguard against abuses in the guardianship  
12 cases. Monitors can be paid court personnel, court appointees or volunteers. For a  
13 comprehensive discussion of the various methods for monitoring guardianships, see  
14 SALLY BALCH HURME, STEPS TO ENHANCE GUARDIANSHIP MONITORING  
15 (A.B.A.1991).  
16

17 The National Probate Court Standards also provide for the filing of reports and  
18 procedures for monitoring guardianships. See NATIONAL PROBATE COURT  
19 STANDARDS, Standards 3.3.14 “Reports by the Guardian,” and 3.3.15 “Monitoring  
20 of the Guardian” (1993). The National Probate Court Standards additionally  
21 contains recommendations relating to the need for periodic review of guardianships  
22 and sanctions for failures of guardians to comply with reporting requirements. See  
23 NATIONAL PROBATE COURT STANDARDS, Standards 3.3.16 “Reevaluation of  
24 Necessity for Guardianship,” and 3.3.17 “Enforcement.”  
25

26 **SECTION 318. TERMINATION OR MODIFICATION OF**  
27 **GUARDIANSHIP.**

28 (a) A guardianship terminates upon the death of the ward or upon order of  
29 the court.

30 (b) On petition of a ward, a guardian, or another person interested in the  
31 ward’s welfare, the court may terminate a guardianship if the ward no longer needs  
32 the assistance or protection of a guardian. The court may modify the type of  
33 appointment or powers granted to the guardian if the extent of protection or  
34 assistance previously granted is currently excessive or insufficient or the ward’s  
35 capacity to provide for support, care, education, health, and welfare has so changed  
36 as to warrant that action.

1 (c) Except as otherwise ordered by the court for good cause, the court,  
2 before terminating a guardianship, shall follow the same procedures to safeguard the  
3 rights of the ward as apply to a petition for guardianship. Upon presentation by the  
4 petitioner of evidence establishing a prima facie case for termination, the court shall  
5 order the termination unless it is proven that continuation of the guardianship is in  
6 the best interest of the ward.

7 Comment

8 If the ward's condition changes so that the guardian believes that the ward is  
9 capable of exercising some or all of the rights that were previously removed, Section  
10 314(b)(5) requires the guardian to immediately notify the court and not wait until the  
11 due date of the next report to be filed under Section 317.

12  
13 Subsection (b) can be used by the court not only to terminate a guardianship but  
14 also to remove powers or add powers granted to the guardian.

15  
16 Subsection (c) requires the court in terminating a guardianship to follow the  
17 same procedures to safeguard the ward's rights as apply to a petition for  
18 appointment of a guardian. This includes the appointment of a visitor and, in  
19 appropriate circumstances, counsel.

20  
21 Although clear and convincing evidence is required to establish a guardianship,  
22 the petitioner need only present a prima facie case for termination. Once the  
23 petitioner has made out a prima facie case, the burden then shifts to the party  
24 opposing the petition to establish by clear and convincing evidence that continuation  
25 of the guardianship is in the best interest of the ward. Given the constriction on  
26 rights involved in a guardianship, the burden of establishing a guardianship should be  
27 greater than that for restoring rights. In determining whether it is in the ward's best  
28 interest for the guardianship to continue, every effort should be made to determine  
29 the ward's wishes and expressed preferences regarding the termination of the  
30 guardianship. In determining the best interest of the ward, the ward's personal  
31 values and expressed desires should be considered.

32  
33 To initiate proceedings under this section, the ward or person interested in the  
34 ward's welfare need not present a formal document prepared with legal assistance.  
35 A request to the court may always be made informally.

36  
37 Unlike the 1982 Act, this Act does not limit the frequency with which petitions  
38 for termination may be made to the court, preferring instead to leave that issue up to

1 general statutes and rules addressing court management in general. Compare U.P.C.  
2 Section 5-311(b) (1982).

3  
4 Termination of the guardianship does not relieve the guardian of liability for  
5 prior acts. See Section 112.  
6

7  
8 **ARTICLE 4**  
9 **PROTECTION OF PROPERTY OF PROTECTED PERSON**  
10

11 **SECTION 401. PROTECTIVE PROCEEDING.** Upon petition and after  
12 notice and hearing, the court may appoint a limited or unlimited conservator or make  
13 any other protective order provided in this [article] in relation to the estate and  
14 affairs of:

15 (1) a minor, if the court determines that the minor owns money or property  
16 requiring management or protection that cannot otherwise be provided or has or  
17 may have business affairs that may be put at risk or prevented because of the minor's  
18 age, or that money is needed for support and education and that protection is  
19 necessary or desirable to obtain or provide money; or

20 (2) any individual, including a minor, if the court determines that, for  
21 reasons other than age:

22 (A) by clear and convincing evidence, the individual is unable to manage  
23 property and business affairs because of an impairment in the ability to receive and  
24 evaluate information or make decisions, even with the use of appropriate  
25 technological assistance, or because the individual is missing, detained, or unable to  
26 return to the United States; and

27 (B) by a preponderance of evidence, the individual has property that will  
28 be wasted or dissipated unless management is provided or money is needed for the

1 support, care, education, health, and welfare of the individual or of individuals who  
2 are entitled to the individual's support and that protection is necessary or desirable  
3 to obtain or provide money.

4 Comment

5 This section sets out the basic standard for appointment of a conservator or entry  
6 of another protective order. Paragraph (1) states the standard for minors for orders  
7 entered by reason of the minor's age. Paragraph (2), while principally focused on the  
8 standard for adults, also applies to a protective order entered for a minor for reasons  
9 other than the minor's age. A conservatorship created for a minor for reasons other  
10 than age need not terminate at age eighteen. See Section 431(a).

11  
12 This section continues the emphasis on limiting assistance expressed in Article 3  
13 by providing that conservatorship includes both limited and unlimited  
14 conservatorships. This Article, like Article 3, encourages the court to appoint a  
15 limited conservator whenever possible.

16  
17 Note the differing evidentiary standards contained in subparagraphs (A) and (B)  
18 of paragraph (2). Paragraph (2) establishes a two-part test for the entry of a  
19 protective order for an adult, or for a minor for reasons other than age. First, unless  
20 it is alleged that the respondent is missing or is an absentee or detainee, the  
21 petitioner must show by clear and convincing evidence that the respondent has an  
22 impairment and that as a result of the impairment, the respondent is unable to  
23 manage the respondent's property and business affairs even with appropriate  
24 technological assistance. In addition, the petitioner must show, by a preponderance  
25 of evidence, that the respondent's property will be dissipated or wasted without  
26 management, or that money is needed to care for the respondent or those entitled to  
27 the respondent's support and that protection is needed to provide or receive the  
28 money. Under paragraph (2), the requisite impairment for the appointment of a  
29 conservator or entry of another protective order is similar to the test for the  
30 appointment of a guardian, which relies on the definition of "incapacitated person."  
31 See Section 102(5).

32  
33 Under paragraph (2)(A), if appropriate technological assistance is available to  
34 meet the respondent's needs, then no conservatorship may be established or other  
35 protective order entered. The drafting committee discussed whether to put any  
36 modification or limitation on the technological assistance, such as that which is  
37 reasonably available or a limitation on availability based on cost. Given the  
38 importance of the respondent's rights, the committee decided to reject any  
39 modification or limitation whatsoever on the required consideration of technological  
40 assistance. Therefore, if appropriate technological assistance exists that can meet  
41 the respondent's needs, regardless of the cost, then that assistance must be treated

1 by the court as meeting the respondent's identified needs by a less restrictive means,  
2 and the petition for a protective proceeding must be denied.

3  
4 This section is based on Section 2-301 of the 1982 Act (U.P.C. Section 5-401  
5 (1982)).

6  
7 **SECTION 402. JURISDICTION OVER BUSINESS AFFAIRS OF**  
8 **PROTECTED PERSON.** After the service of notice in a proceeding seeking a  
9 conservatorship or other protective order and until termination of the proceeding,  
10 the court in which the petition is filed has:

11 (1) exclusive jurisdiction to determine the need for a conservatorship or other  
12 protective order;

13 (2) exclusive jurisdiction to determine how the estate of the protected person  
14 which is subject to the laws of this State must be managed, expended, or distributed  
15 to or for the use of the protected person, individuals who are in fact dependent upon  
16 the protected person, or other claimants; and

17 (3) concurrent jurisdiction to determine the validity of claims against the  
18 person or estate of the protected person and questions of title concerning assets of  
19 the estate.

20 **Comment**

21 While a majority of all proceedings involving a conservatorship will be held in  
22 the court supervising the conservatorship, third parties may bring suit against the  
23 conservator or protected person in other courts to determine the validity of claims  
24 and questions of title concerning estate assets. For the procedures for filing claims  
25 against a conservatorship, see Section 429.

26  
27 The source of this section is Section 2-302 of the 1982 Act (U.P.C. Section 5-  
28 402 (1982)) with slight changes.

29  
30 **SECTION 403. ORIGINAL PETITION FOR APPOINTMENT OR**  
31 **PROTECTIVE ORDER.**

1 (a) The following may petition for the appointment of a conservator or for  
2 any other appropriate protective order:

3 (1) the person to be protected;

4 (2) an individual interested in the estate, affairs, or welfare of the person  
5 to be protected, including a parent, guardian, or custodian; or

6 (3) a person who would be adversely affected by lack of effective  
7 management of the property and business affairs of the person to be protected.

8 (b) A petition under subsection (a) must set forth the petitioner's name,  
9 residence, current address if different, relationship to the respondent, and interest in  
10 the appointment or other protective order, and, to the extent known, state or contain  
11 the following with respect to the respondent and the relief requested:

12 (1) the respondent's name, age, principal residence, current street  
13 address, and, if different, the address of the dwelling where it is proposed that the  
14 respondent will reside if the appointment is made;

15 (2) if the petition alleges impairment in the respondent's ability to receive  
16 and evaluate information, a brief description of the nature and extent of the  
17 respondent's alleged impairment;

18 (3) if the petition alleges that the respondent is missing, detained, or  
19 unable to return to the United States, a statement of the relevant circumstances,  
20 including the time and nature of the disappearance or detention and a description of  
21 any search or inquiry concerning the respondent's whereabouts;

22 (4) the name and address of the respondent's:



1 (A) spouse or, if the respondent has none, an adult with whom the  
2 respondent has resided for more than six months before the filing of the petition; and

3 (B) adult children or, if the respondent has none, the respondent's  
4 parents and adult brothers and sisters or, if the respondent has none, at least one of  
5 the adults nearest in kinship to the respondent who can be found;

6 (5) the name and address of the person responsible for care or custody of  
7 the respondent;

8 (6) the name and address of any legal representative of the respondent;

9 (7) a general statement of the respondent's property with an estimate of  
10 its value, including any insurance or pension, and the source and amount of other  
11 anticipated income or receipts; and

12 (8) the reason why a conservatorship or other protective order is in the  
13 best interest of the respondent.

14 (c) If a conservatorship is requested, the petition must also set forth to the  
15 extent known:

16 (1) the name and address of any proposed conservator and the reason  
17 why the proposed conservator should be selected;

18 (2) the name and address of any person nominated as conservator by the  
19 respondent if the respondent has attained 14 years of age; and

20 (3) the type of conservatorship requested and, if an unlimited  
21 conservatorship, the reason why limited conservatorship is inappropriate or, if a  
22 limited conservatorship, the property to be placed under the conservator's control  
23 and any limitation on the conservator's powers and duties.

Comment

This section lists the information that must be contained in the petition for appointment of a conservator or other protective order. Although subsection (a) allows a petition for appointment to be filed by the person to be protected, the court should scrutinize such a petition closely to confirm that the petition is truly voluntary and that the petitioner has the requisite capacity to file a petition. Normally in such a case it would be better for the individual to execute a durable power of attorney instead of utilizing the more invasive conservatorship.

Subsection (a) specifically provides that a petition for appointment of a conservator or other protective order may be filed by the respondent's guardian. The process for appointing a guardian is more detailed than the appointment of a conservator because of the rights involved and because other mechanisms are available to protect the respondent's property besides a conservatorship. However, in many cases a conservatorship may also be necessary, and so it is incumbent on a guardian to determine whether there is a need for a conservatorship, and if so, petition for an appointment.

Subsections (b)(4)-(6) require that the petition list family members and others who may have information useful to the court and to whom notice of the proceeding must be given under Section 404(b). These persons will likely also have the greatest interest in protecting the respondent and in making certain that the proposed conservatorship is appropriate.

Subsection (b)(4)(A) requires that the petition contain the name and address of the spouse or, if none, then an adult with whom the respondent has resided for more than six months before the petition was filed. Included among the persons with whom the respondent may have resided are a domestic partner and companions. Note that there is no requirement that the respondent have resided with the other person for more than six months *immediately prior* to the filing of the petition, just that the requirement has been met at some point in time before the petition was filed. In applying this provision, the court should keep the purpose of this provision in mind-to obtain a list of person who likely have a significant interest in the respondent's welfare. Courts should use a reasonableness standard so that the petitioner does not have to give the name of every person the respondent has resided with in the respondent's entire life and whose current interest in the respondent may be quite remote. Also, in interpreting what is meant by "resided," the closeness of the relationship to the respondent should be taken into account.

Courts should consider whether they wish to exclude persons providing care for a fee from the class of persons with whom it is considered that the respondent resided. This would limit the application of subsection (b)(4)(A) to individuals with whom the respondent has a close personal relationship, a relative, or to a domestic partner or companion, and would eliminate a professional relationship such as that of a housekeeper, landlord, or owner of a board and care facility.

1           The drafters originally used the language “domestic partner or companion,” and  
2 intended to limit the application of subsection (b)(4)(A) to the spouse, domestic  
3 partner or companion, but at the 1997 Annual Meeting of the Uniform Law  
4 Commissioners where this Act was finalized, this phrase was replaced by the phrase  
5 “adult with whom the respondent has resided for more than six months.” The intent  
6 behind this amendment was not to substantially broaden the concept but only to  
7 expand it to include other individuals who have had an enduring relationship with the  
8 respondent for at least a six-month period and who, because of this relationship,  
9 should be given notice.

10           Subsection (b)(4)(B) requires the names and addresses of the respondent’s adult  
11 children or, if none, parent and adult brothers and sisters or, if none, a relative of the  
12 nearest degree in which a relation can be found. However, if there are several  
13 adults of equal degree of kinship to the respondent, the name and address of one is  
14 all that is required, rather than the names and addresses of the members of the entire  
15 class.  
16

17           Under subsection (b)(6), if the respondent has a legal representative, the  
18 representative’s name and address must be included in the petition. A “legal  
19 representative” is defined in Section 102(6). Notice to such a representative, as  
20 required by Section 404(b), is especially critical for ascertaining whether a  
21 conservatorship or other protective order is really necessary. For example, should a  
22 conservator have already been appointed elsewhere or the respondent have executed  
23 a durable power of attorney with authority in the agent to make financial decisions,  
24 the court may conclude that there may be no need for it to appoint a conservator.  
25

26           Subsection (b)(7) requires the petitioner to make a general statement of the  
27 respondent’s property, including an estimated value, insurance and pension  
28 information and information about other anticipated income or receipts. This  
29 information should be as detailed as possible to enable the visitor to better complete  
30 the report required by Section 406, and to enable the court to determine whether a  
31 protective order is really needed.  
32

33           Subsection (c)(3) emphasizes the importance of limited conservatorship, the  
34 encouragement of which is a major theme of the Act. The petitioner must state in the  
35 petition why a limited conservatorship is not sufficient when requesting an unlimited  
36 conservatorship. If a limited conservatorship is requested, the petition must set out  
37 the property requested to be placed under the conservator’s control.  
38

39           This section differs slightly from the NATIONAL PROBATE COURT STANDARDS,  
40 Standard 3.4.1, “Petition” (1993), which also requires that a petition for  
41 conservatorship include a description of the respondent’s functional limitations and a  
42 statement that less intrusive alternatives have been considered.  
43

44           This section is based on Section 2-304 of the 1982 Act (U.P.C. Section 5-404  
45 (1982)).  
46

1                   **SECTION 404. NOTICE.**

2                   (a) A copy of the petition and the notice of hearing on a petition for  
3 conservatorship or other protective order must be served personally on the  
4 respondent, but if the respondent's whereabouts is unknown or personal service  
5 cannot be made, service on the respondent must be made by [substituted service]  
6 [or] [publication]. The notice must include a statement that the respondent must be  
7 physically present unless excused by the court, inform the respondent of the  
8 respondent's rights at the hearing, and, if the appointment of a conservator is  
9 requested, include a description of the nature, purpose, and consequences of an  
10 appointment. A failure to serve the respondent with a notice substantially complying  
11 with this subsection precludes the court from granting the petition.

12                   (b) In a proceeding to establish a conservatorship or for another protective  
13 order, notice of the hearing must be given to the persons listed in the petition.  
14 Failure to give notice under this subsection does not preclude the appointment of a  
15 conservator or the making of another protective order.

16                   (c) Notice of the hearing on a petition for an order after appointment of a  
17 conservator or making of another protective order, together with a copy of the  
18 petition, must be given to the protected person, if the protected person has attained  
19 14 years of age and is not missing, detained, or unable to return to the United States,  
20 any conservator of the protected person's estate, and any other person as ordered by  
21 the court.

22                   (d) A conservator shall give notice of the filing of the conservator's  
23 inventory, report, or plan of conservatorship, together with a copy of the inventory,

1 report, or plan of conservatorship to the protected person and any other person the  
2 court directs. The notice must be delivered or sent within 14 days after the filing of  
3 the inventory, report, or plan of conservatorship.

4 Comment

5 Personal service of the petition and notice of hearing on the respondent is  
6 required, unless the respondent is missing or personal service cannot be made, in  
7 which event the state’s method for substituted service must be used. A failure to  
8 serve the respondent is jurisdictional, as is a notice that does not substantially  
9 comply with the requirements of subsection (a). Where appropriate, the court  
10 should hold the hearing where the respondent is located. If the respondent’s  
11 presence is impossible because the respondent is missing or absent, then the court  
12 should excuse the respondent’s presence.

13  
14 Subsection (b) requires that notice of hearing be given to the people listed in the  
15 petition but failing to give notice to those listed (other than the respondent) is not  
16 jurisdictional.

17  
18 Subsection (c) addresses the notice requirements for hearings on petitions for  
19 orders after the establishment of the conservatorship. The protected person and the  
20 conservator as well as anyone else the court directs, must be given copies of the  
21 notice of hearing and a copy of any petition. This provision, along with subsection  
22 (d), requiring that the protected person be given a copy of the conservator’s plan,  
23 report, and inventory and a copy of the notice of filing, ensures that the protected  
24 person is kept informed of developments.

25 This section should be read in conjunction with Section 113, which requires that  
26 notice be given at least fourteen days prior to the hearing unless the court or this Act  
27 establishes a different time period.

28  
29 NATIONAL PROBATE COURT STANDARDS, Standard 3.4.7, “Notice” (1993),  
30 provides that the respondent must receive timely notice prior to the hearing on the  
31 conservatorship and that written notice should be in both plain language and in large  
32 type. The notice, at a minimum, must indicate the place and time of the hearing, the  
33 nature and consequences of the hearing as well as the respondent’s rights.

34  
35 This section is based on Section 2-305 of the 1982 Act (U.P.C. Section 5-405  
36 (1982)).  
37



1                   **SECTION 406. ORIGINAL PETITION: ~~PERSONS UNDER~~**  
2                   **~~DISABILITY~~; PRELIMINARIES TO HEARING.**

3                   (a) Upon the filing of a petition for a conservatorship or other protective  
4                   order for a respondent for reasons other than being a minor, the court shall set a date  
5                   for hearing. The court shall appoint a [visitor] unless the petition does not request  
6                   the appointment of a conservator and the respondent is represented by a lawyer.  
7                   The duties and reporting requirements of the [visitor] are limited to the relief  
8                   requested in the petition. The [visitor] must be an individual having training or  
9                   experience in the type of incapacity alleged.

10                   **ALTERNATE PROVISIONS ON APPOINTMENT OF A LAWYER**

11                   [ALTERNATIVE 1]

12                   [(b) The court shall appoint a lawyer to represent the respondent in the  
13                   proceeding if:

- 14                   (1) requested by the respondent;  
15                   (2) recommended by the [visitor]; or  
16                   (3) the court determines that the respondent needs representation.]

17                   [ALTERNATIVE 2]

18                   [(b) Unless the respondent is represented by a lawyer, the court shall  
19                   appoint a lawyer to represent the respondent in the proceeding.]

20                   **END OF ALTERNATE PROVISIONS**

21                   (c) The [visitor] shall interview the respondent in person and, to the extent  
22                   that the respondent is able to understand:

1 (1) explain to the respondent the substance of the petition and the nature,  
2 purpose, and effect of the proceeding;

3 (2) if the appointment of a conservator is requested, inform the  
4 respondent of the general powers and duties of a conservator and determine the  
5 respondent's views regarding the proposed conservator, the proposed conservator's  
6 powers and duties, and the scope and duration of the proposed conservatorship;

7 (3) inform the respondent of the respondent's rights, including the right  
8 to employ and consult with a lawyer at the respondent's own expense, and the right  
9 to request a court-appointed lawyer; and

10 (4) inform the respondent that all costs and expenses of the proceeding,  
11 including respondent's attorney's fees, will be paid from the respondent's estate.

12 (d) In addition to the duties imposed by subsection (c), the [visitor] shall:

13 (1) interview the petitioner and the proposed conservator, if any; and

14 (2) make any other investigation the court directs.

15 (e) The [visitor] shall promptly file a report with the court, which must  
16 include:

17 (1) a recommendation as to whether a lawyer should be appointed to  
18 represent the respondent;

19 (2) recommendations regarding the appropriateness of a conservatorship,  
20 including whether less restrictive means of intervention are available, the type of  
21 conservatorship, and, if a limited conservatorship, the powers and duties to be  
22 granted the limited conservator, and the assets over which the conservator should be  
23 granted authority;



1 (3) a statement of the qualifications of the proposed conservator,  
2 together with a statement as to whether the respondent approves or disapproves of  
3 the proposed conservator, and a statement of the powers and duties proposed or the  
4 scope of the conservatorship;

5 (4) a recommendation as to whether a professional evaluation or further  
6 evaluation is necessary; and

7 (5) any other matters the court directs.

8 (f) The court may also appoint a physician, psychologist, or other individual  
9 qualified to evaluate the alleged impairment to conduct an examination of the  
10 respondent.

11 (g) While a petition to establish a conservatorship or for another protective  
12 order is pending, after preliminary hearing and without notice to others, the court  
13 may issue orders to preserve and apply the property of the respondent as may be  
14 required for the support of the respondent or individuals who are in fact dependent  
15 upon the respondent. The court may appoint a [master] to assist in that task.

16 Legislative Note

17 Those states that enact Alternative 2 of subsection (b) which requires  
18 appointment of counsel for the respondent in all protective proceedings should not  
19 enact subsection (e)(1).  
20

21 Comment

22  
23 Alternative provisions are offered for subsection (b). Alternative 1 is the drafting  
24 committee's position, and the one adopted by the NCCUSL. Alternative 1 relies on  
25 an expanded role for the "visitor," who can be chosen or selected to provide the  
26 court with advice on a variety of matters other than legal issues. Appointment of a  
27 lawyer, nevertheless, is *required* under Alternative 1 when the court determines that  
28 the respondent needs representation, or counsel is requested by the respondent or  
29 recommended by the visitor.  
30

1           Alternative 2 is derived from Section 2-306 of the 1982 Act (U.P.C. Section 5-  
2 406). It is expected that in states enacting Alternative 1 of subsection (b), counsel  
3 will be appointed in most all of the cases. However, the A.B.A. Commission on  
4 Legal Problems of the Elderly attached great significance to expressly making  
5 appointment of counsel “mandatory.” Therefore, for states which wish to provide  
6 for “mandatory appointment” of counsel, Alternative 2 should be enacted.  
7

8           In Alternative 1 for subsection (b), then, appointment of counsel for an  
9 unrepresented respondent is mandated when requested by the respondent, when  
10 recommended by the visitor, or when the court determines the respondent needs  
11 representation. This requirement is in accord with the National Probate Court  
12 Standards. NATIONAL PROBATE COURT STANDARDS, Standard 3.4.5 “Appointment  
13 of Counsel”(1993), like subsection (b) of this section, provides for appointment of  
14 counsel in a conservatorship proceeding when the unrepresented respondent  
15 requests it, the visitor recommends it, the law otherwise requires it, or the court  
16 determines that the respondent needs representation.  
17

18           The drafting committee for this Act debated at length whether to mandate  
19 appointment of counsel or to expand the role of the visitor. The drafting committee  
20 concluded that as between the two, the visitor may be more helpful to the court in  
21 providing information on a wider variety of issues and concerns, by acting as the  
22 eyes and ears of the court as well as determining the respondent’s wishes and  
23 conveying them to the court. The committee was concerned that including  
24 mandatory appointment of counsel would cause many to view this Act as a “lawyer’s  
25 bill” and thus severely handicap the Act’s acceptance and adoption. It is the intent  
26 of the committee that counsel for respondent be appointed in all but the most clear  
27 cases, where all are in agreement regarding the need for a conservatorship or  
28 protective order as well as the proposed conservator. For jurisdictions enacting  
29 Alternative 1 under subsection (b), the visitor needs to be especially sensitive to the  
30 fact that if the respondent is incapacitated, then the respondent may not have  
31 sufficient capacity to intelligently and knowingly waive appointment of counsel. A  
32 court should err on the side of protecting the respondent’s rights and appoint  
33 counsel in most cases  
34

35           Appointment of a visitor is mandatory when a conservatorship is sought for  
36 reasons other than minority even if the respondent is represented by a lawyer  
37 (subsection (a)), and regardless of which alternative is enacted under subsection (b).  
38 Only when the respondent is represented by counsel and the petitioner is seeking a  
39 protective order other than the appointment of a conservator is the appointment of a  
40 visitor waived. Although a lawyer, if qualified, may be appointed as a visitor, the  
41 attorney’s role is that of a visitor and not that of an attorney for the respondent. The  
42 visitor serves as the information gathering arm of the court. The role of the attorney  
43 is to act as the respondent’s advocate. See NATIONAL PROBATE COURT  
44 STANDARDS, Standard 3.4.5(b) “Appointment of Counsel” (1993).  
45

1 The role of a visitor in a conservatorship proceeding is addressed in NATIONAL  
2 PROBATE COURT STANDARD 3.4.4 “Court Visitor” (1993):  
3

4 The probate court should require a court appointee to visit with the  
5 respondent in a conservatorship petition to (1) explain the rights of the  
6 respondent; (2) investigate the facts of the petition; and (3) explain the  
7 circumstances and consequences of the action. The visitor should investigate  
8 the need for additional court appointments and should file a written report  
9 with the court promptly after the visit.  
10

11 The visitor serves as the information gathering arm of the court. The visitor may  
12 be any qualified individual with “training or experience in the type of incapacity  
13 alleged.” Under subsection (c), the visitor must visit the respondent in person and  
14 explain to the respondent a number of items, to the extent the respondent can  
15 understand. If the respondent does not have a good command of the English  
16 language, then the visitor should be accompanied by an interpreter. The drafters did  
17 not mandate that the visitor be able to speak the respondent’s primary language, but  
18 good practice and due process protections dictate the use of interpreters where  
19 needed for the respondent to understand. The phrase “to the extent that the  
20 respondent is able to understand” is a recognition that some respondents may be so  
21 impaired that they are unable to understand. If assistive devices are needed in order  
22 for the visitor to explain to the respondent in a manner necessary so that the  
23 respondent can understand, then the visitor should use those assistive devices.  
24

25 Subsection (c)(4) puts the respondent on notice that if the respondent has an  
26 estate, costs and expenses are paid from the estate, including attorney’s fees and  
27 visitor’s fees. If there is an estate, those entitled to compensation would be paid  
28 from the estate. If there is no estate, those entitled to compensation will ordinarily  
29 be compensated by whatever process the enacting state has for indigent proceedings,  
30 such as from the county general fund, unless the enacting jurisdiction has made other  
31 arrangements. Payment is made pursuant to the procedures provided in Section 417.  
32

33 If the relief sought is a protective order other than the appointment of a  
34 conservator, the visitor’s powers and duties relate only to the relief sought in the  
35 protective order. When the relief sought is a conservatorship, the visitor has an  
36 expanded list of duties. The visitor’s report must contain information and  
37 recommendations to the court regarding the appropriateness of the conservatorship,  
38 whether lesser restrictive alternatives might meet the respondent’s needs,  
39 recommendations about further evaluations, powers to be given the conservator, and  
40 the appointment of counsel. The visitor’s recommendation about the assets over  
41 which the conservator should be granted authority should also include a  
42 recommendation of the amount of the bond that should be required of the  
43 conservator. For states enacting Alternative 1 under subsection (b), if the visitor  
44 does not recommend that a lawyer be appointed, the visitor should explain in the  
45 report the reasons why the visitor is not recommending that a lawyer should not be  
46 appointed.

1 States enacting this Act should consider developing a checklist for the items  
2 enumerated in subsection (e).

3  
4 Subsection (f) authorizes the court to order a professional evaluation of the  
5 respondent when recommended by the visitor, requested by counsel, or the court  
6 otherwise believes it to be necessary. Subsection (g) authorizes the court to use a  
7 master to help in the preservation and application of the respondent’s property while  
8 a petition for appointment of a conservator or other protective order is pending. For  
9 an explanation of why a “master” is appointed instead of a temporary conservator,  
10 see the comment to Section 405.

11  
12 “Visitor” is bracketed in recognition that states use different words to refer to  
13 this position. States enacting this Act should insert the term used in their states.

14  
15 If there is an estate, the visitor would be paid from it. If there is no estate, the  
16 visitor will ordinarily be compensated from the county general fund unless the  
17 enacting jurisdiction has made other arrangements. Payment is made pursuant to the  
18 procedures provided in Section 417.

19  
20 This section is based on Section 2-306 of the 1982 Act (U.P.C. Section 5-406  
21 (1982)).

22  
23 **SECTION 407. CONFIDENTIALITY OF RECORDS.** The written report  
24 of a [visitor] and any professional evaluation are confidential and must be sealed  
25 upon filing, but are available to:

- 26 (1) the court;
- 27 (2) the respondent without limitation as to use;
- 28 (3) the petitioner, the [visitor], and the petitioner’s and respondent’s lawyers,  
29 for purposes of the proceeding; and
- 30 (4) other persons for such purposes as the court may order for good cause.

31 **Comment**

32 This section is new to the Act, although a number of states have a comparable  
33 provision. This section is designed to protect the respondent’s privacy, but still  
34 make the records accessible when needed to any of the involved parties or to others  
35 on a showing of good cause. The drafting committee recognized that “watch-dog”  
36 groups, the media, and others can perform essential functions of deterring abuse and

1 facilitating reform, and in drafting this provision balanced the need to protect the  
2 respondent’s privacy with the need of others to access this information.  
3

4 **SECTION 408. ORIGINAL PETITION: PROCEDURE AT HEARING.**

5 (a) Unless excused by the court for good cause, a proposed conservator  
6 shall attend the hearing. The respondent shall attend and participate in the hearing,  
7 unless excused by the court for good cause. The respondent may present evidence  
8 and subpoena witnesses and documents, examine witnesses, including any court-  
9 appointed physician, psychologist, or other individual qualified to evaluate the  
10 alleged impairment, and the [visitor], and otherwise participate in the hearing. The  
11 hearing may be held in a location convenient to the respondent and may be closed  
12 upon request of the respondent and a showing of good cause.

13 (b) Any person may request permission to participate in the proceeding.  
14 The court may grant the request, with or without hearing, upon determining that the  
15 best interest of the respondent will be served. The court may attach appropriate  
16 conditions to the participation.

17 **Comment**

18 The provision requiring the conservator to attend the hearing is new, although  
19 based on a recommendation from NATIONAL PROBATE COURT STANDARDS,  
20 Standard 3.4.8(c) “Hearing” (1993). While the court may waive the proposed  
21 conservator’s attendance for good cause, in all but the most unusual of  
22 circumstances the proposed conservator should be required to attend to give the  
23 court the opportunity to assess the conservator’s qualifications for appointment and  
24 to make any other inquiry of the conservator that the court determines necessary.  
25 Additionally, the respondent’s attendance is required unless excused for good cause  
26 or the respondent’s attendance is impossible. The respondent has the right to take  
27 an active role in the proceeding.

28  
29 There may be occasions when the court needs to hold the hearing at a location  
30 other than the court, if convenient to the respondent. The respondent may request  
31 that the hearing be closed, and if the respondent shows good cause, the court will

1 close the hearing. Others may make a request to participate, which may be granted  
2 by the court without a hearing if the court finds that the respondent's best interest is  
3 served by the participation. The court's order granting the request to participate  
4 should indicate the extent participation will be allowed.  
5

6 This section is based on subsections (d) and (e) of Section 2-306 of the 1982  
7 Act (subsections (d) and (e) of U.P.C. Section 5-406 (1982)).  
8

9 **SECTION 409. ORIGINAL PETITION: ORDERS.**

10 (a) If a proceeding is brought for the reason that the respondent is a minor,  
11 after a hearing on the petition, upon finding that the appointment of a conservator or  
12 other protective order is in the best interest of the minor, the court shall make an  
13 appointment or other appropriate protective order.

14 (b) If a proceeding is brought for reasons other than that the respondent is a  
15 minor, after a hearing on the petition, upon finding that a basis exists for a  
16 conservatorship or other protective order, the court shall make the least restrictive  
17 order consistent with its findings. The court shall make orders necessitated by the  
18 protected person's limitations and demonstrated needs, including appointive and  
19 other orders that will encourage the development of maximum self-reliance and  
20 independence of the protected person.

21 (c) Within 14 days after an appointment, the conservator shall deliver or  
22 send a copy of the order of appointment, together with a statement of the right to  
23 seek termination or modification, to the protected person, if the protected person has  
24 attained 14 years of age and is not missing, detained, or unable to return to the  
25 United States, and to all other persons given notice of the petition.

26 (d) The appointment of a conservator or the entry of another protective  
27 order is not a determination of incapacity of the protected person.

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Comment

This section emphasizes the related concepts of least restrictive alternative and limited conservatorship, both of which accord with the philosophy of the Act that a conservator should be appointed only when necessary, and then with only those powers that are necessitated by the respondent's actual limitations. The court, in ordering the creation of the conservatorship, shall, in its order, grant the conservator only those powers that are absolutely essential for the conservator to exercise. The court, in its order, must also ensure that the protected person's self-reliance and independence are maximized.

In keeping with the concept of limited conservatorship, subsection (c) requires the guardian to provide the ward and all those persons given notice of the hearing a copy of the order of appointment along with a notice of the right to request a termination or a modification of the guardianship. This makes certain that those who were originally notified of the petition will also be notified of the results because they are the ones most likely to have a continuing interest in the protected person's welfare.

Per subsection (d), the fact that a conservator is appointed or another protective order is entered is not a determination of the protected person's incapacity under Article 3 for any other purpose.

This section is based on Sections 2-306(f) and 2-307(a) and (d) of the 1982 Act (U.P.C. Sections 5-406(f) and 5-407(a) and (d) (1982)).

**SECTION 410. POWERS OF COURT.**

(a) After hearing and upon determining that a basis for a conservatorship or other protective order exists, the court has the following powers, which may be exercised directly or through a conservator:

(1) with respect to a minor for reasons of age, all the powers over the estate and business affairs of the minor which may be necessary for the best interest of the minor and members of the minor's immediate family; and

(2) with respect to an adult, or to a minor for reasons other than age, for the benefit of the protected person and individuals who are in fact dependent on the protected person for support, all the powers over the estate and business affairs of

1 the protected person which the person could exercise if the person were an adult,  
2 present, and not under conservatorship or other protective order.

3 (b) Subject to Section 110 requiring endorsement of limitations on the letters  
4 of office, the court may limit at any time the powers of a conservator otherwise  
5 conferred and may remove or modify any limitation.

6 Comment

7 Subsection (a) gives the court supervising a conservatorship all of the powers the  
8 protected person would have been able to exercise directly were the protected  
9 person of full capacity and the conservatorship or other protective order not in  
10 effect. While these powers may be exercised directly by the court, the powers will  
11 most often be exercised by a conservator without prior court approval. Sections 425  
12 and 427 list distributive and administrative powers that a conservator may exercise  
13 without prior court approval. Section 411 lists powers, nearly all related to estate  
14 planning, that may be exercised only with prior court approval.

15  
16 Subsection (a)(1) gives the court the power to protect the assets of a minor by  
17 withholding distribution from the minor on attainment of majority when continued  
18 supervision of the assets is needed. Before ordering such a continuation, however,  
19 the court must be convinced, for reasons other than the minor's age, that a basis  
20 exists under Section 401(2) for the appointment of a conservator or other protective  
21 order.

22  
23 Subsection (b) authorizes the court at any time to limit the powers of the  
24 conservator, subject to any limitations contained in the letters of conservatorship.  
25 Formal procedures for enlarging or restricting the powers of a conservator are  
26 provided in Section 414. Such formal procedures *must* be utilized in order to grant a  
27 conservator additional powers. Such procedures *may* be utilized to limit the powers  
28 of a conservator previously granted, or the court may elect instead to proceed under  
29 this section. Per Section 110, any restrictions on the conservator's powers must be  
30 endorsed on the letters of conservatorship. Under Section 424(a), third persons are  
31 charged with knowledge of and subject to possible liability for failing to act in  
32 accordance with restrictions endorsed on the letters of office.

33  
34 This section is based on Sections 2-307(b) and 2-325 of the 1982 Act (U.P.C.  
35 Sections 5-407(b) and 5-425 (1982)).

36  
37 **SECTION 411. REQUIRED COURT APPROVAL.**



1 (a) After notice to interested persons and upon express authorization of the  
2 court, a conservator may:

3 (1) make gifts, except as otherwise provided in Section 427(b);

4 (2) convey, release, or disclaim contingent and expectant interests in  
5 property, including marital property rights and any right of survivorship incident to  
6 joint tenancy or tenancy by the entireties;

7 (3) exercise or release a power of appointment;

8 (4) create a revocable or irrevocable trust of property of the estate,  
9 whether or not the trust extends beyond the duration of the conservatorship, or  
10 revoke or amend a trust revocable by the protected person;

11 (5) exercise rights to elect options and change beneficiaries under  
12 insurance policies and annuities or surrender the policies and annuities for their cash  
13 value;

14 (6) exercise any right to an elective share in the estate of the protected  
15 person's deceased spouse and to renounce or disclaim any interest by testate or  
16 intestate succession or by transfer inter vivos; and

17 (7) make, amend, or revoke the protected person's will.

18 (b) A conservator, in making, amending, or revoking the protected person's  
19 will, shall comply with [the State's statute for executing wills].

20 (c) The court, in exercising or in approving a conservator's exercise of the  
21 powers listed in subsection (a), shall consider primarily the decision that the  
22 protected person would have made, to the extent that the decision can be  
23 ascertained. The court shall also consider:

- 1 (1) the financial needs of the protected person and the needs of  
2 individuals who are in fact dependent on the protected person for support and the  
3 interest of creditors;
- 4 (2) possible reduction of income, estate, inheritance, or other tax  
5 liabilities;
- 6 (3) eligibility for governmental assistance;
- 7 (4) the protected person's previous pattern of giving or level of support;
- 8 (5) the existing estate plan;
- 9 (6) the protected person's life expectancy and the probability that the  
10 conservatorship will terminate before the protected person's death; and
- 11 (7) any other factors the court considers relevant.

12 (d) Without authorization of the court, a conservator may not revoke or  
13 amend a durable power of attorney of which the protected person is the principal. If  
14 a durable power of attorney is in effect, absent a court order to the contrary, a  
15 decision of the agent takes precedence over that of a conservator.

#### 16 Comment

17 This section lists actions for which a conservator must obtain prior court  
18 approval. The actions for which court approval is required all relate to the protected  
19 person's estate plan. Except for the power to make, amend, or revoke the protect  
20 person's will, this section duplicates the list of transactions found at Section 2-  
21 307(b)(3) of the 1982 Act (U.P.C. Section 5-407(b)(3)(1982)). The section should  
22 be read together with Section 418(d), which authorizes the conservator to examine  
23 the protected person's estate planning documents.

24  
25 The power to make, amend, or revoke the protected person's will is taken from  
26 the California and South Dakota statutes. See Cal. Prob. Code Sections 2580,  
27 6100.5(c), 6110(c); S. D. Codified Laws Ann. Section 29A-2-520. In subsection  
28 (b), the enacting jurisdiction should insert the citation for its statute on the execution  
29 requirements for ordinary attested wills. Subsection (b) follows the approach taken  
30 by the South Dakota statute. The other approach, followed by California, is to

1 amend the statute on execution of wills to specifically allow execution by a  
2 conservator.

3  
4 Pursuant to subsection (c), decisions by the conservator under this section must  
5 be based primarily on the decision that the protected person would have made, if of  
6 full capacity. The protected person's personal values and expressed desires, past  
7 and present, are to be considered when making decisions. Carrying out the  
8 protected person's intent or probable intent is a major theme of this Act. In this  
9 regard, the Act probably confirms what is already the law. Even in the absence of a  
10 statute, the conservator should consider the protected person's probable wishes,  
11 particularly with respect to gifts and other estate planning related transactions. For  
12 an overview of the history of this judicially-created doctrine and a sampling of  
13 representative cases, see Restatement (Third) of the Law of Trusts, § 11, reporter's  
14 note to cmt. f (Tentative Draft No. 1, 1996). The authority of a court to authorize a  
15 conservator to engage in estate planning related transactions is also expressly  
16 confirmed by statute in a majority of states.

17  
18 While not so limited, the authority confirmed by this section will most often be  
19 used to minimize tax liabilities. For example, by making annual exclusion gifts, the  
20 federal estate tax liability at the protected person's death may be substantially  
21 reduced. Also quite valuable is the ability, with court approval, to amend the  
22 protected person's estate planning documents. For example, failures to meet the  
23 technical requirements for the federal estate tax marital or charitable deduction can  
24 be corrected.

25  
26 This section can also be used for non-tax transactions. Transfers may be made  
27 to qualify the protected person for governmental programs, or the court may  
28 continue the protected person's prior pattern or giving to charities and others. Per  
29 Section 427(b), court approval is required for gifts exceeding 20% of the estate's  
30 annual income.

31  
32 Under subsection (d), prior court approval is required before a conservator may  
33 revoke or amend the protected person's durable power of attorney. Also, if a  
34 durable power of attorney is in effect, the decision of the agent takes precedence  
35 over that of the conservator, absent a court order to the contrary. The purpose of  
36 this provision is to make certain that the court has been made aware of the durable  
37 power of attorney and has determined that the power should be revoked. For this  
38 reason, the petition for the appointment of a conservator must state whether the  
39 respondent has executed a power of attorney and list the name and address of the  
40 agent, if known. Also, the agent must be given notice of the proceeding. See  
41 Sections 403(b)(6) and 404(b).

42  
43 The persons who must be given notice of hearing on a petition under this Section  
44 are as determined under Section 404(c), the statute prescribing the notice  
45 requirements for petitions for orders subsequent to the appointment of a  
46 conservator. Notice of the hearing, together with a copy of the petition, must be

1 given to the protected person, if the protected person has attained fourteen years of  
2 age and is not missing, detained, or unable to return to the United States, any  
3 conservator of the protected person's estate, and any other person as ordered by the  
4 court.

5  
6 Both California and South Dakota have enacted more specific notice  
7 requirements with respect to their statutes authorizing conservators, with court  
8 approval, to engage in a variety of estate planning related transactions. California  
9 requires that notice be given to the conservator, the conservatee, the conservatee's  
10 spouse, any person who has made a request for special notice, any other persons  
11 required to be named in a petition for the appointment of a conservator, and, so far  
12 as known to the petitioner, the conservatee's heirs and beneficiaries under any  
13 purported wills. Cal. Prob. Code Sections 1460, 2581. South Dakota requires  
14 notice to the protected person, to the beneficiaries of the protected person's estate  
15 plan, to the protected person's presumptive heirs and, if known, to any attorney or  
16 financial advisor who advised the protected person within the previous five years.  
17 Should the petition request amendment or revocation of a trust or the protected  
18 person's will, notice must also be given to the trustee and the nominated executor.  
19 See S.D. Codified Laws Section 29A-5-420.

20  
21 Subsection (a) of this section is based on Section 2-307(b) of the 1982 Act  
22 (U.P.C. Section 5-407(b) (1982)). Subsections (b)-(d) are new.

23  
24 **SECTION 412. PROTECTIVE ARRANGEMENTS AND SINGLE**  
25 **TRANSACTIONS.**

26 (a) If a basis is established for a protective order with respect to an  
27 individual, the court, without appointing a conservator, may:

28 (1) authorize, direct, or ratify any transaction necessary or desirable to  
29 achieve any arrangement for security, service, or care meeting the foreseeable needs  
30 of the protected person, including:

- 31 (A) payment, delivery, deposit, or retention of funds or property;  
32 (B) sale, mortgage, lease, or other transfer of property;  
33 (C) purchase of an annuity;  
34 (D) making a contract for life care, deposit contract, or contract for  
35 training and education; or

1 (E) addition to or establishment of a suitable trust[, including a trust  
2 created under the Uniform Custodial Trust Act]; and

3 (2) authorize, direct, or ratify any other contract, trust, will, or  
4 transaction relating to the protected person’s property and business affairs, including  
5 a settlement of a claim, upon determining that it is in the best interest of the  
6 protected person.

7 (b) In deciding whether to approve a protective arrangement or other  
8 transaction under this section, the court shall consider the factors described in  
9 Section 411(c).

10 (c) The court may appoint a [master] to assist in the accomplishment of any  
11 protective arrangement or other transaction authorized under this section. The  
12 [master] has the authority conferred by the order and shall serve until discharged by  
13 order after report to the court.

14 Comment

15 Consistent with the philosophy of the Act that a conservator be appointed only  
16 as a last resort, this section authorizes the court, in lieu of appointing a conservator,  
17 to order a variety of less intrusive “protective arrangements.” A protective  
18 arrangement typically involves a single transaction such as a sale of land or the entry  
19 of a contract for care. The procedure for obtaining a protective arrangement is  
20 similar to that required for the appointment of a conservator. A petition must be  
21 filed (Section 403), notice must be given to those listed in the petition (Section 404),  
22 the court must appoint a visitor unless the respondent is represented by counsel and  
23 the relief sought is a protective proceeding (Section 406(a)), and the court must  
24 appoint a lawyer for the respondent if requested by the respondent, if recommended  
25 by the visitor, or if the court determines that the respondent needs representation  
26 (Alternative 1 of Section 406(b)), or if otherwise required by statute (Alternative 2  
27 of Section 406(b)). The procedure to be followed at the hearing is also identical.  
28 Section 409. At the hearing, the court, applying the standards of Section 401, must  
29 determine that a basis for the protective order exists. Finally, the protective  
30 arrangement ordered must be consistent with the least restrictive order consistent  
31 with the court’s findings. Section 409(b).  
32

1 While the guardianship and conservatorship statutes of many states do not  
2 specifically authorize protective arrangements, such arrangements are often ordered,  
3 usually under the guise of a temporary or emergency conservatorship. This Act  
4 deliberately avoids the use of emergency conservatorships and allows the  
5 appointment of a temporary conservator only as a replacement for a conservator  
6 who holds a regular appointment. See Section 414(a)(4). The act instead prefers the  
7 less intrusive and more precisely defined protective arrangement. But to effectuate a  
8 protective arrangement under this section, the temporary appointment by the court  
9 of someone to implement the protective arrangement will often be required. To  
10 avoid the implication that such appointee is a type of conservator, the Act provides  
11 for the appointment of “masters” instead of either “emergency” or “special”  
12 conservators. The role of the master is to carry out only those tasks that are  
13 specifically ordered by the court. The drafting committee concluded that the terms  
14 “emergency” or “special” conservator were inappropriate because they imply that  
15 the person appointed would have all of the powers and duties of a conservator,  
16 which is much too broad a characterization of the limited role contemplated. The  
17 word “master” is bracketed, recognizing that different states use different words to  
18 refer to the same position. The enacting state that uses a different word should  
19 substitute its own term.  
20

21 Under subsection (a)(2), the settlement of a claim includes the settlement of a  
22 personal injury lawsuit brought on behalf of the minor. One of the more important  
23 protective arrangements listed in subsection (a)(1), and also in the 1982 Act, is the  
24 authority to enter into a contract for life care.  
25

26 This section is based on Section 2-308 of the 1982 Act (U.P.C. Section 5-408  
27 (1982)).  
28

### 29 **SECTION 413. WHO MAY BE CONSERVATOR: PRIORITIES.**

30 (a) Except as otherwise provided in subsection (d), the court, in appointing a  
31 conservator, shall consider persons otherwise qualified in the following order of  
32 priority:

33 (1) a conservator, guardian of the estate, or other like fiduciary appointed  
34 or recognized by an appropriate court of any other jurisdiction in which the  
35 protected person resides;

36 (2) a person nominated as conservator by the respondent, including the  
37 respondent’s most recent nomination made in a durable power of attorney, if the

1 respondent has attained 14 years of age and at the time of the nomination had  
2 sufficient capacity to express a preference;

3 (3) an agent appointed by the respondent to manage the respondent's  
4 property under a durable power of attorney;

5 (4) the spouse of the respondent;

6 (5) an adult child of the respondent;

7 (6) a parent of the respondent; and

8 (7) an adult with whom the respondent has resided for more than six  
9 months before the filing of the petition.

10 (b) A person having priority under subsection (a)(1), (4), (5), or (6) may  
11 designate in writing a substitute to serve instead and thereby transfer the priority to  
12 the substitute.

13 (c) With respect to persons having equal priority, the court shall select the  
14 one it considers best qualified. The court, acting in the best interest of the protected  
15 person, may decline to appoint a person having priority and appoint a person having  
16 a lower priority or no priority.

17 (d) An owner, operator, or employee of [a long-term care institution] at  
18 which the respondent is receiving care may not be appointed as conservator unless  
19 related to the respondent by blood, marriage, or adoption.

#### 20 Comment

21 This section gives top priority for appointment to existing conservators  
22 appointed elsewhere, to the respondent's nominee for the position, and to the  
23 respondent's agent, in that order. Existing conservators are granted a first priority  
24 for two reasons. First, many of these cases will involve transfers of a  
25 conservatorship from another state. To assure a smooth transition, the currently  
26 appointed conservator appointed in this state or another should have the right to the

1 appointment at the new location. Second, many cases may involve situations where  
2 a conservatorship appointment is sought despite the appointment in another place.  
3 Granting the existing conservator priority will deter such forum shopping. Should  
4 the existing conservator be inappropriate for some reason, subsection (c) permits the  
5 court to skip over the existing conservator and appoint someone with lower priority  
6 or even no priority.  
7

8 A conservator or individual nominated by the respondent or the agent named in  
9 the respondent's durable power of attorney has priority for appointment over the  
10 respondent's relatives. The nomination may include anyone nominated orally at the  
11 hearing, if the respondent has sufficient capacity at the time to express a preference.  
12 The nomination may also be made by separate document. While it is generally good  
13 practice for an individual to nominate as conservator the agent named in a durable  
14 power of attorney, the section grants such an agent a preference in the absence of a  
15 specific nomination. The agent is granted preference on the theory that the agent is  
16 the person the respondent would most likely prefer to act. The nomination of the  
17 agent will also make it more difficult for someone to use a conservatorship to thwart  
18 the agent's authority. To assure that the agent will be in a position to assert his  
19 priority, Section 404 (b) requires that the agent receive notice of the proceeding.  
20 Also, until the court has acted to approve the revocation of that authority, Section  
21 411(d) provides that the authority of an agent takes precedence over that of the  
22 conservator.  
23

24 Subsection (a)(7) gives a seventh-level preference to a domestic partner or  
25 companion or an individual who has a close, personal relationship with the  
26 respondent. Note there is no requirement that the respondent have resided with the  
27 other person for more than six months *immediately prior* to the filing of the petition,  
28 just that the requisite residency have occurred at some point in time before the  
29 petition is filed. Courts should use a reasonableness standard in applying this  
30 subsection so that priority is given to someone with whom the respondent has had a  
31 close, enduring relationship. For factors to consider in making this determination,  
32 see the detailed comment to Section 403.  
33

34 While this section substantially overlaps with Section 310, the comparable  
35 provision on selection of guardians, there are some differences. For example,  
36 Section 310 denies a priority to an emergency or temporary guardian, but this  
37 section does not expressly deny a priority for appointment to an emergency or  
38 temporary conservator appointed in another state. But the failure in subsection (a)(1)  
39 to expressly exclude these categories of conservator does not mean that they enjoy a  
40 priority for appointment. Unlike the case with guardians, emergency or temporary  
41 conservators are not included within the definition of "conservator" found in Section  
42 102(2).  
43



1            Subsection (d) prohibits anyone affiliated with a long-term care facility at which  
2 the respondent is receiving care from being appointed as conservator absent a blood,  
3 marital or adoptive arrangement. Strict application of this subsection is crucial to  
4 avoid a conflict of interest and to protect the protected person from potential  
5 financial exploitation. Each state enacting this Act needs to insert the particular term  
6 or terms used in the state for facilities considered to be long-term care institutions.  
7

8            NATIONAL PROBATE COURT STANDARDS, Standard 3.4.11 “Qualifications and  
9 Appointments of Conservators” (1993), recognizes that the court should appoint as  
10 conservator one who is both willing and suitable to manage the respondent’s  
11 finances and property, based on the nature of the respondent’s estate and the  
12 respondent’s incapacity. The standard provides a preference in appointment to one  
13 known by, related to, or requested by the respondent.  
14

15            This section is based on Section 2-309 of the 1982 Act (U.P.C. Section 5-409  
16 (1982)).  
17

18            **SECTION 414. PETITION FOR ORDER SUBSEQUENT TO**  
19 **APPOINTMENT.**

20            (a) A protected person or a person interested in the welfare of a protected  
21 person may file a petition in the appointing court for an order:

22                    (1) requiring bond or collateral or additional bond or collateral, or  
23 reducing bond;

24                    (2) requiring an accounting for the administration of the protected  
25 person’s estate;

26                    (3) directing distribution;

27                    (4) removing the conservator and appointing a temporary or successor  
28 conservator;

29                    (5) modifying the type of appointment or powers granted to the  
30 conservator if the extent of protection or management previously granted is

1 currently excessive or insufficient or the protected person’s ability to manage the  
2 estate and business affairs has so changed as to warrant the action; or

3 (6) granting other appropriate relief.

4 (b) A conservator may petition the appointing court for instructions  
5 concerning fiduciary responsibility.

6 (c) Upon notice and hearing the petition, the court may give appropriate  
7 instructions and make any appropriate order.

8 Comment

9 Once a conservator has been appointed, the court supervising the  
10 conservatorship will ordinarily act only following the request of some moving party.  
11 This section lists the most common types of petitions. Subsection (a)(6) allows for  
12 petitions for “other appropriate relief” to be brought.

13  
14 It is essential that the protected person have the right to petition for appropriate  
15 relief. While such a petition was not forbidden under the 1982 Act, neither was it  
16 expressly authorized. The lead-in language to subsection (a) has been revised to  
17 clarify that a petition may be filed by the protected person.

18  
19 While a limited conservatorship should be ordered, whenever feasible, at the time  
20 of the original appointment, such appointments may also be made at a later date.  
21 Perhaps the possibility of a limited conservatorship was not even considered, or  
22 perhaps the protected person’s situation has improved to the point that a limited  
23 conservatorship is now realistic. Also, even when a limited conservatorship is  
24 ordered in the first instance, it is sometimes necessary to grant the conservator  
25 additional powers or control over additional property. Subsection (a)(5), which is  
26 new to the Act, authorizes petitions to increase or decrease the powers granted to  
27 the conservator or property subject to the conservatorship. Should a request for  
28 increased powers require additional proof of the protected person’s impairment,  
29 such impairment must be proved by clear and convincing evidence. See Section  
30 401(2)(A).

31  
32 This section is based on Section 2-315 of the 1982 Act (U.P.C. Section 5-415  
33 (1982)).



1 control; (2) the extent to which the estate has been deposited under an arrangement  
2 requiring an order of court for its removal; (3) whether an order has been entered  
3 waiving the requirement that accountings be filed and presented or permitting  
4 accountings to be filed less frequently than annually; (4) the extent to which the  
5 income and receipts are payable directly to a facility responsible for or which has  
6 assumed responsibility for the care or custody of the minor or protected person; (5)  
7 whether a guardian has been appointed, and if so, whether the guardian has  
8 presented reports as required; and (6) whether the conservator was appointed  
9 pursuant to a nomination which requested that bond be waived. See S.D. Codified  
10 Laws Section 29A-5-111.  
11

12 This section is based on Section 2-310 of the 1982 Act (U.P.C. Section 5-410  
13 (1982)).

14 **SECTION 416. TERMS AND REQUIREMENTS OF BOND.**

15 (a) The following rules apply to any bond required:

16 (1) Except as otherwise provided by the terms of the bond, sureties and  
17 the conservator are jointly and severally liable.

18 (2) By executing the bond of a conservator, a surety submits to the  
19 jurisdiction of the court that issued letters to the primary obligor in any proceeding  
20 pertaining to the fiduciary duties of the conservator in which the surety is named as a  
21 party. Notice of any proceeding must be sent or delivered to the surety at the  
22 address shown in the court records at the place where the bond is filed and to any  
23 other address then known to the petitioner.

24 (3) On petition of a successor conservator or any interested person, a  
25 proceeding may be brought against a surety for breach of the obligation of the bond  
26 of the conservator.

27 (4) The bond of the conservator may be proceeded against until liability  
28 under the bond is exhausted.

1 (b) A proceeding may not be brought against a surety on any matter as to  
2 which an action or proceeding against the primary obligor is barred.

3 Comment

4 This section specifies various technical requirements that apply when bond is  
5 required. The cost of the bond is payable from the protected person's estate.

6  
7 This section is based on U.P.C. Section 5-411 (1982).

8 **SECTION 417. COMPENSATION AND EXPENSES.** If not otherwise  
9 compensated for services rendered, a guardian, conservator, lawyer for the  
10 respondent, lawyer whose services resulted in a protective order or in an order  
11 beneficial to a protected person's estate, or any other person appointed by the court  
12 is entitled to reasonable compensation from the estate. Compensation may be paid  
13 and expenses reimbursed without court order. If the court determines that the  
14 compensation is excessive or the expenses are inappropriate, the excessive or  
15 inappropriate amount must be repaid to the estate.

16 Comment

17 This section establishes a standard of reasonable compensation for both  
18 guardians and conservators as well as for the respondent's lawyer and any one else  
19 appointed by the court in a guardianship or protective proceeding. Factors to be  
20 considered by the court in setting compensation will vary depending on the  
21 professional or fiduciary role filled by the person making the request. Rates of  
22 compensation may also vary from state to state and at different locales within  
23 particular states.

24  
25 This section is derived from Section 2-313 of the 1982 Act (U.P.C. Section 5-  
26 413 (1982)), but a number of matters left open in the prior version now have been  
27 addressed. First, guardians are expressly added to the list of those who are entitled  
28 to compensation from the estate. Previously, the guardian's right to compensation  
29 was mentioned only in Articles 2 and 3. See Sections 209(a), 316(a). Second, the  
30 section sets out more clearly which lawyers are entitled to compensation. The

1 respondent's lawyer, as well as the lawyer whose services resulted in a protective  
2 order or any other order of benefit to the estate are entitled to compensation and  
3 reimbursement for costs advanced. For example, a lawyer whose services resulted in  
4 the removal of an abusive conservator might be entitled to compensation under this  
5 provision. Third, while compensation may be paid from the estate without court  
6 order, excessive or inappropriate payments must be repaid to the estate.  
7

8 While the size of the estate is an important factor in setting compensation, in  
9 many cases there will be no estate or the estate will not be sufficient to pay the costs  
10 of the initial proceeding. In that event the court, without appointing a conservator,  
11 may simply divide the estate among those entitled to compensation or  
12 reimbursement. Sections 305 and 406 require a visitor to inform the respondent that  
13 attorney's fees and other expenses of the proceeding will be paid from the  
14 respondent's estate. If the respondent is found to be indigent, compensation and  
15 expenses authorized by this section typically will be paid from the general fund of the  
16 county, or from whatever funding exists in the enacting state for indigent  
17 representation, such as legal aid, with the compensation most likely at a fixed rate.  
18

19 For a list of factors relevant in determining a conservator's compensation, see  
20 Restatement (Third) of Trusts § 39 cmt. c (Preliminary Draft No. 3, 1997). Among  
21 the factors listed are skill, experience and time devoted to duties; the amount and  
22 character of the property; the degree of difficulty; responsibility and risk assumed;  
23 the nature and cost of services rendered by others; and the quality of the  
24 performance. See also Restatement (Second) of Trusts § 242 (1959). In setting  
25 compensation, the services actually performed and responsibilities assumed by the  
26 conservator should be closely examined. For example, an adjustment in  
27 compensation may be appropriate if the conservator had delegated significant duties.  
28 On the other hand, a conservator with special skills, such as those of a real estate  
29 agent, may be entitled to extra compensation for performing services that would  
30 ordinarily be delegated. See Restatement (Third) of Trusts § 39 cmt. f (Preliminary  
31 Draft No. 3, 1997).  
32

33 The standard of reasonable compensation also applies if the estate has multiple  
34 conservators. The mere fact that the estate has more than one conservator does not  
35 mean that the conservators together are entitled to more compensation than had  
36 either one acted alone. Nor does the appointment of multiple conservators mean that  
37 the conservators are eligible to receive the compensation in equal shares. The total  
38 amount of the compensation to be paid and how it should be divided depend on the  
39 totality of the circumstances. Factors to be considered include the court's reasons  
40 for appointing multiple conservators and the level of responsibility assumed and  
41 exact services performed by each.  
42

1 This section authorizes the payment of compensation from the respondent's  
2 estate even if no guardian or conservator is appointed or other protective order  
3 entered. Those entitled to compensation in that case are persons appointed by the  
4 court in connection with the proceeding, including the visitor, the respondent's  
5 lawyer, and the doctor or other professional appointed to perform an evaluation.  
6 However, other law in the enacting jurisdiction may grant the respondent a right to  
7 reimbursement should the petition be totally without merit.  
8

9 A guardian or conservator acting as a representative payee of the ward's or  
10 protected person's Social Security benefits may not be paid a fee from Social  
11 Security funds. Both Titles II and XVI of the Social Security Act limit the use of the  
12 funds to basic necessities. The only time that a fee may be taken is if the guardian or  
13 conservator is an "organizational payee" approved by the Social Security  
14 Administration.  
15

16 **SECTION 418. GENERAL DUTIES OF CONSERVATOR; PLAN.**

17 (a) A conservator, in relation to powers conferred by this [article] or implicit  
18 in the title acquired by virtue of the proceeding, is a fiduciary and shall observe the  
19 standards of care applicable to a trustee.

20 (b) A conservator may exercise authority only as necessitated by the  
21 limitations of the protected person, and to the extent possible, shall encourage the  
22 person to participate in decisions, act in the person's own behalf, and develop or  
23 regain the ability to manage the person's estate and business affairs.

24 (c) Within 60 days after appointment, a conservator shall file with the  
25 appointing court a plan for protecting, managing, expending, and distributing the  
26 assets of the protected person's estate. The plan must be based on the actual needs  
27 of the person and take into consideration the best interest of the person. The  
28 conservator shall include in the plan steps to develop or restore the person's ability

1 to manage the person's property, an estimate of the duration of the conservatorship,  
2 and projections of expenses and resources.

3 (d) In investing an estate, selecting assets of the estate for distribution, and  
4 invoking powers of revocation or withdrawal available for the use and benefit of the  
5 protected person and exercisable by the conservator, a conservator shall take into  
6 account any estate plan of the person known to the conservator and may examine  
7 the will and any other donative, nominative, or other appointive instrument of the  
8 person.

#### 9 Comment

10 This section reflects the dual role of a conservator. On the one hand, a  
11 conservator is a fiduciary charged with management of another's property.  
12 Consequently, subsection (a) requires a conservator to observe the standard of care  
13 applicable to trustees. On the other hand, a conservator, like a guardian, also owes  
14 obligations directly to the protected person, obligations emphasized in subsection  
15 (b). Subsection (b) emphasizes the concept of limited conservatorship by limiting the  
16 exercise of the conservator's authority and requiring the participation of the  
17 protected person in decision making. The conservator must encourage the  
18 participation of the protected person in decisions as well as encourage the protected  
19 person to develop or regain the capacity to act without a conservator. Before  
20 making a decision, the conservator should also make an effort to learn the personal  
21 values of the protected person and ask the protected person about the protected  
22 person's desires. The conservator should be particularly cognizant of the views  
23 expressed by the protected person prior to the conservator's appointment.

24 Under subsection (c), the conservator must file a plan with the court within sixty  
25 days after appointment. In addition to plans for expenditures, investments, and  
26 distributions, the plan must list the steps that will be taken to develop or restore the  
27 protected person's ability to manage the person's property and an estimate of the  
28 length of the conservatorship. The filing of a plan will help the conservator perform  
29 more effectively and reduce the need to take action to recover improper  
30 expenditures. While a conservator need not request a hearing on the plan, Section  
31 404(d) does require that the conservator, within fourteen days after its filing, give  
32 notice of the filing of the plan to the protected person and any other person the court  
33 directs. Should those notified have concerns about the plan, a hearing on the plan  
34 may be requested pursuant to Section 414.



1 Subsection (c) of this section, and many of the sections in Article 4 which follow,  
2 are in substantial part specific applications of the fundamental responsibilities stated  
3 in subsections (a) and (b), specifying subsidiary duties and the powers and  
4 immunities necessary to properly implement the conservator’s role. Subsection (c) is  
5 derived from NATIONAL PROBATE COURT STANDARDS, Standard 3.4.15 “Reports by  
6 the Conservator” (1993).  
7

8 Subsection (d), contrary to at least some case law, allows a conservator access  
9 to and the right to examine the protected person’s will and other documents  
10 comprising the protected person’s estate plan. Such access is essential for the  
11 conservator to carry out the obligation, as stated in subsection (b), to consider the  
12 protected person’s views when making decisions. For example, by allowing the  
13 conservator access to the estate plan, the risk of inadvertent sales of specifically  
14 devised property and the difficult ademption problems such sales often create may be  
15 avoided. Access to the estate plan also facilitates, where appropriate, the filing of a  
16 petition with respect to the protected person’s estate plan as authorized by Section  
17 411.  
18

19 Subsection (a) is based on Section 2-316 of the 1982 Act (U.P.C. Section 5-416  
20 (1982)), and subsection (d) on Section 2-326 of the 1982 Act (U.P.C. Section 5-426  
21 (1982)). Subsections (b) and (c) are new.  
22  
23

24 **SECTION 419. INVENTORY; RECORDS.**  
25

26 (a) Within 60 days after appointment, a conservator shall prepare and file  
27 with the appointing court a detailed inventory of the estate subject to the  
28 conservatorship, together with an oath or affirmation that the inventory is believed  
29 to be complete and accurate as far as information permits.

30 (b) A conservator shall keep records of the administration of the estate and  
31 make them available for examination on reasonable request of an interested person.

32 **Comment**  
33

34 The time limit for the filing of the inventory has been reduced to sixty days from  
35 the ninety days provided in the 1982 Act in order to coordinate with the filing of the  
36 conservatorship plan required by Section 418. While technically separate  
37 documents, the conservatorship plan and inventory should ideally be prepared in

1 tandem, with the inventory providing backup data for the course of action  
2 recommended in the conservatorship plan.  
3

4 The requirement in the 1982 Act that the conservator provide certain individuals  
5 with a copy of the inventory has been revised and moved to Section 404(d). The  
6 conservator is no longer allowed to unilaterally decide whether the protected person  
7 is competent to understand the inventory and to withhold the protected person's  
8 copy. The inventory, like all other documents of which notice is required, must be  
9 provided to the protected person regardless of competency.  
10

11 This section is based on Section 2-317 of the 1982 Act (U.P.C. Section 5-417  
12 (1982)).  
13

14 **SECTION 420. REPORTS; APPOINTMENT OF [VISITOR];**

15 **MONITORING.**

16 (a) A conservator shall report to the court for administration of the estate  
17 annually unless the court otherwise directs, upon resignation or removal, upon  
18 termination of the conservatorship, and at other times as the court directs. An order,  
19 after notice and hearing, allowing an intermediate report of a conservator adjudicates  
20 liabilities concerning the matters adequately disclosed in the accounting. An order,  
21 after notice and hearing, allowing a final report adjudicates all previously unsettled  
22 liabilities relating to the conservatorship.

23 (b) A report must state or contain:

24 (1) a list of the assets of the estate under the conservator's control and a  
25 list of the receipts, disbursements, and distributions during the period for which the  
26 report is made;

27 (2) a list of the services provided to the protected person; and

1 (3) any recommended changes in the plan for the conservatorship as well  
2 as a recommendation as to the continued need for conservatorship and any  
3 recommended changes in the scope of the conservatorship.

4 (c) The court may appoint a [visitor] to review a report or plan, interview  
5 the protected person or conservator, and make any other investigation the court  
6 directs. In connection with a report, the court may order a conservator to submit the  
7 assets of the estate to an appropriate examination to be made in a manner the court  
8 directs.

9 (d) The court shall establish a system for monitoring conservatorships,  
10 including the filing and review of conservators' reports and plans.

#### 11 Comment

12 Similar to previous versions of this Act, this section requires a conservator to  
13 periodically account except that the requirement to "account" has been changed to  
14 the requirement to "report." This change was made because a proper assessment of  
15 the conservator's performance requires more than the mere verification of receipts  
16 and disbursements. A conservator is more than a manager of property. To assess  
17 the conservator's compliance with the general duties stated in Section 418, the court  
18 must also determine whether the conservator has acted in accordance with the  
19 conservatorship plan, whether the conservator, to the extent feasible, has attempted  
20 to involve the protected person in decision making, and whether the conservatorship  
21 or its current scope is still appropriate.

22  
23 The reporting requirements in this section are consistent with those in Section  
24 317 for guardians of incapacitated persons. Enforcement of the reporting  
25 requirements under this section is a critical component of court oversight of  
26 conservatorships to prevent abuses. This includes the right of the court under  
27 subsection (a) to modify the reporting requirements as dictated by the circumstances  
28 of a specific conservatorship.

29  
30 States enacting this Act are required under subsection (d) to establish a system  
31 for monitoring conservatorships, which would include, but not be limited to,  
32 mechanisms for assuring that annual reports are timely filed and reviewed. An

1 independent monitoring system is crucial so that the court can adequately safeguard  
2 against possible abuses. Monitors can be paid court personnel, court appointees, or  
3 volunteers. For a comprehensive discussion of the various methods for monitoring  
4 conservatorships, see SALLY BALCH HURME, STEPS TO ENHANCE GUARDIANSHIP  
5 MONITORING (A.B.A. 1991). See also AARP VOLUNTEERS: A RESOURCE  
6 FOR STRENGTHENING GUARDIANSHIPS (AARP 1991).

7  
8 States should also establish a plan for payment for the monitoring. In some  
9 states, the monitor may be a court employee or a volunteer. If the estate has  
10 sufficient funds to pay the monitoring fee, the estate should be charged accordingly.  
11 Only when an estate has insufficient assets to pay for monitoring should public funds  
12 be used to cover the cost of monitoring.

13  
14 The National Probate Court Standards also provide for the filing of reports and  
15 procedures for monitoring conservatorships. See NATIONAL PROBATE COURT  
16 STANDARDS, Standards 3.4.15 “Reports by the Conservator,” and 3.4.16  
17 “Monitoring of the Conservator” (1993). The National Probate Court Standards  
18 additionally contains recommendations relating to the need for periodic review of  
19 conservatorships and sanctions for failure of conservators to comply with reporting  
20 requirements. See NATIONAL PROBATE COURT STANDARDS, Standards 3.4.17  
21 “Revaluation of Necessity for Conservatorship,” and 3.4.18 “Enforcement.”

22  
23 Subsection (a) of this section is derived from Section 2-318 of the 1982 Act  
24 (U.P.C. Section 5-418 (1982)). Subsections (b)-(d) are new.

25  
26  
27 **SECTION 421. TITLE BY APPOINTMENT.**

28 (a) The appointment of a conservator vests title in the conservator as trustee  
29 to all property of the protected person, or to the part thereof specified in the order,  
30 held at the time of appointment or thereafter acquired. An order vesting title in the  
31 conservator to only a part of the property of the protected person creates a  
32 conservatorship limited to assets specified in the order.

33 (b) Letters of conservatorship are evidence of vesting title of the protected  
34 person’s assets in the conservator. An order terminating a conservatorship transfers

1 title to assets remaining subject to the conservatorship, including any described in the  
2 order, to the formerly protected person or the person's successors.

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

7 Comment

8 Subsection (a) of this section should be read in conjunction with Section 409(d),  
9 which provides that the appointment of a conservator or entry of another protective  
10 order is not a determination of incapacity. Consequently, the appointment of a  
11 conservator under this Act does not itself affect the protected person's ability to  
12 enter into contracts or engage in other transactions. Instead, protection against  
13 possibly improvident contracts is provided by vesting in the conservator legal title to  
14 the protected person's assets, the same as if the conservator were acting as a trustee.  
15 This allows for administration of the property independent of the actions of the  
16 protected person except to the extent the conservator is required to consult with the  
17 protected person as required by Section 418. See Section 422 for possible remedies  
18 for third parties who deal with a protected person without knowledge of the  
19 conservatorship.  
20

21 The order appointing a conservator does not necessarily vest title in the  
22 conservator to all assets of the protected person, but only to assets subject to the  
23 conservatorship. Should the order of appointment list the assets subject to the  
24 conservatorship, only title to those assets is transferred to the conservator.  
25 Ordinarily, in the absence of an order limiting the scope of the conservatorship, title  
26 to all of the protected person's assets will be transferred to the conservator.  
27 However, if the protected person has executed a durable power of attorney, title to  
28 assets within the agent's control are not transferred to the conservator until such  
29 time as the power of attorney is revoked and the assets subject to the agency come  
30 within the conservator's control. See Section 411(d).  
31

32 The appointment of the conservator gives the conservator the authority over the  
33 protected person's property, or, if a limited conservator, to that property specified in  
34 the court's order. The letters of conservatorship are evidence of the conservator's  
35 authority and can be recorded to give notice.  
36



1 This section provides a spendthrift effect for property of the protected person  
2 vested in the conservator. The section, like Section 421, is designed to allow the  
3 estate to be administered with a minimum of interference, and to make clear that the  
4 conservator, with respect to the property of the conservatorship, occupies a role  
5 similar to that of a trustee. The section is also designed to protect the estate, and  
6 hence the protected person, against possibly abusive or improvident claims. But  
7 some significant exceptions are recognized to protect the rights of third parties. An  
8 attempted transfer or assignment by the protected person, while ineffective to affect  
9 property rights, may give rise to a claim against the protected person for restitution  
10 or damages which, subject to presentation and allowance, may be satisfied pursuant  
11 to the claims procedure provided in Section 429. In addition, a creditor of the  
12 protected person, while forbidden to directly levy upon or garnish property held in  
13 the conservatorship, may be similarly entitled to relief under the claims procedures.  
14

15 Subsection (c) addresses a special situation. While title to certain tangible  
16 personal property, such as an automobile, is transferred by means of a document of  
17 title, title to most tangible personal property is transferred simply by delivery of  
18 possession. Sales of such property are often casual, and purchasers do not usually  
19 inquire into the source of the seller's title. Upon the conservator's appointment, title  
20 to a protected person's tangible personal property, like title to the protected  
21 person's other assets, is transferred from the protected person to the conservator.  
22 But this transfer of title will normally not be known to a prospective purchaser,  
23 particularly if the tangible personal property is still in the protected person's  
24 possession. The effect of this subsection is to generally validate the title of such  
25 casual purchasers. The conservator may contest the purchaser's title only if the  
26 purchaser failed to pay full value, the purchaser knew of the conservatorship, or the  
27 purchaser, based on the circumstances, should have inquired into the  
28 conservatorship's existence.  
29

30 Subsection (d) clarifies that this section does not supersede protections third  
31 parties may have under other law, such as under the statutes regulating commercial  
32 transactions.  
33

34 Subsections (a) and (b) are based on subsections (b) and (c) of Section 2-319 of  
35 the 1982 Act (subsections (b) and (c) of U.P.C. Section 5-419 (1982)). Subsections  
36 (c) and (d) are new.  
37

38 . **SECTION 423. SALE, ENCUMBRANCE, OR OTHER TRANSACTION**

39 **INVOLVING CONFLICT OF INTEREST.** Any transaction involving the

40 conservatorship estate which is affected by a substantial conflict between the

1 conservator’s fiduciary and personal interests is voidable unless the transaction is  
2 expressly authorized by the court after notice to interested persons. A transaction  
3 affected by a substantial conflict between personal and fiduciary interests includes  
4 any sale, encumbrance, or other transaction involving the conservatorship estate  
5 entered into by the conservator, the spouse, descendant, agent, or lawyer of a  
6 conservator, or a corporation or other enterprise in which the conservator has a  
7 substantial beneficial interest.

#### 8 Comment

9 Transactions involving conservatorship assets entered into by the conservator or  
10 by persons with close business or personal ties to the conservator have the potential  
11 to be tainted by conflict of interest. Because of this serious risk, a transaction  
12 involving the conservatorship property entered into by the conservator or with  
13 persons having close ties to the conservator is voidable without further proof. But  
14 while this principle is well-established, the exact parameters of the principle are less  
15 certain. This section, which is based on comparable provisions of the U.P.C.,  
16 articulates the doctrine with more precision. Compare U.P.C. Section 3-713. Under  
17 this section, a transaction involving the conservatorship property which was entered  
18 into by the conservator or specified relatives or business associates of the  
19 conservator is presumed to be premised on an impermissible advantage based on  
20 conflict of interest. However, transactions involving conservatorship property with  
21 parties not on the list are not necessarily valid. While transactions involving other  
22 parties are not presumed to be invalid, a transaction may still be voided if it is proven  
23 that a substantial conflict between personal and fiduciary interests exists and that the  
24 transaction was affected by the conflict. Also, the fact that the transaction is voidable  
25 does not extinguish any action for breach of fiduciary duty or for damages, separate  
26 and apart from voiding the transaction. The section intentionally does *not* provide  
27 any limitation of time on when an action to void the transaction may be brought.  
28 Instead, a laches test will be applied.

29  
30 Per Section 414, a petition to void a transaction may be filed either by the  
31 protected person or by any person interested in the protected person’s welfare.  
32 Whether the court should grant or deny the petition will typically depend on the  
33 financial outcome of the conservatorship estate. Should the transaction have proven  
34 unprofitable to the conservator or related party, the court will likely allow the  
35 transaction to stand.





1 require that the conservator inquire into the possession of or propriety of the  
2 conservator's exercise of a power. Nor is the third party, contrary to the common  
3 law, responsible for the proper application of funds or property delivered to the  
4 conservator. But consistent with the Act's emphasis on limited conservatorship, the  
5 protection extended to third parties is not unlimited. Third parties are charged with  
6 knowledge of restrictions on the authority of limited conservators. Pursuant to  
7 Section 110, any limitation on the assets subject to a conservatorship must be  
8 endorsed on the conservator's letters.  
9

10 The protections provided by this section are of limited application. As provided  
11 in subsection (b), for many transactions this section will be superseded by statutes  
12 relating to commercial transactions, such as the Uniform Commercial Code, or by  
13 statutes relating to the transfer of securities, such as the state's version of the  
14 Uniform Simplification of Fiduciary Security Transfers Act.  
15

16 For background on Section 7 of the Uniform Trustees' Powers Act, upon which  
17 this section is ultimately based, see Jerome H. Curtis, Jr., *Transmogrification of the*  
18 *American Trust*, 31 REAL PROP. PROB. & TR. J. 251 (1996).  
19

20 This section is based on Section 2-322 of the 1982 Act (U.P.C. Section 5-422  
21 (1982)).  
22

## 23 **SECTION 425. POWERS OF CONSERVATOR IN**

### 24 **ADMINISTRATION.**

25 (a) Except as otherwise qualified or limited by the court in its order of  
26 appointment and endorsed on the letters, a conservator has all of the powers granted  
27 in this section and any additional powers granted by law to a trustee in this State.

28 (b) A conservator, acting reasonably and in an effort to accomplish the  
29 purpose of the appointment, and without further court authorization or confirmation,  
30 may:

31 (1) collect, hold, and retain assets of the estate, including assets in which  
32 the conservator has a personal interest and real property in another State, until the  
33 conservator considers that disposition of an asset should be made;

- 1 (2) receive additions to the estate;
- 2 (3) continue or participate in the operation of any business or other  
3 enterprise;
- 4 (4) acquire an undivided interest in an asset of the estate in which the  
5 conservator, in any fiduciary capacity, holds an undivided interest;
- 6 (5) invest assets of the estate as though the conservator were a trustee;
- 7 (6) deposit money of the estate in a financial institution, including one  
8 operated by the conservator;
- 9 (7) acquire or dispose of an asset of the estate, including real property in  
10 another State, for cash or on credit, at public or private sale, and manage, develop,  
11 improve, exchange, partition, change the character of, or abandon an asset of the  
12 estate;
- 13 (8) make ordinary or extraordinary repairs or alterations in buildings or  
14 other structures, demolish any improvements, and raze existing or erect new party  
15 walls or buildings;
- 16 (9) subdivide, develop, or dedicate land to public use, make or obtain the  
17 vacation of plats and adjust boundaries, adjust differences in valuation or exchange  
18 or partition by giving or receiving considerations, and dedicate easements to public  
19 use without consideration;
- 20 (10) enter for any purpose into a lease as lessor or lessee, with or without  
21 option to purchase or renew, for a term within or extending beyond the term of the  
22 conservatorship;

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

3 (12) grant an option involving disposition of an asset of the estate and  
4 take an option for the acquisition of any asset;

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

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

8 (15) sell or exercise stock subscription or conversion rights;

9 (16) consent, directly or through a committee or other agent, to the  
10 reorganization, consolidation, merger, dissolution, or liquidation of a corporation or  
11 other business enterprise;

12 (17) hold a security in the name of a nominee or in other form without  
13 disclosure of the conservatorship so that title to the security may pass by delivery;

14 (18) insure the assets of the estate against damage or loss and the  
15 conservator against liability with respect to a third person;

16 (19) borrow money, with or without security, to be repaid from the  
17 estate or otherwise and advance money for the protection of the estate or the  
18 protected person and for all expenses, losses, and liability sustained in the  
19 administration of the estate or because of the holding or ownership of any assets, for  
20 which the conservator has a lien on the estate as against the protected person for  
21 advances so made;

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

4 (21) pay taxes, assessments, compensation of the conservator and any  
5 guardian, and other expenses incurred in the collection, care, administration, and  
6 protection of the estate;

7 (22) allocate items of income or expense to income or principal of the  
8 estate, as provided by other law, including creation of reserves out of income for  
9 depreciation, obsolescence, or amortization or for depletion of minerals or other  
10 natural resources;

11 (23) pay any sum distributable to a protected person or individual who is  
12 in fact dependent on the protected person by paying the sum to the distributee or by  
13 paying the sum for the use of the distributee:

14 (A) to the guardian of the distributee;

15 (B) to a distributee's custodian under [the Uniform Transfers to  
16 Minors Act] or custodial trustee under [the Uniform Custodial Trust Act]; or

17 (C) if there is no guardian, custodian, or custodial trustee, to a  
18 relative or other person having physical custody of the distributee;

19 (24) prosecute or defend actions, claims, or proceedings in any  
20 jurisdiction for the protection of assets of the estate and of the conservator in the  
21 performance of fiduciary duties; and

1 (25) execute and deliver all instruments that will accomplish or facilitate  
2 the exercise of the powers vested in the conservator.

3 Comment

4 This section is based on Section 2-323 of the 1982 Act (U.P.C. Section 5-423  
5 (1982)) with some changes. For example, the provision authorizing delegation is  
6 now stated as a separate section. See Section 426. Also, subsection (b)(23) is  
7 revised to expand the list of individuals to whom the conservator may pay sums  
8 otherwise distributable to the protected person. The list now includes custodians  
9 under the Uniform Transfers to Minors Act and trustees under the Uniform  
10 Custodial Trust Act. But the most significant change to this section is the deletion of  
11 the language of former subsection (a) that allowed a conservator of a minor to  
12 exercise the powers of a guardian without seeking formal appointment to that office.  
13

14 While subsection (b)(7) authorizes a conservator to deal with real property  
15 located in another state, before disposing of the property in the other state, local law  
16 may require that the conservator have some contact with or supervision by a court in  
17 that state.  
18

19 In recent years, structured settlements have become more common. While the  
20 term “structured settlement” is not expressly used in this section, subsection (b)(20)  
21 would authorize a conservator to enter into such an agreement. The court, by means  
22 of a protective arrangement, may also approve a structured settlement without  
23 appointing a conservator. See Section 412(a)(2).  
24

25 **SECTION 426. DELEGATION.**

26 (a) A conservator may not delegate to an agent or another conservator the  
27 entire administration of the estate, but a conservator may otherwise delegate the  
28 performance of functions that a prudent trustee of comparable skills may delegate  
29 under similar circumstances.

30 (b) The conservator shall exercise reasonable care, skill, and caution in:

31 (1) selecting an agent;

1 (2) establishing the scope and terms of a delegation, consistent with the  
2 purposes and terms of the conservatorship;

3 (3) periodically reviewing an agent's overall performance and compliance  
4 with the terms of the delegation; and

5 (4) redressing an action or decision of an agent which would constitute a  
6 breach of trust if performed by the conservator.

7 (c) A conservator who complies with subsections (a) and (b) is not liable to  
8 the protected person or to the estate for the decisions or actions of the agent to  
9 whom a function was delegated.

10 (d) In performing a delegated function, an agent shall exercise reasonable  
11 care to comply with the terms of the delegation.

12 (e) By accepting a delegation from a conservator subject to the law of this  
13 State, an agent submits to the jurisdiction of the courts of this State.

14 Comment

15 This new section is based on Section 9 of the Uniform Prudent Investor Act,  
16 which itself was derived from the Restatement (Third) of Trusts: Prudent Investor  
17 Rule Section 171 (1992). The Uniform Prudent Investor Act, despite its title,  
18 addresses more than investment of trust assets. It also covers a variety of topics,  
19 including delegation, relating to the general management of trusts. Section 9 of the  
20 Act is designed to replace Section 3(24) of the Uniform Trustee Powers Act (1964)  
21 on which the former delegation provision of this Act was based. Unlike Section 2-  
22 323(c)(24) of the 1982 Act (U.P.C. Section 5-423(c)(24)(1962)), which merely  
23 authorized delegation without specifying standards, this section subjects delegation  
24 to a standard of care.

25  
26 The purpose of this section is to encourage and protect the trustee in making  
27 delegations appropriate to the facts and circumstances of the particular  
28 conservatorship. This section is designed to strike the appropriate balance between  
29 the advantages and hazards of delegation. The standard for whether a particular

1 function is delegable by a conservator is whether it is a function that a prudent  
2 conservator might delegate under similar circumstances. This section does not  
3 mandate delegation or hold a conservator liable for failing to delegate. However,  
4 such liability may be imposed under some other section if the conservator, due to a  
5 failure to delegate, is unable to perform required duties. See, e.g., Section 418  
6 (general duties of conservator).

7  
8 This section applies to delegation both to agents and co-conservators. Whether a  
9 conservator may delegate to a co-conservator functions which may not be delegated  
10 to an agent and vice versa will depend on the facts and circumstances of the  
11 particular conservatorship.

12  
13 Under subsection (b)(3), the duty to review the agent's performance includes the  
14 periodic evaluation of the continued need for and appropriateness of the delegation,  
15 including the need to possibly terminate the relationship. The conservator's  
16 compliance with this duty should also protect the protected person against the risks  
17 of an overly broad delegation.

18  
19 Although subsection (c) exonerates the conservator from personal responsibility  
20 for the agent's conduct when the delegation satisfies the standards of subsection (a),  
21 subsection (d) makes the agent responsible to the conservatorship.

22  
23 **SECTION 427. PRINCIPLES OF DISTRIBUTION BY CONSERVATOR.**

24 (a) Unless otherwise specified in the order of appointment and endorsed on  
25 the letters of appointment or contrary to the plan filed pursuant to Section 418, a  
26 conservator may expend or distribute income or principal of the estate of the  
27 protected person without further court authorization or confirmation for the support,  
28 care, education, health, and welfare of the protected person and individuals who are  
29 in fact dependent on the protected person, including the payment of child or spousal  
30 support, in accordance with the following rules:

31 (1) A conservator shall consider recommendations relating to the  
32 appropriate standard of support, care, education, health, and welfare for the  
33 protected person or an individual who is in fact dependent on the protected person



1 made by a guardian, if any, and, if the protected person is a minor, the conservator  
2 shall consider recommendations made by a parent.

3 (2) A conservator may not be surcharged for money paid to persons  
4 furnishing support, care, education, or benefit to a protected person, or an individual  
5 who is in fact dependent on the protected person, in accordance with the  
6 recommendations of a parent or guardian of the protected person unless the  
7 conservator knows that the parent or guardian derives personal financial benefit  
8 therefrom, including relief from any personal duty of support, or the  
9 recommendations are not in the best interest of the protected person.

10 (3) In making distributions under this subsection, the conservator shall  
11 consider:

12 (A) the size of the estate, the estimated duration of the  
13 conservatorship, and the likelihood that the protected person, at some future time,  
14 may be fully self-sufficient and able to manage business affairs and the estate;

15 (B) the accustomed standard of living of the protected person and  
16 individuals who are in fact dependent on the protected person; and

17 (C) other money or sources used for the support of the protected  
18 person.

19 (4) Money expended under this subsection may be paid by the  
20 conservator to any person, including the protected person, as reimbursement for  
21 expenditures that the conservator might have made, or in advance for services to be  
22 rendered to the protected person if it is reasonable to expect the services will be

1 performed and advance payments are customary or reasonably necessary under the  
2 circumstances.

3 (b) If an estate is ample to provide for the distributions authorized by  
4 subsection (a), a conservator for a protected person other than a minor may make  
5 gifts that the protected person might have been expected to make, in amounts that  
6 do not exceed in the aggregate for any calendar year 20 percent of the income of the  
7 estate in that year.

#### 8 Comment

9 This section sets forth a conservator's specific duties and powers with respect to  
10 ongoing distributions. Distributions upon termination of the conservatorship are  
11 addressed in Section 431. Special rules with respect to a termination due to the  
12 death of the protected person are covered in Section 428. Distributions under this  
13 section may be made without court authorization or confirmation.

14  
15 This section is based on subsections (a) and (b) of Section 2-324 of the 1982 Act  
16 (subsections (a) and (b) of U.P.C. Section 5-424 (1982)) but with several changes.  
17 The categories for which distributions can be made have been expanded to include  
18 health and welfare. The authority to make distributions for the protected person's  
19 dependents has been clarified. "Dependents" is not limited to dependents whom the  
20 protected person is legally obligated to support, but refers to individuals who are in  
21 fact dependent on the protected person, such as children in college and adult children  
22 with developmental disabilities. Child and spousal support payments are now  
23 specifically included within permitted distributions to dependents. Although Section  
24 411 allows the making of a gift, it may only be done pursuant to court order. Under  
25 this section, a conservator may make a gift without court order if the gift meets the  
26 stated limitations.

#### 27 28 **SECTION 428. DEATH OF PROTECTED PERSON.**

29 [(a)] If a protected person dies, the conservator shall deliver to the court for  
30 safekeeping any will of the protected person which may have come into the

1 conservator's possession, inform the personal representative or beneficiary named in  
2 the will of the delivery, and retain the estate for delivery to the personal  
3 representative of the decedent or to another person entitled to it.

4 [(b) If a personal representative has not been appointed within 40 days after  
5 the death of a protected person and an application or petition for appointment is not  
6 before the court, the conservator may apply to exercise the powers and duties of a  
7 personal representative in order to administer and distribute the decedent's estate.  
8 Upon application for an order conferring upon the conservator the powers of a  
9 personal representative, after notice given by the conservator to any person  
10 nominated as personal representative by any will of which the applicant is aware, the  
11 court may grant the application upon determining that there is no objection and  
12 endorse the letters of conservatorship to note that the formerly protected person is  
13 deceased and that the conservator has acquired all of the powers and duties of a  
14 personal representative.

15 (c) The issuance of an order under this section has the effect of an order of  
16 appointment of a personal representative [as provided in Section 3-308 and Parts 6  
17 through 10 of Article III of the Uniform Probate Code]. However, the estate in the  
18 name of the conservator, after administration, may be distributed to the decedent's  
19 successors without retransfer to the conservator as personal representative.]

#### 20 Comment

21 Subsection (a) lists the required duties of a conservator incident to the death of  
22 the protected person. The conservator must deliver to the court for safekeeping any  
23 will of the protected person which may have come into the conservator's possession,

1 inform the personal representative or a devisee named in the will that the will has  
2 been delivered, and retain the conservatorship estate for delivery to the personal  
3 representative or to another person entitled to it.  
4

5 Subsections (b) and (c) address the particular problems that can arise if the estate  
6 beneficiaries fail to take action to appoint a personal representative for the protected  
7 person's estate. The conservator will then be unable to close the conservatorship  
8 because there is no "successor" to whom to deliver the protected person's assets. To  
9 enable the conservator to expeditiously close the conservatorship, this section  
10 specifies a streamlined process whereby the conservator can secure appointment as  
11 personal representative. These subsections are bracketed for several reasons. First,  
12 the enacting jurisdiction's probate code may already specifically address the right of  
13 the conservator to petition for appointment as personal representative or the right of  
14 the conservator to distribute the conservatorship assets directly to the estate  
15 beneficiaries. Second, subsections (b) and (c) are not essential to the operation of the  
16 Act and may be omitted if the enacting jurisdiction so chooses. Even though the  
17 state's statute may not specifically authorize a conservator to petition for  
18 appointment as personal representative, a conservator, like any other holder of a  
19 decedent's assets, may eventually take action to effect a distribution. Finally,  
20 subsection (b) is specifically tailored for states, such as states which have enacted the  
21 Uniform Probate Code, that allow the appointment of a personal representative  
22 without prior notice to the estate beneficiaries. For example, should the state  
23 enacting this Act have also enacted the U.P.C., the conservator-personal  
24 representative would be required to give notice of the appointment within thirty  
25 days. See U.P.C. Section 3-705. States which require notice to interested persons  
26 prior to the appointment of a personal representative should modify subsection (b)  
27 accordingly.  
28

29 This section is based on Section 2-324(e) of the 1982 Act (U.P.C. Section 5-  
30 424(e) (1982)).  
31

## 32 **SECTION 429. PRESENTATION AND ALLOWANCE OF CLAIMS.**

33 (a) A conservator may pay, or secure by encumbering assets of the estate,  
34 claims against the estate or against the protected person arising before or during the  
35 conservatorship upon their presentation and allowance in accordance with the  
36 priorities stated in subsection (d). A claimant may present a claim by:

1 (1) sending or delivering to the conservator a written statement of the  
2 claim, indicating its basis, the name and address of the claimant, and the amount  
3 claimed; or

4 (2) filing a written statement of the claim, in a form acceptable to the  
5 court, with the clerk of court and sending or delivering a copy of the statement to  
6 the conservator.

7 (b) A claim is deemed presented on receipt of the written statement of claim  
8 by the conservator or the filing of the claim with the court, whichever first occurs. A  
9 presented claim is allowed if it is not disallowed by written statement sent or  
10 delivered by the conservator to the claimant within 60 days after its presentation.  
11 The conservator before payment may change an allowance to a disallowance in  
12 whole or in part, but not after allowance under a court order or judgment or an  
13 order directing payment of the claim. The presentation of a claim tolls the running  
14 of any statute of limitations relating to the claim until 30 days after its disallowance.

15 (c) A claimant whose claim has not been paid may petition the court for  
16 determination of the claim at any time before it is barred by a statute of limitations  
17 and, upon due proof, procure an order for its allowance, payment, or security by  
18 encumbering assets of the estate. If a proceeding is pending against a protected  
19 person at the time of appointment of a conservator or is initiated against the  
20 protected person thereafter, the moving party shall give to the conservator notice of  
21 any proceeding that could result in creating a claim against the estate.

1 (d) If it appears that the estate is likely to be exhausted before all existing  
2 claims are paid, the conservator shall distribute the estate in money or in kind in  
3 payment of claims in the following order:

4 (1) costs and expenses of administration;

5 (2) claims of the federal or state government having priority under other  
6 law;

7 (3) claims incurred by the conservator for support, care, education,  
8 health, and welfare previously provided to the protected person or individuals who  
9 are in fact dependent on the protected person;

10 (4) claims arising before the conservatorship; and

11 (5) all other claims.

12 (e) Preference may not be given in the payment of a claim over any other  
13 claim of the same class, and a claim due and payable may not be preferred over a  
14 claim not due.

15 (f) If assets of the conservatorship are adequate to meet all existing claims,  
16 the court, acting in the best interest of the protected person, may order the  
17 conservator to grant a security interest in the conservatorship estate for the payment  
18 of any or all claims at a future date.

19 Comment

20  
21 This section provides a procedure for the expeditious payment and resolution of  
22 claims. Should the estate be insufficient to satisfy all claims, payment will be made in  
23 accordance with the priorities specified in subsection (d). Subsection (a) provides for  
24 the conservator's payment of appropriate claims and the method by which claims can  
25 be presented.

1 Subsection (d), which should be read in conjunction with the applicable  
2 bankruptcy law, is not intended to preclude the filing of a petition for bankruptcy if  
3 the protected person is otherwise eligible.  
4

5 This section is based on Section 2-327 of the 1982 Act (U.P.C. Section 5-427  
6 (1982)), which in turn was drawn from the claims procedure contained in Article III,  
7 Part 8 of the U.P.C., except that the priorities in subsection (d) are designed for a  
8 conservatorship as opposed to a decedent's estate. The 1982 version has been  
9 revised, however, to incorporate a 1987 amendment to U.P.C. Section 3-806. The  
10 effect of this provision is to clarify that a conservator may change an allowance of  
11 claim to a disallowance at any time prior to payment or court order. In addition,  
12 subsection (d)(3) has been revised to conform to the revisions of the distribution  
13 standards under Section 427.  
14

15 **SECTION 430. PERSONAL LIABILITY OF CONSERVATOR.**  
16

17 (a) Except as otherwise agreed, a conservator is not personally liable on a  
18 contract properly entered into in a fiduciary capacity in the course of administration  
19 of the estate unless the conservator fails to reveal in the contract the representative  
20 capacity and identify the estate.

21 (b) A conservator is personally liable for obligations arising from ownership  
22 or control of property of the estate or for other acts or omissions occurring in the  
23 course of administration of the estate only if personally at fault.

24 (c) Claims based on contracts entered into by a conservator in a fiduciary  
25 capacity, obligations arising from ownership or control of the estate, and claims  
26 based on torts committed in the course of administration of the estate may be  
27 asserted against the estate by proceeding against the conservator in a fiduciary  
28 capacity, whether or not the conservator is personally liable therefor.

1 (d) A question of liability between the estate and the conservator personally  
2 may be determined in a proceeding for accounting, surcharge, or indemnification, or  
3 in another appropriate proceeding or action.

4 [(e) A conservator is not personally liable for any environmental condition on  
5 or injury resulting from any environmental condition on land solely by reason of an  
6 acquisition of title under Section 421.]

7 Comment

8 Subsection (a) is significant in that it provides that the conservator is generally  
9 *not personally liable* for contracts entered into as the conservator as long as the  
10 conservator discloses the representative capacity in the contract as well as identifies  
11 the estate. Liability in such cases is limited to the estate assets. But the conservator  
12 will be personally liable if the contract expressly so provides.

13  
14 Subsection (b) reverses the common law rule that a conservator, as a fiduciary is  
15 liable for torts committed in the course of administering the conservatorship  
16 property regardless of the conservator's personal fault. The protection from liability  
17 provided by this subsection does not apply, however, if the conservator is  
18 "personally at fault," meaning that the conservator committed the tort either  
19 intentionally or negligently.

20  
21 Subsection (c) confirms the intent of this section, that absent special agreement  
22 or other circumstances, a conservator is liable only in a representative capacity.

23  
24 Subsection (e) is new, in recognition of the growing issue of environmental  
25 conditions on land that must be dealt with by the conservator. The effect of this  
26 subsection is to protect a conservator from possible liability due to the automatic  
27 transfer of title to the protected person's assets accruing upon the conservator's  
28 appointment pursuant to Section 421. For actions taken as conservator, the  
29 conservator's liability under state or federal environmental provision or regulation is  
30 generally limited to those assets held in the capacity as conservator. The  
31 conservator may be liable if the conservator's negligence causes or contributes to an  
32 environmental problem or potential environmental problem. Whether the  
33 conservator might be liable for actions or failures to act with respect to an  
34 environmental condition depends on both state and federal environmental  
35 regulations, including CERCLA (Comprehensive Environmental Response,  
36 Compensation and Liability Act), found at 42 U.S.C. § 9601 et seq.



1  
2 This section is placed in brackets to signal to the enacting jurisdiction that it  
3 should expand on and conform the language of subsection (e) to whatever provisions  
4 it may have enacted with respect to liability of other types of fiduciaries for  
5 environmental conditions.  
6

7 This section is based on Section 2-328 of the 1982 Act (U.P.C. Section 5-428  
8 (1982)). This section, with the exception of subsection (e), is also similar to U.P.C.  
9 Sections 3-808 (personal representatives) and 7-306 (trustees).  
10

11 **SECTION 431. TERMINATION OF PROCEEDINGS.**

12 (a) A conservatorship terminates upon the death of the protected person or  
13 upon order of the court. Unless created for reasons other than that the protected  
14 person is a minor, a conservatorship created for a minor also terminates when the  
15 protected person attains majority or is emancipated.

16 (b) Upon the death of a protected person, the conservator shall conclude the  
17 administration of the estate by distribution to the person's successors. The  
18 conservator shall file a final report and petition for discharge within [30] days after  
19 distribution.

20 (c) On petition of a protected person, a conservator, or another person  
21 interested in a protected person's welfare, the court may terminate the  
22 conservatorship if the protected person no longer needs the assistance or protection  
23 of a conservator. Termination of the conservatorship does not affect a conservator's  
24 liability for previous acts or the obligation to account for funds and assets of the  
25 protected person.

26 (d) Except as otherwise ordered by the court for good cause, before  
27 terminating a conservatorship, the court shall follow the same procedures to

1 safeguard the rights of the protected person that apply to a petition for  
2 conservatorship. Upon the establishment of a prima facie case for termination, the  
3 court shall order termination unless it is proved that continuation of the  
4 conservatorship is in the best interest of the protected person.

5 (e) Upon termination of a conservatorship and whether or not formally  
6 distributed by the conservator, title to assets of the estate passes to the formerly  
7 protected person or the person's successors. The order of termination must provide  
8 for expenses of administration and direct the conservator to execute appropriate  
9 instruments to evidence the transfer of title or confirm a distribution previously made  
10 and to file a final report and a petition for discharge upon approval of the final  
11 report.

12 (f) The court shall enter a final order of discharge upon the approval of the  
13 final report and satisfaction by the conservator of any other conditions placed by the  
14 court on the conservator's discharge.

#### 15 Comment

16 This section is new.

17  
18 Termination of a conservatorship must be distinguished from termination of a  
19 particular conservator's appointment. For the provisions on termination of a  
20 conservator's appointment, see Section 112. This section does not apply to  
21 modification of a conservatorship, which is addressed in Section 414.

22  
23 Upon termination of a conservatorship, a conservator is not entitled to an order  
24 of discharge until the court approves the conservator's final report. A "report" in  
25 subsection (b) refers to a full and detailed accounting of monies received and  
26 expended, as well as other matters, including a description of the conservator's  
27 activities. See Section 420 for the required contents. A report lacking in sufficient  
28 detail will preclude entry of the final order of discharge. Until the final order of

1 discharge is entered, a conservator remains liable for previous acts as well as the  
2 obligation to account for the protected person's assets and funds. After notice and  
3 hearing, an order allowing a final report adjudicates all previously unsettled liabilities  
4 relating to the conservatorship. See Section 420(a).  
5

6 If an enacting state chooses to use a different time period for the filing of the  
7 final report and petition for discharge than that contained in subsection (b), the time  
8 period used should not be that much longer than the thirty days contained in  
9 subsection (b).  
10

11 Subsection (d) requires the court to follow the same procedures for a petition to  
12 terminate a conservatorship as apply to the petition for conservatorship, which may  
13 include the appointment of a visitor and counsel in some cases. The standard to  
14 terminate a conservatorship is prima facie evidence, intentionally a lower standard  
15 than the standard for creating a conservatorship. Once the petitioner has made out a  
16 prima facie case, the burden then shifts to the party opposing the petition to establish  
17 by clear and convincing evidence that continuation of the conservatorship is in the  
18 best interest of the protected person. A similar standard applies to the termination of  
19 a guardianship for an incapacitated person. See Section 318(c) and comment.  
20

21 Prior to entering a final order of discharge, the court should confirm that the  
22 conservator has accounted sufficiently for the assets and other property and  
23 executed the appropriate documents and delivered the property under the  
24 conservator's control.  
25

26 To initiate proceedings under this section, the protected person or person  
27 interested in the protected person's welfare need not present a formal document  
28 prepared with legal assistance. A request to the court may always be made  
29 informally.  
30

31 The termination provision of the 1982 Act, which was quite abbreviated, was  
32 located at Section 2-329 (U.P.C. Section 5-429 (1982)).  
33

34 **SECTION 432. PAYMENT OF DEBT AND DELIVERY OF PROPERTY**  
35 **TO FOREIGN CONSERVATOR WITHOUT LOCAL PROCEEDING.**

36 (a) A person who is indebted to or has the possession of tangible or  
37 intangible property of a protected person may pay the debt or deliver the property to  
38 a foreign conservator, guardian of the estate, or other court-appointed fiduciary of

1 the State of residence of the protected person. Payment or delivery may be made  
2 only upon proof of appointment and presentation of an affidavit made by or on  
3 behalf of the fiduciary stating that a protective proceeding relating to the protected  
4 person is not pending in this State and the foreign fiduciary is entitled to payment or  
5 to receive delivery.

6 (b) Payment or delivery in accordance with subsection (a) discharges the  
7 debtor or possessor, absent knowledge of any protective proceeding pending in this  
8 State.

9 **Comment**

10 This section confirms that a person holding personal property of a protected  
11 person may deliver it to a conservator appointed in another state or foreign country  
12 without concern about liability. The protection does not apply, however, if the  
13 person holding the property is aware that a protective proceeding is pending in this  
14 state. Unlike Section 2-330 of the 1982 Act (U.P.C. Section 5-430 (1982)), upon  
15 which this section was derived, the conservator need no longer present a special  
16 affidavit in order to obtain the protection of this section. The third party may of  
17 course always demand an affidavit or other proof in order to make certain that the  
18 foreign conservator does indeed have the requisite authority.

19  
20 Should it become necessary to appoint a conservator in the enacting state, the  
21 conservator has priority for appointment under Section 413(a)(1). The conservator  
22 may also petition for ancillary powers as provided under Section 433.

23  
24 **SECTION 433. FOREIGN CONSERVATOR: PROOF OF AUTHORITY;**  
25 **BOND; POWERS.** If a conservator has not been appointed in this State and a  
26 petition in a protective proceeding is not pending in this State, a conservator  
27 appointed in the State in which the protected person resides may file in a court of  
28 this State, in a [county] in which property belonging to the protected person is  
29 located, authenticated copies of letters of appointment and of any bond. Thereafter,

1 the conservator may exercise all powers of a conservator appointed in this State as  
2 to property in this State and may maintain actions and proceedings in this State  
3 subject to any conditions otherwise imposed upon nonresident parties.

4 **Comment**

5 This section allows a conservator appointed in another state or foreign country  
6 to exercise powers with respect to assets located in the enacting state. This section is  
7 particularly useful should the protected person own real estate in the enacting  
8 jurisdiction. Personal property can ordinarily be disposed of pursuant to the  
9 authority conferred by Section 432.

10  
11 This section should be contrasted with Section 107, which contains the  
12 procedure for transferring jurisdiction over the conservatorship from another state or  
13 foreign country. Unlike Section 107, the court in the other state or foreign country  
14 retains continuing authority over the conservatorship and the conservator remains  
15 accountable to that court. This section merely allows the conservator to exercise  
16 management powers with respect to assets located in the enacting jurisdiction.

17  
18 This section is based on Section 2-331 of the 1982 Act (U.P.C. Section 5-431  
19 (1982)).

20 **ARTICLE 5**

21 **MISCELLANEOUS PROVISIONS**

22 **SECTION 501. UNIFORMITY OF APPLICATION AND**

23 **CONSTRUCTION.** In applying and construing this Uniform Act, consideration  
24 must be given to the need to promote uniformity of the law with respect to its  
25 subject matter among States that enact it.

26 **SECTION 502. SEVERABILITY CLAUSE.** If any provision of this [Act] or  
27 its application to any person or circumstances is held invalid, the invalidity does not  
28 affect other provisions or applications of the [Act] which can be given effect without

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the invalid provision or application, and to this end the provisions of this [Act] are severable.

**SECTION 503. EFFECTIVE DATE.** This [Act] takes effect .....

**SECTION 504. REPEAL.** The following acts and parts of acts are repealed:

- (1) .....
- (2) .....
- (3) .....