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Wyoming's Law of Decedents' Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code - Part IV

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This is the concluding article of a four-part series in which Professor Averill compares present Wyoming law with corresponding provisions of the Uniform Probate Code. The previous parts of Professor Averill's analysis have focused on testate and intestate succession; procedures for the administration of a decedent's estate; and ancillary administration, multiple-party accounts, and administration of trusts. In this, Part IV, Professor Averill discusses the deficiencies of Wyoming's present guardianship law and illustrates the comprehensive and flexible system which the Uniform Probate Code provides for dealing with people who are unable to manage their own affairs. Professor Averill then concludes this series by offering persuasive arguments for the adoption of the Uniform Probate Code in Wyoming.

WYOMING'S LAW OF DECEDENTS' ESTATES, GUARDIANSHIP AND TRUSTS: A COMPARISON WITH THE UNIFORM PROBATE CODE--PART IV

*Lawrence H. Averill, Jr.**

INTRODUCTION TO PART IV

PART IV of this article will conclude this series† with a discussion of guardianship and an overall conclusion. Since guardianship law is important but unfortunately ignored or neglected by legal literature, a relatively thorough discussion and comparison will be made.

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†Averill, *Wyoming's Law of Decedents' Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code—Part I*, 7 LAND & WATER L. REV. 169 (1972); *Part II*, 8 LAND & WATER L. REV. 187 (1973); *Part III*, 9 LAND & WATER L. REV. 567 (1974).

XVI. GUARDIANSHIP (THE PROTECTION OF
PERSONS UNDER DISABILITY AND THEIR PROPERTY)

A. Introduction

The concept and necessity of guardianship derive from the circumstance when a person is under some type of disability which causes that person to be unable to manage his own personal and business affairs.⁹³³ Through the device of a guardian, such a disabled person's rights and interests can be protected.⁹³⁴ Persons who suffer from such disabilities are minors, mental incompetents⁹³⁵ and other incompetents.⁹³⁶ The disability of a minor is presumed by legislative determination depending upon the person's age.⁹³⁷ The other forms of disability generally require voluntary action by the person or some form of legal proceeding to determine the incompetency status.⁹³⁸

Another feature of guardianship is that it has two separate and distinct functions.⁹³⁹ The first and most apparent is guardianship of property. Under such a guardianship, the guardian manages (receives and expends) his ward's property or estate. The second, which is particularly important in the case of minors, is the guardianship of the person. Here the guardian has custody and, therefore, physical control over the ward. One guardian may be permitted to serve in both capacities.

Guardianship laws, with a few exceptions, have typically remained unchanged for many years.⁹⁴⁰ Unfortunately, in this country they were frequently enacted by the state's

933. WOERNER, *AMERICAN LAW OF GUARDIANSHIP OF MINORS AND PERSONS OF UNSOUND MIND* § 1, at 1 (1897).

934. 5 HILLYER, *BANCROFT'S PROBATE PRACTICE* § 1271, at 3-4 (2d ed. 1950) [hereinafter cited *BANCROFT*].

935. This term means any person of unsound mind including idiocy, insanity, lunacy or *non compos mentis*. See WOERNER, *supra* note 933, § 113, at 375; 5 *BANCROFT* § 1294, at 57.

936. This term means any person who for any other reason is disabled including disease, old age and as far as property management is concerned, disappearance. See 5 *BANCROFT* § 1294, at 57-58.

937. WOERNER, *supra* note 933, § 1, at 1.

938. *Id.* at 2.

939. 5 *BANCROFT* § 1270, at 2-3.

940. See generally Fratcher, *Persons Under Disability*, *UNIFORM PROBATE CODE PRACTICE MANUAL* § 14.1, at 197-203 (Assoc. of Continuing Legal Education Administrators 1972).

original legislature and forgotten. Consequently, many of the procedures and substantive regulations suffer unreasonably from excessive formality or administrative restrictions, or both. In addition, they frequently are antiquated, poorly organized, fragmented and insufficient in coverage. Wyoming statutes and law suffer more or less from all of the deficiencies mentioned.

Despite these inadequacies, legislatures have not acted. This is probably because legal scholars have had little interest in the area. For example, the most recent major treatise published in the United States on this subject was published in 1897.⁹⁴¹ An abortive attempt in 1946, by the draftsmen of the Model Probate Code⁹⁴² did not stir reform in the states. It was with this void in mind that the drafters of the Uniform Probate Code included a comprehensive and modernized article on the law dealing with the protection of disabled persons. The Code's general purposes are to streamline guardianship, to consolidate and reorganize existing concepts, to make guardianship more responsive to modern commercial and social needs and to eliminate guardianships when they are not essential.⁹⁴³ Consequently, the goal of the Code is to make guardianship as effective and efficient as an ordinary prudent person would be in managing his estate and conducting his personal relationships.⁹⁴⁴

The following discussion will attempt to explain Wyoming's present law of guardianships, point out its deficiencies and then explain and compare the Code's approach. Pervasive issues considered will include who and when is a person to be made a ward of a guardian; who and how is one to be appointed guardian; what are the powers, duties and liabilities of a guardian; and how and when does a guardianship terminate.⁹⁴⁵ The Wyoming Uniform Veterans' Guardian-

941. WOERNER, *supra* note 933.

942. PROBLEMS IN PROBATE LAW—A MODEL PROBATE CODE 189-234 (1946).

943. See Fratcher, *Toward Uniform Guardianship Legislation*, 64 MICH. L. REV. 983, 987-88 (1966); Fratcher, *supra* note 940, at 201-03.

944. Fratcher, *supra* note 940, at 202.

945. The questions, problems and litigation concerning detention or commitment of the ward to an institution are not discussed in this Article. Under Wyoming's present statutory pattern, these issues are dealt with in a separate Title of the Wyoming Statutes. See WYO. STAT. tit. 25 (1957,

ship Act⁹⁴⁶ will also be explained and compared to the Code.

B. Wyoming Law

1. *When are Guardians Appointed?* Substantively enacted as part of the 1890-91 Probate Procedure Act,⁹⁴⁷ the principal statute provides that a guardian may be appointed by the district court of each county for any person who is a minor, an incompetent or an insane person, and who resides or has an estate within the county.⁹⁴⁸ Such an appointment is not mandatory but is within the discretion of the court.⁹⁴⁹ A 1965 Act, concerned with the procedure for determining incompetency, gives the district court the same authority and discretion for what this Act called a "mentally incompetent person" or an "incompetent person."⁹⁵⁰ The prior principal statute was not specifically repealed in whole or in part.

Although not clearly separated into separate articles, chapters, or sections of the statutes, the above criteria provide that a guardian may be appointed for the person or for the person's estate, or for both.⁹⁵¹ In addition, apparently, different guardians could be appointed for the two separate functions.⁹⁵²

According to the recent "Rights and Responsibilities" Act⁹⁵³ a minor is a person who has not reached the nineteenth

Supp. 1973). *But cf.* WYO. STAT. § 3-74 (1957). The Code is also not intended to apply to these issues. UNIFORM PROBATE CODE: OFFICIAL TEXT WITH COMMENTS § 5-312(a) (1) (1974 ed.) [hereinafter cited as U.P.C.] *See also* U.P.C. § 5-304, Comment at 214-15.

946. WYO. STAT. §§ 3-59 to -77 (1957).

947. Ch. 70, (ch. XXI, § 1), (ch. XXII, § 1) [1890-91] Wyo. Sess. Laws 304, 306. A minor amendment and consolidation was passed in 1931. Ch. 73, § 145 [1931] Wyo Sess. Laws 125. *But cf., In re Kosmicki*, 468 P.2d 818, 821-22 (Wyo. 1970). A brief history of Wyoming's law on guardianship is discussed in Averill, *Wyoming's Law of Decedents' Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code—Part I*, 7 LAND & WATER L. REV. 169, 173 (1972).

948. WYO. STAT. § 3-2 (1957). *See also* WYO. STAT. § 3-52 (1957) (Nonresident wards).

949. *Id.*

950. WYO. STAT. § 3-29.1 (Supp. 1973).

951. *See, e.g.*, WYO. STAT. §§ 3-6 to -8; 3-29.1, -29.7 (1957 and Supp. 1973).

952. *See In re Estate and Guardianship of Sowerwine*, 413 P.2d 48, 50 (Wyo. 1966).

953. Ch. 213 [1973] Wyo Sess. Law 312-38.

anniversary of his birth.⁹⁵⁴ Before this Act, of course, a person was a minor until he was twenty-one years of age.⁹⁵⁵ Under the Wyoming Statutes as they exist today there are, however, no definitions for the words "incompetents" and "insane persons" as used in the principal statute.⁹⁵⁶ The 1965 Act, however, includes definitions⁹⁵⁷ for "mentally incompetent person" and for "incompetent person" when those terms are used in that Act. The former includes any person "who is unable, unassisted, to properly manage and take care of himself or his property or both as the result of mental illness, mental deficiency or mental retardation." The latter includes any person "who is unable, unassisted, to properly manage and take care of himself or his property as the result of the infirmities of advanced age, physical disability, disease, alcoholism or addiction to drugs."

2. *How is a Guardian Selected?* There are no statutory definitions of or restrictions upon who may become or be appointed a guardian. Presumably, a guardian must be "proper,"⁹⁵⁸ and probably could be a corporation⁹⁵⁹ or an institution.⁹⁶⁰ The general principle and primary consideration followed by the courts in selecting a guardian of the es-

954. WYO. STAT. §§ 8-18.1(a)(i); 14-1.1 (Supp. 1973). A guardian of the estate of a child under 19 years of age need not be appointed if the total estate belonging to the minor does not exceed \$1,500. WYO. STAT. § 14-5 (Comp. 1965). Such a sum may be paid to the parent who has rightful custody of the minor and who under oath swears that the estate does not exceed \$1,500. *Id.* The parent must apply these sums to the use and benefit of the child. *Id.*

955. WYO. STAT. § 14-1.1 (Supp. 1973).

956. The 1890-91 Probate Procedure Act defined only the words "insane person" and "person of unsound mind." Ch. 70 (Ch. XXII, § 10) [1890-91] Wyo. Sess. Laws 308. Even this definition was probably superseded in 1929. Ch. 155, § 2 [1929] Wyo. Sess. Laws 241-42. The 1929 law was repealed and replaced in 1963. Ch. 188, § 42 [1963] Wyo. Sess. Laws 330-31. See WYO. STAT. § 25-49(a) (Comp. 1967). The original definitions of "insane person" and "person of unsound mind" were finally specifically repealed by the 1965 Act. Ch. 135, § 16 [1965] Wyo. Sess. Laws 371. Consequently, there presently are no definitions in the Statutes for the terms "insane persons" or "incompetents" as used in the principal statute.

957. WYO. STAT. § 3-29.1 (Supp. 1973).

958. WYO. STAT. § 3-6 (Supp. 1973). See also WYO. STAT. § 3-7 (1957) in which the word "competent" is used.

959. At least they can serve as guardian of the property. See *In re Estate and Guardianship of Sowerwine*, *supra* note 952, at 51.

960. See WYO. STAT. § 3-29.9 (Supp. 1973) (The director of a private or public institution may be appointed conservator when subsistence income is the primary part of the ward's estate.) WYO. STAT. §§ 3-30 to -33 (1957) (Appointment of Board of Charities and Reform as Guardian); and WYO. STAT. §§ 3-33.1-8 (Supp. 1973) (Conservators of Estates of Minors and Incompetents Admitted to State Training School and State Hospital).

tate or the person or both is the welfare of the ward.⁹⁶¹ Generally, selection of a guardian lies completely within the discretion of the court subject, of course, to this general principle.

With respect to minors, the selection process is complicated by some statutory specificity. Although the general principle still prevails, the statutes establish certain presumptions or guidelines when special circumstances exist. If a minor is fourteen years of age or older, he has an absolute right to nominate his own guardians of the person and of his estate subject only to the approval of the court.⁹⁶² The same nomination power applies to a minor who has a guardian and then attains the age of fourteen.⁹⁶³ The Wyoming Supreme Court has held that, with respect to the appointment of a guardian of the estate, this right is superior to any preference a parent might otherwise have, even though the parent had been duly appointed under a divorce decree as guardian of the minors before they became fourteen.⁹⁶⁴

Parents are accorded some special considerations, however. Husbands and wives while married have joint custody of their children and are therefore joint guardians of the person for their children.⁹⁶⁵ Upon the death of either, the survivor retains the right of custody.⁹⁶⁶ In addition, the surviving parent, upon his or her death, by an acknowledged written instrument or by a duly executed will⁹⁶⁷ can select a guardian of the person and nominate a guardian of the estate⁹⁶⁸ for a child during the child's minority.⁹⁶⁹ The same selection power is given to the parent who is awarded custody in a divorce proceeding.⁹⁷⁰ The only specific limitations mentioned are

961. *E.g.*, *Elm v. Key*, 480 P.2d 104 (Wyo. 1971). See also WOERNER, *supra* note 933, at 98-99.

962. WYO. STAT. § 3-3 (Supp. 1973).

963. WYO. STAT. § 3-5 (1957).

964. *In re Estate and Guardianship of Sowerwine*, *supra* note 952, at 51-52.

965. WYO. STAT. §3-6(b) (Supp. 1973).

966. *Id.*

967. That the will be actually probated is not apparently required. *Cf. Id.*

968. The statute uses the word "tuition" which has generally been held to mean "estate." *E.g.*, *Kellogg v. Burdick*, 110 App. Div. 472, 96 N.Y.S. 965, 967 (App. Div. 1906).

969. WYO. STAT. §§ 3-6(c)-(d) (Supp. 1973).

970. WYO. STAT. § 3-6(d) (Supp. 1973).

that the person selected as guardian must be "proper" and that he is subject to removal for failure to discharge his guardianship duties.⁹⁷¹ Presumably, the selection or choice made by a minor who is or attains the age of fourteen years would take priority over the parental nominee.⁹⁷²

Notwithstanding these statutory preferences, the Wyoming Supreme Court has held that the welfare of the minor is the primary consideration; consequently, the statutory preferences have not always been followed.⁹⁷³ In addition, in many situations there is no statutory preference, *e.g.*, a fatherless, motherless (orphaned) minor under fourteen with no prior guardian appointed or a mentally or other incompetent. The court in such situations must appoint guardians of the estate and of the person and, in doing so, must use its best discretion under the general principle.⁹⁷⁴

The requirements for the actual appointment of guardians are far from being clearly expressed in the statutes. Presumably, a qualified parent, or both parents, are the guardians of the persons for their minor children automatically, without court approval, or as a matter of law.⁹⁷⁵ On the other hand, notwithstanding any of the statutory preferences, in order for any person to serve as guardian of the estate for a minor, he must be "legally appointed" by the court,⁹⁷⁶ and except for parental custodial rights for minors, court appointment is apparently required when any other guardian of the estate or of the person is required.⁹⁷⁷

If court appointment is necessary, the appointment procedure to follow is partially confused because there are two different procedures possible, *i.e.*, one for minors, incompe-

971. WYO. STAT. §§ 3-6(c)-(d) (Supp. 1973).

972. See notes 962-64 and accompanying text *supra*.

973. *E.g.*, *In re Kosmicki*, 468 P.2d 818 (Wyo. 1970).

974. WYO. STAT. § 3-7 (1957).

975. WYO. STAT. § 3-6(b) (Supp. 1973).

976. WYO. STAT. § 3-6(a) (Supp. 1973).

977. See WYO. STAT. §§ 3-2 to -5 (1957, Supp. 1973) (Appointment of guardians for minors); WYO. STAT. §§ 3-2, -29.2, -20.6 (1957 and Supp. 1973) (Appointment of guardians for insane persons, mentally incompetents and other incompetents).

The statement in the text does not apply to the designation of a custodian under the "Uniform Gifts to Minors Act." WYO. STAT. §§ 34-136.1-10 (Supp. 1973).

tents and insane persons under the principal statute⁹⁷⁸ and one for mentally or other incompetents under the 1965 Act.⁹⁷⁹

Under these two statutory procedures both the notice requirements and the substantive test differ. Under the principal statute, notice of a court appointment of a guardian must be given to any person having the care of the minor, incompetent or insane person and to the relatives residing within the county.⁹⁸⁰ After notice and probably a hearing, the court is then given discretion to appoint a guardian of the person or of the estate, or both, "when it appears necessary."⁹⁸¹ Under the 1965 Act, however, notice must be given ten days before the time set for the hearing to the spouse and children, if any, if not then to the parents, brothers and sisters, if any, but if none to the nearest known relative and to any person, hospital or institution having the care of the person alleged to be mentally incompetent or incompetent.⁹⁸² The court, upon the hearing,⁹⁸³ is required to determine whether a preponderance of the evidence shows that the person is mentally incompetent or incompetent and if it does, a guardian must be appointed for the person or for his estate, or both.⁹⁸⁴

Meritoriously, the 1965 Act includes a voluntary proceeding⁹⁸⁵ in addition to the contested or adversary proceeding.

978. WYO. STAT. § 3-2 (1957).

979. WYO. STAT. § 3-29.1-15 (Supp. 1973).

980. WYO. STAT. § 3-2 (1957).

981. *Id.*

982. WYO. STAT. §§ 8-29.2, -29.5 (Supp. 1973).

983. The hearing procedure includes several safeguards for the alleged ward. First, the alleged incompetent must be present or there must be a full written explanation for his absence either by a physician and a court appointed non-involved examiner or by the head of the state institution which has custody of the ward. WYO. STAT. § 3-29.3 (Supp. 1973). Second, he may have counsel and if he does not, the court may in its discretion appoint such. WYO. STAT. § 29.5 (Supp. 1973).

984. WYO. STAT. § 3-29.6 (Supp. 1973).

985. WYO. STAT. § 3-29.13 (Supp. 1973). The Wyoming legislature in 1965 also enacted a law creating what is called a "Limited Power of Attorney." Ch. 187 [1965] Wyo. Sess. Laws 481; WYO. STAT. §§ 34-111.1-10 (Supp. 1973). The law provides that a power of attorney executed according to set conditions will not become invalid because the principal subsequently becomes disabled. Its purpose is to provide alternatives to inter vivos trusts and to voluntary guardianship proceedings for persons who anticipate some kind of disability. Unfortunately, the procedures are too formalistic and the situations in which it may apply are too limited. It requires execution in a judge's presence and his endorsed approval. The power becomes a court record and if valued above a specified amount of corpus or income, it is subject to a filing fee. WYO. STAT. § 34-111.3 (Supp. 1973). Furthermore, the corpus and income subject to the power can not exceed \$50,000 or

Under it, any person may petition for a guardian to be appointed for the management of his own estate. Such a petition must be accompanied by a physician's written statement concerning the petitioner's inability to "properly manage, care for or conserve his estate." If it is determined to be in the best interest of the petitioner, the court must appoint a guardian for his estate.

It is clear that, as far as mentally incompetents and other incompetents are concerned, the 1965 Act greatly clarified and improved the guardianship law and procedure. Unfortunately, since both the 1890-91 and 1965 Acts apparently apply to persons who are "incompetent," "insane," and "mentally incompetent," they could come into conflict, *e.g.*, the different notice requirements. Wyoming law definitely needs clarification in this area.

3. *Powers, Duties and Liabilities of Guardians.* The powers, duties and liabilities of guardians of minors and other disabled persons are generally similar to those for personal representatives of decedents' estates.⁹⁸⁶ Guardianship is also very much like a trust in regard to its fiduciary relationship to the ward.⁹⁸⁷ In fact, it is frequently stated that a guardian is a trustee and not merely an agent for the ward's benefit and protection.⁹⁸⁸ The one primary exception to these analogous relationships, however, is that a guardian of the estate does not hold title to either the real or personal property of his ward.⁹⁸⁹

Other than the general condition that the guardian must faithfully discharge his trust with regard to the ward's care, treatment and education,⁹⁹⁰ the guardianship statutes are silent concerning the powers and duties of a guardian of the

\$3,000, respectively. WYO. STAT. § 34-111.4 (Supp. 1973). These requirements and restrictions substantially reduce the situations in which this limited power of attorney will be used. The *inter vivos* trust, in particular, remains a much more viable device.

986. WOERNER, *AMERICAN LAW OF GUARDIANSHIPS OF MINORS AND PERSONS OF UNSOUND MIND* § 53, at 172-73 (1897).

987. *Id.*; 5 BANCROFT, § 1272, at 5.

988. 5 BANCROFT, § 1272, at 6.

989. WOERNER, *supra* note 986.

990. WYO. STAT. § 3-10 (1957). Additional conditions may be inserted by the court into the order of appointment. *Id.*

person. Presumably, the duties of such a guardian are much like those of a parent. For example, the guardian may use reasonable force to discipline or control the ward.⁹⁹¹ According to Wyoming's marriage statutes, a guardian has authority to give written consent to the marriage of a minor.⁹⁹²

As far as the power of a guardian over the ward's property is concerned, the statutes are full of responsibilities but are void of discretion and authority. Every guardian⁹⁹³ appointed under Wyoming statutes has the following responsibilities:

- 1) he must pay out of the ward's estate all "just debts" which the ward owes;⁹⁹⁴
- 2) he must settle, demand, sue for and receive all debts due to the ward;⁹⁹⁵
- 3) he must appear for and represent the ward in all legal proceedings unless another is appointed for that purpose, *i.e.*, a guardian ad litem;⁹⁹⁶
- 4) he must manage the ward's estate "frugally and without waste";⁹⁹⁷
- 5) he must apply income as needed from the ward's estate for the "comfortable and suitable maintenance and support of the ward and his family, if any";⁹⁹⁸
- 6) he may, as any interested person may, agree to a partition of the ward's estate;⁹⁹⁹
- 7) he must return an inventory of the ward's estate to the court within three months after his appointment;¹ and,

991. 5 BANCROFT, § 1340, at 169.

992. WYO. STAT. § 20-3 (1957).

993. Including guardians appointed for non-resident wards. WYO. STAT. §§ 3-52, -53 (1957).

994. WYO. STAT. § 3-23 (1957).

995. WYO. STAT. § 3-24 (1957).

996. *Id.* See WYO. STAT. § 3-13 (1957).

997. WYO. STAT. § 3-25 (1957).

998. *Id.*

999. WYO. STAT. § 3-27 (1957).

1. WYO. STAT. § 3-28 (1957).

- 8) he must account for the ward's estate annually to the court for settlement and allowance.²

If in managing the estate, the income from the ward's estate is not sufficient to properly maintain and educate a minor ward or it would otherwise be in a ward's best interest, the guardian may sell or exchange the ward's real or personal property only upon obtaining a court order.³ All such final sales of a ward's property must be preceded and accompanied by: 1) a petition to the court;⁴ 2) a determination by the court that the sale is necessary or beneficial to the ward;⁵ 3) an order for a hearing upon the petition;⁶ 4) a notice to the ward's next of kin and all other persons interested in the estate;⁷ 5) a hearing on the petition⁸ and 6) an order of sale;⁹ 7) a court approved guardian bond to the ward if real estate is to be sold.¹⁰ Moreover, the sale must be for cash or for credit not to extend beyond three years from sale and only with security;¹¹ the proceedings of the sale or exchange must be returned and filed with the court;¹² and the sale or exchange must then be confirmed and ratified by the court again only upon petition, notice, hearing and order.¹³

If the above procedure is meticulously followed, the guardian's sale of his ward's property is valid.¹⁴ This procedure, however, is about as complex and arduous as will be found anywhere else in the law. Admittedly, the sale of a ward's property is an important one which requires caution. The present procedure, however makes such a sale far too difficult and expensive, *e.g.*, attorney's fees, bonding fees, court and notice costs. This procedure could even be destructive if an emergency arose and the sale should be made quickly. The

2. WYO. STAT. §§ 3-28, -29 (1957).
 3. WYO. STAT. § 3-34 (1957). *But cf.* WYO. STAT. §§ 3-23, -25 (1957) (Personal property could possibly be sold without a court order).
 4. WYO. STAT. §§ 3-35, -39 (1957).
 5. WYO. STAT. §§ 3-35, -39, -40 (1957).
 6. WYO. STAT. § 3-40 (1957).
 7. WYO. STAT. § 3-41 (1957).
 8. WYO. STAT. §§ 3-42 to -44 (1957).
 9. WYO. STAT. § 3-45 (1957).
 10. WYO. STAT. § 3-46 (1957).
 11. WYO. STAT. § 3-50 (1957).
 12. WYO. STAT. § 3-47 (1957).
 13. WYO. STAT. §§ 3-49, -47 (1957).
 14. 5 BANCROFT, § 1412, at 330. *See also* WYO. STAT. § 3-36 (1957).

statute specifically state that the hearing at which the necessity of the sale must be shown, can not be less than four weeks from the date of the order to have the hearing.¹⁵

Significantly, with proper draftsmanship a testamentary guardian may apparently be given broad management powers over the ward's person and estate.¹⁶ Presumably, these duties and powers would be similar to those which may be given to executors and trustees, including the power to sell property without court order. This is an excellent statutory provision and it is unfortunate that it only applies to testamentary guardians.

Wyoming law does contain some good features. As far as the scope of a guardian's investment powers over cash principal or sale proceeds are concerned,¹⁷ they are covered by the recently enacted "prudent man rule."¹⁸ This is the modern view and should be retained. In addition, the present statutes which restrict the liability of third persons who deal with fiduciaries are also specifically applicable to guardians' transactions.¹⁹ Again, these are good provisions and their concept should be retained. The Uniform Trustees' Powers Act²⁰ which was enacted in 1965, however, does not include guardians within its scope, although a testamentary guardian could probably be given its powers by an incorporation by reference clause in the appointing will.²¹

Until 1973, all guardians were required under Wyoming statutes to have a bond conditioned upon the premise that they will faithfully, according to law, carry out the duties of

15. WYO. STAT. § 3-40 (1957).

16. WYO. STAT. § 3-12 (Supp. 1973).

17. WYO. STAT. §§ 3-38, -51 (1957).

18. WYO. STAT. § 4-19.1 (Supp. 1973). The court may order deviations from the rule. See *United States Fidelity and Guaranty Co. v. Durrin*, 61 Wyo. 1, 154 P.2d 348 (1944). The only restrictions which a court might put upon this investment power would be the very unlikely situation when the court would within its statutory powers specifically limit the guardian to investments in real estate, "federal farm loan bonds" or some other asset. WYO. STAT. § 3-51 (1957).

19. Uniform Fiduciaries Act, WYO. STAT. §§ 4-1 to -3, 4-8 to -15 (1957); Uniform Act for Simplification of Fiduciary Security Transfers, WYO. STAT. §§ 4-15.1-11 (Supp. 1973).

20. WYO. STAT. §§ 4-36 to -45 (Supp. 1973).

21. WYO. STAT. § 4-37(b) (Supp. 1973).

their trust.²² In 1973, the Wyoming legislature enacted a significant amendment to this statute. The statute now makes bonding discretionary with the court depending upon whether the court finds the selected person morally and financially responsible so that to require a bond would be an "unwarranted dissipation of the ward's estate."²³ This change is meritorious because bonding is frequently an unnecessary expense.

When a bond is still required, it must be backed by sufficient sureties and is to be approved by the judge of the district court.²⁴ In addition, the statute imposes three conditions²⁵ as a part of a guardian's bond whether or not such conditions are actually expressed in the bond: 1) to make and file with the court a complete inventory of all of the ward's real and personal property of which the guardian has possession or knowledge; 2) to administer the ward's estate according to law, to the ward's best interest, and to faithfully discharge his trust with regard to this estate and to the ward's care, custody and education; 3) to render sworn accounts to the court, or to the ward or to the ward's legal representative three months after appointment, when ordered at other times by the court, and at expiration and to distribute at settlement all the remaining property to those entitled to it. Upon the filing and approval of the bond, the court must issue letters of guardianship which are stated to be "substantially the same as letters of administration" and which must include an oath by the guardian that he will perform his guardianship duties according to law.²⁶

Although the law generally requires it when a parent is the guardian,²⁷ a non-parental guardian has no legal respon-

22. WYO. STAT. §§ 3-9, -12 (1957).

23. WYO. STAT. § 3-9 (Supp. 1973).

24. *Id.*

25. *Id.* Interestingly, it would appear that without a bond, the three implied conditions would not necessarily be a part of the guardian's appointment. This unintentional alteration by the 1973 amendment can be rectified if the judge makes the three conditions a part of the order of appointment under his optional condition power. WYO. STAT. § 3-10 (1957).

26. *Id.*

27. 5 BANCROFT, § 1342, at 171-72. *Cf.* WYO. STAT. § 20-71 (Supp. 1973). *But cf.* WYO. STAT. § 14-4 (Comp. 1965) (This section was enacted in the 1890-91 Probate Procedure Act).

sibility to support a ward from the guardian's own estate.²⁸ Guardians are also entitled to repayment of their expenses and reasonable compensation for their services subject to court approval.²⁹

4. *Duration, Removal and Termination of Guardianships.* The termination of a guardianship occurs upon the happening of several specific events. All guardianships end upon the death of the ward.³⁰ The guardianship of the person of a competent minor ends upon the ward attaining majority³¹ or getting married.³² Other than because of death, a guardianship of the estate of a minor, however, ends only upon attaining majority.³³ Under a still applicable part of the 1890-91 Probate Procedure Act, a guardianship of the estate and of the person of an insane or incompetent person ends only by discharge when, after petition by the ward or other persons, the court or judge finds that it is no longer necessary.³⁴ Under the 1965 Act, such a guardianship of a mental incompetent or other incompetent ends when, after a petition by the ward, guardian, relatives, or friends, the court determines that the ward is "able, unassisted, to properly manage and take care of himself or his property."³⁵ An affidavit of such competency from the head of the institution, if the ward had been committed, or from an attending licensed physician or other qualified person, is prima facie evidence of the mental competency of the ward.³⁶ A ward who has voluntarily submitted to a guardianship of his estate can petition for a termination of his guardianship and the court may terminate the guardianship and order a final accounting

28. 5 BANCROFT, § 1342, at 170-71. See also WYO. STAT. § 3-26.

29. WYO. STAT. § 3-22 (1957). See *Nagle v. Robins*, 9 Wyo. 211, 62 P. 796 (1900).

30. 5 BANCROFT, § 1436, at 402.

31. WYO. STAT. § 3-8 (1957).

32. *Id.*

33. *Id.* Until 1973, a minor above the age of nineteen years of age, could have his disability of minority removed by a petition for a court order and such an emancipation order would terminate all guardianships. WYO. STAT. §§ 14-1 to -3 (1957). Since majority now occurs at the age of nineteen, the emancipation procedure was repealed. Ch. 213, § 3 [1973] Wyo. Sess. Laws 337.

34. WYO. STAT. § 3-15 (1957).

35. WYO. STAT. § 3-29.10(a) (Supp. 1973).

36. WYO. STAT. § 3-29.10(b) (Supp. 1973).

of the guardian upon a physician's report that the petitioner is able to handle his own affairs.³⁷

Termination may also occur in several other ways. Guardians, of course, can be removed for their own incapacity and for failure to properly discharge their trust.³⁸ Resignations by guardians, however, are permitted only when "proper,"³⁹ and probably only with court approval.⁴⁰ When both the guardian and the ward are non-residents, the non-resident guardian is empowered to petition the court for the removal of the ward's property to the ward's residence.⁴¹ Such an order, if granted by the court, constitutes a discharge of any local guardian who had possession of the property and, therefore, a termination of his guardianship in this state.⁴²

5. *The Uniform Veterans' Guardianship Act.* When the disabled person is a recipient of benefits from the federal Veterans' Administration, Wyoming has a separate act applicable. This Act, called the Uniform Veterans' Guardianship Act⁴³ was enacted in 1929.⁴⁴ Passage in the states was urged by the Veterans' Administration because of the federal interest in securing honest and efficient management of veterans' benefits.⁴⁵

Basically, the Act requires a guardian to be appointed according to its requirements and procedures whenever a person, who is a minor, insane or incompetent, is entitled to receive money, earnings, interest or profits derived from the

37. WYO. STAT. § 3-29.14 (Supp. 1973).

38. WYO. STAT. § 3-14 (1957).

39. *Id.*

40. 5 BANCROFT, § 1438, at 411-12.

41. WYO. STAT. §§ 3-56, -57 (1957).

42. WYO. STAT. § 3-58 (1957).

43. WYO. STAT. §§ 3-59 to -77 (1957). Since most minors and incompetents whose guardianships are affected by the Act are not veterans, the name of the Act is a misnomer and misleading. See Fratcher, *The Uniform Probate Code and the Veterans' Administration*, 24 CASE W. RES. L. REV. 261, 274 n.45 (1973).

44. Ch. 6 [1929] Wyo. Sess. Laws 6-10. The Uniform Act was substantially amended in 1942 by the Commissioners on Uniform Laws. 1942 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 206-23. Wyoming retained the 1928 version. See WYO. STAT. § 3-60, Comparative legislation at 242 (1957).

45. Fratcher, *Toward Uniform Guardianship Legislation*, 64 MICH. L. REV. 983, 988-89 (1966). See also Fratcher, *supra* note 43, at 273-76.

Veterans' Administration.⁴⁶ The Act therefore covers more persons than merely those who would be classified as veterans, including for example, the veterans' spouses and children.

Recently, the Act has been criticized for the burdensome restrictions and requirements it places upon guardians appointed.⁴⁷ Under its terms, for example, before a guardian can be appointed for a ward under the Act, the petition for appointment of the guardian must be accompanied by a certificate from the director of the bureau, or his representative, setting forth the ward's minority status or the ward's incompetency as determined by the bureau's records or on the bureau's examination.⁴⁸ Such a certificate is apparently required notwithstanding the fact that the bureau has no means of certifying such status of a non-veteran ward who receives its benefits.⁴⁹

In addition, whereas the general guardianship statutes provide for reasonable fees, prudent man investments and discretionary bonding, guardianships under the act have a limitation on commissions of five percent of the ward's income per annum,⁵⁰ a specific legal list investment restriction⁵¹ and a mandatory bonding requirement.⁵² Even though these provisions may be limited to the benefits received from the bureau, they would require that a guardian maintain separate accounts and records for such assets. Such precision in record keeping is not generally possible from the typical lay guardian.

The Act is nonduplicative in one area, *i.e.*, it includes provision for commitment to veterans' hospitals.⁵³ This provision should be retained although it might be better located in the title of the Wyoming Statutes which deals with the hospitalization of the mentally ill.⁵⁴

46. WYO. STAT. § 3-61 (1957).

47. Fratcher, *supra* note 43.

48. WYO. STAT. §§ 3-63 to -65 (1957).

49. See Fratcher, *Toward Uniform Guardianship Legislation*, 64 MICH. L. REV. 983, 992 (1966).

50. WYO. STAT. § 3-70 (1957).

51. WYO. STAT. §§ 3-71 (1957).

52. WYO. STAT. §§ 3-67 (1957).

53. WYO. STAT. § 3-74 (1957).

54. WYO. STAT. tit. 25 (1957, Supp. 1973).

6. *Summary.* A perusal of the Wyoming statutes dealing with guardianship clearly reveals that they are in need of substantial reformation. There is a need to remove the unreasonable restrictions placed upon guardians in the management of ward's estates. There is need for clarity of the authority of the guardian over the ward's person. The responsibilities of third persons dealing with disabled persons, wards and guardians need exposition. And, the duality of guardianships caused by the Uniform Veterans' Guardianship Act needs to be reconciled or eliminated. Although the 1965 Act greatly clarified guardianship law and procedure for mental incompetents and other incompetents, as noted even it raises questions of duplicity with the other guardianship statutes.

In addition, the above explanation of present law does not reveal a subtle defect which one discovers when studying the area, *i.e.*, the statutory provisions are frequently poorly drafted, organized, repetitious, occasionally contradictory and often found in other titles of the statutes. The recent piecemeal remedial legislative enactments have definitely not rectified these defects. Of all the areas of probate related law which need reform, guardianship law is by far the one in most dire need. The Uniform Probate Code offers a comprehensive legislative package for such reform.

C. The Uniform Probate Code

In modernizing the law of guardianship, the Code renovates, reorganizes and renames many of the guardianship devices and concepts.⁵⁵ The new organization both separates devices and concepts from each other and combines them when obviously appropriate. Although the guardianship name is retained under the Code, it only concerns itself with the person who has physical control over or custody of the ward.⁵⁶ In addition, its provisions concerning guardians of

55. See generally Fratcher, *Persons Under Disability*, UNIFORM PROBATE CODE PRACTICE MANUAL, Ch. 14 (Assoc. of Continuing Legal Education Administrators 1972).

56. U.P.C. art. 5, pts. 2 and 3. The terms "ward" and "minor wards" are defined as and limited to "a person for whom a guardian has been appointed". U.P.C. § 5-101(4). See also U.P.C. § 1-201(16) (Definition of "Guardian").

minor wards⁵⁷ are separated and different from those concerning guardians of wards who are otherwise disabled.⁵⁸ The issues raised by these two types of guardianship were sufficiently different so that separate treatment was necessary. The Code then renames the guardian of the ward's property as the conservator of the protected person.⁵⁹ All provisions concerned with the conservator are included within one division regardless of whether the disabled person is a minor or another type of disabled person. In this area there was no need to separate property management problems associated with minors from those problems associated with other types of disabled persons.

The avowed goals of the Code's provisions concerned with persons under disabilities are to minimize the necessity for employing the devices and procedures and to simplify these procedures and devices when it is essential to employ them.⁶⁰ Many features of the Code which attempt to attain these goals will be emphasized throughout the explanation of the Code's guardianship and conservatorship provisions. Several collateral but related devices incorporated within the Code which seek these goals deserve discussion at this point.

In the case of a minor, a person who owes the minor \$5,000 or less of cash or personal property per year may pay or deliver it to the minor, if 18 or married; to the minor's custodian; to the minor's guardian or into a federally insured financial institution savings account in the minor's name and with notice to the minor.⁶¹ If these conditions are met, the person making the payment or delivery is discharged from liability for misappropriation by the recipient. The persons paid, other than the minor and the financial institution, are obligated to apply the money or property to the minor's support and education, to conserve any excess for delivery to

57. U.P.C. §§ 5-201 to -212.

58. U.P.C. §§ 5-301 to -313.

59. U.P.C. §§ 5-401 to -431. A "protected person" is one "for whom a conservator has been appointed or other protective order has been made." U.P.C. § 5-101(3). The "conservator," therefore, is defined as one "who is appointed by a Court to manage the estate of a protected person." U.P.C. § 1-201(6).

60. U.P.C. art 5, General Comment, at 199.

61. U.P.C. § 5-103.

the minor upon his attaining majority, and are empowered to reimburse themselves for out of pocket expenses for the minor's support but not to pay themselves for their own services. Payments or deliveries may not be made under this section if the person who owes the minor has actual notice that an appointed conservator exists or that proceedings for the appointment of one are pending. This facility of payment provision will provide an alternative to conservatorships and other protective proceedings in many situations.

Another alternative to protective and conservator proceedings provided in the Code appears in its provisions which renovate the power of attorney device. Under the Code, a written power of attorney may specifically provide that a disability does not affect power.⁶² In addition, all written powers of attorney are not revoked by death, disability or incompetence until actual notice of such event is received.⁶³ These two sections dealing with written powers of attorney will be particularly useful with older clients who do not wish to enter into a complex trust but who anticipate impending senility or incompetence. Similarly they will avoid in many situations the need for and embarrassment of formal protective proceedings.⁶⁴

The Code includes another provision which, under limited circumstances, may avoid the necessity of the appointment of a guardian for either a minor or an incapacitated person. Except for the power to consent to a minor's marriage or adoption, a parent or guardian may temporarily delegate to another person any of his care, custody and property powers over the ward.⁶⁵ The delegation must be made by a properly executed power of attorney and cannot exceed six months in duration. This provision provides continual guardianship protection in case an emergency would arise when the parent or appointed guardian is absent.⁶⁶

62. U.P.C. § 5-501. Compare WYO. STAT. §§ 34-111.1 to -10 (Supp. 1973). See note 985 *supra*.

63. U.P.C. § 5-502.

64. It has been suggested that the Code's power of attorney device might be used by military personnel whose whereabouts or death or both may become unknown. Fratcher, *supra* note 55, § 14.37, at 250.

65. U.P.C. § 5-104.

66. For example, the delegatee could give consent to an emergency operation. U.P.C. § 5-104, Comment at 205.

1. *When Are Guardians Appointed?*

a. **Guardians of Minors.** The definition of who is a minor is left to the individual state to decide.⁶⁷ Presumably, Wyoming would define minors as any person under the age of nineteen.⁶⁸ Under the Code a court appointed or accepted guardian⁶⁹ for a minor is only appointed if the minor is unmarried and all parental rights of custody have been terminated or suspended.⁷⁰ A natural or adoptive parent is, therefore, automatically the guardian of the person of his or her minor children and unless circumstances such as death or a court order have terminated or suspended this guardianship, another person could not be appointed guardian of the minor's person.⁷¹

b. **Guardians of Incapacitated Persons.** The Code defines an incapacitated person as one who for any reason except minority "lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person."⁷² Although any cause which meets the standard is covered, specifically mentioned examples of the cause of such a condition include mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs and chronic intoxication.⁷³ Before a guardian is appointed, the court must be satisfied that the person for whom a guardian is sought is actually incapacitated and that the appointment is necessary or at least desirable for the purpose of providing continuing care and supervision of the incapacitated person.⁷⁴ It must be emphasized that this guardian is not the guardian of the incapacitated person's property but is the caretaker

67. U.P.C. § 1-201(24).

68. WYO. STAT. §§ 8-18.1; 14-1.1 (Supp. 1973).

69. U.P.C. § 5-201.

70. U.P.C. § 5-204.

71. Presumably, this parent would have to be removed according to the removal proceedings before any other person could be appointed guardian of the minor. U.P.C. § 5-204. See U.P.C. § 5-212. This prerequisite of removal before the court can appoint another also applies to testamentary guardians who have accepted under an effective will. U.P.C. § 5-202; U.P.C. § 5-204, Comment at 207. See ACLEA NAT'L CONFERENCE ON THE UNIFORM PROBATE CODE—STUDY MATERIALS 112 (1972) [hereinafter cited as STUDY MATERIALS].

72. U.P.C. § 5-101(1). It is contended that this standard raises a different issue than the issues raised by commitment or protective proceedings. See Fratcher, *supra* note 55, § 14.18, at 221.

73. U.P.C. § 5-101(1).

74. U.P.C. § 5-304.

of the incapacitated person's person.⁷⁵ Consequently, the definition of incapacity makes questions concerning the alleged incapacitated person's ability to manage his estate irrelevant.⁷⁶

The Code's appointment procedure is designed to prevent unwarranted appointments of such guardians. The alleged incapacitated person must be represented by counsel⁷⁷ and he is to be visited before appointment by a "visitor"⁷⁸ who has no personal interest in the proceeding and who is either trained in law, nursing or social work.⁷⁹ In addition, once a guardian is appointed, the ward is permitted to petition for the guardian's removal by way of an informal letter to the judge and intentional interference by any person with such a communication could constitute contempt.⁸⁰

The Code has other beneficial features as well. Conflicting adjudications are avoided by making a guardian appointed under the Code's provisions subordinate to orders of a court of competent jurisdiction dealing with commitment proceedings under mental health legislation.⁸¹ In addition, a less drastic alternative procedure is also provided permitting, under special circumstances, an appointment of a temporary guardian.⁸² Such an appointment would be useful and allow flexibility in emergency, short duration situations.

c. Protective Proceedings and Conservatorships. As emphasized above, the Code separates its guardianship provisions concerned with the custody and care of the ward's person from management of the protected person's estate. Under the heading "Protective Proceedings," disabled persons who are in need of having their assets and property managed or protected may have a conservator appointed or obtain

75. See U.P.C. § 5-312.

76. STUDY MATERIALS at 115. See also Fratcher, *supra* note 55, § 14.18, at 221.

77. U.P.C. § 5-303(b).

78. *Id.*

79. U.P.C. § 5-308. To save some expense, it would seemingly be possible to designate an appointed guardian ad litem, if any, as the "visitor," too. Cf. U.P.C. § 5-407(b).

80. U.P.C. § 5-307(b).

81. U.P.C. § 5-312(a)(1).

82. U.P.C. § 5-310. Temporary guardians may be appointed without notice and are limited in duration to a maximum of six months. *Id.*

some other protective court order for such a purpose.⁸³ It is also important to emphasize that just because a guardian of the person is necessary, it does not mean that protective proceedings are required or vice versa.⁸⁴ For example, a person may need a guardian but has no property or assets requiring a conservator. Under other circumstances, a person may require a conservator but not require a guardian. In fact, a conservator of an unmarried minor without a parent with parental rights actually has the duties and powers of a guardian of that minor until the minor marries, obtains majority or a guardian is officially appointed.⁸⁵ Of course, when a guardian and a conservator or other protective order are both required they may both be sought and the proceedings may be consolidated.⁸⁶

Although the Code combines its provisions dealing with the management of property for minors and for disabled persons into one part, it does differentiate between these two situations when necessary.⁸⁷ For example, the standards upon which the court acts are different. A conservator may be appointed by the court or other protective orders issued for a minor only when the minor has property needing management or protection or has business affairs which minority may jeopardize or prevent or has a need for support and education funds better obtainable through a conservator.⁸⁸ For other incapacitated persons, however, similar court action may be taken only when a person is unable to manage his property and affairs for any reason and that person's property may be wasted or dissipated without proper management or when support, care and welfare funds for that person are necessary and better obtainable through a conservator.⁸⁹

The petition for an appointment or protective order may be initiated by the prospective protected person; by any person interested in this person's estate, affairs or welfare; or by

83. U.P.C. § 5-401.

84. See generally Fratcher, *supra* note 55, § 14.22, at 226-29.

85. U.P.C. § 5-424(a).

86. U.P.C. § 5-102(b).

87. U.P.C. § 5-401, Comment at 221.

88. U.P.C. § 5-401(1).

89. U.P.C. § 5-401(2).

any person adversely affected by the lack of effective management.⁹⁰ For a minor, if the court determines that it would be in the best interest of the minor to have an attorney appointed, it may appoint an attorney who can represent the minor as a guardian ad litem.⁹¹ For other incapacitated persons, the person must be protected by his own counsel or the court must appoint an attorney to represent him as a guardian ad litem.⁹² In addition, the court may direct that the alleged incapacitated person be examined by a physician or send a visitor to interview him, or both.⁹³ Only after a hearing and only after the court is convinced that a need is established, may the court appoint a conservator or make some other protective order.⁹⁴

As indicated, the court is provided, under this procedure, a less drastic alternative than the appointment of a conservator. This alternative device gives the court "single transaction" power to make any authorization, ratification or other direction which would be in the best interests of the protected person with respect to any transaction relating to the person's financial affairs or estate.⁹⁵ Such court orders would include single transactions such as the sale of an asset or maybe a series of transactions. They would have obvious usefulness anytime a full permanent or long term conservatorship is not necessary.

2. *How is a Guardian or Conservator Selected?*

a. **Guardians of Minors.** As indicated above, unless parental rights of custody have been terminated or suspended, the parent or surviving parent is automatically the guardian of the person of a minor.⁹⁶ There need be no official acceptance or court action taken in these situations. In addition, a parent of a minor may appoint by will a guardian of an

90. U.P.C. § 5-404(a).

91. U.P.C. § 5-407(a).

92. U.P.C. § 5-407(b).

93. *Id.*

94. U.P.C. § 5-407(c).

95. U.P.C. §§ 5-409(a)-(b). The interests of the protected persons' creditors and dependents and whether continuing protection of a conservator is required must be considered by the court. U.P.C. § 5-409(c).

96. U.P.C. § 5-204.

unmarried minor.⁹⁷ The appointment of the last competent parent to die has priority.⁹⁸ Such a testamentary appointment becomes effective upon filing the guardian's acceptance in the court in which the will is probated.⁹⁹ If a parent is unable, for whatever reasons, to serve as guardian or if a testamentary appointment has not been accepted for thirty days, a minor of fourteen years or more may nominate a person of his choice.¹⁰⁰ This person must be appointed unless the court finds that such an appointment would be against the best interest of the minor.¹⁰¹ In all other cases, the court upon petition may appoint any person whose appointment would be in the best interest of the minor.¹⁰²

If a court appointment is necessary, the Code provides a procedure to follow. Notice must be given to the minor if fourteen or more years of age, to the person who had the custody and care of the minor for the sixty days prior to the petition and to the minor's living parents if any.¹⁰³ At the hearing the court is to make the appointment only after it determines that a qualified person¹⁰⁴ seeks it, that venue is proper,¹⁰⁵ that the necessary notices have been given, that the proper priorities have been observed,¹⁰⁶ and that the appointment would serve the welfare and best interest of the minor.¹⁰⁷ If the circumstances do not qualify, the court can dismiss or make any other appropriate order which would be in the minor's best interest.¹⁰⁸ In addition, if the court determines

97. U.P.C. § 5-202.

98. *Id.* See Fratcher, *supra* note 55, § 14.9, at 211.

99. U.P.C. § 5-202. Unless objected to before or within thirty days of acceptance by the minor ward, who must be fourteen years old or more, the nominated person becomes the guardian without additional court proceedings. U.P.C. § 5-202. Even a testamentary guardian accepted in a court under a will probated in the parents' domicile is recognized in the Code state. *Id.*

100. U.P.C. § 5-203.

101. U.P.C. § 5-206.

102. *Id.*

103. U.P.C. § 5-207(a). Notice to these persons must be given in a manner according to the Code's general notice provision. U.P.C. § 1-401.

104. "Qualified person" is not defined in the Code but it is not restricted either.

105. Venue "is in the place where the minor resides or is present." U.P.C. § 5-205.

106. The court must determine that all parental rights of custody are terminated or suspended and that a testamentary guardian who would have the next priority does not exist. U.P.C. § 5-204.

107. U.P.C. § 5-207(b). The court has a convenient option to appoint, in its discretion, a temporary guardian who would have ordinary guardian status except his authority has a maximum duration of six months.

108. *Id.*

that it is necessary, it can appoint a guardian ad litem for the minor.¹⁰⁹

Significantly, once a guardian accepts a testamentary appointment or a court appointment, that person, after appropriate notice, submits personally to the jurisdiction of the court to any proceeding related to the guardianship instituted by an interested person.¹¹⁰ This provision provides a continuing jurisdiction for litigating guardianship matters regardless of where the guardian resides.

b. Guardians of Incapacitated Persons. The Code continues the testamentary appointment device for the appointment of a guardian for incapacitated persons.¹¹¹ Although generally recognized in statutes dealing with the appointment of a guardian for minors, the authority does not generally exist when dealing with guardians of incapacitated persons. Significantly, testamentary appointment of a guardian in these situations is limited to two special circumstances, *i.e.*, only when the testamentary appointment is made by the incapacitated person's spouse¹¹² or by his parent.¹¹³ A spouse's appointment takes priority over a parent's appointment if in conflict¹¹⁴ and the appointment of the last parent to die takes precedence over the first to die unless the surviving parent has also been adjudged incapacitated.¹¹⁵ Apparently any person¹¹⁶ can be appointed.¹¹⁷

Under this procedure, a valid appointment becomes effective upon the guardian filing an acceptance of appointment in the court in which the will has been probated.¹¹⁸ The appointed guardian must give seven days advance notice to the incapacitated person and to the person having his care

109. U.P.C. § 5-207(d). The court is to give preference to an attorney selected by the minor if the minor is fourteen or more years of age. *Id.*

110. U.P.C. § 5-208.

111. U.P.C. § 5-301.

112. U.P.C. § 5-301(b).

113. U.P.C. § 5-301(a).

114. U.P.C. § 5-301(b).

115. U.P.C. § 5-301(a).

116. Defined as "an individual, a corporation, an organization, or other legal entity." U.P.C. § 1-201(29).

117. *Cf.* U.P.C. § 5-301(d), and Comment at 213.

118. U.P.C. §§ 5-301(a)-(b).

or to his nearest adult relative.¹¹⁹ The incapacitated person can prevent the appointment from taking effect by filing a written objection with the court.¹²⁰ This objection would not necessarily foreclose the person from eventually being appointed but would restrict that person's appointment solely to the formal appointment procedure.¹²¹ Finally, all of these testamentary appointments are terminated if the will making the appointment is denied probate in formal proceedings¹²² although a Code state will recognize a testamentary appointment made in another state if the other state is the testator's domicile.¹²³

Beyond this testamentary appointment procedure, the Code is much more specific as to the person who can become or should become guardian of an incapacitated person than it is for a guardian of a minor. In an appointment proceeding a full priority list is established ranking by status the persons ordinarily most desirable for the job.¹²⁴ Specifically, the incapacitated person's spouse is first, any of his adult children are second, his parents or his deceased parent's nominee by will or writing is third,¹²⁵ any relative with whom he has resided for six months is fourth, and any person nominated by a person who is caring for or paying for the incapacitated person's welfare and support is fifth.¹²⁶ When consistent with the priority list, any competent person or institution may be appointed guardian of an incapacitated person.¹²⁷

The incapacitated person or any person interested in his welfare may petition for the appointment of a guardian.¹²⁸ As discussed *supra*,¹²⁹ the Code provides substantial protec-

119. *Id.*

120. U.P.C. § 5-301(d).

121. *Id.*

122. U.P.C. §§ 5-301(a)-(b).

123. U.P.C. § 5-301(c).

124. U.P.C. § 5-311(b).

125. It is not clear how this nomination authority works into the testamentary appointment device and why the spouse is not given this authority too. See Fratcher, *Persons Under Disability*, UNIFORM PROBATE CODE PRACTICE MANUAL § 14.18, at 222 (Assoc. of Continuing Legal Education Administrators 1972).

126. Professor Fratcher states that the first four in priority may confer their priority on a nominee. *Id.*

127. U.P.C. § 5-311(a).

128. U.P.C. § 5-303(a).

129. See notes 74-80 and accompanying text *supra*.

tion for the alleged incapacitated person throughout the proceedings. In addition, the alleged incapacitated person is entitled to be present at the hearing and to have counsel present evidence and cross examine all relevant witnesses.¹³⁰ The notice requirements for these guardianship proceedings are also designed to be protective of the alleged incapacitated person.¹³¹ The person alleged to be incapacitated must be personally served and waiver of notice is ineffective unless he is present at the hearing or a visitor confirms the waiver. His spouse, parents and adult children must also be personally served, if they reside within the state. And his guardian, conservator or caretaker and custodian, if any, must also be given notice. If no one but the alleged incapacitated person is notified, then one of his closest adult relatives should be notified if one can be found. In a provision nearly identical to the one for guardians of minors,¹³² a guardian of an incapacitated person, once he accepts his appointment, submits personally after notice to the court for all guardianship related proceedings.¹³³

c. Conservators. Because of the authority and power given by the Code to an appointed conservator and the potential for misuse of this device, the Code establishes several prerequisites before one may be appointed conservator. A general overall requirement is that the conservator be an individual or a corporation possessing trustee powers.¹³⁴ The Code then lists specific priorities for consideration for appointment.¹³⁵ The first priority is held by any similar type fiduciary appointed by an appropriate court in any other jurisdiction in which the protected person resides.¹³⁶ This would

130. U.P.C. §§ 5-303 (b).

131. U.P.C. §§ 5-309.

132. See note 109 and accompanying text *supra*.

133. U.P.C. §§ 5-305.

134. U.P.C. §§ 5-410 (a).

135. U.P.C. §§ 5-410 (a) (1)-(7).

136. U.P.C. §§ 5-410 (a) (1). A foreign conservator also has the ability to collect debts or property from persons within the Code state by presenting to the debtor or possessor proof of his appointment and an affidavit. U.P.C. § 5-431. The affidavit must recite that there are no protective proceedings pending within the state and that the foreign conservator is entitled to payment or delivery. *Id.* A foreign domiciliary personal representative has a similar authority in a decedent's estate situation. See U.P.C. § 4-201, and Averill, *Wyoming's Law of Decedents' Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code—Part III*, 9 LAND & WATER L. REV. 567, 571 (1974).

apparently even include such a fiduciary appointment in a foreign country.¹³⁷ The second priority goes to any nominee, corporate or individual, of the protected person if that person is fourteen years of age and the court determines he has sufficient mental capacity to make an intelligent choice.¹³⁸ The next four priorities¹³⁹ concern relatives: the protected person's spouse; one of his adult children; one of his parents or one of his parent's testamentary nominees; or any of his relatives with whom he has been living for more than six months prior to the filing of the petition. A last priority lies within the nomination power of any person caring for the protected person or paying benefits to him.¹⁴⁰ Nominees nominated by either a non-resident fiduciary, a spouse, an adult child, or a parent or relative caring for the person may serve in the person's stead.¹⁴¹ Between persons of equal priority, the court has discretion to select the one best qualified if more than one is willing to serve and for good cause shown, the court has discretion to ignore these priorities and to appoint anyone, including a person without any priority.¹⁴²

The Code is designed to prevent unnecessary appointments of conservators. Not only will the priority list and the supervisory discretion the court possesses over this priority list aid in this matter, but the procedural requirements of the appointment proceeding are also helpful. First, appointment of a conservator can only occur after formal notice is given to the appropriate persons involved¹⁴³ and after a full court hearing.¹⁴⁴ Second, the person for whom a conservator is to be appointed must be represented in the proceedings either by a guardian ad litem¹⁴⁵ or when minority is involved, under court approval, by a parent.¹⁴⁶ And, third, the court may in its discretion also have an alleged incapacitated person examined by an uninvolved physician or interviewed

137. Fratcher, *supra* note 125, § 14.27, at 234.

138. U.P.C. § 5-410(a)(2).

139. U.P.C. §§ 5-410(a)(3)-(6).

140. U.P.C. § 5-410(a)(7).

141. U.P.C. § 5-410(b).

142. *Id.*

143. U.P.C. § 5-405.

144. U.P.C. § 5-407.

145. U.P.C. §§ 5-407(a)-(b).

146. STUDY MATERIALS 119. See U.P.C. § 1-403.

by a visitor or both.¹⁴⁷ These features of the Code coupled with the substantive requirement that the court be affirmatively shown that the protected person requires a conservator,¹⁴⁸ should achieve the Code's purpose.

3. *Powers, Duties and Liabilities of Guardians and Conservators.*

a. *Guardians of Minors.* Except that a guardian of a minor is not liable, as a parent would be, for the acts of the ward, he has the powers and duties of a parent who properly has custody and whose child is unemancipated.¹⁴⁹ Specifically included¹⁵⁰ within these duties, but not exclusive, are the duties to take reasonable care of the ward's property; to apply money received for the ward to the ward's current needs for support, care and education; to conserve any excess sums for the ward's future needs; and to report the ward's condition and the condition of the ward's estate which has been subject to the guardian's possession or control to the court on petition of any person interested in the minor's welfare, or as required by court rule. There is no duty to give bond. Non-exclusive powers specifically listed¹⁵¹ by the Code include the power to commence protective proceedings if necessary to protect the ward's estate; to receive according to any type of contract, trust, devise or fiduciary entity sums for the support of the ward; to institute legal proceedings in order to compel persons having a duty to support the ward or to pay sums to the ward for the ward's support; to further the ward's education, social and other activities; to authorize medical and other professional care, treatment or advice; and to consent to the marriage or adoption of the ward.

A guardian's relationship to the Code's protective proceedings is important to understand. First, the guardian has a duty to commence protective proceedings if necessary to protect the ward's estate or property.¹⁵² Second, if sums are

147. U.P.C. § 5-407(b).

148. U.P.C. § 5-407(c). *See also* U.P.C. § 5-401.

149. U.P.C. § 5-209.

150. U.P.C. §§ 5-209(a)-(d).

151. *Id.*

152. U.P.C. § 5-209(a).

received in excess of the ward's future needs and a conservator has been appointed, the guardian must pay over these sums to the conservator at least annually.¹⁵³ Third, a guardian may not use sums received for compensation for his personal services unless the compensation is approved by court order or approved by a duly appointed conservator who is not the guardian.¹⁵⁴ Significantly, the above restrictions prohibiting a guardian from acting like a conservator do not apply vice versa.¹⁵⁵ If a guardian has not been appointed for a minor ward, a duly appointed conservator has no duty to commence guardianship proceedings and, if willing, may perform the functions of a guardian.¹⁵⁶ This power of a conservator to act as a guardian may become a very popular and useful approach to guardianship.¹⁵⁷

Notwithstanding the limitation upon a guardian's power to act as a conservator, it is clear that the Code has provided a guardian with sufficient power to perform the functions for which he is appointed. For example, the guardianship appointment does not terminate even though the guardian moves from the state of appointment and takes the ward with him.¹⁵⁸ Furthermore, the Code properly limits the scope of a guardianship by removing from the guardian an obligation to provide for the ward's support from his own funds.¹⁵⁹ All in all, the Code seems to strike a reasonable and meritorious balance between a guardian's duties and his powers.

b. Guardians of Incapacitated Persons. Basically, the general powers, duties and obligations of a guardian of an

153. U.P.C. § 5-209(b).

154. *Id.*

155. The apparent reason why a guardian cannot act as a conservator but a conservator may act as a guardian relates to the manner in which they are appointed, qualified and supervised. Guardians can be and will be typically appointed and recognized very informally; conservators, however, must proceed through what would be considered a formal proceeding in order to be appointed custodian. Compare U.P.C. §§ 5-201 to -207 with U.P.C. §§ 5-407, -410. In addition, the court will generally exercise greater authority over conservators than it will over guardians. This includes, for example, a conservator's requirement to sometimes furnish a bond, a requirement of inventory and record keeping, and a discretionary accounting requirement. See U.P.C. §§ 5-411, -418, -419.

156. U.P.C. § 5-424.

157. Fratcher, *supra* note 125, § 14.8, at 210.

158. U.P.C. § 5-201.

159. U.P.C. § 5-209.

incapacitated person are the same as a guardian of a minor person, *i.e.*, those which a parent has over his unemancipated child but without liability to third persons for the ward's acts.¹⁶⁰ The only significant differences between the two types of guardians deal with restrictions upon a guardian for an incapacitated person. First, a guardian of an incapacitated person is entitled to custody of his ward only if a court of competent jurisdiction has not otherwise detained or committed the ward.¹⁶¹ This limitation, of course, avoids any conflict the Code may have with commitment laws. Second, if a conservator has been appointed, the powers of the guardian of the incapacitated ward are further restricted. Under these circumstances, for example, the conservator is now the only one empowered to institute proceedings to compel third persons having a duty to support the ward or owing sums for the welfare of the ward to perform their duties¹⁶² and to receive money or tangible property owing to the ward.¹⁶³ Third, if there is no conservator, the guardian may not charge the ward's estate for room and board unless the charge is approved by order of court after notice to at least one of the ward's next of kin.¹⁶⁴ Even if a conservator has been appointed, the conservator must approve the room and board charges and they must be reasonable under the circumstances.¹⁶⁵ Whereas, when necessary, a conservator may act as a guardian of a minor if a guardian has not been appointed, a conservator does not have that power over incapacitated persons but would have to seek court appointment.¹⁶⁶

c. Conservators. The powers, duties and liabilities of a conservator are extensively outlined and detailed in the Code. Of the three kinds of fiduciaries for disabled persons dealt with in the Code, the conservator is clearly made the most important and is consequently given the broadest authority as well as being the most supervised by the Court. Consequently, the Code has treated the conservator's authority over the prop-

160. U.P.C. § 5-312. See notes 149-51 and accompanying text *supra*.

161. U.P.C. § 5-312(a) (1).

162. U.P.C. § 5-312(a) (4) (i).

163. U.P.C. § 5-312(a) (4) (ii).

164. *Id.*

165. U.P.C. § 5-312(b).

166. *Cf.* U.P.C. § 5-424.

erty of the ward in a manner very similar to the authority of a trustee in dealing with the trust estate.¹⁶⁷ On the other hand however, because a conservator is given these extensive powers and because the conservator is dealing with the property of a person by definition unable to protect himself, the Code provides protective devices against any abuse by conservators.¹⁶⁸

Actually the foundation of the broad powers given to a conservator is found in the powers given to the Court in dealing with the estate of a protected person.¹⁶⁹ The Code gives the court, with respect to a minor without other disability, all powers over the estate and affairs of the minor which are or might be necessary to the best interests of the minor, his family and members of his household.¹⁷⁰ Much broader powers are given to the court with respect to the estates of persons needing protection for reasons other than minority. Here, the court has all powers over the protected person's estate and affairs which that person could exercise if present¹⁷¹ and not under the disability.¹⁷² The one specified exception is that the court does not have the power to make a will for the disabled ward.¹⁷³ Specifically mentioned powers include, for example, the power to make gifts, release property interests, create revocable or inter vivos trusts of the ward's property and change beneficiaries under insurance and other contractual programs.¹⁷⁴ The change of beneficiaries and releases, renunciations or gifts exceeding 20% of any year's income of the estate, however, may be ordered by the court only after special hearing and notice and only after it is determined to be in the best interests of the ward.¹⁷⁵ Court orders under this provision have no effect upon the capacity of the protected person.¹⁷⁶ In other words, notwithstanding

167. Fratcher, *supra* note 125, § 14.31, at 240.

168. STUDY MATERIALS 119-20.

169. U.P.C. § 5-408.

170. U.P.C. § 5-408(2).

171. Confinement and disappearance are reasons for a court to make a protective order. U.P.C. § 5-401. See Fratcher, *The Uniform Probate Code and the Veterans' Administration*, 24 CASE W. RES. L. REV. 261, 280 n.83 (1973).

172. U.P.C. § 5-408(3).

173. *Id.*

174. *Id.*

175. U.P.C. § 5-408(4).

176. U.P.C. § 5-408(5).

the court's power to make orders under this provision, the protected person would still be able to bind himself by contract.¹⁷⁷ Significantly, any court order under this provision is required to follow and consider any estate plan of the protected person of which the court has knowledge.¹⁷⁸

The relationship between these powers given to the court and the powers given to the conservator is that the court can exercise its powers either directly or indirectly through the conservator.¹⁷⁹ The court may, in its discretion and subject to the restrictions put upon its own powers,¹⁸⁰ confer upon the conservator any of its own powers or the court can give the conservator none of its powers and even limit the powers which the conservator normally possesses automatically.¹⁸¹ Any such latter limitations would have to be endorsed upon the conservator's letters of appointment in order to bind third parties.¹⁸²

Unless so restricted the conservator once appointed is not reliant, however, upon obtaining one of these special orders from the court. The Code provides him with a broad and explicit array of powers.¹⁸³ A general provision gives him all powers given to trustees under the law of the state.¹⁸⁴ He is also accorded the power to invest and reinvest funds of the estate without court authorization or confirmation according to law¹⁸⁵ and, when reasonably necessary to carry out the purposes of the conservatorship, he is also empowered to take any of a long list of specified actions and transactions without court authorization or confirmation.¹⁸⁶ The enumerated powers accorded a conservator are nearly identical to those given to a personal representative of a decedent's estate under the Code.¹⁸⁷ Finally, and again similar to trustees,

177. See Fratcher, *Persons Under Disability*, UNIFORM PROBATE CODE PRACTICE MANUAL § 14.30, at 238 (Assoc. of Continuing Legal Education Administrators 1972).

178. U.P.C. § 5-427.

179. U.P.C. §§ 5-408, -426.

180. U.P.C. § 5-408(4).

181. U.P.C. § 5-426.

182. *Id.*

183. U.P.C. § 5-424.

184. U.P.C. § 5-424(a).

185. U.P.C. § 5-424(b).

186. U.P.C. § 5-424(c).

187. Compare U.P.C. §§ 5-424(c) (1)-(25) with U.P.C. §§ 3-715(1)-(27).

conservators are vested with title to all of the protected person's property.¹⁸⁸ In order to permit third persons to deal with conservators without fear of liability, the Code exonerates them if they have dealt in good faith for value and they are not required to see that assets paid or delivered to conservators are properly applied to the protected person's use.¹⁸⁹

In addition to the administration powers, the conservator is accorded substantial and significant distributive powers. Again, without court authorization or confirmation, the conservator is empowered to expend and distribute income or principal of the estate for his protected person's support, education, care or benefit.¹⁹⁰ In making such expenditures and distributions, the conservator may also consider the protected person's dependents.¹⁹¹ Furthermore, payments may be made in advance of services when the conservator reasonably expects them to be performed and when advance payment is customary or reasonably necessary.¹⁹² Except for the requirement of court approval for amounts exceeding 20% of the income of the estate for any year, if the estate is otherwise sufficient for the purposes of the custodianship, a conservator is permitted to make gifts to charities and to other objects in the same manner as the protected person would be expected to make.¹⁹³ This gift making power, however, does not apply to the conservator of a person who is disabled solely because of minority.¹⁹⁴

The conservator's power may even extend beyond his protected person's death. If the protected person dies and no personal representative is appointed or no application for such appointment is made within forty days from the date of death, the conservator, after notice to persons demanding notice and to any person nominated executor in any known

188. U.P.C. § 5-420. The Code in transferring title to the conservator is specifically careful not to cause adverse consequences because of statute, regulation, contract or any other estate planning device. *Id.* See Fratcher, *supra* note 177, § 14.30, at 238.

189. U.P.C. § 5-423.

190. U.P.C. § 5-425(a).

191. *Id.*

192. U.P.C. § 5-425(a)(4).

193. U.P.C. § 5-425(b).

194. *Id.*

will of the deceased, may be authorized by the court to act as personal representative.¹⁹⁵ Under this power there need not be an actual transfer of title from the conservator to the conservator as personal representative.¹⁹⁶

As indicated with the administrative powers, many of the rights and responsibilities which apply to a conservator parallel nearly exactly those applicable to a personal representative of a decedent's estate. For example, the method and scope of approving and paying claims against the protected person's estate¹⁹⁷ and the individual liability of the conservator for contracts entered into in his fiduciary capacity and for torts committed in the course of the administration of the estate are similar.¹⁹⁸ As with a personal representative, a conservator is empowered to approve and to pay just claims against the estate¹⁹⁹ and his individual liabilities for such described contracts²⁰⁰ and torts²⁰¹ are limited, thereby making it necessary for the creditor to go against the estate itself.²⁰²

The duties of a conservator are commensurate with his powers. A conservator's general duty is to exercise his powers as a fiduciary according to the standard of care the Code sets for trustees.²⁰³ More specifically, every conservator is required to prepare and to file with the appointing court within ninety days of his appointment, a complete inventory of the protected person's estate.²⁰⁴ Copies of the inventory must also be provided to the protected person if he is fourteen years of age or more and if he has sufficient mental capacity to understand these matters and to the parent or guardian with whom he resides.²⁰⁵ Of course, the conservator is also required to keep suitable records of his administration for

195. U.P.C. § 5-424(e).

196. *Id.*

197. Compare U.P.C. § 5-428 with U.P.C. § 3-803.

198. Compare U.P.C. § 5-429 with U.P.C. § 3-808.

199. U.P.C. § 5-428(a).

200. U.P.C. § 5-429(a).

201. U.P.C. § 5-429(c).

202. U.P.C. §§ 5-429(a)-(d). The conservator's liability to the estate may be determined in any relevant and related proceeding concerning the conservator and his protected person's estate. U.P.C. § 5-429(d).

203. U.P.C. §§ 5-417, 7-302.

204. U.P.C. § 5-418.

205. *Id.*

the perusal of any interested person.²⁰⁶ On termination, the conservator is required to account to the court and to the protected person or to his personal representative.²⁰⁷ Throughout the administration of the estate, the conservator has the overriding duty to act reasonably according to the functions and purposes of his appointment.²⁰⁸

The conservator also has distributive duties. When expending or distributing assets of the estate, the conservator must consider the recommendations made by the protected person's parent or guardian.²⁰⁹ With certain limitations, the conservator is protected when he relies upon such recommendations.²¹⁰ In addition, when making these distributions the conservator must consider the size of the estate, the duration of the conservatorship, the potential for future termination of the conservatorship, the protected person's accustomed standard of living and his other funds or sources of funds.²¹¹ Upon majority for a minor²¹² and upon the ceasing of the disability for other protected persons,²¹³ the conservator is required to pay over all of the protected person's funds and properties to him as soon as possible.

In the overall administration of a protected person's estate, including investing and selection of assets for distribution, the conservator, and the court in the exercise of its extensive powers, are required to take into account any known estate plan of the protected person.²¹⁴ Within the term estate plan are included the protected person's will, any trust created by him, and any other will substitute created or originated by the protected person.²¹⁵ This is a beneficial provision with the goal of reducing unfair and unintentional hardship or loss to beneficiaries of the protected person's estate.

206. *Id.*

207. U.P.C. § 5-419.

208. U.P.C. § 5-424(c).

209. U.P.C. § 5-425(a)(1).

210. *Id.* The limitations are that the conservator cannot rely if he knows that the parent or guardian are deriving personal financial benefit or if the recommendations are clearly not in the protected person's best interest. *Id.*

211. U.P.C. § 5-425(a)(2).

212. U.P.C. § 5-425(c).

213. U.P.C. § 5-425(d).

214. U.P.C. § 5-427.

215. *Id.*

A conservator's obligation to furnish a bond is left to the discretion of the court.²¹⁶ If required, the bond is conditioned upon the faithful discharge of the conservator's fiduciary duties. Unless the court directs otherwise, the bond is to equal the aggregate capital value of the property of the estate plus one year's estimated income less court controlled securities deposited under special arrangements and less the value of real estate of which the conservator cannot sell without court authorization. The court is given discretion to accept other means of security for the performance of the fiduciary duties.

When bond is furnished by sureties, the Code also has provisions establishing the bond's terms and requirements.²¹⁷ First, all sureties are jointly and severally liable with the conservator and with each other.²¹⁸ Second, the surety, by executing an approved bond, consents to the jurisdiction of the court when named a party defendant to proceedings pertaining to the conservator's fiduciary duties.²¹⁹ Of course, the surety is entitled to notice of such proceedings.²²⁰ The third requirement is that the surety is liable on the bond until the penalty is exhausted regardless of how many proceedings it takes to exhaust it.²²¹ When applicable, the surety is accorded the defenses of *res judicata* and the statute of limitations.²²²

The court, under the Code, is capable of dealing with nearly any situation. At any time during the administration of a conservatorship, the Code provides that all persons interested in the welfare of the protected person are permitted to file petitions requesting special or general protections from the conservator's misconduct.²²³ These would in-

216. U.P.C. § 5-411.

217. U.P.C. § 5-412.

218. U.P.C. § 5-412(a)(1).

219. U.P.C. § 5-412(a)(2).

220. *Id.*

221. U.P.C. § 5-412(a)(4). Any interested person including a successor conservator may institute proceedings for breach of the bond's obligation. U.P.C. § 5-412(a)(3).

222. U.P.C. § 5-412(b).

223. U.P.C. § 5-416(a). As with guardians, a conservator upon accepting appointment submits personally to any proceeding with notice related to his conservatorship. U.P.C. § 5-413.

clude a court order requiring bonded security or additional bonded security; requiring an accounting for the administration; requiring distribution; removing the conservator and appointing a successor or temporary conservator; and any other appropriate relief. The conservator, on the other hand, is given the authority and the right to petition the court for instructions when his fiduciary responsibility is in doubt.²²⁴ Notice and a hearing are a necessity for such proceedings.²²⁵

4. *Duration and Termination.*

a. **Guardians of Minors.** A guardianship of a minor continues until the minor dies, is adopted, marries or attains majority and it terminates upon the guardian's death, removal or approved resignation.²²⁶ Although termination means the guardian's authority and responsibility end, it does not affect the guardian's liability for prior acts or the guardian's obligation to account for the ward's funds and assets.²²⁷

Removal proceedings may be instituted by any person interested in the ward's welfare or by the ward himself if fourteen years of age or more.²²⁸ The general ground for removal is that it would be in the best interests of the ward.²²⁹ The guardian may resign but the resignation does not terminate the guardianship until it is approved by the court.²³⁰

Venue for these proceedings is in the jurisdiction in which the guardian was appointed or accepted his testamentary appointment or where the ward resides, if different.²³¹ This venue rule gives persons flexibility in determining the appropriate court in which to proceed when the ward has been removed from the state of appointment.²³² If, however, venue of the court is based solely upon the residence of the ward, the court must notify the initiating court even if the

224. U.P.C. § 5-416 (b).

225. U.P.C. § 5-416 (c).

226. U.P.C. § 5-210.

227. *Id.*

228. U.P.C. § 5-212 (a).

229. U.P.C. § 5-212 (c).

230. U.P.C. § 5-212 (a).

231. U.P.C. § 5-211 (a).

232. U.P.C. § 5-211, Comment at 211.

initiating court is in another state.²³³ The court of residence must then determine whether to retain jurisdiction or to transfer it to the initiating court.²³⁴ This *forum non conveniens* decision should be based upon the best interests of the ward.

b. Guardians of Incapacitated Persons. Termination of a guardianship for an incapacitated person occurs when either the guardian or the ward dies, when the guardian is determined incapacitated, or when the guardian is removed or resigns according to proper procedures and proceedings.²³⁵ Such a termination of authority and responsibility, of course, does not affect the guardian's liability for prior acts or the duty to account for the ward's funds and assets.²³⁶

Removal proceedings may be instituted by the ward or by any other person interested in the ward's welfare.²³⁷ The ward may request a removal order merely by sending an informal letter to the court or judge.²³⁸ So that wards who are displeased about being held to be incapacitated do not continually bring new proceedings one after another, the order adjudicating incapacity can specify a discretionary restriction on review.²³⁹ This discretionary restriction on review is phrased in terms of time and cannot exceed one year.²⁴⁰

The procedures for removing a guardian or accepting the resignation of a guardian or for ordering that the ward's incapacity has terminated contain the same safeguards as the proceedings to appoint a guardian.²⁴¹ This may include the appointment of a visitor who can then visit the present guardian's residence or the place where the ward resides or is detained and can observe the conditions under which the ward lives.²⁴² The venue provisions concerned with guardian-

233. U.P.C. § 5-211(b).

234. *Id.*

235. U.P.C. § 5-306.

236. *Id.*

237. U.P.C. § 5-307(a).

238. U.P.C. § 5-307(b). See note 80 and accompanying text *supra*.

239. U.P.C. § 5-307(b).

240. *Id.* See U.P.C. § 5-307, Comment at 216. Temporary guardians may be removed at any time. U.P.C. § 5-310.

241. U.P.C. § 5-307(c).

242. *Id.*

ships of incapacitated persons are identical to those of guardians of minors.²⁴³

c. Conservators. The only automatic termination of a conservatorship under the Code would be by the death of the conservator.²⁴⁴ All other methods require either affirmative action by the conservator himself or a proceeding before the court. When a minor obtains majority or when the conservator is satisfied that the protected person's disability no longer exists, the conservator is empowered and required to terminate the conservatorship and to pay over and distribute all funds and assets to the protected person as soon as possible after the payment of claims and expenses of administration.²⁴⁵ Upon the petition of the protected person, his personal representative, any person interested in the protected person's welfare or the conservator, the court in its discretion may terminate the conservatorship.²⁴⁶ In this court proceeding the protected person is protected as if this were a proceeding to initiate a protective order.²⁴⁷ If the minority or disability has ceased, of course, the court may terminate the conservatorship.²⁴⁸

Upon termination or removal, title to the protected person's property passes either to that person himself or to the conservator's successors subject to expenses of administration or to evidence of the conservator's conveyance or both.²⁴⁹ If a new conservator is appointed, that conservator succeeds to the title and to the powers of the prior conservator.²⁵⁰

Upon resignation, removal or termination for any other reason, a conservator must provide an accounting either to the court, to the former protected person or to the protected person's personal representative.²⁵¹ If the conservator wants to end the potential for liability, he may file for a court re-

243. U.P.C. § 5-313. See notes 231-34 and accompanying text *supra*.

244. Cf. U.P.C. § 5-430.

245. U.P.C. §§ 5-425(c)-(d).

246. U.P.C. § 5-430.

247. *Id.*

248. *Id.*

249. U.P.C. § 5-430.

250. U.P.C. § 5-415.

251. U.P.C. § 5-419.

view and approved final accounting and a final order made upon notice and hearing adjudicates all the conservator's unsettled liabilities to the protected person and to all successors.²⁵²

5. *The Uniform Veterans' Guardianship Act.* Unlike Wyoming's existing statutory scheme, the Code makes no special provision with regard to estates consisting of or including benefits received under a Veterans' Administration program.²⁵³ In fact, the avowed purpose of the Code is to supersede the Veterans' Act in those states where it had been enacted and to provide a single system for the protection of the property of minors and others unable to manage their own property. The rationale is that the Veterans' Act was unnecessary and unduly cumbersome. It is also contended that there was no reason to treat the Veterans' Administration differently than other governmental agencies, such as the Social Security Administration.²⁵⁴

Furthermore, it is submitted that the Code has adequate provision and protections for the Veterans' Administration.²⁵⁵ Under the Code's protective proceedings, any interested person is entitled to file with the registrar a request for notice of proceedings under the Code.²⁵⁶ A governmental agency, such as the Veterans' Administration, which is paying or planning to pay the protected person is specifically designated as an interested person under this provision.²⁵⁷ Any person interested in the welfare of a protected person may also file a petition requesting any or all of the following: bond or additional security, an accounting, distribution, removal or any other appropriate relief.²⁵⁸ The word "person" as used in this section would also include a governmental agency such as the Veterans' Administration.²⁵⁹ Actually, if the court

252. *Id.*

253. U.P.C. art. V, General Comment at 201-02. See generally Fratcher, *Toward More Uniform Guardianship Legislation*, 64 MICH. L. REV. 983 (1966).

254. Fratcher, *The Uniform Probate Code and the Veterans' Administration*, 24 CASE W. RES. L. REV. 261, 277 (1973).

255. See generally *Id.* at 279-83.

256. U.P.C. § 5-406.

257. *Id.*

258. U.P.C. § 5-416.

259. U.P.C. § 1-201(29).

deemed it desirable it could limit or restrict a conservator's powers to precisely those which a guardian presently has under the Uniform Veterans' Guardianship Act.²⁶⁰

In other words, the Code offers to the Veterans' Administration an affirmative action device to supervise guardians and conservators in the same manner as it has done in the past under the Uniform Veterans' Guardianship Act.²⁶¹ No substantial harm would be done if this Act were repealed.

6. *Summary.* As with the Code's provisions in other areas of probate law, the Code offers a comprehensive and flexible statutory system for dealing with all kinds of disabled persons.²⁶² It offers for disabled persons a multitude of devices. If all of them are not needed in a particular situation, they need not be employed. Those devices not used in one circumstance or at one particular time may be used in another or added to a present device being employed. The various fiduciaries are given adequate powers and responsibilities to accomplish their assignments. Safeguards are provided to prevent and discourage misuse by interested and outside persons. The Wyoming legislature should definitely give the Code's provisions for disabled persons serious consideration.

XVII. CONCLUSION

After four years, four articles, and four different volumes of the law review, what is the answer to the question, "Should Wyoming enact the Uniform Probate Code?" In the author's opinion the answer is "Definitely, yes." The more experience and examination one has with and makes of the Code, the more one feels the urgency and necessity for its enactment.

The recurring questions asked, however, are "Why do we need the Code? Our present system works, doesn't it?" The answer to the second question, first is "Amazingly, yes."

260. U.P.C. § 5-426. Of course, any restrictions of this nature would have to be endorsed on the conservator's letters of appointment in order for them to bind third persons. *Id.*

261. Fratcher, *supra* note 254, at 283.

262. See *Conservatorship: Present Practice and Uniform Probate Code Compared*, 5 REAL PROPERTY, PROBATE & TRUST J. 507 (1970).

Admittedly our present system is not all bad. Wyoming lawyers and judges have, actually, made an archaic system work far longer and far better than should be expected.

The answer to the first question, however, consumes the second: "Because the Code reflects the realities and necessities of modern society and our present system does not." For example, why in a modest estate should the surviving spouse only receive one-half and the children receive the other half? This statutory distribution will probably require the creation of a guardianship if the children are minors or it will leave the spouse with inadequate means of support. The Code guarantees the spouse the first \$50,000 of the estate plus one half of any remainder.

Consider another important improvement in the Code. Why must the powers and duties of the personal representative of an estate of one who died intestate be so greatly different than the "executor" of an estate of one who died under a properly planned testate estate? The proper reason for having a will should not be to avoid the procedural restriction of intestacy. The law should not keep intestacy unpleasant in order to increase the need to have a will. There are far better and rational reasons for having a will. Wyoming laws, however, impose many restrictions upon the personal representative of an intestate. The Code correctly attempts to equalize their positions.

These two examples of deficiencies in present law barely scratch the surface of the problem. Wyoming law not only suffers from archaic substantive rules but it also possesses a substantial number of inconsistencies, excessive formalities, and total omissions. Nearly every page of these four articles reveals an additional problem with our present law or how the Code has handled it in a better way.

The Code, on the other hand, is comprehensive, integrated and procedurally efficient. Its greatest attribute is its pervasive flexibility. The Code's procedures throughout its seven Articles are adaptable to the needs of the particular facts of

each case. In addition, it is not a system of new revolutionary concepts and devices which are untested and uncharted. Each has its tested counterpart in some state within the United States.

The purpose of this series of articles is to familiarize Wyoming attorneys with the provisions of the Code as they relate to present Wyoming law. It is hoped that it has accomplished this goal. It must be emphasized, however, that these articles are not a substitute for perusing the Code itself. Actually, they are best examined together.

Finally, the Code is not an inalterable document. In fact, each of the states which have enacted it has made alterations. On the other hand, it is not designed to be enacted on a piecemeal basis. Legislatures should not try to superimpose one or more of its Articles upon its current laws. The Code should, therefore, be considered as a package subject, of course, to any necessary internal alteration. The Code, then, if enacted as modified, would substantially improve Wyoming's present law of decedents' estates, guardianship, trusts and the other areas of law covered by it.