

## **SJR 22: Guardianship Laws and Services**

### *Uniform Laws & Montana's Guardianship Laws: Looking Back & Looking Forward*

Prepared for the Children, Families, Health, and Human Services Interim Committee

by Alexis Sandru, Staff Attorney

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SJR 22 calls for the Children, Families, Health, and Human Services Interim Committee to study Montana's existing guardianship laws<sup>1</sup> to determine if changes to the laws could improve protections for elderly and disabled adults. It has been suggested to the Committee through public comment that Montana's guardianship laws are dated and that it may be beneficial to look to uniform guardianship legislation that is being drafted by the Uniform Law Commission. This paper provides information about the Uniform Law Commission (ULC) and its activity related to guardianship, as well as the history behind Montana's guardianship laws and the ULC's influence on those laws.

The ULC, established in 1892, is a nonprofit unincorporated association comprised of over 300 uniform law commissioners who are attorneys and who are appointed by each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. The sole purpose of the ULC is to review state laws, to determine which areas should be uniform among the states, and to research, draft, and promote the enactment of uniform state laws. A uniform law drafted by the ULC is not in effect until a state adopts it.<sup>2</sup> The ULC solicits proposals for new study and drafting projects twice a year.<sup>3</sup> Each proposal is investigated and, if approved by the Executive Committee, is assigned to a drafting committee of commissioners who meet throughout the year. Drafts must be considered at no less than two ULC annual meetings by all commissioners sitting as a Committee of the Whole. Once approved by the Committee of the Whole, the drafts must be approved by a majority of the states present, but no less than 20 states, in order to be adopted as a uniform law.<sup>4</sup>

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<sup>1</sup> All references to "guardianship laws" in this paper refer to guardianship laws pertaining to adults, contained in Title 72, chapter 5, part 3, MCA, and exclude laws pertaining to the guardianship of minors.

<sup>2</sup> Uniform Law Commission, *About the ULC*, [http://www.uniformlaws.org/Narrative.aspx?title=About the ULC](http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC) (accessed December 15, 2015).

<sup>3</sup> Uniform Law Commission, *New Project Proposals*, [http://www.uniformlaws.org/Narrative.aspx?title=New Project Proposals](http://www.uniformlaws.org/Narrative.aspx?title=New%20Project%20Proposals) (accessed December 15, 2015).

<sup>4</sup> Uniform Law Commission, *ULC Drafting Process*, [http://www.uniformlaws.org/Narrative.aspx?title=ULC Drafting Process](http://www.uniformlaws.org/Narrative.aspx?title=ULC%20Drafting%20Process) (accessed December 15, 2015).

The ULC first took up guardianship in 1969 with the approval of the Uniform Probate Code. The ULC has since drafted two uniform guardianship acts, one in 1982 and another in 1997, referred to as the Uniform Guardianship and Protective Proceedings Act. The 1982 uniform act expanded the Uniform Probate Code to include the concept of limited guardianship, which was due, in part, to the fact that some states, including Montana, had already begun enacting the concept after it was recommended by the American Bar Association Commission on the Mentally Disabled. The 1982 uniform act sought to make the concept of limited guardianship explicit.

The 1997 uniform act built on the 1982 uniform act, "providing that guardianship and conservatorship should be viewed as a last resort, that limited guardianships or conservatorships should be used whenever possible, and that the guardian or conservator should consult with the ward or protected person, to the extent feasible, when making decisions."<sup>5</sup> Changes in the 1997 revision included:

- prohibiting a court from appointing a guardian for an incapacitated person unless the court made a specific finding that the respondent's needs could not be met by any less restrictive means;
- requiring the visitor to investigate whether less restrictive alternatives were available and report to the court;
- additional procedural safeguards, including requirements for the contents of a petition for appointment, requiring the appointment of a visitor, requiring personal service of the respondent, options for appointing counsel, and requiring the respondent and proposed guardian to attend the hearing unless excused by the court for good cause;
- requiring the guardian to take the views of the ward into account, to maintain sufficient contact with the ward, and to encourage the ward to participate in decisions;
- providing that the burden of proof in establishing guardianship is clear and convincing evidence and the burden of proof in terminating a guardianship is prima facie evidence; and
- requiring the court to establish a monitoring system.

Six states adopted the 1997 revision.

In 2007, the ULC completed the Adult Guardianship and Protective Proceedings Jurisdiction Act, which provides a mechanism for multistate jurisdictional disputes. The District of Columbia, Puerto Rico, and 42 other states, including Montana, have adopted this act.<sup>6</sup>

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<sup>5</sup> Uniform Law Commission Prefatory Note to Uniform Guardianship and Protective Proceedings Act (1997), pages 1-2.

<sup>6</sup> Uniform Law Commission, *Legislative Fact Sheet -- Adult Guardianship and Protective Proceedings Jurisdiction Act*, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Adult Guardianship and Protective Proceedings Jurisdiction Act](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act) (accessed December 17, 2015).

Recently, the ULC has convened a drafting commission to work on revising the 1997 Uniform Guardianship and Protective Proceedings Act. The drafting committee is looking to incorporate into the 1997 uniform act recommendations from the Third National Guardianship Summit, which focused on postappointment guardianship issues. Examples of issues the drafting committee is considering include but are not limited to:

- revising terminology to incorporate person-first language, i.e., changing references to "ward" to "person under guardianship";
- incorporating person-centered planning and decisionmaking standards;
- promoting limited guardianships;
- improving transparency in fees for guardians;
- enhancing requirements for guardianship monitoring;
- providing requirements for health care decisionmaking and residential decisionmaking;
- expanding and modifying notice requirements;
- eliminating sections allowing the testamentary appointment of a guardian; and
- requiring court approval for a guardian to agree to the marriage or divorce of the protected person.<sup>7</sup>

The earliest the revisions would be approved by the ULC is the summer of 2017.

The foundation of Montana's guardianship laws was established by legislation enacted in 1974 and 1981. In fact, almost all<sup>8</sup> of Montana's guardianship laws were enacted in 1974 as part of the adoption of the Uniform Probate Code.<sup>9</sup> Testimony before the 1974 Legislature did not mention the guardianship component of the Uniform Probate Code; however, comments to the Uniform Probate Code noted that "the Article contains many provisions designed to minimize or avoid the necessity of guardianship and protective proceedings, as well as provisions designed to simplify and minimize arrangements which become necessary for care of persons or their property."

In 1981, the Legislature enacted the concept of limited guardianship, which included the addition of provisions:

- providing for limited guardianship and specifying that guardianship may be used only as necessary and to the extent required by the person's limitations;
- allowing interested persons to request that they be notified before any order is made in a guardianship proceeding;

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<sup>7</sup> Uniform Law Commission, *Committees: Guardianship and Protective Proceedings Act*, <http://uniformlaws.org/Committee.aspx?title=Guardianship%20and%20Protective%20Proceedings%20Act> (accessed December 17, 2015).

<sup>8</sup> The other provisions in Title 72, chapter 5, part 3, MCA, were 72-5-305, 72-5-306, and 72-5-318 through 72-5-320, which were enacted in 1981, and 72-5-322, which was enacted in 1977.

<sup>9</sup> The ULC subsequently revised the Uniform Probate Code in 1975, 1982, 1987, 1989, 1990, 1991, 1997, 1998, 2002, 2003, 2008, and 2010.

- specifying what information must be included in a petition for appointment of a guardian; and
- amending who may serve as a guardian, including the addition of a state agency to serve as guardian.<sup>10</sup>

The sponsor of the 1981 legislation stated that "the problem leading to drafting of this bill is that developmentally disabled people are not able to handle all of their affairs themselves and need limited guardianships to help in some instances. Current law does not provide a precise definition of the authority the guardian has or does not have."<sup>11</sup>

In 1989, 72-5-302 through 72-5-304, MCA, pertaining to testamentary appointment of a guardian, and 72-5-325, MCA, pertaining to the removal or resignation of a guardian or termination of a guardianship, were amended as the result of an amendment proposed in 1987 by the Joint Editorial Board of the national Uniform Probate Code. The amendments also met a recommendation of the American Bar Association Commission on the Mentally Disabled.<sup>12</sup>

While a handful of Montana's guardianship laws have been amended outside of the 1974, 1981, and 1989 legislation,<sup>13</sup> much of the original 1974, 1981, and 1989 enactments and amendments have remained unchanged.

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<sup>10</sup> Ch. 344, Laws 1981.

<sup>11</sup> Mont. Sen. Jud. Comm. Hearing February 14, 1981.

<sup>12</sup> It appears that some of this language also appeared in the ULC Uniform Guardianship and Protective Proceedings Act of 1982.

<sup>13</sup> See 72-5-304 and 72-5-321 through 72-5-324, MCA.