

2009

Walter Michael Andrus, Trustee of the Mary
Elizabeth Andrus Nevada Trust v. The
Northwestern Mutual Life Insurance Company :
Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WALTER MICHAEL ANDRUS, Trustee
of the Mary Elizabeth Andrus Nevada
Trust,

Plaintiff/Appellant,

vs.

THE NORTHWESTERN MUTUAL LIFE
INSURANCE COMPANY,
Defendant,

REBEKAH ANDRUS,

Cross-Claim Interpleader
Plaintiff/Appellee,

vs.

WALTER MICHAEL ANDRUS, Trustee
of the Mary Elizabeth Andrus Nevada
Trust, as Guardian of Jared Michael
Andrus, an Incapacitated Person, and
individually,

Cross-Claim Defendant/
Appellant.

BRIEF OF APPELLEE

³
Case No. 2009089-CA

District Court Case No. 080501087

APPEAL FROM SUMMARY JUDGMENT, IN THE FIFTH JUDICIAL
DISTRICT COURT, WASHINGTON COUNTY, STATE OF UTAH, THE
HONORABLE JAMES L. SHUMATE PRESIDING

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FILED
UTAH APPELLATE COURTS

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Case No. 2009089-CA

District Court Case No. 080501087

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from the trial court's entry of partial summary judgment in favor of Appellee and against Appellant, in the Fifth Judicial District Court, Washington

County, State of Utah, the Honorable James L. Shumate presiding. This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103 (2008 as amended).

**STATEMENT OF ISSUES PRESENTED ON APPEAL
AND STANDARDS OF APPELLATE REVIEW**

Issue No. 1: Whether the trial court erred in granting partial summary judgment in favor of R. Andrus?

Standard of Review: In reviewing a grant of summary judgment, it is necessary to “determine only whether the [district] court erred in applying the governing law and whether the [district] court correctly held that there were no disputed issues of material fact.” *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 400 (Utah 1998) (internal quotation marks omitted).

Issue No. 2: Whether Appellant exceeded his authority as guardian of Jared Andrus in changing his ward’s life insurance beneficiary designation?

Standard of Review: Questions involving legal conclusions are reviewed under a “correctness standard, which incorporates a clearly erroneous standard for review of subsidiary factual determinations.” *State v. Ramirez*, 817 P.2d 774, 782 n. 3 (Utah 1991).

Issue No. 3: Whether the District Court relied on disputed issues of material fact in granting Appellee’s Motion for Partial Summary Judgment?

Standard of Review: “In determining whether the trial court correctly found that there was no genuine issue of material fact, we review the facts and inferences from them in the light most favorable to the losing party.” *Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989).

STATUTES AND RULES

The following statutes, and rules are reproduced in **Addendum A**:

Fed. R. Civ. P. 30
Fed. R. Civ. P. 32
Utah Code Ann. § 75-5-209
Utah Code Ann. § 75-5-304
Utah Code Ann. § 75-5-309
Utah Code Ann. § 75-5-312
Utah Code Ann. § 75-5-401
Utah Code Ann. § 75-5-404
Utah Code Ann. § 75-5-405
Utah Code Ann. § 75-5-408
Utah R. App. P. 24

STATEMENT OF THE CASE

On April 21, 2008, Appellant Walter Michael Andrus (“W.M. Andrus”) filed a complaint against the Northwestern Mutual Life Insurance Company (“Northwestern”) alleging breach of contract for Northwestern’s refusal to pay the proceeds of a life insurance policy upon the death of the insured, Jared Andrus. R. 1-6. On May 19, 2008, Northwestern removed the action from the Utah Fifth District Court, Washington County, to the Federal District Court, District of Utah, joining Appellee, Rebekah Andrus (“R. Andrus”), through interpleader as a competing claimant to the proceeds of the life insurance policy. R. 24-26. Thereafter, Northwestern paid the proceeds of the life insurance policy to the Federal Court and was dismissed from the action.

Upon being joined to the action, R. Andrus filed cross-claims against W.M. Andrus alleging breach of contract, fraud, breach of fiduciary duty, sought declaratory relief that she was entitled to the proceeds of the life insurance policy. R. 303-317.

Thereafter, R. Andrus filed her Motion for Partial Summary Judgment on the issue of declarative relief and W.M. Andrus filed his Motion for Summary Judgment seeking declaration that 85% of the proceeds of the policy should be paid to the Mary Elizabeth Andrus Nevada Trust. R. 365-268; 201-203.

Prior to ruling on Appellant and Appellee's cross-motions the Federal District Court remanded the case to the Fifth District Court, Washington County, on June 2, 2009 citing lack of diversity as a result of Northwestern's dismissal from the action. R. 57-58. On September 1, 2009, the Fifth District trial court set for hearing the issue of cross-motions for summary judgment. R. 328-329. After hearing oral argument from counsel, the trial court granted partial summary judgment in favor of R. Andrus and against W.M. Andrus and declared that R. Andrus is entitled to 100% of the proceeds of the life insurance policy. R. 333-334. W.M. Andrus timely filed his Notice of Appeal on October 21, 2009. R. 336-337.

STATEMENT OF FACTS¹

On August 17, 2001, Jared Andrus and R. Andrus, as husband and wife, purchased a term life insurance policy No. 15 843 524 (the "Policy") from the Northwestern Mutual Life Insurance Company with a paid on death benefit in the amount of \$500,000.00. R. 227. Jared was listed as the Owner of the policy and he was also the person insured by it. R. 227. On the date it was purchased, Jared Andrus named his wife, Rebekah D. Andrus ("R. Andrus"), as the direct beneficiary to one-hundred percent of the proceeds of the

¹ The Facts are recited in a light most favorable to the trial court's decision. *See State v. Tetmyer*, 947 P.2d 1157, 1158 (Utah App. 1997).

policy. R. 232. The Policy premiums were at all times paid for by Jared Andrus and R. Andrus. R. 264. Jared Andrus never altered or changed his original beneficiary designation and remained married to R. Andrus until his untimely death on December 23, 2007. R. 251.

Approximately five years after the Policy was purchased, in October 2006, Jared Andrus became seriously ill and exhibited symptoms of extreme weight loss, swelled feet and poor vision. R. 306, 284. Over the next several months, Jared's condition worsened and in May 2007, Jared was diagnosed with Non-Hodgkins B-Cell Lymphoma. *Id.*

Due to Jared's mental and emotional instability on June 15, 2007, a Verified Petition for Guardianship was filed in Washington County, Utah wherein Walter Michael Andrus ("W.M. Andrus"), Jared's father, was nominated to serve as Jared's guardian. R. 235-236. The Verified Petition for Guardianship states that the value of the estate to be possessed by the guardian was \$9,000. R. 237. The Petition does not address the Policy and it was never raised in any of the guardianship documents filed with the probate court. R. 234, 235-238, 262. Also, R. Andrus was not provided notice of the guardianship hearing pursuant to Utah Code Ann. § 75-5-309(3) and therefore, was unable to participate. R. 306, 284. On July 10, 2007, W.M. Andrus was appointed as Jared's legal guardian. R. 234.

Approximately seven days following his appointment as guardian of Jared Andrus, on July 17, 2007, W.M. Andrus completed, but did not submit to Northwestern Mutual, a Designation of Beneficiaries by Owner for Death Proceeds Only form ("Beneficiary

Change Form”) R. 239-241. The Beneficiary Change Form was signed by W.M. Andrus, as full legal guardian of Jared Andrus. R. 239-241. The purpose of the Beneficiary Change Form was to attempt to reduce R. Andrus’ portion of paid on death proceeds of the Policy by 85% in favor of funding the Mary Elizabeth Andrus Nevada Trust (the “Trust”), a revocable trust, created by W.M. Andrus. R. 239; 242-243. Although the Trust refers to W.M. Andrus as the “donor,” it is to be funded solely by the proceeds of the marital Policy and does not specify any form of contribution from W.M. Andrus.² R. 242; 249. W.M. Andrus is also the specified as the “Trustee.” R. 242.

Both the Beneficiary Change form and the Trust were never shown to Jared Andrus or R. Andrus. R. 251. Also, Jared never specifically directed W.M. Andrus to execute the Beneficiary Change Form. R. 252. After W.M. Andrus executed the Beneficiary Change Form he placed it in a drawer rather than immediately submitting it to Northwestern Mutual’s home office to effectuate the beneficiary change. R. 252.

On November 30, 2007, W.M. Andrus’ authority as guardian of Jared M. Andrus was terminated by court order and Jared Andrus died of lymphoma approximately one month later on December 23, 2007. R. 254, 255. During the period between the termination of the guardianship and Jared’s death, the Beneficiary Change Form continued to sit in W.M. Andrus’ drawer and was never shown to Jared. R. 252. After

² Although the Trust lists two funding sources other than the life insurance policy, each of those two sources fail as there were no other payments “due the trust” or any other payments “due the beneficiary . . . from any other trust.” See R. 249. Also, W.M. Andrus was the guardian of Jared Andrus, not Mary Andrus, and had no ability to divert Mary’s inheritances to the Trust.

Jared's death, W.M. Andrus delivered the Beneficiary Change Form to Northwestern Mutual Life Insurance Company and both R. Andrus and W.M. Andrus filed competing claims to the proceeds of the Policy. R. 257.

ARGUMENT SUMMARY

On appeal, W.M. Andrus claims that because the probate court granted him "full legal guardianship" of Jared Andrus, he had authority under Utah Code Ann. § 75-5-312 to change the beneficiary designation of his ward's life insurance policy. Additionally, W.M. Andrus claims his actions were in the best interests of his ward and that the trial court may have relied on disputed material facts in granting R. Andrus' Motion for Partial Summary Judgment because at oral argument, Appellee's counsel raised facts from W.M. Andrus' deposition which he claims that he was never able to read or sign. Both claims fail because they are lacking in merit and not supported by the record.

W.M. Andrus' arguments fail to comply with the requirements of Rule 24, Utah Rules of Appellate Procedure. W.M. Andrus' makes no effort to cite any portions of the record relied upon in making his arguments and rarely cites applicable law on which his arguments rely. Additionally, W.M. Andrus' recites many immaterial facts which contain no citation to the record and many of which were wholly disputed at the trial court level. To the extent W.M. Andrus' brief is inadequate, it need not be considered by this Court.

Also, W.M. Andrus' claims are lacking in merit and do not reflect the applicable statutory or case law. Utah Code Ann. § 75-5-312 does not empower a guardian to

change the beneficiary designation of his ward's life insurance policy and W.M. Andrus was never granted that authority from the probate court as the Policy was never disclosed to or properly considered by the court. Utah Code Ann. § 75-5-312, like Utah Code Ann. § 75-5-209, requires a guardian to petition the court for a protective proceeding if the guardian is aware of property or affairs of the ward which he believes are in need of protection. A protective proceeding is necessary to enable a guardian to change his ward's beneficiary designation on a life insurance policy that is within the reach of the probate court and is commenced pursuant to Utah Code Ann. § 75-5-401-408. However, questions remain whether a term life insurance policy, as a non-probate contract, would even be subject to the reach of the court through a protective proceeding, let alone a guardianship.

In addition, pursuant to the terms of the Policy itself, the Northwestern Mutual life insurance company was under no obligation to honor the beneficiary change form submitted by W.M. Andrus. The beneficiary designation change form was of no effect as it was submitted after the termination of the guardianship and after Jared Andrus' death. Therefore, the original beneficiary designation to R. Andrus remained in place.

Finally, the Court did not rely on disputed material facts because Appellee's counsel was permitted to cite to portions of W.M. Andrus' unsigned deposition. The trial court made it clear that its decision was based on the language of the relevant statutes and not deposition testimony from W.M. Andrus that he now wishes to dispute. W.M. Andrus had the ability to attempt to suppress the deposition if he considered his

testimony objectionable and failed to do so within the time allowed by the Rules.

Therefore, even if the trial court were to rely on such testimony, it could properly do so.

ARGUMENT

W.M. Andrus essentially raises the following claims on appeal: (1) that as guardian of Jared Andrus, he was vested with authority to change the beneficiary designation of his ward's life insurance policy; (2) that he was acting in the best interests of his ward; and (3) that the trial court may have relied on disputed material facts in granting R. Andrus' Motion for Partial Summary Judgment. *See* Brief of Appellant ("Br. Of Apl't.") at 10-11. W.M. Andrus' claims fail because they are inadequately briefed, lacking in merit and not supported by the record.

I. APPELLANT'S CLAIMS ARE INADEQUATELY BRIEFED AND NEED NOT BE REVIEWED BY THIS COURT

"It is well established that a reviewing court will not address arguments that are not adequately briefed." *State v. Parra*, 972 P.2d 924, 926 (Utah App. 1998). The briefing requirements are found in rule 24, Utah Rules of Appellate Procedure. Rule 24(a)(9) requires that "[t]he argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issues not preserved in the trial court, with citations to the authorities, statutes and parts of the record relied on." Utah R. App. P. 24(a)(9). "[An appellate] court is not a depository in which the appealing party may dump the burden of argument and

research.”” *Brigham Young Univ. v. Tremco Consultants, Inc.*, 2005 UT 19, ¶ 42, 110 P.3d 678 (citations omitted).³

In the instant case, W.M. Andrus’ arguments are inadequately briefed. Contrary to the requirements of Rule 24(a)(9), the entirety of W.M. Andrus’ arguments are wholly void of any citation to the actual record. *See* Br. of Aplt. W.M. Andrus’ entire first argument is premised on the assertion that Utah Code Ann. § 75-5-312 grants a guardian the authority to change his wards beneficiary designation. *See* Br. of Aplt. Although he references the statute throughout his brief, W.M. Andrus makes only two actual citations to that statute and those citations do not support his conclusions. *Id.* In fact, in twelve pages of argument, W.M. Andrus makes only five citations to relevant legal authority and none of which support his conclusions. *See* Br. of Aplt. at 11-22. Rather than citing to relevant legal authority, W.M. Andrus draws his own unsupported conclusions and bootstraps them to use as support for subsequent conclusions. *See id.*

For example, W.M. Andrus cites to the language of Utah Code Ann. § 75-5-312 to explain that a guardian has essentially the same powers over the ward as parent over their minor child. Br. of Aplt. at 12. In answering his own rhetorical question, W.M. Andrus summarily concludes without citation to law or supporting authority that a parent’s authority extends to changing their child’s life insurance beneficiary designation. *Id.* at 13. Later, W.M. Andrus bootstraps this summary conclusion as the basis of support for

³ *See also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (“Judges are not like pigs, hunting for truffles buried in briefs.”).

arguing that a guardian is also not prohibited from changing his ward's life insurance beneficiary designation. *Id.* at 15.

Additionally, W.M. Andrus' Statement of Facts is insufficient. Many of the statements made by W.M. Andrus are disputed facts which are immaterial to this appeal and represent self-serving statements of hearsay which are inadmissible as evidence and were not considered by the trial court. R. 332:28. The trial court specifically stated that it was making its decision on the language of the statute and not the disputed facts. *Id.*

Rule 24(a)(7), Utah Rules of Appellate Procedure, requires that the statement of facts be "relevant to the issues presented for review[.]" Utah R. App. P. 24(a)(7). Most importantly, the rule requires that "[a]ll statements of fact and references to the proceedings below shall be supported by citations to the record[.]" *Id.* "This court need not, and will not consider any facts not properly cited to, or supported by, the record." *Uckerman v. Lincoln Nat'l Life Ins. Co.*, 588 P.2d 142, 144 (Utah 1978) (declining to consider an appellant's factual allegations where they were either unsupported by the record or not properly cited); *see also Koulis v. Standard Oil Co.*, 746 P.2d 1182, 1184-85 (Utah App. 1987) (disregarding sua sponte an appellant's brief where it was "filled with burdensome, emotional, immaterial and inaccurate argument," and "only a small proportion of authorities cited . . . b[ore] any resemblance to the propositions for which they [were] cited").

W.M. Andrus' Statement of Facts contains disputed and unfounded allegations and argument which are immaterial to this appeal. Br. of Aplt. at 4-10. For example, fact

statements numbered 3-6; 8-10; and 20-23 in Appellant's brief all rely on W.M. Andrus own self-serving affidavit and are wholly replete with inadmissible hearsay. *See* Br. of Aplt. at 5-10. In exchange for actual facts, W.M. Andrus offers burdensome conjecture such as "[d]ue to his illness and concerns over the immaturity and instability of his wife . . ." and "due to Rebakah Andrus' mental and emotional instability" Br. of Aplt. at 5. Unfortunately, these are only a couple of the many egregious examples contained in W.M. Andrus' brief which were not relied on in applying the language of the statute to determine the outcome of the trial court's decision. *See* Br. of Aplt. at 4-10. As stated above, the trial court explicitly indicated that it was making its decision on the language of the statute and not the disputed facts. R. 332:28.

In sum, W.M. Andrus impermissibly treats this Court as "a depository in which [he] dump[s] the burden of argument and research." *Brigham Young Univ.*, 2005 UT 19 at ¶ 42 (citations omitted). Furthermore, W.M. Andrus' stated facts fail to appropriately cite to the record and are "filled with burdensome, emotional, immaterial and inaccurate argument[.]" *Koulis*, 746 P.2d at 1184-85. Accordingly, where W.M. Andrus has inadequately briefed his appeal and failed to comply with the clear directive offered in Rule 24(a)(7), this Court may decline consideration his appeal. *See Uckerman*, 588 P.2d at 144; *Koulis*, 746 P.2d at 1184-85.

II. APPELLANT’S CLAIM THAT BY VIRTUE OF HIS GUARDIANSHIP OF JARED ANDRUS, HE WAS VESTED WITH AUTHORITY TO CHANGE THE BENEFICIARY DESIGNATION OF HIS WARD’S LIFE INSURANCE POLICY IS WITHOUT MERIT.

W.M. Andrus claims that the trial court erred by not granting his Motion for Summary Judgment. Br. of Aplt. at 11. At the heart of his claim is the assertion that the trial court misinterpreted Utah law as it pertains to guardianships. Br. of Aplt. at 11.

With regard to this claim, W.M. Andrus argues that (1) Utah Code is sufficiently broad to confer upon a guardian authority to change the beneficiary designation of his ward’s life insurance policy; (2) that W.M. Andrus’ authority to change the beneficiary designation was not limited by the Letter of Guardianship; and (3) his actions were in the best interests of his ward. Br. of Aplt. at 12-17. However, W.M. Andrus’ argument regarding the Utah Uniform Probate Code espouses a myopic view of the statutes, employs conclusory reasoning coupled with inadequate support, and relies on disputed and immaterial statements which the trial court refused to consider in making its ruling.

A. Without properly petitioning the Courts, Utah Code is not sufficiently broad to confer upon a guardian the ability to change the beneficiary designation of the ward’s life insurance policy.

W.M. Andrus’ primary argument is that Utah Probate Code is broad enough to confer upon a guardian the authority to change his ward’s non-probate term life insurance beneficiary designation regardless of whether the matter of the life insurance policy was raised before the Court. Br. of Aplt. at 12. To support his argument, W.M. Andrus identifies only one statute, Utah Code Ann. § 75-5-312, on which to base his conclusion. *Id.* Moreover, his argument ignores portions of that statute, attendant case law, and

ignores the purpose and language of the remaining statutes in the Utah Uniform Probate Code, namely § 75-5-209 and §§ 75-5-401 through 408, which were adopted by the legislature to deal with a protected person's property matters and other affairs.

- 1. Utah Code Ann. § 75-5-312 provides a guardian the authority to administer in matters incident to providing care, supervision and support to the ward rather than administering the ward's assets, estate planning or other property or affairs.**

Utah Code Ann. § 75-5-312 does not empower a guardian with the ability to change his ward's life insurance beneficiary designation, especially when the matter has not been raised before the Court or contained within the Order of Appointment. Utah Code Ann. § 75-5-312(1) states that "a guardian of an incapacitated person has only the powers, rights, and duties respecting the ward granted in the order of appointment under Utah Code Ann. § 75-5-304." Utah Code Ann. § 75-5-312(1). Under § 75-5-304(1), the purpose of a guardianship is to "provid[e] continuing care and supervision of the incapacitated person." Utah Code Ann. § 75-5-304(1). Without qualifying the language of § 75-5-304, and absent specific limitation, "the guardian has the same powers, rights, and duties respecting the ward that a parent has respecting the parent's unemancipated minor child" Utah Code Ann. § 75-5-312(2).

W.M. Andrus' claims with a rhetorical and perfunctory conclusion that a parent's power extends to changing the minor's life insurance beneficiary designation so long as the parent "use[s] the correct form and submit[s] the form in a timely manner." Br. of Appt. at 13. However, W.M. Andrus fails to cite to any supporting authority for his conclusion. Moreover, his conclusion is not consistent with the language of Utah Code

Ann. § 75-5-209 which addresses the duties and powers of a guardian of a minor. Under § 75-5-209 “A guardian of a minor has the powers and responsibilities of a parent who has not been deprived of custody of the parent’s unemancipated minor, including the powers and responsibilities described in Subsection (3).” Utah Code Ann. § 75-5-209(2). Those powers, *inter alia*, include each of the following: (i) to take reasonable care of personal effects of the minor; (ii) receive money payable to the ward from various sources including from private contract, trust, conservatorship, and custodianship; (iii) exercise care to conserve excess money for the ward’s future needs; (iv) facilitate the ward’s education, social and other activities; authorize medical care; and (v) pay sums for the welfare of the ward. *Id.* at (3).

The language of § 75-5-209 as it relates to the powers of a guardian is consistent with § 75-5-312. Under § 75-5-312, the powers of a guardian generally include the ability to determine the ward’s residence, to provide comfort, maintenance, education and care for the ward, to take reasonable care of the ward’s furniture, vehicles and personal effects and to give medical consents for the ward’s treatment or care. Utah Code Ann. § 75-5-312 (2)(a)-(c). Moreover, neither the language of §75-5-312 or the language of § 75-5-209 provide authorization or inherent authority to a guardian to alter their ward’s life insurance beneficiary designation. To the contrary, each of the activities and duties specified in both statutes relate to the purpose of a guardianship,” to provide continuing care and supervision of the incapacitated person.” Utah Code Ann. § 75-5-304(1).

In addition, both § 75-5-312 and § 75-5-209 draw a distinction between matters of comfort, maintenance and support of the ward as opposed to financial and property matters of the ward. § 75-5-312 recognizes that a guardian has limited power over property matters and requires a guardian to “commence protective proceedings if other property of the ward is in need of protection.” *Id.* at (2)(b). Likewise, § 75-5-209 imposes the same requirement on guardians of a minor by specifying that “A guardian of a minor . . . (b) must commence protective proceedings if necessary to protect other property of the guardian’s ward.” Utah Code Ann. 75-5-209(3)(b) (emphasis added). Also, Subsection (d)(ii) of § 75-5-312 embodies the distinction between matters of care, comfort and support and matters related to property by preferring the appointment of conservator to preside over the ward’s property and money matters. Utah Code Ann. § 75-5-312(d)(ii). Further, it reaffirms the scope of a guardian’s duty by charging the guardian to “apply the money and property for support, care, and education of the ward; . . .” *Id.*

Additionally, the Uniform Law Comments to both § 75-5-312 and § 75-5-209 are consistent with interpreting the guardianship statutes to limit a guardian’s reach over his ward’s contracts and other property matters. Both Comments offer useful insight into the intent of the guardianship statutes and the legislature’s intent in adopting the statutes.

The Uniform Law Comment to § 75-3-312 provides as follows:

All guardians, however appointed, have the powers and duties of a guardian of a minor as provided in § 5-209, subsections (b), (c) and (d). As discussed in the Comment to § 5-209, these powers do not enable a

guardian to deal with property matters of the ward. A protective order under § 5-401 et seq. is indicated when property management is needed.

Uniform Law Comment to Utah Code Ann. § 75-5-312 (emphasis added). Similarly, the Uniform Law Comment to § 75-5-209 provides:

The powers of a guardian regarding the property of the ward are quite limited. Note, also, that the section does not encourage a guardian to apply to the court for additional property power. Rather, the provisions are designed to encourage use of a protective proceeding under § 5-401 if property powers beyond those statutorily available to a guardian are needed.

Uniform Law Comments to § 75-5-209 at ¶ 4. As indicated by both Comments, § 75-5-312 should not be read so broadly to include the ability to administer over the ward's non-probate life insurance contracts as W.M. Andrus suggests. *See* Br. of Aptl. at 12-13.

Although § 75-5-312 and § 75-5-209 limits a guardian's authority to bind the ward to contracts, to alter life insurance contracts or amend beneficiary designations, Utah law does provide a vehicle for reaching life insurance proceeds and changing beneficiary designations. As indicated by the language of the guardianship statutes and Comments to those statutes, the proper procedure for gaining access to change a beneficiary designation is through a conservatorship action or protective proceeding under §§ 75-5-401 through 408. Utah Code Ann. § 75-5-404, as opposed to § 75-5-209 or § 75-5-312, speaks directly to the issue of touching a ward's life insurance policy and sets forth the procedure for gaining the power to reach it. § 75-5-404, outlines the requirements for a petition for conservatorship or other protective order and provides that "[t]he petition shall set forth to the extent known . . . a general statement of his [the person to be

protected] property with an estimate of the value thereof, including any compensation, insurance, pension, or allowance to which he is entitled” Utah Code Ann. § 75-5-404(2) (emphasis added). Further, by initiating a protective proceeding under §§ 75-5-401 through 408, an individual may petition the court for a broad range of powers over the affairs of an incapacitated person. *See* Utah Code Ann. § 75-5-408. Those powers include “all the powers over [the protected persons] estate and affairs which he could exercise if present and not under disability, except the power to make a will.” Utah Code Ann. § 75-5-408(1)(c). Specifically included in those powers is the ability to “enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond [the protected persons] disability or life . . . and change beneficiaries under insurance and annuity policies” *Id.* (emphasis added).

Until his death, Jared Andrus was the “owner” of the Northwestern Mutual Life Insurance Policy No. 15 843 524 (the “Policy”). R. 227. That Policy was marital property of Jared Andrus and R. Andrus which was solely paid for by Jared Andrus and his wife, R. Andrus, and R. Andrus is listed as the beneficiary to one-hundred percent of the proceeds of that Policy. R. 232; Moreover, that Policy does not fit the definition of “clothing, furniture, vehicles, and other personal effects” as specified by § 75-5-312(2)(b) as property coming under the control of the guardian. *See* Utah Code Ann. § 75-5-312(2)(b). Accordingly, W.M. Andrus, had a fiduciary duty to his ward, Jared Andrus, to commence protective proceedings as required by § 75-5-312(2)(b) if he believed that the Policy, as “other property of the ward,” was in need of protection. *See id.* However, he

failed to do so and therefore deprived the court of the ability to permissibly delegate authority to W.M. Andrus to change the beneficiary designation of Jared's Policy.

As justification for his failure to petition the Court for authority to reach his ward's life insurance policy, W.M. Andrus argues that conservatorship law, and presumably a protective proceeding, does not apply because the Policy had no cash value and therefore was not a part of the ward's estate. Br. of Aplt. at 15-16. If that argument is believed, then W.M. Andrus certainly did not have the power to reach the Policy, as a non-probate contract is not specified by § 75-5-312 as being under the reach of a guardian. *See id.* Also, through a guardianship action, the probate court would likely lack the authority to power to act in matters outside of the ward's probate estate as probate court does not confer that power upon the court. *See Utah Code Ann. § 75-5-408* (granting the court authority to confer the power to change a life insurance beneficiary designation through use of a protective proceeding). However, § 75-5-401 through 408 does not require that the life insurance policy have a cash value to seek an appropriate order of protection from the court. §§ 75-5-401 through 408 applies to both the protected person's "affairs", as well as that person's estate.

(2) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that the person:

(a) is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability . . . and

(b) has property which will be wasted or dissipated unless proper management is provided or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person and protection is necessary or desirable to obtain or provide funds.

Utah Code Ann. § 75-5-401(2)(a)-(b) (emphasis added). Therefore, even if the Policy was not considered “other property of the ward” in need of protection as contemplated by § 75-5-312(2)(b), it was certainly one of Jared Andrus’ estate planning “affairs” as contemplated under § 75-5-401 and subject to protective proceedings or conservatorship. *See generally* Utah Code Ann. § 75-5-312(2)(b); *see also* §75-5-401. If W.M. Andrus believed that the Policy was in need of protection from the named beneficiary and co-owner of the Policy, then he had a heightened fiduciary duty to properly approach the Court seeking an order of protection. Br. of Aplt. at 18 (explaining that W.M. Andrus was concerned that the Policy would be wasted on “mundane living expenses.”; *see also* Utah Code Ann. § 75-5-312;

2. Utah case law limits the authority of a guardian to powers granted by statute and does not support extending the powers of a guardian to meddle with life insurance policies or other property or contract matters of the ward.

In seeming disregard for the relevant statutes as discussed above, W.M. Andrus argues that the case of *In re Boyer*, 636 P.2d 1085 (Utah 1981), supports a finding that a life insurance policy may be reached by a guardian. Br. Of Aplt. at 12. However, *In re Boyer* does not stand for this proposition. *In re Boyer* addresses the issue of whether §75-5-312 is constitutionally overbroad and recognizes that “[t]he [guardianship] process should be individualized and based upon careful consideration of the particular need for supervision.” *Id.* at 1091. In that regard, it is consistent with the language of § 75-5-304 that “[t]he court shall prefer a limited guardianship and may only grant a full guardianship if no other alternative exists.” Utah Code Ann. § 75-5-304(2). It further

supports R. Andrus' position that the issue of changing the ward's life insurance beneficiary designation should have been raised before the court in either the guardianship action or through a subsequent protective proceeding.

In *In re Boyer*, the Utah Supreme Court was confronted with the constitutionality of the standards for determining competency under Utah statute. 636 P.2d 1085 at 1087. The Court also addressed the constitutional breadth of § 75-5-312 and the flexibility a court has in fashioning a guardian's powers. *Id.* At 1090-1091. In determining that § 75-5-312 is constitutional if correctly applied, the Supreme Court stated that the powers of a guardian should be "clearly defined as the circumstances permit." *Id.* at 1091. Moreover, the Supreme Court affirmed that the powers of a guardian are constrained by statute. *Id.* ("In appointing a guardian, the court should state with particularity the powers granted, unless the full scope of the statutory authorization is warranted") (citing *In re Roe*, 383 Mass. 415, 421 N.E. 2d 40 (1981)) (emphasis added). Thus, even if "full legal guardianship" is granted by the issuing court, those powers are nonetheless constrained by statute to "providing continuing care and supervision of the incapacitated person." Utah Code Ann. 75-5-304(1).

As further support for the delineation between the powers of care and support delegated to a guardian and matters involving the ward's personal property and contracts, *Andrus v. Blazzard et al*, 54 L.R.A. 354, 63 P. 888, 890-891 (Utah 1901) offers useful guidance and authority. Although *Andrus* was decided well prior to Utah's adoption of the Utah Uniform Probate Code, the principles espoused by the Utah Supreme Court in

limiting a guardian's ability to bind the ward's estate by contract are complimentary to the language of § 75-5-312. In *Andrus*, a court appointed guardian signed a note and mortgage securing debt on behalf of his ward "as General Guardian." *Andrus*, 63 P. 888 at 888. Thereafter, when the note was not paid, the guardian was personally sued on the obligation. *Id.* Asserting his defense, the guardian claimed that he was not personally liable on the debt as his actions were for the benefit of the ward, an incompetent person. *Id.* at 889. Moreover, previous to his executing the note, the guardian sought specific permission from the probate court to execute the note and mortgage and obtained that permission. *Id.* Consequently, the guardian claimed that he had acted pursuant to that court order and therefore should not be held personally liable on the debt. *Id.*

In finding the guardian personally liable for the debt he incurred on behalf of his ward, the Supreme Court noted that the relevant statutory law on guardianships precluded the probate court from ordering the guardian to bind the ward by contract. *Id.* at 890. Thus, even though the court specifically ordered the guardian to execute the note and mortgage, such order was not authorized by statute and therefore an unauthorized order which subjected the guardian to personal liability on the note. *Id.*

In the instant case W.M. Andrus was granted full legal guardianship of Jared Andrus by the Fifth District Court and shortly thereafter attempted to change his ward's life insurance beneficiary designation. R. 234; 239-240. Jared's life insurance policy constitutes a valid contract, entered into between Jared Andrus and the Northwestern Mutual Life Insurance Company in 2001. R. 227-233. Like the guardian in *Andrus*,

W.M. Andrus attempted to contractually bind his ward by executing an amendment to that Policy in the form of a beneficiary change form, and signed that form in his own name “as full legal guardian.” R. 239-241. The effect of that beneficiary change form was to divert eighty-five percent (85%) of the proceeds of the Policy from Jared Andrus’ spouse, R. Andrus, in favor of a revocable trust created by W.M. Andrus which lists W.M. Andrus as “trustee” and “donor.” *See id.* However, unlike the guardian in *Andrus*, W.M. Andrus attempted to do so without specifically seeking permission from the court. R. 213. Therefore, W.M. Andrus’ actions were those of his own and not binding on either Jared Andrus or his estate. *See Andrus*, 63 P. 888 at 890.

B. THE LETTER OF GUARDIANSHIP ISSUED TO W.M. ANDRUS LIMITED HIS POWERS AS A GUARDIAN TO THOSE CONFERRED BY § 75-5-312 AND DID NOT INCLUDE THE ABILITY TO CHANGE THE BENEFICIARY DESIGNATION OF THE LIFE INSURANCE POLICY.

Despite language of the controlling statutes and case law, W.M. Andrus argues that the Letter of Guardianship contains “no limits” on W.M. Andrus’ authority as guardian and therefore conferred “all the powers, authorities, rights, and responsibilities of full legal guardianship of Jared Michael Andrus” upon him. Br. of Appt. at 17. R. Andrus does not contend that the Letter of Guardianship conferred upon W.M. Andrus the rights and responsibilities of full legal guardianship, but those rights and responsibilities are limited by statute as discussed above. *See In re Boyer*, 636 P.2d 1085, 1091 (“In appointing a guardian, the court should state with particularity the powers granted, unless the full scope of the statutory authorization is warranted”) (emphasis added). In Utah, the statutory authority for a guardian is derived from § 75-5-

312. Thus, as discussed above, W.M. Andrus was granted the responsibility of following the guardianship statute which required him to initiate protective proceedings if he became aware of “other property” of the ward which was in need of protection. *See* Utah Code Ann. § 75-5-312.

W.M. Andrus never petitioned the court for protective proceedings in accordance with the mandates of § 75-5-312, or raised the issue in the guardianship action. However, had he done so, he would have been required to provide notice to all interested persons, including Jared Andrus and R. Andrus of his intention to change Jared’s beneficiary designation. *See* Utah Code Ann. § 75-5-405 (requiring personal service of notice upon the person to be protected and their spouse). Instead, W.M. Andrus relied on the guardianship that was in place and allowed R. Andrus to continue to pay into the Policy without informing her of the existence of the completed, but not delivered, Beneficiary Change Form. R. 264. As W.M. Andrus testified through deposition that informing R. Andrus of the Beneficiary Change Form “would have been a huge mistake.” *Id.*

Moreover, even if this Court determined that § 75-5-312 is broad enough to confer upon a guardian the power to change a beneficiary designation through a guardianship action, W.M. Andrus was not granted that power. Prior to coming under a disability, Jared Andrus made his own beneficiary designation on the Policy and listed his spouse, R. Andrus, as beneficiary to one-hundred percent of the proceeds of the Policy. R. 232. The matter of Jared Andrus’ life insurance policy was never contemplated by the court as it was neither raised by Jared Andrus in the initial Petition for Guardianship, or thereafter

by W.M. Andrus through a protective proceeding. R. 235-238. In fact, the Verified Petition for Guardianship never addressed the Policy, nor contemplated its inclusion as being subject to the guardian's reach. *Id.* The life insurance policy was not listed in any of the following: the Verified Petition for Guardianship; the Estate Value Worksheet; the Findings of Fact, Order; or Letter of Guardianship. R. 234; 235-238; 258-261; 262.

However, section 13 of the Verified Petition for Guardianship does specify that the value of Jared's estate, which he intended to enter into his guardian's possession, was limited to \$9,000, the amount represented on the Estate Value Worksheet. R. 262. Consequently, the probate court conferred upon W.M. Andrus the power to possess only the value of Jared's estate which was listed on the Verified Petition and reflected in Section 13 of the Courts' Findings of Fact, together with those "affairs" which were brought before the court and which did not include the life insurance policy. R. 260 at section 13.

C. W.M. ANDRUS' CLAIM THAT HIS ACTIONS IN ATTEMPTING TO CHANGE THE BENEFICIARY DESIGNATION WERE IN THE BEST INTERESTS OF HIS WARD IS BASED ON DISPUTED FACTS AND SHOULD NOT BE CONSIDERED BY THIS COURT.

Interestingly enough, W.M. Andrus also claims that he was acting in his ward, Jared Andrus', best interests in changing Jared's beneficiary designation. Br. of Aplt. at 17. However, that argument should not be considered by this Court as it is wholly based on disputed facts and not supported by the record. Jared Andrus made his own beneficiary designation on August 17, 2001, wherein he named his spouse, R. Andrus the beneficiary to one-hundred percent of the proceeds of that Policy. R. 232. W.M. Andrus' claims that the probate Court "found" that R. Andrus was unfit to serve as

Jared's guardian is misguided and deceptive. *See* Br. of Aplt. at 17. R. Andrus was never provided statutory notice of the guardianship hearing as required by § 75-5-309 and she was not in attendance at the hearing. R. 306, 284. W.M. Andrus never informed R. Andrus or Jared Andrus that the Beneficiary Change Form had been completed and Jared never executed or saw that form. R. 251. Even after the guardianship was terminated, Jared was never shown the beneficiary change form or the Mary Elizabeth Andrus Nevada Trust which was executed by W.M. Andrus during the period of the guardianship. R. 251. Rather than submitting the Beneficiary Change Form to Northwestern Mutual for immediate consideration, W.M. Andrus placed it in a drawer until after Jared's death when he submitted it to Northwestern Mutual. R. 251-252. With no knowledge that the Beneficiary Change Form had been completed by W.M. Andrus, Jared had no reason to object to the substance of W.M. Andrus's changes. *See id.*

D. ALLOWING A GUARDIAN TO CIRCUMVENT THE REQUIREMENTS OF UTAH CODE ANN. § 75-5-312 IS NOT GOOD PUBLIC POLICY.

Despite the plain language of the § 75-5-312 limiting a guardian's authority over the property and assets of the ward, W.M. Andrus' argues that "it is good public policy to allow a guardian . . . to execute beneficiary changes on the incapacitated person's life insurance policy." Br. of Aplt. at 14. Not only is W.M. Andrus' argument is entirely void of any authority, but it is in direct conflict with the provisions of the Utah Uniform Probate Code. *See* Utah Code Ann. §§ 401-408; *see also* Utah Code Ann. 75-5-312(2)(b).

Since the legislature has provided the vehicle for changing beneficiaries under a life insurance policy using §§ 75-5-401-408, it would make little sense to also provide a

guardian with the same powers as those which require the appointment of a conservator or protective proceeding. *See id.* Moreover, it would make even less sense to require a guardian to seek protection of a ward's property and affairs through protective proceeding if a guardian was already endowed with that authority. *See* Utah Code Ann. § 75-5-312(2)(b). If applied, W.M. Andrus' argument would thoroughly cause confusion in the area of fiduciary responsibilities and require a complete redrafting of the statutes in this area of law. *See generally id* (requiring a guardian to petition for protective proceedings). In addition, those seeking guardianships would have incentive to hide their intentions for appointment from the courts, opening the flood gates for lawsuits in this area. Therefore, W.M. Andrus' inconsistent interpretation of the probate code is neither good public policy nor what the legislature intended in adopting the Code.

III. APPELLANT'S CLAIM THAT THE TRIAL COURT RELIED ON DISPUTED MATERIAL FACTS IN GRANTING R. ANDRUS' PARTIAL MOTION FOR SUMMARY JUDGEMENT IS LIKEWISE WITHOUT MERIT.

W.M. Andrus' claim that the trial court "may" have improperly considered disputed material facts is without merit. *See* Br. of Aplt. at 21. The trial court specifically addressed the portions of the deposition W.M. Andrus takes issue with and stated that those portions were not material to its decision. R. 332:26-28. During the trial court's hearing on the cross motions for summary judgment Mr. Meyers, counsel for W.M. Andrus, stated that he had an "objection to the deposition of Mr. Andrus that has been quoted somewhat by Mr. Gibbs." *Id.* at 26. Mr. Meyers further stated that "Mr. Andrus was told that he, at the end of the deposition, later on would be allowed to review

a copy, make any corrections or changes that he needed to make, and then it would be submitted as a final version.” *Id.* at 26-27. Mr. Meyers further explained that “due to, I guess the intransigence of the deposition company . . . that never happened.” *Id.* at 27. In response, the court addressed the fact that the deposition was not signed and inquired of Mr. Meyers through the following exchange:

THE COURT: “Are those portions that are referenced in the pleadings, the argument, the memoranda and the arguments here in Court, are they material to the Court’s decision, do you think, counsel?”

MR MEYERS: Well, I don’t think they’re material, but I think they think they’re material because they quoted them. The key thing is they used a quote out of context to try to make it look like Mr. Andrus had some type of personal interest or personal agenda against Rebekah Andrus, and so our feeling was that first a quote shouldn’t be taken out of context of, you know, the proceeding context of the deposition, and second of all there’s no other evidence in the record that indicates he was acting in his own personal interest.

THE COURT: Well, counsel, you both heard what my view of this situation is. I have two parties here most concerned about this little girl, and not motivated by self-interest at all, and that’s why it doesn’t strike me as material—

MR. MEYERS: That’s good.

THE COURT: --without the deposition there. It does not strike me as material because what I think is material are the written documents that we have, the pleadings

before this Court, and the Court's application of the statute, and that is not subject to factual dispute. Those things say what they say. The statute says what it says. My files are my files, and I feel comfortable in ruling on it, but I want to give everybody the opportunity to make sure this record is secure." R. 332: 27-28.

Thus, W.M. Andrus addressed the issue of whether W.M. Andrus' actions as a guardian were improper and the trial court specifically stated that it was making the decision on the language of the statute and not on the factual disputes. *Id.*

In addition, even if the trial court did rely on the W.M. Andrus' deposition testimony, it would have been entirely proper. If W.M. Andrus was concerned about being unable to read and sign the deposition, he did not timely object. Pursuant to Rule 30(e) *Fed. R. Civ. P.*, "If requested . . . the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them." In addition, Rule 32(d)(4) requires that errors or irregularities in the manner in which the deposition is prepared, signed, certified or sealed are waived unless a motion to suppress the deposition or some portion of it is "made with reasonable promptness after such defect is, or with due diligence might have been, ascertained." *Fed. R. Civ. P. 32(d)(4).*

W.M. Andrus was deposed on September 26, 2008. On October 9, 2008, Kathy H. Morgan of Todd Olivas & Associates issued her Reporter's Certificate which attested that W.M. Andrus was provided a reading copy of the deposition prior to forwarding the

same to counsel for R. Andrus. Addendum “B.” R. Andrus filed her Partial Motion for Summary Judgment on December 23, 2008, nearly three months after the deposition was taken, and W.M. Andrus first objected to the use of the deposition in his response to the Partial Motion for Summary Judgment on February 9, 2009. R. 153. To this day, W.M. Andrus has never filed a motion to suppress the deposition as required by the Rule 32. *See* Fed. R. Civ. P. 32(d)(4); *see also* Utah R. Civ. P. 32(c)(4). W.M. failed to take the initiative to review the deposition within 30 days as required by Rule 30(e). Even after being notified that it was available for review, W.M. Andrus failed to make an objection of any kind until nearly 120 days following the issuance of the Reporter’s Certificate and until after portions of it were cited by R. Andrus in her Motion for Partial Summary Judgment. *See* R. 153 (indicating the first objection to the deposition which was filed by W.M. Andrus). Therefore, pursuant to Rule 32(d)(4), W.M. Andrus has waived his ability to suppress the portions of his deposition which he finds “objectionable” and the trial court would properly be able to rely on those portions cited by R. Andrus during oral argument or through her memoranda.

IV. THE BENEFICIARY CHANGE FORM IS OF NO LEGAL EFFECT AS IT WAS NOT TIMELY SUBMITTED TO NORTHWESTERN MUTUAL.

In addition to exceeding the scope of his powers as a guardian, W.M. Andrus’ Beneficiary Change Form has no legal effect. The Policy itself sets forth restrictions on an owner’s ability to change the beneficiary designation and requires that the change be made while the Owner is living. The relevant portion of the Policy states as follows: “The Owner may name and change the beneficiaries of death proceeds: while the insured

is living [; or] during the first 60 days after the date of death of the Insured, if the Insured just before the insured's death was not the Owner. A change made during this 60 days cannot be revoked." R. 23. According to Section 7.2 of the Policy "[a] naming or change of beneficiary will be made on receipt at the Home Office of written request that is acceptable to the Company." R. 23. Therefore, according to the language of the Policy, a beneficiary designation is changed when the home office receives a request from the owner of the Policy, provided the owner is still alive at the time the request is received.

On December 23, 2007, the date of his death, Jared Andrus remained the owner of the Policy. R. 229. The Beneficiary Change Form was completed and signed by W.M. Andrus, "as full legal guardian of Jared Michael Andrus" on July 17, 2007. R. 239. As indicated, W.M. Andrus did not submit the completed Beneficiary Change Form to Northwestern Mutual until after Jared had died. R. 257. At the time Jared Andrus died, Northwestern Mutual had not changed the beneficiary designation on the Policy as the Home Office had not received a written request to do so; neither could they do so thereafter under Section 7.2 as the insured was not then living on the date the Home Office received the written request. R. 23. Accordingly, Jared's original beneficiary designation remained in place and R. Andrus remained the beneficiary to one-hundred percent of the proceeds of the Policy.

In addition, although the Policy includes language allowing the beneficiary change form to take effect as of the date it was signed by the owner, it is of no consequence in this action. R. 231. The owner of the policy was not the individual who requested the

change. R. 239. Even if W.M. Andrus' power as a guardian allowed him the ability to complete the Beneficiary Change Form, which it did not, the guardianship was terminated on November 31, 2007, approximately one month prior to Jared's death. R. 254. Consequently, W.M. Andrus had no continuing duty or power as guardian after November 31, 2007. Moreover, the Beneficiary Change Form which he completed but did not submit was no longer, if ever, of any legal effect.

Notwithstanding, W.M. Andrus argues that the change to the beneficiary designation was made while Jared Andrus was alive. Br. of Aplt. at 18. However, as specified by the language of the Policy itself, a change in beneficiaries is not made until after the beneficiary change form is received by the Northwestern Mutual "home office." R. 231. As indicated above, W.M. Andrus failed to timely submit the change form and therefore, the original beneficiary designation, Jared Andrus' beneficiary designation, remained as specified and payable in its entirety to R. Andrus.

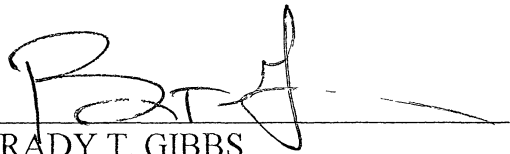
CONCLUSION

The issue presented is one of interpretation of Utah law, specifically as it applies to the powers of a guardian. R. Andrus remained married to Jared Andrus on the date of Jared's death. Jared Andrus was at all times prior to his death the "Owner" of the Policy and never engaged in any action to either personally change the beneficiary designation of the Policy, or subject the Policy to the control of W.M. Andrus, as either Jared's father or legal guardian. Accordingly, W.M. Andrus exceeded the scope of his guardianship by attempting to change the beneficiary designation of the Policy in order to fund a self-

administered trust and which excludes provisions for the maintenance of Jared Andrus's surviving spouse. Additionally, W.M. Andrus did not timely submit the Beneficiary Change Form to Northwestern Mutual as was required by the Policy. For the foregoing reasons, Appellees request that the judgment of the trial court be affirmed with costs to Appellant.

RESPECTFULLY SUBMITTED this 22nd day of April, 2010.

WRONA LAW FIRM, P.C.



BRADY T. GIBBS
Attorneys for Cross-Claim Interpleader
Plaintiff/Appellee

MAILING CERTIFICATE

I hereby certify that on the 22nd day of April, 2010 I served a copy of the foregoing BRIEF OF APPELLEE on each of the following by depositing a copy in the U.S.

Mail, postage pre-paid, addressed to:

Larry M. Meyers
Liberty Law Firm
P.O. Box 1146
St. George, UT 84771-1146

Gwen Mortensen

ADDENDUM A

Rule 30. Deposition by Oral Examination

(a) When a Deposition May Be Taken.

(1) *Without Leave.* A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) Notice in General.

A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) Producing Documents.

If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) Method of Recording.

(A) *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) By Remote Means.

The parties may stipulate — or the court may on motion order — that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) Officer's Duties.

(A) *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

- (i) the officer's name and business address;
- (ii) the date, time, and place of the deposition;
- (iii) the deponent's name;
- (iv) the officer's administration of the oath or affirmation to the deponent; and
- (v) the identity of all persons present.

(B) *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) Notice or Subpoena Directed to an Organization.

In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) Examination and Cross-Examination.

The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) Objections.

An objection at the time of the examination — whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition — must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) Participating Through Written Questions.

Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) Duration.

Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) Sanction.

The court may impose an appropriate sanction — including the reasonable expenses and attorney's fees incurred by any party — on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) Motion to Terminate or Limit.

(A) *Grounds*. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order*. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses*. Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) Review; Statement of Changes.

On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate.

The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) Certification and Delivery.

The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) Documents and Tangible Things.

(A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals — after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked — in which event the originals may be used as if attached to the deposition.

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) Copies of the Transcript or Recording.

Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) Notice of Filing.

A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses.

A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

- (1) attend and proceed with the deposition; or
- (2) serve a subpoena on a nonparty deponent, who consequently did not attend.

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

(1) In General.

At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

- (A) the party was present or represented at the taking of the deposition or had reasonable notice of it;
- (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and
- (C) the use is allowed by Rule 32(a)(2) through (8).

(2) Impeachment and Other Uses.

Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) Deposition of Party, Agent, or Designee.

An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) Unavailable Witness.

A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable — in the interest of justice and with due regard to the importance of live testimony in open court — to permit the deposition to be used.

(5) Limitations on Use.

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that,

when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) Using Part of a Deposition.

If a party offers in evidence only part of a deposition, an adverse party may require the offer or to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) Substituting a Party.

Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) Deposition Taken in an Earlier Action.

A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) Objections to Admissibility.

Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of presentation.

Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Waiver of Objections.

(1) To the Notice.

An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) To the Officer's Qualification.

An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

- (A) before the deposition begins; or
- (B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) To the Taking of the Deposition.

(A) *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence — or to the competence, relevance, or materiality of testimony — is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if:

- (i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and
- (ii) it is not timely made during the deposition.

(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross question, within 7 days after being served with it.

(4) To Completing and Returning the Deposition.

An objection to how the officer transcribed the testimony — or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition — is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

75-5-209. Powers and duties of guardian of minor -- Residual parental rights and duties -- Adoption of a ward.

(1) For purposes of this section, "residual parental rights and duties" is as defined in Section **78A-6-105**.

(2) Except as provided in Subsection (4)(a), a guardian of a minor has the powers and responsibilities of a parent who has not been deprived of custody of the parent's unemancipated minor, including the powers and responsibilities described in Subsection (3).

(3) A guardian of a minor:

(a) must take reasonable care of the personal effects of the guardian's ward;

(b) must commence protective proceedings if necessary to protect other property of the guardian's ward;

(c) subject to Subsection (4)(b), may receive money payable for the support of the ward to the ward's parent, guardian, or custodian under the terms of a:

(i) statutory benefit or insurance system;

(ii) private contract;

(iii) devise;

(iv) trust;

(v) conservatorship; or

(vi) custodianship;

(d) subject to Subsection (4)(b), may receive money or property of the ward paid or delivered by virtue of Section **75-5-102**;

(e) except as provided in Subsection (4)(c), must exercise due care to conserve any excess money or property described in Subsection (3)(d) for the ward's future needs;

(f) unless otherwise provided by statute, may institute proceedings to compel the performance by any person of a duty to:

(i) support the ward; or

(ii) pay sums for the welfare of the ward;

(g) is empowered to:

(i) facilitate the ward's education, social, or other activities; and

(ii) subject to Subsection (4)(d), authorize medical or other professional care, treatment, or advice;

(h) may consent to the:

(i) marriage of the guardian's ward, if specifically authorized by a court to give this consent; or

(ii) adoption of the guardian's ward if the:

(A) guardian of the ward is specifically authorized by a court to give this consent; and

(B) parental rights of the ward's parents have been terminated; and

(i) must report the condition of the minor and of the minor's estate that has been

subject to the guardian's possession or control:

(i) as ordered by court on petition of any person interested in the minor's welfare; or

(ii) as required by court rule.

(4) (a) Notwithstanding Subsection (2), a guardian of a minor is not:

(i) legally obligated to provide from the guardian's own funds for the ward; and

(ii) liable to third persons by reason of the guardian's relationship for acts of the ward.

(b) Sums received under Subsection (3)(c) or (d):

(i) may not be used for compensation for the services of a guardian, except as:

(A) approved by court order; or

(B) determined by a duly appointed conservator other than the guardian; and

(ii) shall be applied to the ward's current needs for support, care, and education.

(c) Notwithstanding Subsection (3)(e), if a conservator is appointed for the estate of the ward, the excess shall be paid over at least annually to the conservator.

(d) A guardian of a minor is not, by reason of giving the authorization described in Subsection (3)(g)(ii), liable for injury to the minor resulting from the negligence or acts of third persons, unless it would have been illegal for a parent to have given the authorization.

(5) A parent of a minor for whom a guardian is appointed retains residual parental rights and duties.

(6) If a parent of a minor for whom a guardian is appointed consents to the adoption of the minor, the guardian is entitled to:

(a) receive notice of the adoption proceeding pursuant to Section **78B-6-110**;

(b) intervene in the adoption; and

(c) present evidence to the court relevant to the best interest of the child pursuant to Subsection **78B-6-110(11)**.

(7) If a minor for whom a guardian is appointed is adopted subsequent to the appointment, the guardianship shall terminate when the adoption is finalized.

Uniform Law Comments [UPC § 5-209]

This section, derived in part from 1969 UPC § 5-209, represents an expansion and reorganization of the UPC section. Subsection (a) specifies that the parental powers and responsibilities entailed in a guardianship are those concerned with the ward's "support, care, and education." These terms, when read with subsection (b), obviously refer to all kinds of considerations that should be weighed and implemented on behalf of the ward by one invested with legal authority to control the ward's activities.

Subsection (b)(1) is new. It reflects a consensus of the drafting committee that a person who accepts a guardianship for a

minor should be forewarned by explicit statutory language that the position entails responsibilities to make and maintain personal contact with the ward.

The basic duties of a guardian are described in the mandates of subsection (b). Subsection (c) outlines optional authority that is extended to every guardian by the statute. Subsection (d), dealing with the delicate question of compensation for a guardian, requires that a guardian obtain approval from an independent conservator of the minor's estate or from the court before taking sums as compensation from funds of the minor that have been received

by the guardian. In contrast to 1969 UPC § 5-312(a)(4) which permitted a guardian for an incapacitated person to take funds of the ward by way of reimbursement for personal funds previously expended for certain purposes, this section requires court approval before any guardian's claim for reimbursement can be satisfied otherwise than through a conservator. Note, however, that no advance court approval is required in order to permit a guardian to use available funds of the ward for the ward's current needs as provided in subsection (b)(3).

The powers of a guardian regarding property of the ward are quite limited. Note, also, that the section does not encourage a guardian to apply to the appointing court for additional property power. Rather, the provisions are designed to encourage use of a protective proceeding under § 5-401 if property powers beyond those statutorily available to a guardian are needed. In this connection, it may be observed that subsection (c)(3), which contains one of the section's few references to use of the courts by a guardian, authorizes a guardian to institute proceedings to enforce a duty to support or pay money only if there is no conservator for the estate of the ward.

If the circumstances of a minor dictate that authority to control both person and property be obtained, protective proceedings under § 5-401 et seq. are indicated.

Section 5-423(a) provides that a conservator for a minor as to whom no one has parental authority has the powers of a guardian as well as plenary power as a statutory trustee over the assets of the minor. In addition, as noted in the comment to § 5-204, the provisions of this Article enable interested persons to obtain appointment of the same or different persons as guardian and conservator for a minor even though § 5-423(a) makes it patently unnecessary to obtain two appointments in a case where a single person is to serve in both capacities.

Subsection (e) is new and extends the limited guardianship concept to guardians of minors by encouraging court orders limiting the already limited authority of a guardian. Using this provision, a court, at the time of appointment or on petition thereafter, might limit the authority of a guardian so that, for example, the guardian would not be able to direct the ward's religious training, or so that the guardian would be restricted in controlling the ward's place of abode by a condition that the ward's consent to any change of abode be given. The section provides that special restrictions of this sort may be removed or altered by further court order. Obviously, the drafters did not intend that the procedure for contracting and expanding special limitations on a guardian's power should be used to grant a guardian greater powers than are described in the section.

Historical and Statutory Notes

Uniform Law

This section is similar to § 5-209 of the Uniform Probate Code. See Volume 8, Pts. I, II, Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

This section is also similar to § 2-109 of the Uniform Guardianship and Protective Proceedings Act (1982). See Volume 8A Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

75-5-304. Findings -- Limited guardianship preferred -- Order of appointment.

(1) The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the incapacitated person.

(2) The court shall prefer a limited guardianship and may only grant a full guardianship if no other alternative exists. If the court does not grant a limited guardianship, a specific finding shall be made that nothing less than a full guardianship is adequate.

(3) A guardian appointed by will or written instrument, under Section 75-5-301, whose appointment has not been prevented or nullified under Subsection 75-5-301(4), has priority over any guardian who may be appointed by the court, but the court may proceed with an appointment upon a finding that the testamentary or instrumental guardian has failed to accept the appointment within 30 days after notice of the guardianship proceeding. Alternatively, the court may dismiss the proceeding or enter any other appropriate order.

75-5-309. Notices in guardianship proceedings.

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

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

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

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

(d) any guardian appointed by the will of the parent who died later or spouse of the incapacitated person.

(2) The notice shall be in plain language and large type and the form shall have the final approval of the Judicial Council. The notice shall indicate the time and place of the hearing, the possible adverse consequences to the person receiving notice of rights, a list of rights, including the person's own or a court appointed counsel, and a copy of the petition.

(3) Notice shall be served personally on the alleged incapacitated person and the person's spouse and parents if they can be found within the state. Notice to the spouse and parents, if they cannot be found within the state, and to all other persons except the alleged incapacitated person shall be given as provided in

Section **75-1-401**. Waiver of notice by the person alleged to be incapacitated is not effective unless the person attends the hearing or the person's waiver of notice is confirmed in an interview with the visitor appointed pursuant to Section **75-5-303**.

75-5-309. Notices in guardianship proceedings.

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

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

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

(d) any guardian appointed by the will of the parent who died later or spouse of the incapacitated person.

(2) The notice shall be in plain language and large type and the form shall have the final approval of the Judicial Council. The notice shall indicate the time and place of the hearing, the possible adverse consequences to the person receiving notice of rights, a list of rights, including the person's own or a court appointed counsel, and a copy of the petition.

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

75-5-312. General powers and duties of guardian -- Penalties.

(1) A guardian of an incapacitated person has only the powers, rights, and duties respecting the ward granted in the order of appointment under Section **75-5-304**.

(2) Absent a specific limitation on the guardian's power in the order of appointment, the guardian has the same powers, rights, and duties respecting the ward that a parent has respecting the parent's unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a

guardian has the following powers and duties, except as modified by order of the court:

(a) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, the guardian is entitled to custody of the person of the ward and may establish the ward's place of abode within or without this state.

(b) If entitled to custody of the ward the guardian shall provide for the care, comfort, and maintenance of the ward and, whenever appropriate, arrange for the ward's training and education. Without regard to custodial rights of the ward's person, the guardian shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of the ward is in need of protection.

(c) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service.

(d) If no conservator for the estate of the ward has been appointed, the guardian may:

(i) institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform that duty; or

(ii) receive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward; but the guardian may not use funds from the ward's estate for room and board which the guardian, the guardian's spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one adult relative in the nearest degree of kinship to the ward in which there is an adult. The guardian must exercise care to conserve any excess for the ward's needs.

(e) (i) A guardian is required to report the condition of the ward and of the estate which has been subject to the guardian's possession or control, as required by the court or court rule.

(ii) The guardian shall, for all estates in excess of \$50,000, excluding the residence owned by the ward, send a report with a full accounting to the court on an annual basis. For estates less than \$50,000, excluding the residence owned by the ward, the guardian shall fill out an informal annual report and mail the report to the court. The report shall include the following: a statement of assets at the beginning and end of the reporting year, income received during the year, disbursements for the support of the ward, and other expenses incurred by the estate. The guardian shall also report the physical conditions of the ward, the place of residence, and a list of others living in the same household. The court may require additional information. The forms for both the informal report for estates under \$50,000, excluding the residence owned by the ward, and the full accounting report for larger estates shall be approved by the Judicial Council. This annual report shall be examined and approved by the court. If the ward's income is limited to a federal or state program requiring an annual accounting report, a copy

of that report may be submitted to the court in lieu of the required annual report.

(iii) Corporate fiduciaries are not required to petition the court, but shall submit their internal report annually to the court. The report shall be examined and approved by the court.

(iv) The guardian shall also render an annual accounting of the status of the person to the court which shall be included in the petition or the informal annual report as required under Subsection (2)(e). If a fee is paid for an accounting of an estate, no fee shall be charged for an accounting of the status of a person.

(v) If a guardian:

(A) makes a substantial misstatement on filings of annual reports;

(B) is guilty of gross impropriety in handling the property of the ward; or

(C) willfully fails to file the report required by this subsection, after receiving written notice from the court of the failure to file and after a grace period of two months has elapsed, the court may impose a penalty in an amount not to exceed \$5,000. The court may also order restitution of funds misappropriated from the estate of a ward. The penalty shall be paid by the guardian and may not be paid by the estate.

(vi) These provisions and penalties governing annual reports do not apply if the guardian is the parent of the ward.

(f) If a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this code; and the guardian must account to the conservator for funds expended.

(3) Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward and is entitled to receive reasonable sums for services and for room and board furnished to the ward as agreed upon between the guardian and the conservator, if the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to third persons or institutions for the ward's care and maintenance.

Uniform Law Comments [UPC § 5-309]

The reference to § 5-306 coordinates this section with the limited guardian concept. All guardians, however appointed, have the powers and duties of a guardian of a minor as provided in § 5-209, subsections (b), (c), and (d). As discussed in the Comment to § 5-209, these powers do not enable a guardian to deal with property matters of the ward. A protective order

under § 5-401 et seq. is indicated when property management is needed. Though the legislation does not contemplate that the statutory authority of a guardian may be increased by court order, the court, at the time of appointment or on motion or petition thereafter, may limit the power of a guardian in any respect. The provisions of § 5-304(b) requiring advance notice of

a proceeding regarding a guardian's power instituted subsequent to appointment would apply to a post-appointment proceeding to impose or remove restrictions on a guardian's authority

The language regarding a guardian's liability to third persons for acts of the ward is based on a somewhat differently worded statement in 1969 UPC § 5-310. Both

formulations are intended merely to prevent any attribution of liability to a guardian on account of a ward's acts that might be thought to follow from the guardian's legal control of the ward. Neither version is intended to exonerate a guardian from the consequences of his or her own negligence.

Historical and Statutory Notes

Uniform Law

This section is similar to § 5-309 of the Uniform Probate Code. See Volume 8, Pts. I, II, Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

This section is also similar to § 2-209 of the Uniform Guardianship and Protective Proceedings Act (1982). See Volume 8A Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

75-5-401. Protective proceedings.

(1) Upon petition and after notice and hearing in accordance with the provisions of this part, the court may appoint a conservator or make other protective order for cause as follows:

(a) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns money or property that requires management or protection which cannot otherwise be provided, has or may have business affairs which may be jeopardized or prevented by minority, or that funds are needed for the minor's support and education and protection is necessary or desirable to obtain or provide funds.

(b) The provisions of Subsection (1)(a) may be applied to a person beyond minority up to age 21 under special circumstances as determined by the court.

(2) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that the person:

(a) is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and

(b) has property which will be wasted or dissipated unless proper management is provided or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person and protection is necessary or desirable to obtain or provide funds.

(3) Appointment of a conservator or other protective order may not be denied solely on the basis that the person for whom the conservatorship or other protective order is sought has a valid power of attorney in effect.

75-5-404. Original petition for appointment or protective order.

(1) The person to be protected, any person who is interested in his estate, affairs, or welfare, including his parent, guardian, or custodian, or any person who would be adversely affected by lack of effective management of his property and affairs may petition for the appointment of a conservator or for other appropriate protective order.

(2) The petition shall set forth to the extent known, the interest of the petitioner; the name, age, residence, and address of the person to be protected; the name and address of his guardian, if any; the name and address of his nearest relative known to the petitioner; a general statement of his property with an estimate of the value thereof, including any compensation, insurance, pension, or allowance to which he is entitled; and the reason why appointment of a conservator or other protective order is necessary. If the appointment of a conservator is requested, the petition also shall set forth the name and address of the person whose appointment is sought and the basis of his priority for appointment.

75-5-405. Notice.

(1) On a petition for appointment of a conservator or other protective order, the person to be protected and his spouse or, if none, his parents, must be served personally with notice of the proceeding at least 10 days before the date of the hearing if they can be found within the state, or, if they cannot be found within the state, they must be given notice in accordance with Section **75-1-401**. Waiver by the person to be protected is not effective unless he attends the hearing or, unless minority is the reason for the proceeding, waiver is confirmed in an interview with the visitor.

(2) Notice of a petition for appointment of a conservator or other initial protective order, and of any subsequent hearing, must be given to any person who has filed a request for notice under Section **75-5-406** and to interested persons and other persons as the court may direct. Except as otherwise provided in Subsection (1) above, notice shall be given in accordance with Section **75-1-401**.

75-5-408. Permissible court orders.

(1) The court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons:

(a) While a petition for appointment of a conservator or other protective order

is pending and after preliminary hearing and without notice to others, the court has power to preserve and apply the property of the person to be protected as may be required for his benefit or the benefit of his dependents.

(b) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and affairs of the minor which are or might be necessary for the best interests of the minor, his family, and the members of his household.

(c) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has, for the benefit of the person and members of his household, all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will. These powers include, but are not limited to the power to make gifts, to convey or release his contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to exercise or release his powers as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life, to exercise options of the disabled person to purchase securities or other property, to exercise his rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise his right to an elective share in the estate of his deceased spouse, and to renounce any interest by testate or intestate succession or by inter vivos transfer.

(d) The court may exercise, or direct the exercise of, its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding 20% of any year's income of the estate, or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is in the best interests of the protected person, and that he either is incapable of consenting or has consented to the proposed exercise of power.

(2) An order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists has no effect on the capacity of the protected person.

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) Motion in the District Court.

Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) Action on the Motion.

If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) Prior Approval.

A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) Notice of District Court's Denial.

The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) Motion in the Court of Appeals.

A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(b) Leave to Proceed in Forma Pauperis on Appeal or Review of an Administrative-Agency Proceeding.

When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1).

(c) Leave to Use Original Record.

A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

ADDENDUM B

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Kathy Morgan, Registered Professional Reporter and Notary Public in and for the State of Utah, do hereby certify:

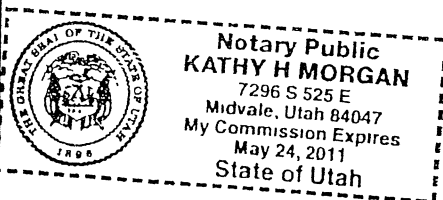
That prior to being examined, the witness, WALTER ANDRUS, was by me duly sworn to tell the truth, the whole truth, and nothing but the truth;


That said deposition was taken down by me in stenotype on September 26, 2008, at the place therein named, and was thereafter transcribed and that a true and correct transcription of said testimony is set forth in the preceding pages;

I further certify that, in accordance with Rule 30(e), a request having been made to review the transcript, a reading copy was sent to Mr. Larry Meyers for the witness to read and sign before a notary public and then return to me for filing with Mr. Brady Gibbs.

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

WITNESS MY HAND AND OFFICIAL SEAL this 9th day of October, 2008.




Kathy H. Morgan, CSR, RPR