



# Children, Families, Health, and Human Services Interim Committee

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## 69th Montana Legislature

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TO: Children, Families, Health, and Human Services Interim Committee  
FROM: Milly Allen, Research Analyst  
RE: HJ 26 Background Materials from Study Sponsor

Rep. Brian Close sponsored HJ 26, a study of guardianship and conservatorship in Montana. Rep. Close asked staff to print the following documents for committee members.

Committee staff paginated and dated the documents; otherwise, they are presented as submitted by Rep. Close.

Please note that these background materials are not presentation aids for Agenda Item 1.

Contents: Potential Uniform Act Provisions with Commentary (8 pages)  
Map of Background Check Requirements by State (2 pages)  
Map of Mandatory Training Requirements by State (2 pages)

# **POTENTIAL UNIFORM ACT PROVISIONS WITH COMMENTARY**

**GENERAL COMMENT:** The proposed additions from the UCGOPAA generally place guardrails around guardians, and enhance protections for incompetent persons. The goal being to maximize their potential while strengthening guardian accountability.

In addition to the comments below, it will be necessary to ensure that terminology between the UCGOPAA and current Montana law are consistent, with the preference being to substitute current Montana terms for UCGOPAA terms. The goal being is to supplement Montana law and procedure and not completely rewrite it.

The below will also need to be coordinated with these additional measure currently under construction: (1) Mandatory Training; (2) Background Checks (with exceptions); and (3) Mandatory Certification of Professional Guardians

Lastly, there will need to be a transition rule to bring existi(30 ng guardianships into conformity (say, three years).

## **SECTION 117. DISCLOSURE OF BANKRUPTCY OR CRIMINAL HISTORY.**

(a) Before accepting appointment as a guardian or conservator, a person shall disclose to the court whether the person:

(1) is or has been a debtor in a bankruptcy, insolvency, or receivership proceeding; or

(2) been convicted of:

(A) a felony;

(B) a crime involving dishonesty, neglect, violence, or use of physical force; or

(C) other crime relevant to the functions the individual would assume as guardian or conservator.

(b) A guardian or conservator that engages or anticipates engaging an agent the guardian or conservator knows has been convicted of a felony, a crime involving dishonesty, neglect, violence, or use of physical force, or other crime relevant to the functions the agent is being engaged to perform promptly shall disclose that knowledge to the court.

(c) If a conservator engages or anticipates engaging an agent to manage finances of the individual subject to conservatorship and knows the agent is or has been a debtor in a bankruptcy, insolvency, or receivership proceeding, the conservator promptly shall disclose that knowledge to the court.

**COMMENT:** Needs to be coordinated with proposed background checks (with exceptions); and need to consider transition rule for existing guardians/conservators

## **SECTION 123. THIRD-PARTY ACCEPTANCE OF AUTHORITY OF GUARDIAN OR CONSERVATOR.**

(a) A person must not recognize the authority of a guardian or conservator to act on behalf of an individual subject to guardianship or conservatorship if:

(1) the person has actual knowledge or a reasonable belief that the letters of office of the guardian or conservator are invalid or the conservator or guardian is exceeding or improperly exercising authority granted by the court; or

(2) the person has actual knowledge that the individual subject to guardianship or conservatorship is subject to physical or financial abuse, neglect, exploitation, or abandonment by the guardian or conservator or a person acting for or with the guardian or conservator.

(b) A person may refuse to recognize the authority of a guardian or conservator to act on behalf of an individual subject to guardianship or conservatorship if:

(1) the guardian's or conservator's proposed action would be inconsistent with this [act]; or

(2) the person makes, or has actual knowledge that another person has made, a report to the [government agency providing protective services to adults or children] stating a good-faith belief that the individual subject to guardianship or conservatorship is subject to physical or financial abuse, neglect, exploitation, or abandonment by the guardian or conservator or a person acting for or with the guardian or conservator.

(c) A person that refuses to accept the authority of a guardian or conservator in accordance with subsection (b) may report the refusal and the reason for refusal to the court. The court on receiving the report shall consider whether removal of the guardian or conservator or other action is appropriate.

(d) A guardian or conservator may petition the court to require a third party to accept a decision made by the guardian or conservator on behalf of the individual subject to guardianship or conservatorship.

## **SECTION 127. GRIEVANCE AGAINST GUARDIAN OR CONSERVATOR.**

(a) An individual who is subject to guardianship or conservatorship, or person interested in the welfare of an individual subject to guardianship or conservatorship, that reasonably believes the guardian or conservator is breaching the guardian's or conservator's fiduciary duty or otherwise acting in a manner inconsistent with this [act] may file a grievance in a record with the court.

(b) Subject to subsection (c), after receiving a grievance under subsection (a), the court:

(1) shall review the grievance and, if necessary to determine the appropriate response, court records related to the guardianship or conservatorship;

(2) shall schedule a hearing if the individual subject to guardianship or conservatorship is an adult and the grievance supports a reasonable belief that:

(A) removal of the guardian and appointment of a successor may be appropriate under Section 318;

(B) termination or modification of the guardianship may be appropriate under Section 319;

(C) removal of the conservator and appointment of a successor may be appropriate under Section 430; or

(D) termination or modification of the conservatorship may be appropriate under Section 431; and

(3) may take any action supported by the evidence, including:

(A) ordering the guardian or conservator to provide the court a report, accounting, inventory, updated plan, or other information;  
(B) appointing a guardian ad litem;  
(C) appointing an attorney for the individual subject to guardianship or conservatorship; or  
(D) holding a hearing.

(c) The court may decline to act under subsection (b) if a similar grievance was filed within the six months preceding the filing of the current grievance and the court followed the procedures of subsection (b) in considering the earlier grievance.

### **SECTION 301. BASIS FOR APPOINTMENT OF GUARDIAN FOR ADULT.**

(a) On petition and after notice and hearing, the court may:

(1) appoint a guardian for an adult if the court finds by clear-and-convincing evidence that:

(A) the respondent lacks the ability to meet essential requirements for physical health, safety, or self-care because the respondent is unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making; and

(B) the respondent's identified needs cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative; or

(2) with appropriate findings, treat the petition as one for a conservatorship under [Article] 4 or protective arrangement under [Article] 5, issue any appropriate order, or dismiss the proceeding.

(b) The court shall grant a guardian appointed under subsection (a) only those powers necessitated by the demonstrated needs and limitations of the respondent and issue orders that will encourage development of the respondent's maximum self-determination and independence. The court may not establish a full guardianship if a limited guardianship, protective arrangement instead of guardianship, or other less restrictive alternatives would meet the needs of the respondent.

**COMMENT: Need to coordinate with existing Montana statute**

### **SECTION 311. NOTICE OF ORDER OF APPOINTMENT; RIGHTS.**

(a) A guardian appointed under Section 309 shall give the adult subject to guardianship and all other persons given notice under Section 303 a copy of the order of appointment, together with notice of the right to request termination or modification. The order and notice must be given not later than 14 days after the appointment.

(b) Not later than 30 days after appointment of a guardian under Section 309, the court shall give to the adult subject to guardianship, the guardian, and any other person entitled to

notice under Section 310(e) or a subsequent order a statement of the rights of the adult subject to guardianship and procedures to seek relief if the adult is denied those rights. The statement must be in at least 16-point font, in plain language, and, to the extent feasible, in a language in which the adult subject to guardianship is proficient. The statement must notify the adult subject to guardianship of the right to:

(1) seek termination or modification of the guardianship, or removal of the guardian, and choose an attorney to represent the adult in these matters;

(2) be involved in decisions affecting the adult, including decisions about the adult's care, dwelling, activities, or social interactions, to the extent reasonably feasible;

(3) be involved in health-care decision making to the extent reasonably feasible and supported in understanding the risks and benefits of health-care options to the extent reasonably feasible;

(4) be notified at least 14 days before a change in the adult's primary dwelling or permanent move to a nursing home, mental-health facility, or other facility that places restrictions on the individual's ability to leave or have visitors unless the change or move is proposed in the guardian's plan under Section 316 or authorized by the court by specific order;

(5) object to a change or move described in paragraph (4) and the process for objecting;

(6) communicate, visit, or interact with others, including receiving visitors, and making or receiving telephone calls, personal mail, or electronic communications, including through social media, unless:

(A) the guardian has been authorized by the court by specific order to restrict communications, visits, or interactions;

(B) a protective order or protective arrangement instead of guardianship is in effect that limits contact between the adult and a person; or

(C) the guardian has good cause to believe restriction is necessary because interaction with a specified person poses a risk of significant physical, psychological, or financial harm to the adult, and the restriction is:

(i) for a period of not more than seven business days if the person has a family or pre-existing social relationship with the adult; or

(ii) for a period of not more than 60 days if the person does not have a family or pre-existing social relationship with the adult;

(7) receive a copy of the guardian's plan under Section 316 and the guardian's report under Section 317; and

(8) object to the guardian's plan or report.

**COMMENT: Needs to be coordinated with existing Montana statute & procedure**

#### **SECTION 316. GUARDIAN'S PLAN.**

(a) A guardian for an adult, not later than 60 days after appointment and when there is a significant change in circumstances, or the guardian seeks to deviate significantly from the guardian's plan, shall file with the court a plan for the care of the adult. The plan must be based on the needs of the adult and take into account the best interest of the adult as well as the adult's preferences, values, and prior directions, to the extent known to or reasonably ascertainable by the guardian. The guardian shall include in the plan:

(1) the living arrangement, services, and supports the guardian expects to arrange, facilitate, or continue for the adult;

(2) social and educational activities the guardian expects to facilitate on behalf of the adult;

(3) any person with whom the adult has a close personal relationship or relationship involving regular visitation and any plan the guardian has for facilitating visits with the person;

(4) the anticipated nature and frequency of the guardian's visits and communication with the adult;

(5) goals for the adult, including any goal related to the restoration of the adult's rights, and how the guardian anticipates achieving the goals;

(6) whether the adult has an existing plan and, if so, whether the guardian's plan is consistent with the adult's plan; and

(7) a statement or list of the amount the guardian proposes to charge for each service the guardian anticipates providing to the adult.

(b) A guardian shall give notice of the filing of the guardian's plan under subsection (a), together with a copy of the plan, to the adult subject to guardianship, a person entitled to notice under Section 310(e) or a subsequent order, and any other person the court determines. The notice must include a statement of the right to object to the plan and be given not later than 14 days after the filing.

(c) An adult subject to guardianship and any person entitled under subsection (b) to receive notice and a copy of the guardian's plan may object to the plan.

(d) The court shall review the guardian's plan filed under subsection (a) and determine whether to approve the plan or require a new plan. In deciding whether to approve the plan, the court shall consider an objection under subsection (c) and whether the plan is consistent with the

guardian's duties and powers under Sections 313 and 314. The court may not approve the plan until [30] days after its filing.

(e) After the guardian's plan filed under this section is approved by the court, the guardian shall provide a copy of the plan to the adult subject to guardianship, a person entitled to notice under Section 310(e) or a subsequent order, and any other person the court determines.

**COMMENT: Needs a transition rule for existing guardianships**

### **SECTION 317. GUARDIAN'S REPORT; MONITORING OF GUARDIANSHIP.**

(a) A guardian for an adult, not later than 60 days after appointment and at least annually thereafter, shall file with the court a report in a record regarding the condition of the adult and accounting for funds and other property in the guardian's possession or subject to the guardian's control.

(b) A report under subsection (a) must state or contain:

- (1) the mental, physical, and social condition of the adult;
- (2) the living arrangements of the adult during the reporting period;
- (3) a summary of the supported decision making, technological assistance, medical services, educational and vocational services, and other supports and services provided to the adult and the guardian's opinion as to the adequacy of the adult's care;
- (4) a summary of the guardian's visits with the adult, including the dates of the visits;
- (5) action taken on behalf of the adult;
- (6) the extent to which the adult has participated in decision making;
- (7) if the adult is living in a [mental health] facility or living in a facility that provides the adult with health-care or other personal services, whether the guardian considers the facility's current plan for support, care, treatment, or habilitation consistent with the adult's preferences, values, prior directions, and best interest;
- (8) anything of more than de minimis value which the guardian, any individual who resides with the guardian, or the spouse, [domestic partner,] parent, child, or sibling of the guardian has received from an individual providing goods or services to the adult;
- (9) if the guardian delegated a power to an agent, the power delegated and the reason for the delegation;
- (10) any business relation the guardian has with a person the guardian has paid or that has benefited from the property of the adult;
- (11) a copy of the guardian's most recently approved plan under Section 316 and a statement whether the guardian has deviated from the plan and, if so, how the guardian has deviated and why;
- (12) plans for future care and support of the adult;



(13) a recommendation as to the need for continued guardianship and any recommended change in the scope of the guardianship; and

(14) whether any co-guardian or successor guardian appointed to serve when a designated event occurs is alive and able to serve.

(c) The court may appoint a [visitor] to review a report submitted under this section or a guardian's plan submitted under Section 316, interview the guardian or adult subject to guardianship, or investigate any other matter involving the guardianship.

(d) Notice of the filing under this section of a guardian's report, together with a copy of the report, must be given to the adult subject to guardianship, a person entitled to notice under Section 310(e) or a subsequent order, and any other person the court determines. The notice and report must be given not later than 14 days after the filing.

(e) The court shall establish procedures for monitoring a report submitted under this section and review each report at least annually to determine whether:

(1) the report provides sufficient information to establish the guardian has complied with the guardian's duties;

(2) the guardianship should continue; and

(3) the guardian's requested fees, if any, should be approved.

(f) If the court determines there is reason to believe a guardian for an adult has not complied with the guardian's duties or the guardianship should be modified or terminated, the court:

(1) shall notify the adult, the guardian, and any other person entitled to notice under Section 310(e) or a subsequent order;

(2) may require additional information from the guardian;

(3) may appoint a [visitor] to interview the adult or guardian or investigate any matter involving the guardianship; and

(4) consistent with Sections 318 and 319, may hold a hearing to consider removal of the guardian, termination of the guardianship, or a change in the powers granted to the guardian or terms of the guardianship.

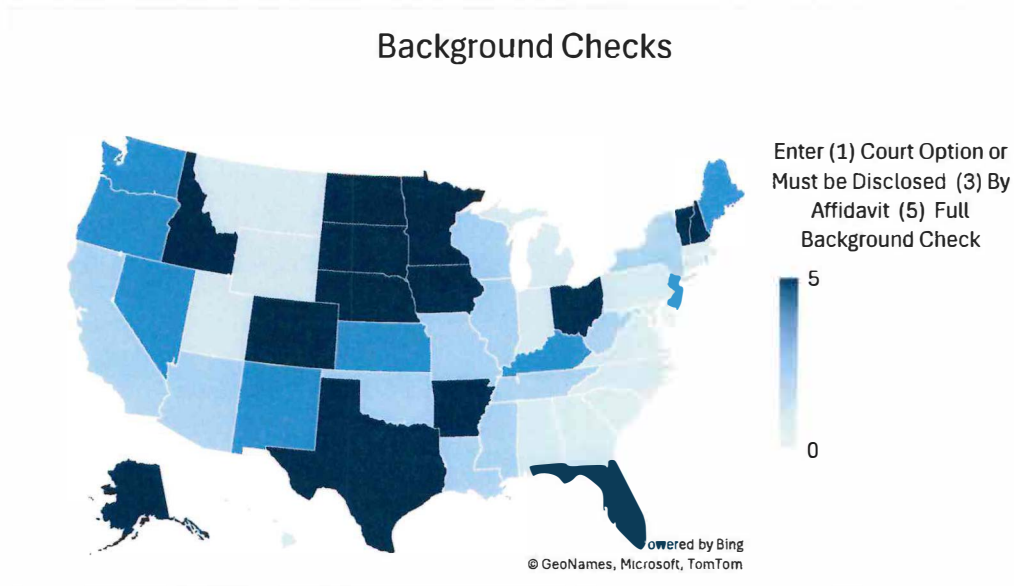
(g) If the court has reason to believe fees requested by a guardian for an adult are not reasonable, the court shall hold a hearing to determine whether to adjust the requested fees.

(h) A guardian for an adult may petition the court for approval of a report filed under this section. The court after review may approve the report. If the court approves the report, there is a rebuttable presumption the report is accurate as to a matter adequately disclosed in the report.

**COMMENT: Consider adding no waiver of reports by the Court. Need a transition rule for existing guardians/conservators**

**State**      **Enter (1) Court Option or Must be Disclosed (3) By Affidavit (5) Full Background Check**

Alabama	0
Alaska	5
Arizona	1
Arkansas	5
California	1
Colorado	5
Connecticut	0
Delaware	0
Florida	5
Georgia	0
Hawaii	0
Idaho	5
Illinois	1
Indiana	0
Iowa	5
Kansas	3
Kentucky	3
Louisiana	1
Maine	3
Maryland	0
Massachusetts	0
Michigan	0
Minnesota	5
Mississippi	1
Missouri	1
Montana	0
Nebraska	5
Nevada	3
New Hampshire	5
New Jersey	3
New Mexico	3
New York	1

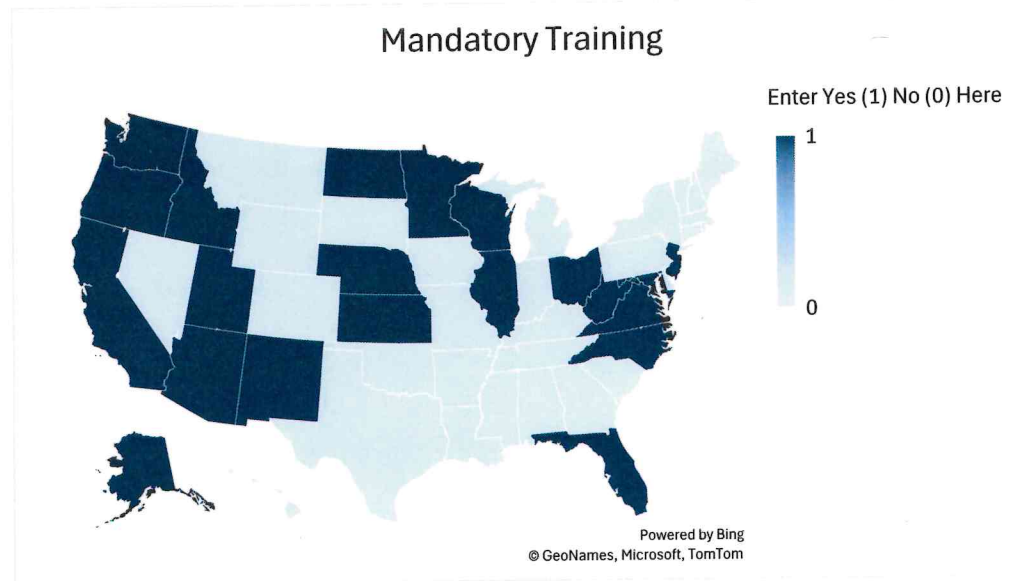


0 None required  
 1 At Court option or must be disclosed  
 3 By Affidavit (ex: Uniform Act)  
 5 Full background check

North Carolina	0
North Dakota	5
Ohio	5
Oklahoma	1
Oregon	3
Pennsylvania	0
Rhode Island	1
South Carolina	0
South Dakota	5
Tennessee	1
Texas	5
Utah	0
Vermont	5
Virginia	0
Washington	3
West Virginia	1
Wisconsin	1
Wyoming	0

**State**                      **Enter Yes (1) No (0) Here**

Alabama	0
Alaska	1
Arizona	1
Arkansas	0
California	1
Colorado	0
Connecticut	0
Delaware	0
Florida	1
Georgia	0
Hawaii	0
Idaho	1
Illinois	1
Indiana	0
Iowa	0
Kansas	1
Kentucky	0
Louisiana	0
Maine	0
Maryland	1
Massachusetts	0
Michigan	0
Minnesota	1
Mississippi	0
Missouri	0
Montana	0
Nebraska	1
Nevada	0
New Hampshire	0
New Jersey	1
New Mexico	1
New York	0



vermont & Tennessee bills pending

Nevada - by local court order

North Carolina	1
North Dakota	1
Ohio	1
Oklahoma	0
Oregon	1
Pennsylvania	0
Rhode Island	0
South Carolina	0
South Dakota	0
Tennessee	0
Texas	0
Utah	1
Vermont	0
Virginia	1
Washington	1
West Virginia	1
Wisconsin	1
Wyoming	0