

Utah Working Interdisciplinary Network of Guardianship Stakeholders (WINGS)

Thursday, April 21, 2022, 12:00 pm | 2 hours |

AGENDA

Topic	Presenter	Materials
12:00 Meeting begins		
<ul style="list-style-type: none"> Housekeeping, minutes 	Judge Kelly	1. <i>WINGS Minutes (February 2022 – draft)</i>
12:05 Guest Topics		
<ul style="list-style-type: none"> Accessibility in the Courts – Office of Fairness and Accountability 	Judge Kelly Guest Attendee: Jonathan Puente	
<ul style="list-style-type: none"> Accessibility in the Courts – Office of Legal Services Innovation 	Judge Kelly Guest Presenters: Nathanael Player Sue Crismon	
12:50 Stakeholder Updates		
<ul style="list-style-type: none"> GRAMP <ul style="list-style-type: none"> Court Visitor Program Funding District Court Conference Other <ul style="list-style-type: none"> In-person hearings 	Stakeholders	2. <i>Common Pitfalls (DCJC 2022)</i>
1:00 New & Ongoing Projects		
<ul style="list-style-type: none"> HB 320 – Guardianship Bill of Rights 	Group Discussion	3. <i>HB0320</i> 4. <i>SB0155</i> 5. <i>Rule 6-501 (Redline 04.04.2022)</i>
<ul style="list-style-type: none"> Reporting requirements for limited guardian Informal vs. formal accounting forms 	Brant Christiansen	6. <i>Utah Code 75-5-304</i> 7. <i>Utah Code 75-5-312</i> 8. <i>Edits – 75-5-304 and 75-5-312(f)(v)</i>
<ul style="list-style-type: none"> Utah Code 75-5-303 	Group Discussion	9. <i>Utah Code 75-5-303 (to discuss)</i> 10. <i>A Guide to Guardianship Medical Evaluations (Foster, Denton, Alderman)</i> 11. <i>The Challenges of Submitting Competent Medical Evidence of Incapacity (Denton)</i>
1:50 Other Business		
<ul style="list-style-type: none"> 		
2:00 Meeting adjourned		

Next meeting:

June 16, 2022 (via WebEx)

Utah Code § 75-5-304(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.”

Guardianship in the Courts: Common Pitfalls

1. Limited guardianship is preferred.

“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.” [Utah Code § 75-5-304\(2\)\(a\).](#))

2. The Court has continuing jurisdiction in guardianship and conservatorship cases.

The court has continuing jurisdiction to monitor guardianships/conservatorships. Once an order is entered, the appointment ends only upon the death of the protected person, or the death, incapacitation, resignation, or removal of the guardian/conservator (with approval by the court). The court has the authority to ensure the welfare of the protected person without direct action from parties. ([Utah Code §§ 75-5-306](#), [75-5-312](#), [75-5-417.](#))

3. Probate Code requires judicial review of guardianship and conservatorship annual reports.

All guardianship and conservatorship annual reports “shall be examined and approved by the court.” ([Utah Code §§ 75-5-312\(3\)\(v\)\(E\)](#), [75-5-417\(2\)](#)). Report approval indicates the judge has reviewed the report, had found “the report is in order,” and has not requested additional information or scheduled a hearing via the Review of Guardianship or Conservatorship Reports coversheet. (CJA Rule 6-501, [Review of Guardianship or Conservatorship Reports.](#))

4. An attorney is required to represent the respondent on guardianship petitions.

The respondent must have an attorney in guardianship petition hearings. If the respondent does not have an attorney, the court shall appoint one. ([Utah Code § 75-5-303\(2\)\(b\).](#)) An attorney can be waived if *all seven* criteria under Section 75-5-303(5)(d) are met, including: (v) no attorney from the Guardianship Signature Program is able to provide counsel to the respondent within 60 days of the date of the appointment, and (vii) a Court Visitor is appointed.

5. Court Visitors are required in specific instances, and otherwise requested.

The respondent shall be present at the guardianship petition hearing. ([Utah Code § 75-5-303\(5\)\(a\).](#)) Unless the medical criteria listed in Section 75-5-303(5)(b) apply, the court must appoint a Court Visitor and review the submitted report, before the respondent’s presence can be waived. Likewise, if an attorney for the respondent cannot be found, a Court Visitor must be appointed. ([Id. § 75-5-303\(d\)\(vii\).](#))

6. Court Visitors are the “eyes and ears” of the court, not a party to the case.

A Court Visitor: (a) does not advocate for any party in the case; (b) cannot file or respond to motions; (c) does not amend submitted reports; and (d) does not take actions beyond those ordered by the court. It is the role of the court to determine the meaning and impact of the report and what happens next. ([Order Assigning a Court Visitor](#); CJA Rule 6-507.)

GUARDIANSHIP BILL OF RIGHTS

2022 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Nelson T. Abbott

Senate Sponsor: Todd D. Weiler

LONG TITLE

General Description:

This bill addresses the rights of a person with respect to a guardianship.

Highlighted Provisions:

This bill:

- ▶ addresses the rights of a person alleged to be incapacitated with respect to a guardianship;
- ▶ addresses the rights of an incapacitated person with respect to a guardianship;
- ▶ provides that the rights of an incapacitated person do not abrogate any remedy provided by law;
- ▶ provides that the rights of an incapacitated person may be addressed in a guardianship proceeding or a private cause of action;
- ▶ amends the powers and duties of a guardian and conservator to address the rights of an incapacitated person; and
- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides a coordination clause.

Utah Code Sections Affected:

AMENDS:

75-5-312, as last amended by Laws of Utah 2018, Chapters 244 and 294

29 75-5-417, as last amended by Laws of Utah 2004, Chapter 89

30 ENACTS:

31 75-5-301.5, Utah Code Annotated 1953

32 **Utah Code Sections Affected by Coordination Clause:**

33 75-5-301.5, Utah Code Annotated 1953

34 75-5-312, as last amended by Laws of Utah 2018, Chapters 244 and 294



36 *Be it enacted by the Legislature of the state of Utah:*

37 Section 1. Section **75-5-301.5** is enacted to read:

38 **75-5-301.5. Rights of a person alleged to be incapacitated -- Rights of an**
39 **incapacitated person.**

40 (1) Except as otherwise provided by this chapter or any other law, a person alleged to
41 be incapacitated has the right to:

42 (a) be represented by counsel before a guardianship is imposed and have counsel
43 represent the person during the guardianship proceeding;

44 (b) receive a copy of all documents filed in a guardianship proceeding;

45 (c) have a relative, a physician, or any interested person speak about or raise any issue
46 of concern on behalf of the person during the guardianship proceeding;

47 (d) receive information about guardianships from the court; and

48 (e) be treated with respect and dignity.

49 (2) Except as otherwise provided by this chapter or any other law, an incapacitated
50 person for whom a guardian is appointed has right to:

51 (a) have counsel represent the incapacitated person at any time after the guardian is
52 appointed;

53 (b) have a relative, a physician, or any interested person speak about or raise any issue
54 of concern on behalf of the person in any court hearing about the guardianship;

55 (c) receive a copy of all documents filed in court regarding the guardianship;

- 56 (d) receive information about guardianships from the court;
- 57 (e) ask questions and express concerns or complaints about a guardian and the actions
- 58 of a guardian to the court;
- 59 (f) participate in developing an individualized plan for the incapacitated person's care,
- 60 including:
 - 61 (i) managing the incapacitated person's assets and property;
 - 62 (ii) determining the incapacitated person's residence; and
 - 63 (iii) determining the services to be received by the incapacitated person;
- 64 (g) be given consideration in regards to the incapacitated person's current and
- 65 previously stated desires, preferences for health care and medical treatment, and religious and
- 66 moral beliefs;
- 67 (h) remain as independent as possible, including giving deference to the incapacitated
- 68 person's preference for the incapacitated person's residence and standard of living:
 - 69 (i) as expressed or demonstrated before a determination of capacity was made; or
 - 70 (ii) as currently expressed or demonstrated by the incapacitated person if the preference
 - 71 is reasonable under the circumstances;
- 72 (i) be granted the greatest degree of freedom possible that is consistent with the reasons
- 73 for the guardianship;
- 74 (j) be able to exercise control over all aspects of the incapacitated person's life that are
- 75 not granted to the guardian in the order of appointment;
- 76 (k) engage in any activity that the court has not expressly reserved for the guardian,
- 77 including marriage or domestic partnership, traveling, working, or having a driver license;
- 78 (l) be treated with respect and dignity;
- 79 (m) be treated fairly by the incapacitated person's guardian;
- 80 (n) maintain privacy and confidentiality in personal matters;
- 81 (o) receive telephone calls and personal mail and associate with relatives and
- 82 acquaintances unless the guardian and the court determine that the association should be

83 restricted or prohibited in accordance with Section 75-5-312.5;

84 (p) receive timely, effective, and appropriate health care and medical treatment that
85 does not violate the incapacitated person's rights;

86 (q) have all services provided by a guardian at a reasonable rate of compensation;

87 (r) have a court review any request for payment by a guardian to avoid excessive or
88 unnecessary fees or duplicative billing;

89 (s) receive prudent financial management of the incapacitated person's property;

90 (t) subject to Subsections 75-5-312(3)(f)(viii) and 75-5-417(4), receive a copy of an
91 accounting report regarding the incapacitated person's estate that is submitted to the court by
92 the guardian under Section 75-5-312 or the conservator under Section 75-5-417 if a conservator
93 is appointed for the incapacitated person;

94 (u) receive and control the incapacitated person's salary;

95 (v) maintain a bank account and manage the incapacitated person's personal money;

96 and

97 (w) ask the court to:

98 (i) review the management activity of a guardian if a dispute cannot be resolved
99 regarding the guardian's management;

100 (ii) continue to review the need for a guardianship or to modify or terminate a
101 guardianship; and

102 (iii) enter an order restoring the incapacitated person's capacity at the earliest possible
103 time.

104 (3) The rights of an incapacitated person under this section do not abrogate any remedy
105 provided by law.

106 (4) Any right described in this section may be:

107 (a) addressed in a guardianship proceeding; or

108 (b) enforced through a private cause of action.

109 Section 2. Section 75-5-312 is amended to read:

110 **75-5-312. General powers and duties of guardian -- Penalties.**

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

113 (2) Except as provided in Subsection (4), a guardian has the same powers, rights, and
114 duties respecting the ward that a parent has respecting the parent's unemancipated minor child.

115 (3) In particular, and without qualifying Subsections (1) and (2), a guardian has the
116 following powers and duties, except as modified by order of the court:

117 (a) To the extent that it is consistent with the terms of any order by a court of
118 competent jurisdiction relating to detention or commitment of the ward, the guardian is entitled
119 to custody of the person of the ward and may establish the ward's place of [~~abode~~] residence
120 within or without this state, except that the guardian must give consideration to the ward's
121 preference for the ward's place of residence in accordance with Section [75-5-301.5](#).

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

127 (c) A guardian may give any consents or approvals that may be necessary to enable the
128 ward to receive medical or other professional care, counsel, treatment, or service, except that
129 the guardian must:

130 (i) give consideration to the ward's current and previously stated desires for health care
131 and medical treatment in accordance with Section [75-5-301.5](#); and

132 (ii) respect the ward's right to receive timely, effective, and appropriate health care in
133 accordance with Section [75-5-301.5](#).

134 (d) A guardian may not unreasonably restrict visitation with the ward by family,
135 relatives, or friends.

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

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

139 (ii) compel the production of the ward's estate documents, including the ward's will,
140 trust, power of attorney, and any advance health care directive; and

141 (iii) receive money and tangible property deliverable to the ward and apply the money
142 and property for support, care, and education of the ward:

143 (A) except that the guardian may not use funds from the ward's estate for room and
144 board that the guardian, the guardian's spouse, parent, or child have furnished the ward unless a
145 charge for the service is approved by order of the court made upon notice to at least one adult
146 relative in the nearest degree of kinship to the ward in which there is an adult; and

147 (B) the guardian shall exercise care to conserve any excess for the ward's needs.

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

150 (ii) A guardian is required to immediately notify all interested persons if the guardian
151 reasonably believes that the ward's death is likely to occur within the next 30 days, based on:

152 (A) the guardian's own observations; or

153 (B) information from the ward's physician or other medical care providers.

154 (iii) A guardian is required to immediately notify persons who request notification and
155 are not restricted in associating with the ward pursuant to Section [75-5-312.5](#) of:

156 (A) the ward's admission to a hospital for three or more days or to a hospice program;

157 (B) the ward's death; and

158 (C) the arrangements for the disposition of the ward's remains.

159 (iv) Unless emergency conditions exist, a guardian is required to file with the court a
160 notice of the guardian's intent to move the ward and to serve the notice on all interested persons
161 at least 10 days before the move. The guardian shall take reasonable steps to notify all
162 interested persons and to file the notice with the court as soon as practicable following the
163 earlier of the move or the date when the guardian's intention to move the ward is made known

164 to the ward, the ward's care giver, or any other third party.

165 (v) (A) If no conservator for the estate of the ward has been appointed, the guardian
166 shall, for all estates in excess of \$50,000, excluding the residence owned by the ward, send a
167 report with a full accounting to the court on an annual basis.

168 (B) For estates less than \$50,000, excluding the residence owned by the ward, the
169 guardian shall fill out an informal annual report and mail the report to the court.

170 ~~[(C)]~~ (vi) A report under Subsection (3)(f)(v)(A) or (B) shall include a statement ~~[of]~~
171 regarding:

172 (A) all assets at the beginning and end of the reporting year;

173 (B) any income received during the year;

174 (C) any disbursements for the support of the ward~~;~~ ~~and~~;

175 (D) any investments or trusts that are held for the ward's benefit;

176 (E) any expenditures or fees charged to the ward's estate; and

177 (F) any other expenses incurred by the ward's estate.

178 (vii) (A) ~~[The]~~ A guardian shall ~~[also]~~ report the physical conditions of the ward, the
179 place of residence, and a list of others living in the same household to the court.

180 (B) The court may require additional information.

181 ~~[(D)]~~ (C) The forms for both the informal report for estates under \$50,000, excluding
182 the residence owned by the ward, and the full accounting report for larger estates shall be
183 approved by the Judicial Council.

184 ~~[(E)]~~ (D) An annual report shall be examined and approved by the court.

185 ~~[(F)]~~ (E) If the ward's income is limited to a federal or state program requiring an
186 annual accounting report, a copy of that report may be submitted to the court in lieu of the
187 required annual report.

188 (viii) Upon a motion and after a hearing, the court may alter the frequency of, or the
189 information included in, an accounting report provided to a ward in accordance with
190 Subsection 75-5-301.5(2)(t).

191 ~~[(vi)]~~ (ix) Corporate fiduciaries are not required to petition the court, but shall submit
192 their internal report annually to the court. The report shall be examined and approved by the
193 court.

194 ~~[(vii)]~~ (x) (A) The guardian shall also render an annual accounting of the status of the
195 person to the court that shall be included in the petition or the informal annual report as
196 required under this Subsection (3)(f).

197 (B) If a fee is paid for an accounting of an estate, a fee may not be charged for an
198 accounting of the status of a person.

199 ~~[(viii)]~~ (xi) If a guardian:

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

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

202 (C) willfully fails to file the report required by this Subsection (3)(f), after receiving
203 written notice from the court of the failure to file and after a grace period of two months has
204 elapsed, the court may impose a penalty in an amount not to exceed \$5,000.

205 ~~[(ix)]~~ (xii) The court may also order restitution of funds misappropriated from the
206 estate of a ward. The penalty shall be paid by the guardian and may not be paid by the estate.

207 ~~[(x)]~~ (xiii) The provisions and penalties in this Subsection (3)(f) governing annual
208 reports do not apply if the guardian or a coguardian is the parent of the ward.

209 ~~[(xi)]~~ (xiv) For the purposes of Subsections (3)(f)(i), (ii), (iii), and (iv), "interested
210 persons" means those persons required to receive notice in guardianship proceedings as set
211 forth in Section [75-5-309](#).

212 (g) If a conservator has been appointed:

213 (i) all of the ward's estate received by the guardian in excess of those funds expended
214 to meet current expenses for support, care, and education of the ward shall be paid to the
215 conservator for management as provided in this code; and

216 (ii) the guardian shall account to the conservator for funds expended.

217 (4) (a) A court may, in the order of appointment, place specific limitations on the

218 guardian's power.

219 (b) A guardian may not prohibit or place restrictions on association with a relative or
220 qualified acquaintance of an adult ward, unless permitted by court order under Section
221 75-5-312.5.

222 (c) A guardian is not liable to a third person for acts of the guardian's ward solely by
223 reason of the relationship described in Subsection (2).

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

230 (6) A person who refuses to accept the authority of a guardian with authority over
231 financial decisions to transact business with the assets of the protected person after receiving a
232 certified copy of letters of guardianship is liable for costs, expenses, attorney fees, and damages
233 if the court determines that the person did not act in good faith in refusing to accept the
234 authority of the guardian.

235 (7) A guardian shall, to the extent practicable, encourage the ward to participate in
236 decisions, exercise self-determination, act on the ward's own behalf, and develop or regain the
237 capacity to manage the ward's personal affairs. To the extent known, a guardian, in making
238 decisions, shall consider the expressed desires and personal values of the ward.

239 Section 3. Section 75-5-417 is amended to read:

240 **75-5-417. General duty of conservator.**

241 (1) A conservator shall act as a fiduciary and shall observe the standards of care as set
242 forth in Section 75-7-902.

243 ~~[(2) The conservator shall, for all estates in excess of \$50,000, excluding the residence~~
244 ~~owned by the ward, send a report with a full accounting to the court on an annual basis.]~~

245 (2) (a) For all estates in excess of \$50,000 excluding the residence owned by the ward,
246 the conservator shall send a report with a full accounting to the court on an annual basis.

247 (b) For estates less than \$50,000[;] excluding the residence owned by the ward, the
248 conservator shall fill out an informal annual report and mail the report to the court. [The report
249 shall include the following: a statement of assets at the beginning and end of the reporting year,
250 income received during the year, disbursements for the support of the ward, and other expenses
251 incurred by the estate. The court may require additional information. The forms for both the
252 informal report for estates under \$50,000, excluding the residence owned by the ward, and the
253 full accounting report for larger estates shall be approved by the judicial council. This annual
254 report shall be examined and approved by the court.]

255 (c) A report under Subsection (2)(a) or (b) shall include a statement regarding:

256 (i) all assets at the beginning and end of the reporting year;

257 (ii) any income received during the year;

258 (iii) any disbursements for the support of the ward;

259 (iv) any investments or trusts that are held for the ward's benefit;

260 (v) any expenditures or fees charged to the ward's estate; and

261 (vi) any other expenses incurred by the ward's estate.

262 (d) The Judicial Council shall approve the forms for the accounting reports described
263 in Subsections (2)(a) and (b).

264 (e) An annual accounting report under Subsection (2)(a) or (b) shall be examined and
265 approved by the court.

266 (3) (a) Corporate fiduciaries are not required to fully petition the court, but shall submit
267 their internal report annually to the court. [The report]

268 (b) A report under Subsection (3)(a) shall be examined and approved by the court.

269 (4) Upon a motion and after a hearing, the court may alter the frequency of, or the
270 information included in, an accounting report provided to a ward in accordance with
271 Subsection [75-5-301.5\(2\)\(t\)](#).

272 ~~[(4)]~~ (5) (a) The court may impose a fine in an amount not to exceed \$5,000, if, after
 273 receiving written notice of the failure to file and after a grace period of two months have
 274 elapsed, a conservator or corporate fiduciary:

- 275 (i) makes a substantial misstatement on filings of any required annual reports;
 - 276 (ii) is guilty of gross impropriety in handling the property of the ward; or
 - 277 (iii) willfully fails to file the report required by this section.
- 278 (b) The court may also order restitution of funds misappropriated from the estate of a
 279 ward.
- 280 (c) The penalty shall be paid by the conservator or corporate fiduciary and may not be
 281 paid by the estate.

282 ~~[(5)]~~ (6) These provisions and penalties governing annual reports do not apply if the
 283 conservator is the parent of the ward.

284 Section 4. **Coordinating H.B. 320 with S.B. 155 -- Substantive amendments.**

285 If this H.B. 320 and S.B. 155, Guardianship and Conservatorship Amendments, both
 286 pass and become law, the Legislature intends that the Office of Legislative Research and
 287 General Counsel prepare the database for publication by:

288 (1) amending Subsection 75-5-301.5(2)(t) in H.B. 320 to read:
 289 "(t) subject to Subsections 75-5-312(4)(h) and 75-5-417(4), receive a copy of an
 290 accounting report regarding the incapacitated person's estate that is submitted to the court by
 291 the guardian under Section 75-5-312 or the conservator under Section 75-5-417 if a conservator
 292 is appointed for the incapacitated person;";

293 (2) amending Subsection 75-5-312(2)(a) in S.B. 155 to read:
 294 "(a) to the extent that it is consistent with the terms of any order by a court relating to
 295 detention or commitment of the ward, a guardian is entitled to custody of the person of the
 296 ward and may establish the ward's place of residence within, or outside of, this state, except
 297 that the guardian must give consideration to the ward's preference for the ward's place of
 298 residence in accordance with Section 75-5-301.5;";

299 (3) amending Subsection 75-5-312(2)(d) in S.B. 155 to read:

300 "(d) a guardian may give the consent or approval that may be necessary to enable the
301 ward to receive medical or other professional care, counsel, treatment, or service, except that
302 the guardian must:

303 (i) give consideration to the ward's current and previously stated desires for health care
304 and medical treatment in accordance with Section 75-5-301.5; and

305 (ii) respect the ward's right to receive timely, effective, and appropriate health care in
306 accordance with Section 75-5-301.5;"; and

307 (4) amending Subsection 75-5-312(4) in S.B. 155 to read:

308 "(4)(a) An accounting report under Subsection (2)(k) shall include a statement
309 regarding:

310 (i) all assets at the beginning and end of the reporting year;

311 (ii) any income received during the year;

312 (iii) any disbursements for the support of the ward;

313 (iv) any investments or trusts that are held for the ward's benefit;

314 (v) any expenditures or fees charged to the ward's estate; and

315 (vi) any other expenses incurred by the ward's estate.

316 (b) The court may require additional information in an accounting report under
317 Subsection (2)(k).

318 (c) The Judicial Council shall approve forms for the accounting reports described in
319 Subsection (2)(k).

320 (d) An annual accounting report under Subsection (2)(k) shall be examined and
321 approved by the court.

322 (e) If the ward's income is limited to a federal or state program requiring an annual
323 accounting report, a copy of that report may be submitted to the court in lieu of the required
324 annual accounting report under Subsection (2)(k).

325 (f) (i) A corporate fiduciary is not required to petition the court, but shall submit the

326 corporate fiduciary's internal report annually to the court.

327 (ii) The report under Subsection (4)(f)(i) shall be examined and approved by the court.

328 (g) If a fee is paid for an accounting of an estate, a fee may not be charged for an

329 accounting of the status of a ward under Subsection (2)(l).

330 (h) Upon a motion and after a hearing, the court may alter the frequency of, or the

331 information included in, an accounting report provided to a ward in accordance with

332 Subsection [75-5-301.5\(2\)\(t\)](#)."

GUARDIANSHIP AND CONSERVATORSHIP AMENDMENTS

2022 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Todd D. Weiler

House Sponsor: Nelson T. Abbott

LONG TITLE

General Description:

This bill amends provisions related to guardianships and conservatorships.

Highlighted Provisions:

This bill:

- ▶ amends the duties of the Office of Public Guardian;
- ▶ addresses a guardian's authority to make and assist with a ward's health care decisions;
- ▶ amends provisions related to the termination, removal, or resignation of a guardian of an incapacitated person;
- ▶ amends the duties and responsibilities of a guardian of an incapacitated person;
- ▶ amends provisions relating to a proceeding addressing a guardian restricting or prohibiting a ward's associations; and
- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

[62A-14-105](#), as last amended by Laws of Utah 2009, Chapter 75

[75-5-304](#), as last amended by Laws of Utah 2017, Chapter 403

[75-5-312.5](#), as last amended by Laws of Utah 2018, Chapter 244

30 REPEALS AND REENACTS:

31 **75-5-306**, as last amended by Laws of Utah 1977, Chapter 194

32 **75-5-307**, as last amended by Laws of Utah 2012, Chapter 274

33 **75-5-312**, as last amended by Laws of Utah 2018, Chapters 244 and 294



35 *Be it enacted by the Legislature of the state of Utah:*

36 Section 1. Section **62A-14-105** is amended to read:

37 **62A-14-105. Powers and duties of the office.**

38 (1) The office shall:

39 (a) [~~before January 1, 2000,~~] develop and operate a statewide program to:

40 (i) educate the public about the role and function of guardians and conservators; [~~and~~]

41 (ii) educate guardians and conservators on:

42 (A) the duties of a guardian and a conservator; and

43 (B) standards set by the National Guardianship Association for guardians and

44 conservators; and

45 [(fi)] (iii) serve as a guardian, conservator, or both for a ward upon appointment by a
46 court when no other person is able and willing to do so and the office petitioned for or agreed
47 in advance to the appointment;

48 (b) possess and exercise all the powers and duties specifically given to the office by
49 virtue of being appointed as guardian or conservator of a ward, including the power to access a
50 ward's records;

51 (c) review and monitor the personal and, if appropriate, financial status of each ward
52 for whom the office has been appointed to serve as guardian or conservator;

53 (d) train and monitor each employee and volunteer, and monitor each contract provider
54 to whom the office has delegated a responsibility for a ward;

55 (e) retain all court-delegated powers and duties for a ward;

56 (f) report on the personal and financial status of a ward as required by a court in
57 accordance with Title 75, Chapter 5, Protection of Persons Under Disability and Their

- 58 Property;
- 59 (g) handle a ward's funds in accordance with the department's trust account system;
- 60 (h) request that the department's audit plan, established pursuant to Section 63I-5-401,
- 61 include the requirement of an annual audit of all funds and property held by the office on behalf
- 62 of wards;
- 63 (i) maintain accurate records concerning each ward, the ward's property, and office
- 64 services provided to the ward;
- 65 (j) make reasonable and continuous efforts to find a family member, friend, or other
- 66 person to serve as a ward's guardian or conservator;
- 67 (k) after termination as guardian or conservator, distribute a ward's property in
- 68 accordance with Title 75, Chapter 5, Protection of Persons Under Disability and Their
- 69 Property; and
- 70 (l) submit recommendations for changes in state law and funding to the governor and
- 71 the Legislature and report to the governor and Legislature, upon request[~~;~~ and].
- 72 [~~(m) establish, implement, and enforce rules.~~]
- 73 (2) The office may:
- 74 (a) petition a court pursuant to Title 75, Chapter 5, Protection of Persons Under
- 75 Disability and Their Property, to be appointed an incapacitated person's guardian, conservator,
- 76 or both after conducting a prepetition assessment under Section 62A-14-107;
- 77 (b) develop and operate a statewide program to recruit, train, supervise, and monitor
- 78 volunteers to assist the office in providing guardian and conservator services;
- 79 (c) delegate one or more responsibilities for a ward to an employee, volunteer, or
- 80 contract provider, except as provided in Subsection 62A-14-107(1);
- 81 (d) solicit and receive private donations to provide guardian and conservator services
- 82 under this chapter; and
- 83 (e) adopt rules, in accordance with Title 63G, Chapter 3, Utah Administrative
- 84 Rulemaking Act, to:
- 85 (i) effectuate policy; and

86 (ii) carry out the office's role as guardian and conservator of wards as provided in this
87 chapter.

88 Section 2. Section 75-5-304 is amended to read:

89 **75-5-304. Findings -- Limited guardianship preferred -- Order of appointment.**

90 (1) The court may appoint a guardian as requested if [it] the court is satisfied that [the]:

91 (a) the person for whom a guardian is sought is incapacitated [and that the]; and

92 (b) the appointment is necessary or desirable as a means of providing continuing care

93 and supervision of the incapacitated person.

94 (2) (a) (i) The court shall prefer a limited guardianship and may only grant a full
95 guardianship if no other alternative exists.

96 (ii) If the court does not grant a limited guardianship, a specific finding shall be made
97 that nothing less than a full guardianship is adequate.

98 (b) (i) An order of appointment of a limited guardianship shall state the limitations of
99 the guardianship.

100 (ii) Letters of guardianship for a limited guardianship shall state the limitations of the
101 guardianship unless the court determines for good cause shown that a limitation should not be
102 listed in the letters.

103 (3) ~~[A]~~ (a) Except as provided in Subsection (3)(b), a guardian appointed by will or
104 written instrument, under Section 75-5-301, whose appointment has not been prevented or
105 nullified under Subsection 75-5-301(4), has priority over any guardian who may be appointed
106 by the court[~~, but the court may proceed with an appointment upon].~~

107 (b) Upon a finding that the testamentary or instrumental guardian has failed to accept
108 the appointment within 30 days after notice of the guardianship proceeding[~~. Alternatively, the~~
109 court may], the court may:

110 (i) dismiss the proceeding [or]; or

111 (ii) enter any other appropriate order.

112 (4) If the court grants a guardian with the power to make or assist with health care
113 decisions for an incapacitated person, the court shall include in the order of appointment the

114 name of any interested person for whom the guardian must notify of any significant health care
115 or treatment received by the incapacitated person.

116 Section 3. Section 75-5-306 is repealed and reenacted to read:

117 **75-5-306. Termination of guardianship for incapacitated person -- Termination of**
118 **authority and responsibility of guardian.**

119 (1) (a) Except for the time period described in Subsection (1)(b), the ward or any
120 person interested in the ward's welfare may petition for an order:

121 (i) that the ward is no longer incapacitated; and

122 (ii) for removal or resignation of the guardian in accordance with Section 75-5-307.

123 (b) In an order adjudicating capacity, a court may specify a minimum period of time,
124 not exceeding one year, during which no petition for an adjudication that the ward is no longer
125 incapacitated can be filed without leave from the court.

126 (c) A request for the order described in Subsection (1) may be made by informal letter
127 to the court.

128 (d) Any person who knowingly interferes with a request described in Subsection (1)(a)
129 may be sanctioned by the court.

130 (2) The authority and responsibility of a guardian for an incapacitated person
131 terminates upon:

132 (a) the death of the guardian or the ward;

133 (b) the determination that the guardian is incapacitated; or

134 (c) the removal or resignation of the guardian in accordance with Section 75-5-307.

135 (3) Resignation of a guardian does not terminate the guardianship until the resignation
136 has been approved by the court.

137 (4) Testamentary appointment of a guardian under an informally probated will
138 terminates if the will is later denied probate in a formal proceeding.

139 (5) Termination of a guardian does not affect the guardian's liability for the guardian's
140 prior acts or the guardian's obligation to account for funds and assets of the guardian's ward.

141 (6) On a petition to order that a ward's incapacity is terminated, the court shall follow

142 the same procedures to safeguard the rights of the ward for a petition for appointment of a
143 guardian under Section 75-5-303.

144 Section 4. Section 75-5-307 is repealed and reenacted to read:

145 **75-5-307. Removal or resignation of guardian.**

146 (1) On a petition of resignation from a guardian, the court may:

147 (a) accept the guardian's resignation; or

148 (b) make any other order that is appropriate.

149 (2) On a petition of removal of a guardian from the ward or any person interested in the
150 ward's welfare, the court may remove a guardian if:

151 (a) the guardian obtained the appointment by fraud, deceit, or gross misrepresentation;

152 (b) the guardian fails to perform the guardian's duties described in Section 75-5-312;

153 (c) the guardian is unable to perform the guardian's duties, described in Section

154 75-5-312, due to incapacity or illness;

155 (d) the guardian fails to use reasonable care and diligence in the management of the
156 ward's estate;

157 (e) the guardian is found by the court to have filed a petition frivolously or in bad faith
158 under Section 75-5-312.5;

159 (f) the guardian's interests have become adverse to the faithful performance of the
160 guardian's duties and there is a risk that the guardian will fail to faithfully perform the

161 guardian's duties; or

162 (g) removal of the guardian would be in the best interest of the ward.

163 (3) If the court removes a guardian under Subsection (2), the court may:

164 (a) appoint a successor guardian; or

165 (b) make any other order that is appropriate.

166 (4) On a petition of resignation or removal of a guardian, the court shall follow the
167 same procedures to safeguard the rights of the ward for a petition for appointment of a guardian
168 under Section 75-5-303.

169 (5) The court is not required to appoint an attorney to represent the ward if the case is

170 uncontested and the ward's incapacity is not at issue.

171 Section 5. Section **75-5-312** is repealed and reenacted to read:

172 **75-5-312. General powers and duties of guardian -- Penalties.**

173 (1) (a) A guardian of an incapacitated person shall diligently and in good faith carry out
174 the specific duties, powers, and rights that the guardian is granted:

175 (i) in an order of appointment by a court under Section **75-5-304**; and

176 (ii) under this section.

177 (b) A court may, in the order of appointment, place specific limitations on the
178 guardian's power, duties, and rights.

179 (c) (i) Except as provided in this Subsection (1), a guardian has the same powers,
180 rights, and duties respecting the ward that a parent has respecting the parent's unemancipated
181 minor.

182 (ii) A guardian is not liable to a third person for acts of the guardian's ward solely by
183 reason of the relationship described in Subsection (1)(c)(i).

184 (d) In carrying out duties, powers, and rights that a guardian is granted, the guardian
185 shall encourage the ward, to the extent practicable, to participate in decisions, exercise
186 self-determination, act on the ward's own behalf, and develop or regain the capacity to manage
187 the ward's personal affairs.

188 (e) To the extent known, a guardian, in making decisions about the ward, shall consider
189 the expressed desires, preferences, and personal values of the ward.

190 (2) Except as modified by an order of appointment under Section **75-5-304**, a guardian
191 has the following duties and powers:

192 (a) to the extent that it is consistent with the terms of any order by a court relating to
193 detention or commitment of the ward, a guardian is entitled to custody of the person of the
194 ward and may establish the ward's place of abode within, or outside of, this state;

195 (b) if a guardian is entitled to custody of the ward, the guardian shall provide for the
196 care, comfort, and maintenance of the ward and, whenever appropriate, arrange for the ward's
197 training and education;

198 (c) without regard to custodial rights of the ward's person, a guardian shall take
199 reasonable care of the ward's clothing, furniture, vehicles, and other personal effects and
200 commence protective proceedings if other property of the ward is in need of protection;

201 (d) a guardian may give the consent or approval that may be necessary to enable the
202 ward to receive medical or other professional care, counsel, treatment, or service;

203 (e) a guardian is required to notify any interested person named in the order of
204 appointment under Subsection 75-5-304(4) of any significant health care or treatment received
205 by the ward;

206 (f) a guardian is required to immediately notify persons who request notification and
207 are not restricted in associating with the ward in accordance with Section 75-5-312.5 of:

208 (i) the ward's admission to a hospital for three or more days or to a hospice program;

209 (ii) the ward's death; or

210 (iii) the arrangements for the disposition of the ward's remains;

211 (g) a guardian is required to immediately notify all interested persons if the guardian
212 reasonably believes that the ward's death is likely to occur within the next 10 days, based on:

213 (i) the guardian's own observations; or

214 (ii) information from the ward's physician or other medical care providers;

215 (h) a guardian is required to:

216 (i) unless emergency conditions exist:

217 (A) file with the court a notice of the guardian's intent to move the ward; and

218 (B) serve the notice on all interested persons at least 10 days before the day on which
219 the guardian moves the ward; or

220 (ii) take reasonable steps to:

221 (A) notify all interested persons of the guardian's intent to move the ward; and

222 (B) file the notice of the move with the court as soon as practicable following the
223 earlier of the move or the date when the guardian's intention to move the ward is made known
224 to the ward, the ward's care giver, or any other third party;

225 (i) except as otherwise provided by Section 75-5-312.5, a guardian may not restrict or

226 prohibit a ward's association, as defined in Section 75-5-312.5, with family, relatives, or
227 friends;

228 (j) if no conservator for the estate of the ward has been appointed, a guardian may:

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

231 (ii) compel the production of the ward's estate documents, including the ward's will,
232 trust, power of attorney, and any advance health care directive; and

233 (iii) receive money and tangible property deliverable to the ward and apply the money
234 and property for support, care, and education of the ward, except that:

235 (A) the guardian may not use funds from the ward's estate for room and board that the
236 guardian or the guardian's spouse, parent, or child have furnished the ward unless a charge for
237 the service is approved by order of the court made upon notice to at least one adult relative in
238 the nearest degree of kinship to the ward in which there is an adult; and

239 (B) the guardian shall exercise care to conserve any excess for the ward's needs;

240 (k) if no conservator for the estate of the ward has been appointed:

241 (i) for all estates in excess of \$50,000 excluding the residence owned by the ward, a
242 guardian shall send a report with a full accounting to the court on an annual basis; or

243 (ii) for estates less than \$50,000 excluding the residence owned by the ward, a guardian
244 shall fill out an informal annual report and mail the report to the court;

245 (l) a guardian shall provide an annual accounting of the status of the ward, including a
246 report of the physical and mental condition of the ward, the ward's estate that has been subject
247 to the guardian's possession, the ward's place of residence and others living in the same
248 household, to the court in the petition or the annual report as required under Subsection (2)(k);
249 and

250 (m) a guardian shall comply with standards set by the National Guardianship
251 Association for guardians to the extent that the standards are applicable to the guardian.

252 (3) For the purposes of Subsections (2)(f), (g), and (h), an interested person is a person
253 required to receive notice in guardianship proceedings as described in Section 75-5-309.

254 (4) (a) An accounting report under Subsection (2)(k) shall include a statement of assets
255 at the beginning and end of the reporting year, income received during the year, disbursements
256 for the support of the ward, and other expenses incurred by the estate.

257 (b) The court may require additional information in an accounting report under
258 Subsection (2)(k).

259 (c) The Judicial Council shall approve forms for the accounting reports described in
260 Subsection (2)(k).

261 (d) An annual accounting report under Subsection (2)(k) shall be examined and
262 approved by the court.

263 (e) If the ward's income is limited to a federal or state program requiring an annual
264 accounting report, a copy of that report may be submitted to the court in lieu of the required
265 annual accounting report under Subsection (2)(k).

266 (f) (i) A corporate fiduciary is not required to petition the court, but shall submit the
267 corporate fiduciary's internal report annually to the court.

268 (ii) The report under Subsection (4)(f)(i) shall be examined and approved by the court.

269 (g) If a fee is paid for an accounting of an estate, a fee may not be charged for an
270 accounting of the status of a ward under Subsection (2)(l).

271 (5) If a conservator has been appointed for a ward:

272 (a) all of the ward's estate received by the guardian in excess of those funds expended
273 to meet current expenses for support, care, and education of the ward shall be paid to the
274 conservator for management as provided in this chapter; and

275 (b) the guardian shall account to the conservator for funds expended.

276 (6) (a) Any guardian of a person for whom a conservator has been appointed:

277 (i) shall control the custody and care of the ward; and

278 (ii) is entitled to receive reasonable sums for services and for room and board furnished
279 to the ward as agreed upon between the guardian and the conservator if the amounts agreed
280 upon are reasonable under the circumstances.

281 (b) The guardian may request the conservator to expend the ward's estate by payment

282 to third persons or institutions for the ward's care and maintenance.

283 (7) (a) The court may impose a penalty in an amount not to exceed \$5,000 if a
284 guardian:

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

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

287 (iii) willfully fails to file the report required by this section after receiving written
288 notice from the court of the failure to file and after a grace period of two months has elapsed.

289 (b) The court may order restitution of funds misappropriated from the estate of a ward.

290 (c) A penalty under this Subsection (7) shall be paid by the guardian and may not be
291 paid by the ward or the ward's estate.

292 (d) The provisions and penalties in Subsection (2)(k) or (l) governing annual reports do
293 not apply if the guardian or a coguardian is the parent of the ward.

294 (8) A person who refuses to accept the authority of a guardian with authority over
295 financial decisions to transact business with the assets of the ward after receiving a certified
296 copy of letters of guardianship is liable for costs, expenses, attorney fees, and damages if the
297 court determines that the person did not act in good faith in refusing to accept the authority of
298 the guardian.

299 Section 6. Section **75-5-312.5** is amended to read:

300 **75-5-312.5. Association between an adult ward and a relative or acquaintance of**
301 **the adult ward.**

302 (1) As used in this section:

303 (a) "Associate" or "association" means:

304 (i) visitation of an adult ward by a relative or qualified acquaintance; or

305 (ii) communication between an adult ward and a relative or qualified acquaintance in
306 any form, including by telephone, mail, or electronic communication.

307 (b) "Qualified acquaintance" means an individual, other than a relative of the adult
308 ward, who:

309 (i) has established a significant, mutual friendship with the adult ward; or

310 (ii) is clergy in the adult ward's religion or religious congregation.

311 (c) "Relative" means an adult ward's spouse, parent, step-parent, child, step-child,
312 sibling, step-sibling, half-sibling, grandparent, grandchild, uncle, aunt, nephew, niece, or first
313 cousin.

314 (2) (a) Except as otherwise provided by court order, a guardian may not restrict or
315 prohibit the right of an adult ward to associate with a relative or qualified acquaintance of the
316 adult ward.

317 (b) If an adult ward is unable to express consent to visitation by a relative or a qualified
318 acquaintance of the adult ward, the consent of the adult ward is presumed based on evidence of
319 a prior relationship between the adult ward and the relative or qualified acquaintance of the
320 adult ward.

321 (c) A guardian may not permit a relative or qualified acquaintance of an adult ward to
322 associate with the adult ward:

323 (i) if a court order prohibits the association;

324 (ii) in a manner prohibited by court order; or

325 (iii) if the adult ward expresses a desire to not associate with the relative or qualified
326 acquaintance.

327 (3) A guardian may, as part of the initial guardianship proceeding, petition the court to
328 issue an order:

329 (a) prohibiting or placing conditions on association between an adult ward and a
330 relative or qualified acquaintance of the adult ward; or

331 (b) granting the guardian the authority to prohibit or place conditions on association
332 between an adult ward and a relative or qualified acquaintance of the adult ward.

333 (4) A guardian may, at any time after the initial guardianship proceeding:

334 (a) petition the court to issue an order described in Subsection (3) or to rescind or
335 modify an order described in Subsection (3); or

336 (b) petition, subject to notice, the court on an emergency basis to issue a temporary
337 order until further order of the court described in Subsection (3) or to rescind or modify an

338 order described in Subsection (3).

339 (5) An adult ward, a relative of an adult ward, or a qualified acquaintance of an adult
340 ward may, at any time after the initial guardianship proceeding, petition the court to rescind or
341 modify an order described in Subsection (3).

342 (6) If a guardian violates Subsection (2), the adult ward, a relative of the adult ward, or
343 a qualified acquaintance of the adult ward may [~~do one or more of the following~~], as
344 applicable:

345 [~~(a) petition the court to issue an order to show cause why the guardian should not be
346 held in contempt of court;~~]

347 (a) file an ex parte motion to enforce an order or to obtain sanctions;

348 (b) seek an injunction to enforce compliance by the guardian with the law and any
349 applicable court order; or

350 (c) petition the court to have the guardian removed as guardian of the adult ward.

351 (7) For a hearing on a petition filed under this section, a court:

352 (a) may appoint a court visitor to meet with the adult ward to determine the wishes of
353 the adult ward regarding association;

354 (b) shall give notice and an opportunity to be heard to the guardian, the adult ward, and
355 the relative or qualified acquaintance;

356 (c) shall preserve the right of the adult ward to be present at the hearing; and

357 (d) may order supervised visitation by the relative or qualified acquaintance before the
358 hearing.

359 (8) A court may not enter an order prohibiting or placing restrictions on association
360 between an adult ward and a relative or qualified acquaintance, unless the court finds by a
361 preponderance of the evidence that:

362 (a) the adult ward desires the prohibition or restriction;

363 (b) if the adult ward had the capacity to make a knowing and intelligent decision
364 regarding the association, the adult ward would prohibit the association or impose the
365 restriction; or

366 (c) the prohibition or restriction is the least restrictive means necessary to protect the
367 health or welfare of the adult ward.

368 (9) In making the determination described in Subsection (8), the court may consider
369 any relevant evidence, including:

370 (a) the wishes of the adult ward, expressed during or before the guardianship;

371 (b) the history of the relationship between the adult ward and the relative or qualified
372 acquaintance;

373 (c) any history of criminal activity, abuse, neglect, or violence by the relative or
374 qualified acquaintance; or

375 (d) whether a protective order was ever issued against the relative or qualified
376 acquaintance with respect to the adult ward.

377 (10) Except as provided in Subsection (11), the guardian shall have the burden of proof
378 when:

379 (a) seeking an order prohibiting association or placing restrictions on association with a
380 relative or qualified acquaintance of the adult ward;

381 (b) modifying an order to place additional prohibitions or restrictions on association
382 with a relative or qualified acquaintance of the adult ward; or

383 (c) opposing an action described in Subsection (6)(a) or (b).

384 (11) The relative or qualified acquaintance shall have the burden of proof if the relative
385 or qualified acquaintance is seeking to modify an order previously entered by a court under this
386 section.

387 (12) (a) If, in a proceeding under this section, the court finds that the petition was filed
388 frivolously or in bad faith, the court shall award attorney fees to a party opposing the petition.

389 (b) If, in a proceeding under this section, the court finds that the guardian is in
390 contempt of court or has acted frivolously or in bad faith in prohibiting or restricting
391 association, the court:

392 (i) ~~may~~ shall award attorney fees to the prevailing party; and

393 (ii) may impose a sanction, not to exceed \$1,000, against the guardian.

394 (c) A court shall prohibit attorney fees awarded under this [~~section~~] Subsection (12)
395 from being paid by the adult ward or the adult ward's estate.

1 **Rule 6-501. Reporting requirements for guardians and conservators.**

2 **Intent:**

3 To establish standards and procedures for annual reports and accountings that guardians and
4 conservators are required to file under the Utah Uniform Probate Code.

5 **Applicability:**

6 This rule applies to individuals seeking appointment as guardians and conservators and
7 individuals who are appointed by the court as guardians, and conservators.

8 **Statement of the Rule:**

9 (1) **Definitions.**

10 (A) "Accounting" means the annual accounting required by Utah Code Section 75-5-312 and
11 Section 75-5-417 and the final accounting required by Utah Code Section 75-5-419.

12 (B) "Interested person" means the respondent, if he or she is ~~not a minor of an appropriate~~
13 ~~age and mental capacity to understand the proceedings~~, the respondent's guardian and
14 conservator, the respondent's spouse, adult children, parents and siblings, and any other
15 person interested in the welfare, estate, or affairs of the respondent who requests notice under
16 Utah Code Section 75-5-406. If no person is an interested person, then interested person
17 includes at least one of the respondent's closest adult relatives, if any can be found. For
18 purposes of minor guardianship, interested persons include the persons listed in Utah Code
19 Section 75-5-207.

20 (C) "Inventory" means the inventory required by Utah Code Section 75-5-418.

21 (D) "Serve" means any manner of service permitted by Utah Rule of Civil Procedure 5.

22 (E) "Protected person" means a minor or an incapacitated person for whom the court appoints
23 a guardian or a protected person for whom the court appoints a conservator.

24 (F) "Report" means the inventory, accounting, or annual report on the status of the protected
25 person under Utah Code Sections 75-5-209 and 75-5-312, and the final accounting under
26 Sections 75-5-210 and 75-5-419

27 (G) "Respondent" means a person who is alleged to be incapacitated and for whom the
28 appointment of a guardian or conservator is sought.

29 (2) **Exceptions.**

30 (A) Paragraph (4) does not apply to the following:

31 (i) a guardian licensed under Utah Code Section 75-5-311(1)(a);

32 (ii) the Office of Public Guardian; or

33 (iii) a conservator licensed under Utah Code Section 7-5-2.

34 (B) Paragraphs (6), (7), (8), (9), and (10) do not apply if the guardian or conservator is a parent
35 of the protected person.

36 (C) Paragraph (7)(C) does not apply to the guardian of a minor if the minor's estate consists
37 of funds that are deposited in a restricted account, which requires judicial approval for
38 withdrawal, or if there is no estate.

39 (D) Paragraph (9) does not apply to a conservator who is appointed for the purpose of
40 receiving a personal injury settlement for a minor if 1) no funds are to be distributed until the
41 minor reaches the age of majority, or 2) no structured settlement payments are to be made
42 until the minor reaches the age of majority.

43 (3) **Examination and private information record.**

44 (A) Before the court enters an order appointing a guardian or conservator, the proposed
45 guardian or conservator must file a verified statement showing satisfactory completion of a
46 court-approved examination on the responsibilities of a guardian or conservator.

47 (B) Before the court enters an order of appointment, the proposed guardian or conservator
48 must file a completed and verified Private Information Record form provided by the
49 Administrative Office of the Courts.

50 (C) The guardian or conservator must continue to keep the court apprised of any changes to
51 the guardian or conservator's contact information.

52 (4) **Recordkeeping.** The guardian must keep contemporaneous records of significant events in
53 the life of the protected person and produce them if requested by the court. The conservator must
54 keep contemporaneous receipts, vouchers or other evidence of income and expenses and
55 produce them if requested by the court. The guardian and conservator must maintain the records
56 until the appointment is terminated and then deliver them to the protected person, if there is no
57 successor, to the successor guardian or conservator, or to the personal representative of the
58 protected person's estate.

59

60 (5) **Report forms.** Subject to the requirements of Paragraph (6):

61 (A) forms substantially conforming to the Judicial Council-approved forms are acceptable for
62 content and format;

63 (B) a corporate fiduciary may file its internal report or accounting; and

64 (C) if the protected person's estate is limited to a federal or state program requiring an annual
65 accounting, the fiduciary may file a copy of that accounting.

66 (6) Information required in reports, cover sheet, and service. .

67 (A) The annual report and annual accounting must contain sufficient information to put
68 interested persons on notice of all significant events and transactions during the reporting
69 period. Compliance with Paragraph (4) is presumed sufficient, but the court may direct that a
70 report or accounting be prepared with content and format as it deems necessary.

71 (B) The annual report and annual accounting must include the Judicial Council-approved
72 report coversheet, which must be filed as a proposed document.

73 (C) The guardian, conservator, or both must serve a copy of the report, inventory, and
74 accounting under Rule 5 of the Utah Rules of Civil Procedure on all interested persons. The
75 annual report and annual accounting must include the following language at the top right
76 corner of the first page, in bold type: **You have the right to object to the report or**
77 **accounting within 28 days of service. If you do not object within that time, your**
78 **objection may be waived.**

79 (7) **Annual status reports.**

80 (A) The guardian must file with the appointing court a report on the status of the protected
81 person no later than 60 days after the anniversary of the appointment. The status report must
82 be in substantially the same form as the status report form approved by the Utah Judicial
83 Council, including the required attachments. The guardian must file the report with the court
84 that appointed the guardian unless that court orders a change in venue under Utah Code
85 Section 75-5-313. The reporting period is yearly from the appointment date unless the court
86 changes the reporting period on motion of the guardian. The guardian may not file the report
87 before the close of the reporting period. For good cause the court may extend the time for
88 filing the report, but a late filing does not change the reporting period.

89 (B) The judge may conduct a hearing even though no objection is filed. If the judge finds that
90 the report is in order, the judge must approve it.

91 (C) If there is no conservator, the guardian must file the inventory and accounting required of
92 a conservator under Utah Code Section 75-5-312.

93 **(8) Inventory.**

94 (A) Within 90 days after the appointment, the conservator must file with the appointing court
95 the inventory required by Utah Code Section 75-5-418. The inventory must be in substantially
96 the same form as the inventory form approved by the Utah Judicial Council, including the
97 required attachments. The court may extend the time for filing the inventory for good cause.

98 (B) The judge may conduct a hearing even though no objection is filed. If the judge finds that
99 the inventory is in order, the judge must approve it.

100 **(9) Annual accounting.**

101 (A) The conservator must file with the appointing court an accounting of the estate of the
102 protected person no later than 60 days after the anniversary of the appointment. The
103 accounting must be in substantially the same form as the accounting form approved by the
104 Utah Judicial Council, including the required attachments. The conservator must file the
105 accounting with the court that appointed the conservator unless that court orders a change in
106 venue under Utah Code Section 75-5-403. The reporting period is yearly from the appointment
107 date unless the court changes the reporting period on motion of the conservator. The
108 conservator may not file the accounting before the close of the reporting period. For good
109 cause the court may extend the time for filing the accounting, but a late filing does not change
110 the reporting period.

111 (B) The judge may conduct a hearing even though no objection is filed. If the judge finds that
112 the accounting is in order, the judge must approve it.

113 **(10) Final accounting.**

114 (A) The conservator must file with the court a final accounting of the estate of the protected
115 person with the motion to terminate the appointment.

116 (B) The court may conduct a hearing even though no objection is filed. If the court finds that
117 the accounting is in order, the court must approve it.

118 **(11) Objections.**

119 (A) If an interested person objects to a report or accounting, the person must file a written
120 objection with the court and serve a copy on all interested persons within 28 days from the
121 date of service of the report or accounting. A request to submit must be included with the

122 objection. The court may for good cause, including in order to accommodate a person with a
123 disability, waive the requirement of a writing and document the objection and request to submit
124 in the court record.

125 (B) The objection must specify in writing the entries to which the person objects and state the
126 reasons for the objection.

127 (C) An objection to a report or accounting may not contain a request to remove or substitute
128 the guardian or conservator. Any request for removal or substitution of the guardian or
129 conservator must be filed as a separate petition consistent with Utah Code Section 75-5-307
130 or 75-5-415.

131 (D) If an objection is filed, the court must conduct a hearing unless the court determines that
132 a hearing is not necessary. If the court determines that a hearing is not necessary, the court
133 must issue a minute entry or order stating why a hearing is not necessary.

134 (E) At the hearing, the court may require the guardian or conservator to supplement or amend
135 the report or accounting if the court determines there is good cause for the objection.

136 (F) If the court determines that the objection is unfounded or is filed in bad faith, the court may
137 deny the objection and approve the report or accounting.

138 (12) **Waiver.** If an interested person does not object to a report or accounting within 28 days of
139 service, the interested person waives any objection unless:

140 (A) the objection relates to matters not fairly disclosed by the report or accounting; or

141 (B) the time for objection is extended by the court under Rule 6 of the Utah Rules of Civil
142 Procedure. If the request for an extension is made before the time has run, the court may
143 extend the time for good cause. If the request is made after the time has run, the court may
144 extend for excusable neglect.

145 (13) **Report approval.**

146 (A) **Approval.** The court must examine and approve reports as required by Utah Code
147 sections 75-5-312 and 75-5-417. Approving a report means the judge has reviewed it, to the
148 court's knowledge notice has been given to every person entitled to notice, no objection has
149 been received, the report meets the requirements set forth by the report form, and the court
150 has not requested additional information or scheduled a hearing. Such approval does not
151 foreclose a valid claim permitted under paragraphs (11)(A) or (11)(B), nor does it start an
152 appeal time.

153 (B) **Notice to interested persons.** When a court approves a report, the court must note that
154 approval on the Judicial Council-approved coversheet and place the coversheet in the case
155 file. When a court does not approve a report, the court must indicate on the coversheet, or in
156 an order, the reasons for non-approval, any additional actions required, and serve the
157 coversheet or order on all interested persons entitled to notice.

158 (14) **Report on a minor.** Under Utah Code Section 75-5-209, a person interested in the welfare
159 of a minor may petition the court for a report from the guardian on the minor's welfare or the
160 minor's estate. If the court orders a report from the guardian, the status report must be in
161 substantially the same form as the status report form for guardianships of adults approved by the
162 Utah Judicial Council, including the required attachments.

163 *Effective May/November 1, 20__*

Effective 5/9/2017

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)
 - (a) 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.
 - (b) An order of appointment of a limited guardianship shall state the limitations of the guardianship. Letters of guardianship for a limited guardianship shall state the limitations of the guardianship unless the court determines for good cause shown that a limitation should not be listed in the letters.
- (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.

Amended by Chapter 403, 2017 General Session

Effective 3/19/2018

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) Except as provided in Subsection (4), a guardian has the same powers, rights, and duties respecting the ward that a parent has respecting the parent's unemancipated minor child.
- (3) In particular, and without qualifying Subsections (1) and (2), 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) A guardian may not unreasonably restrict visitation with the ward by family, relatives, or friends.
 - (e) 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;
 - (ii) compel the production of the ward's estate documents, including the ward's will, trust, power of attorney, and any advance health care directive; and
 - (iii) receive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward:
 - (A) except that the guardian may not use funds from the ward's estate for room and board that 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; and
 - (B) the guardian shall exercise care to conserve any excess for the ward's needs.
 - (f)
 - (i) A guardian is required to report the condition of the ward and of the estate that has been subject to the guardian's possession or control, as required by the court or court rule.
 - (ii) A guardian is required to immediately notify all interested persons if the guardian reasonably believes that the ward's death is likely to occur within the next 30 days, based on:
 - (A) the guardian's own observations; or
 - (B) information from the ward's physician or other medical care providers.
 - (iii) A guardian is required to immediately notify persons who request notification and are not restricted in associating with the ward pursuant to Section 75-5-312.5 of:
 - (A) the ward's admission to a hospital for three or more days or to a hospice program;
 - (B) the ward's death; and
 - (C) the arrangements for the disposition of the ward's remains .
 - (iv) Unless emergency conditions exist, a guardian is required to file with the court a notice of the guardian's intent to move the ward and to serve the notice on all interested persons at least 10 days before the move. The guardian shall take reasonable steps to notify all

interested persons and to file the notice with the court as soon as practicable following the earlier of the move or the date when the guardian's intention to move the ward is made known to the ward, the ward's care giver, or any other third party.

- (v)
 - (A) If no conservator for the estate of the ward has been appointed, 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.
 - (B) 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.
 - (C) A report under Subsection (3)(f)(v)(A) or (B) shall include 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.
 - (D) 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.
 - (E) An annual report shall be examined and approved by the court.
 - (F) 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.
- (vi) 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.
- (vii) The guardian shall also render an annual accounting of the status of the person to the court that shall be included in the petition or the informal annual report as required under this Subsection (3)(f). If a fee is paid for an accounting of an estate, a fee may not be charged for an accounting of the status of a person.
- (viii) 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 (3)(f), 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.
- (ix) 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.
- (x) The provisions and penalties in this Subsection (3)(f) governing annual reports do not apply if the guardian or a coguardian is the parent of the ward.
- (xi) For the purposes of Subsections (3)(f)(i), (ii), (iii), and (iv), "interested persons" means those persons required to receive notice in guardianship proceedings as set forth in Section 75-5-309.
- (g) If a conservator has been appointed:
 - (i) 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 shall be paid to the conservator for management as provided in this code; and
 - (ii) the guardian shall account to the conservator for funds expended.
- (4)
 - (a) A court may, in the order of appointment, place specific limitations on the guardian's power.

- (b) A guardian may not prohibit or place restrictions on association with a relative or qualified acquaintance of an adult ward, unless permitted by court order under Section 75-5-312.5.
- (c) A guardian is not liable to a third person for acts of the guardian's ward solely by reason of the relationship described in Subsection (2).
- (5) 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.
- (6) A person who refuses to accept the authority of a guardian with authority over financial decisions to transact business with the assets of the protected person after receiving a certified copy of letters of guardianship is liable for costs, expenses, attorney fees, and damages if the court determines that the person did not act in good faith in refusing to accept the authority of the guardian.
- (7) A guardian shall, to the extent practicable, encourage the ward to participate in decisions, exercise self-determination, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. To the extent known, a guardian, in making decisions, shall consider the expressed desires and personal values of the ward.

Amended by Chapter 244, 2018 General Session

Amended by Chapter 294, 2018 General Session

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)

(a) 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.

(b) An order of appointment of a limited guardianship shall state the limitations of the guardianship. Letters of guardianship for a limited guardianship shall state the limitations of the guardianship unless the court determines for good cause shown that a limitation should not be listed in the letters.

(c) If the order of appointment of a limited guardianship limits the guardian's ability to access financial records of the protected person, then the guardian shall be exempt from any accounting requirement under Utah Code Section 75-5-312(3)(f)(v).

(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.

Utah Code Section 75-5-312(3)(f)(v)

(A) If no conservator for the estate of the ward has been appointed, 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.

(B) 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.

(C) A report under Subsection (3)(f)(v)(A) or (B) shall include 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.

(D) 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.

(E) An annual report shall be examined and approved by the court.

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(F) 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.

(vi) 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.

(vii) The guardian shall also render an annual accounting of the status of the person to the court that shall be included in the petition or the informal annual report as required under this Subsection (3)(f). If a fee is paid for an accounting of an estate, a fee may not be charged for an accounting of the status of a person.

(viii) 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 (3)(f), 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.

(ix) 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.

(x) The provisions and penalties in this Subsection (3)(f) governing annual reports do not apply if the guardian or a coguardian is the parent of the ward.

Effective 5/8/2018

75-5-303 Procedure for court appointment of a guardian of an incapacitated person.

<p>(1) An incapacitated person or any person interested in the incapacitated person's welfare may petition for a finding of incapacity and appointment of a guardian.</p>	
<p>(2)</p> <ul style="list-style-type: none">(a) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity.(b) Unless the allegedly incapacitated person has counsel of the person's own choice, the court shall appoint an attorney to represent the person in the proceeding the cost of which shall be paid by the person alleged to be incapacitated, unless the allegedly incapacitated person and the allegedly incapacitated person's parents are indigent.(c) If the court determines that the petition is without merit, the attorney fees and court costs shall be paid by the person filing the petition.(d) If the court appoints the petitioner or the petitioner's nominee as guardian of the incapacitated person, regardless of whether the nominee is specified in the moving petition or nominated during the proceedings, the petitioner shall be entitled to receive from the incapacitated person reasonable attorney fees and court costs incurred in bringing, prosecuting, or defending the petition.	<p>(b) – the wording here is inconsistent with the wording in Code 75-5-407 (dealing with conservators), which says, “<i>Unless the person to be protected has already retained counsel...</i>”</p> <p>What capacity must the respondent have in order to <u>choose</u> their own attorney?</p>
<p>(3) The legal representation of the incapacitated person by an attorney shall terminate upon the appointment of a guardian, unless:</p> <ul style="list-style-type: none">(a) there are separate conservatorship proceedings still pending before the court subsequent to the appointment of a guardian;(b) there is a timely filed appeal of the appointment of the guardian or the determination of incapacity; or(c) upon an express finding of good cause, the court orders otherwise.	
<p>(4) The person alleged to be incapacitated may be examined by a physician appointed by the court who shall submit a report in writing to the court and may be interviewed by a visitor sent by the court. The visitor also may interview the person seeking appointment as guardian, visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that the person will be detained or reside if the requested appointment is made, conduct other investigations or observations as directed by the court, and submit a report in writing to the court.</p>	<p>Confusion over what is meant by a “physician appointed by the court.”</p>

<p>(5)</p> <p>(a) The person alleged to be incapacitated shall be present at the hearing in person and see or hear all evidence bearing upon the person's condition. If the person seeking the guardianship requests a waiver of presence of the person alleged to be incapacitated, the court shall order an investigation by a court visitor, the costs of which shall be paid by the person seeking the guardianship.</p>	<p>Define what is meant by "in person"?</p> <p>A respondent cannot be excused from the hearing if the respondent does not have counsel (per (5)(d)). Does this need to be made clearer?</p>
<p>(b) The investigation by a court visitor is not required if there is clear and convincing evidence from a physician that the person alleged to be incapacitated has:</p> <p>(i) fourth stage Alzheimer's Disease;</p> <p>(ii) extended comatosis; or</p> <p>(iii)</p> <p>(A) an intellectual disability; and</p> <p>(B) an intelligence quotient score under 25.</p>	<p>Fourth stage Alzheimer's and an IQ score of 25 are not legitimate criteria. Update medical criteria to language used in diagnoses.</p> <p>NOTE - medicine is not sufficiently standardized so that any kind of diagnosing system could be used, because not all providers will write notes in the same way.</p> <p>Suggested language (per WINGs member Dr. Michelle Miranda, Clinical Neuropsychologist):</p> <p>(b) The investigation by a court visitor is not required if there is clear and convincing evidence from a physician that the person alleged to be incapacitated has:</p> <p>(i) A progressing neurodegenerative (dementing) disease causing dependence for basic activities of daily living (dressing/eating/etc.)</p> <p>(ii) extended comatosis</p> <p>(iii) A severe intellectual disability causing dependence for basic activities of daily living (dressing/eating/etc.)</p>
<p>(c) The person alleged to be incapacitated is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or the person's counsel so requests.</p>	<p>Discuss including clarifying language that addresses the issues surrounding Court Visitors being called to testify.</p>
<p>(d) Counsel for the person alleged to be incapacitated, as defined in Subsection 75-1-201(22), is not required if:</p> <p>(i) the person is the biological or adopted child of the petitioner;</p> <p>(ii) the value of the person's entire estate does not exceed \$20,000 as</p>	<p>NOTE – the way the statute is written, if an individual is excused from the hearing under the medical criteria listed in 5b, the attorney requirement <u>cannot</u> be waived, per 5d.</p>

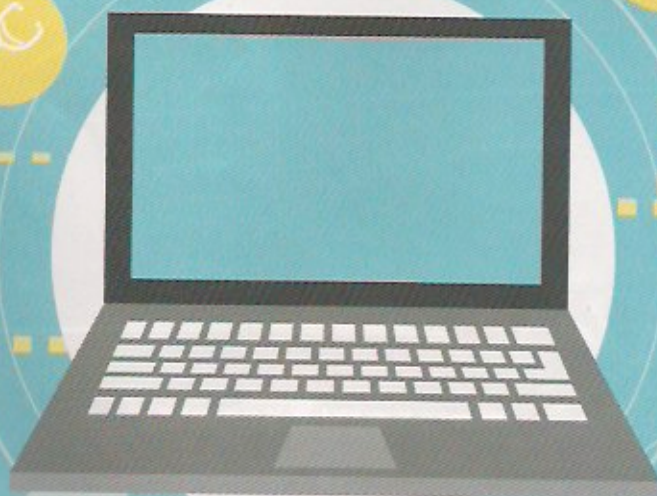
<p>established by an affidavit of the petitioner in accordance with Section 75-3-1201;</p> <ul style="list-style-type: none">(iii) the person appears in court with the petitioner;(iv) the person is given the opportunity to communicate, to the extent possible, the person's acceptance of the appointment of petitioner;(v) no attorney from the state court's list of attorneys who have volunteered to represent respondents in guardianship proceedings is able to provide counsel to the person within 60 days of the date of the appointment described in Subsection (2);(vi) the court is satisfied that counsel is not necessary in order to protect the interests of the person; and(vii) the court appoints a visitor under Subsection (4).	<p>Top line, add language: "Counsel for the person alleged to be incapacitated, as defined in Subsection 75-1-201(22), is not required if each of the following criteria are met:"</p> <ul style="list-style-type: none">(i) is there value in adjusting/adding criteria to account for parents caring for adult children between the ages of 18-21 with incapacity?(iii) – this means that if the respondent has been excused from the hearing, per (5)(a), counsel cannot be waived. Should this be made clearer?(iv) – What does this look like? If is expressed only during the hearing? To a Court Visitor?(v) – The 60 days language is confusing and should be clarified.(vi) – keep the "and" and the end of the sentence, in addition to adding the redline language above.
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Amended by Chapter 455, 2018 General Session

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A Guide to Guardianship Medical Evaluations: A Utah Perspective

BY NORMAN L. FOSTER, MD; ROBERT DENTON, JD;
KENT ALDERMAN, JD



PHYSICIANS INCREASINGLY ARE BEING asked to provide medical evidence for guardianship. This article is designed to bridge the gap between the legal and medical perspectives and to be a practical guide for handling such a request effectively and with appropriate reimbursement. We are sharing this information with both the medical and legal communities to start a conversation that will improve guardianship proceedings in Utah.

The Physician's Role in Guardianship

Guardianship is required when a person is incompetent and a durable power of attorney isn't in place. The outcome of guardianship hearings is dependent upon information physicians provide the court. An individual's personal physician is in the best position to provide accurate, high quality medical evidence. Yet physicians usually are not trained to administer guardianship evaluations and may be unaware of what the court needs or how to document their services for reimbursement. Before a guardian can be appointed, the court must decide if an individual meets the definition of legal incapacity under Utah law:

"Incapacitated" or "incapacity" is measured by functional limitations and means a judicial determination after proof by clear and convincing evidence that an adult's ability to do the following is impaired to the extent that the individual lacks the ability, even with appropriate technological assistance, to meet the essential requirements

for financial protection or physical health, safety, or self-care: (a) receive and evaluate information; (b) make and communicate decisions; or (c) provide for necessities such as food, shelter, clothing, health care, or safety."

A finding of incapacity does not require identifying the causes of functional limitations. However, few judges are likely to rule someone incapacitated without evidence of some explained physical or mental impairment. In trying to balance rights with protection, the law seeks to limit the duration and extent of guardianship restrictions whenever possible. The court thus looks to the physician for prognosis, clinical course and likely response to treatment based upon the diagnosis.

Performing and Documenting a Medical Examination for Guardianship

Since the goals of a medical evaluation and a medical guardianship evaluation differ, each should be allotted their own time. Physicians naturally seek a diagnosis, but may not recognize or assess incapacity in the usual course of care. For an established patient, the physician often already has completed the necessary first step - a diagnostic and treatment evaluation. The guardianship examination, however, also requires an evaluation of function, considering information from multiple sources, and a closer consideration of the patient's social circumstances. Consultation may be appropriate from a cognitive neurologist, neuropsychologist, psychiatrist, or social worker, and a home visit and review of existing evaluations may be necessary. To accomplish these tasks, one or more separate visits should be arranged specifically for this purpose. Scheduling an extended visit may be needed. Trying to shoehorn a guardianship evaluation into an already scheduled medical visit or trying to complete a report without a separate appointment will only lead to frustration and an inadequate assessment for the court. Ultimately it does not serve the best interests of the patient.

A guardianship evaluation results in a medical evidence report. The critical elements include documenting the qualifications of the examiner and the sources on which the conclusions are based. It is helpful to describe the testing performed and the observations that led to physician's conclusion of incapacity or not in the areas listed in the legal definition. It also should provide sufficient evidence of why the individual does or does not need a substitute decision-maker, listing the specific condition(s) that contribute to limited capacity. Notice that identifying a cause or diagnosis alone isn't sufficient, as it might for purely medical documentation. Instead, the functional consequences of the patient's illnesses must be considered, explaining the extent to which mitigation of any disability is possible. The report can be supplemented by attaching a copy of the medical documentation completed for reimbursement.

Physicians may see inadequate reimbursement as a barrier to performing a competency evaluation. Fortunately, solutions

are available. Poor reimbursement is not an excuse for a poor quality medical evidence report. While it is true that neither the court nor lawyers pay for guardianship evaluations, the costs can be borne by the alleged incapacitated person's medical insurance and existing assets, or the assets of the person requesting the evaluation. To bill medical insurance, completing a report for the court is not enough. Documentation must reflect the services provided and be detailed enough to justify the level of billing. Insurers reimburse for their beneficiaries' medical services based on whether they deem the services to be medically necessary. Because insurers do not provide consistent guidance on medical necessity, it is crucial that physicians appropriately categorize the patient's appointment as care coordination for a specific medical condition. Competency evaluations are a necessary part of the coordination of care since guardianship may be needed for proper medical care. Thus, health care insurers are appropriately billed for medical evaluations for guardianship.

For insurance reimbursement, visit documentation must appear in the medical record and state that the visit is performed for care coordination, even if it is court ordered. The physician can reasonably bill the visit an E&M (evaluation and management) service using CPT codes 99201-99245. E&M billing can be based either on individual exam components or on time, when greater than 50% of a visit is spent on counseling and care coordination. Because collecting medical evidence for guardianship doesn't correspond well to E&M components, it is almost always more appropriate to bill based upon time. The level of service should reflect the actual time spent with the patient, using prolonged service codes 99354 and 99355 when appropriate. Specifically state the number of minutes spent in direct patient contact (e.g. "40 minutes in direct patient contact, more than 50% spent in care coordination"). The time spent can be further established through the length of the visit scheduled in office records and explicitly stating start and end times (e.g. "patient seen from 2:00PM to 2:40PM"). If the court report form for guardianship is completed in the presence of the patient, include it in the billed time. This only makes sense since form completion is part of care coordination and it is preferable to have the patient and informants present to accurately complete some sections.

Conclusion

A medical evidence evaluation must track the language of the statute defining incapacity as closely as possible to aid the court in making its legal determination. The physician should set forth in detail the areas in which the individual needs substitute decision-making and the reasons for that determination. In seeking health insurance reimbursement, the physician should prepare a separate medical visit note and attend to the documentation requirements. In this way, the physician simultaneously can serve the best interests of the patient and the ethical role of the physician in society. ■

¹Utah Code Section 75-1-201(22)

The authors are members of the Working Interdisciplinary Network of Guardianship Stakeholders program, composed of individuals and groups from various disciplines with interest in action to improve the state's spectrum of guardianship/conservatorship services and processes, including those services and processes related to alternatives to guardianship/conservatorship.



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Utah Bar JOURNAL



Volume 27 No. 3
May/June 2014

Summer Convention Registration Inside

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WINGS: The Challenges of Submitting Competent Medical Evidence of Incapacity in Guardianship Proceedings

by Robert Denton

Guardianship is one of many methods available to help ensure that the needs of an individual with limited mental capacity are met. Other than possibly civil commitment, it is the most drastic one. A finding of incapacity by a court and the appointment of a guardian results in the loss of freedom to direct one's life and make basic choices. Because of the significant impact it can have on one's life, it is crucial that competent, persuasive evidence is presented to the judge regarding the individual's incapacity.

Capacity is about decision-making. Many disorders can impair one's capacity to make decisions. Dementia or Alzheimer's disease, mental illness, intellectual disability, traumatic brain injuries, and strokes are some of the most common causes of a decreased ability to make adequate decisions for oneself. With some of these impairments, the individual's capacity is likely declining. With others, it will be static. It is possible that the functional decision-making skills of an individual with an intellectual disability or traumatic brain injury may improve, even though their medical/cognitive abilities remain static. Medical evidence for each of those conditions may come from a different type of health care practitioner using different examinations and test results. With advances in medicine many individuals with these conditions live longer. More individuals need a substitute decision-maker, and our medical knowledge is far more sophisticated. The former places a greater burden on the medical community as it is asked to provide more expert opinions about an individual's capacity, and our advanced knowledge makes the question of the extent of one's capacity, and its duration, more complicated.

Before a guardian can be appointed for an individual, a court must find that the person is incapacitated. "Incapacitated" or "incapacity"

is measured by functional limitations and means a judicial determination after proof by clear and convincing evidence that an adult's ability to do the following is impaired to the extent that the individual lacks the ability, even with appropriate technological assistance, to meet the essential requirements for financial protection or physical health, safety, or self-care: (a) receive and evaluate information; (b) make and communicate decisions; or (c) provide for necessities such as food, shelter, clothing, health care, or safety.

Utah Code Ann. § 75-1-201(22) (LexisNexis 2013). Until 2013, a finding of incapacity required that the individual have a "mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause" for their inability to "make or communicate responsible decisions." Utah Code Ann. § 75-1-201(22) (LexisNexis 2012). Now there is no statutory requirement to prove a physical or mental cause for incapacity. The focus is solely upon the individual's functioning. However, evidence of a physical or mental basis for the alleged incapacitated person's functional limitations should be available to the judge. Since incapacity must be proven by clear and convincing evidence, a judge may be less willing to find incapacity when there is no identified cause for the limited functional abilities. The strongest case of incapacity will include proof of a physical

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or mental impairment, functional limitations that arise specifically from those impairments, and how those functional limitations directly render the individual unable to receive and evaluate information, make and communicate different types of decisions, or provide for necessities such as food, shelter, and clothing.

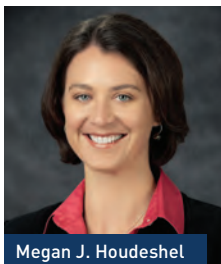
The medical evaluation of incapacity should be detailed, setting forth the health care professional's testing process and observations that led to his or her conclusion. There should be sufficient evidence to demonstrate in what areas of life the individual needs a substitute decision-maker. The law prefers a limited guardianship. Utah Code Ann. § 75-5-304 (LexisNexis 2013). A petitioner must be able to identify the specific deficits the individual has because of the individual's limited capacity. Areas of decision-making authority could include medical, financial, residential, and prevocational habilitation. The medical and functional evidence should prove decision-making deficits in each of the areas the petitioner wants to be included in the guardianship.

The medical and functional evidence workgroup at the November 6, 2013 guardianship summit identified three issues that are most critical and problematic in relation to the guardianship court

process: (1) the minimal information necessary for the court to make a decision on the issue of capacity; (2) cost as a barrier to obtaining competent medical evidence; and (3) identifying critical decision points and the resources available from when the need for a guardian is first identified by the court to appoint a guardian. This final issue is particularly important when events or circumstances arise that place the alleged incapacitated person at greater risk of harm.

Minimum Information Needed by the Court

Providing the best medical evidence of incapacity is not simple. The health care professionals are not necessarily clear about the type of information that is most useful to the judge. There is nothing specific in the law about the type of information a health care professional should provide to the court. Practitioners often do not know when this information is presented or what form it should take. Attorneys often do not know which type of health care professional is the best source of medical information of incapacity and how the health care professional will be reimbursed for the cost of preparing the necessary information.



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At the summit, health care professionals talked about various difficulties they have in writing an evaluation of an individual's decision-making capacity. They do not always understand the legal terminology involved in guardianship proceedings. There can be inconsistencies between the legal terminology and the medical terminology they use on a daily basis. On the other hand, attorneys representing the parties may not be as familiar with the medical terminology relevant to conditions that might render an individual incapacitated. The two professionals need to work together to make sure there is a clear understanding of the medical–legal relationships. This is particularly true when the health care professional has not treated the alleged incapacitated person but is asked by the parties or the judge for an evaluation. Some guidelines in blending the medical and legal for both the health care professionals and the attorneys would be helpful, perhaps with a well-crafted evaluation form.

Often the alleged incapacitated person's condition is declining. This presents greater challenges to both attorneys and health care professionals evaluating the individual. Given the strong preference for limited guardianship, the focus must be on what the alleged incapacitated person can currently do or will likely be able to do in the near future. Trying to structure a guardianship to anticipate the inevitable decline while at the same time maintaining the individual's fundamental right to make decisions about important parts of their lives is tricky. Health care professionals can assist with this by projecting, to the extent possible, a timeline for the decline. With this, changes to the guardianship can be a relatively simple matter. At the same time, prognosing this timeline cannot be speculative.

At least one health care professional was unclear on his role when conducting the evaluation. Are they supposed to be advocates for the alleged incapacitated person or are they supposed to provide an objective, neutral opinion? One way for the health care professional to meet her need to be an advocate would be to include in her evaluation a consideration of resources that could be available to the individual that would lessen the need for a guardian or reduce the scope of the guardianship needed. A list of resources typically available to individuals with different types of mental impairments would help the evaluator in some cases.

One part of the discussion was surprising. The workgroup panelists assumed that there is a need not to burden health care providers by asking for too much information about the alleged incapacitated person's medical condition and to avoid

submitting too much information to judges. The responses of the health care professionals and judges at the symposium was unexpected – some of the health care providers feel that they cannot adequately address an individual's capacity in less than a ten-to-twelve-page report. The judges feel that too much information is better than too little.

Payment for Professional Evaluations

Many alleged incapacitated persons do not have the income or estate to pay for thorough and competent evaluations of incapacity. Unfortunately, payors such as private insurance, Medicare, and Medicaid only pay for the costs of medical treatment. They will not pay for evaluations for other purposes, such as guardianship proceedings. This problem is exacerbated when the individual has received little, or no, medical treatment in the past. Under these circumstances, more testing and assessments may be necessary since there are no records the evaluator can refer to.

Identifying Critical Decision Points and Available Resources

This generated the liveliest discussion in the breakout sessions. Representatives of law enforcement at the sessions described their frustration when they come upon a person in need of protection who clearly is not capable of making decisions necessary to keep out of harm's way. Too often the individual does not have a guardian, and there is no other alternative available to make sure that decisions can be made to meet the individual's needs. Sometimes, depending upon the individual's disability, it is difficult to determine where to *bring* people when they are in need of protection. At crisis points, such individuals usually do not require acute medical or psychiatric hospitalization and are discharged back into the community with little change in condition or available supports. What works for someone with a mental illness may not work if the person had a traumatic brain injury or an intellectual disability. Someone with Alzheimer's disease or dementia may benefit from a different type of temporary placement.

Family members often do not understand the process for obtaining a guardianship or are intimidated by or do not have the money to go through the process to obtain guardianship. It can be a long period of time between an incident indicating that a person cannot make decisions on his or her own and the day a guardianship petition is granted.

Guardianship is not always necessary to ensure that an individual's basic needs for food, shelter, clothing, and medical care are

met. There are alternatives that can be less expensive and allow the individual to retain greater freedom and independence. Advanced health care directives can identify a substitute decision-maker when an individual is unable to give informed consent to medical care. The law also recognizes a hierarchical order of relatives who can be default decision-makers for medical care. Utah Code Ann. § 75-2a-108 (LexisNexis 2013). By a durable power of attorney, an individual can grant someone else the authority to make decisions and take various actions on their behalf in financial matters. The power of attorney can remain effective after the grantor no longer has the capacity to make informed choices on his or her own. Trusts are another vehicle through which an appointed person can take care of the financial affairs of another. Of course, none of these options are available when the individual has the type of mental impairment that has prevented them from ever being competent, such as an intellectual disability. Likewise, they cannot be created by an individual after they become incapacitated. Advanced planning is required.

A court currently has the ability to grant an emergency temporary guardianship when circumstances warrant, or when a guardian is not performing the guardian's duties. *Id.* § 75-5-310. However, there is no definition of emergency. The judges attending the workgroup discussions did not feel constrained by the lack of a definition of "emergency." They did not think that the lack of a definition has led to any abuse of the provision.

There was also some discussion in the group about time-limited guardianships. Often situations arise when the alleged incapacitated person may be in need of greater support or intervention. The steps to take on his or her behalf may be short in duration. A temporary or time-limited guardianship may be sufficient to meet the individual's immediate critical need. At the same time, in the majority of these situations, the individual's incapacity will not be short lived. He or she will need a guardian long term. In these situations, the time-limited guardianship should be avoided.

The group also discussed the option of civil commitment. The standards for commitment are different. There must be a high degree of impairment before an individual can be committed. For an individual with mental illness, there must be substantial danger that the individual with mental illness will commit suicide, inflict serious bodily injury to himself or others, or will suffer serious bodily injury because he or she is unable to meet their basic needs, such as food, clothing, or shelter. *Id.* §§ 62A-15-602(14), -631(10)(b). For an individual with an intellectual disability, he or she must pose an immediate danger

of physical injury to self or others, lack the capacity to provide the basic necessities of life, such as food, clothing, or shelter, or be in immediate need of habilitation, rehabilitation, care, or treatment to minimize the effects of a condition which poses a threat of serious physical or psychological injury to the individual. *Id.* § 62A-5-312(13).

Commitment will not directly protect the individual's finances. It does not reach to most medical needs. For individuals with mental illness, it reaches only one part of the overall medical need – mental health treatment. Commitment will last only as long as the risk of serious harm to self or others remains. For people with mental illness, sometimes their condition is cyclical. For others, while they are taking their medications, they may not pose the necessary risk. Commitment can be a relatively short-term answer. It can be little more than a mechanism for crisis management.

Forms

There is a Report on Clinical Evaluation form on the Utah State Courts' website. It asks for the critical information of capacity needed by a court. It may not accommodate the evaluator who feels the need to provide the court a great deal of information. The report itself would not justify payment for the evaluation by a private or public insurer. Members of the medical and functional evidence workgroup will tweak the form to meet some of the concerns raised in the summit sessions and enhance the likelihood that the evaluator will be reimbursed for their evaluation. The revised form must be submitted to the Board of District Court Judges for its approval before it can be posted on the Utah State Courts' website. A draft of the revised form will soon be posted on the WINGS website, <http://www.utcourts.gov/howto/family/GC/wings/>.

Outline of Resources Available

WINGS will outline the types of resources that are available to an individual with potentially limited decision-making capacity, families, health care providers, public agencies, and law enforcement at various points in time when there are threats to the individual's ability to meet his or her own needs. Those resources may help the individual when a critical need is not being met, provide alternative supports and services so that a guardianship is not needed, or be a resource for individuals as they consider filing a petition for guardianship. It will outline the process for obtaining an emergency guardianship. The outline will also be submitted to the Board of District Court Judges for its approval before it can be posted on the Utah State Courts' website.