

# Utah Working Interdisciplinary Network of Guardianship Stakeholders (WINGS)

Thursday, February 17, 2022, 12:00 pm | 2 hours |

## AGENDA

	Topic	Presenter	Materials
12:00	Meeting begins		
	<ul style="list-style-type: none"> <li>Housekeeping</li> <li>Minutes</li> </ul>	Judge Kelly	1. <i>WINGS Minutes (December 2021 – draft)</i>
12:10	Stakeholder Updates		
	<ul style="list-style-type: none"> <li>GRAMP</li> <li>Legislative Update</li> <li>Other</li> </ul>	Stakeholders	
12:30	Projects Updates		
	<ul style="list-style-type: none"> <li>Rules 6-501 &amp; 6-507</li> <li>Rules 1-205 &amp; 3-421</li> </ul>	Judge Kelly Shonna Thomas	2. <i>Rule 6-501 (2.10.22)</i>
12:45	Ongoing Projects		
	<ul style="list-style-type: none"> <li>Accessibility in the Courts</li> </ul>	Judge Kelly Andrew Riggle Katie Cox	<b>Guest Attendees:</b> <ul style="list-style-type: none"> <li>Jonathan Puente (Director, Office of Fairness and Accountability)</li> <li>Nathanael Player (Director, Self Help Center and Law Library)</li> </ul>
	<ul style="list-style-type: none"> <li>Utah Code 75-5-303</li> </ul>	Group Discussion	3. <i>Utah Code 75-5-303 (to discuss - 2.14.22)</i> 4. <i>A Guide to Guardianship Medical Evaluations (Foster, Denton, Alderman)</i> 5. <i>The Challenges of Submitting Competent Medical Evidence of Incapacity (Denton)</i>
1:35	New Topics		
	<ul style="list-style-type: none"> <li>Reporting requirements for limited guardian</li> <li>Informal vs. formal accounting forms</li> </ul>	Brant Christiansen	6. <i>Utah Code 75-5-304</i> 7. <i>Utah Code 75-5-312</i>
1:50	Other Business		
	<ul style="list-style-type: none"> <li></li> </ul>		
2:00	Meeting adjourned		

Next meeting:

April 21, 2022 (via WebEx)

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 requirements sufficient to satisfy the Utah Uniform  
5 Probate Code.

6 **Applicability:**

7 This rule applies to individuals seeking appointment as guardians and conservators and  
8 individuals who are appointed by the court as guardians and conservators, with the following  
9 exceptions:

10 This rule does not apply if a parent is a the conservator or a guardian or coguardian is the parent  
11 of the wardprotected person.

12 Paragraph (1) does not apply to the guardian of a minor if the guardianship is limited to the  
13 purpose of attending school.

14 Paragraph (1) does not apply to a conservator licensed under the Title 7, Chapter 5, Trust  
15 Business, to a guardian licensed under §75-5-311(1)(a), or to the Office of Public Guardian.

16 Paragraphs (6)(A), (6)(B) and (6)(C) do not apply to the guardian of a minor if the guardianship is  
17 limited to the purpose of attending school. A person interested in the minor may request a report  
18 under Utah Code Section 75-5-209.

19 Paragraph (6)(D) does not apply to the guardian of a minor if the minor's estate consists of funds  
20 that are is deposited in an a restricted account, which is an account requiring judicial approval for  
21 withdrawal, or if there is no estate. A person interested in the minor may request an accounting  
22 under Utah Code Section 75-5-209.to a conservator who is appointed for the purpose of for a  
23 minor 1) funds distributed, until the minor reaches the age of majority, or 2) no structured settlement  
24 payments are to be made, until the minor reaches the age of majority

25 **Statement of the Rule:**

26 (1) Definitions.

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

29 (B) "Interested person" means the respondent, if he or she is of an appropriate age and mental  
30 capacity to understand the proceedings, the respondent's guardian and conservator, the

31 respondent's spouse, adult children, parents and siblings, and any other person interested in  
32 the welfare, estate, or affairs of the respondent who requests notice under Utah Code Section  
33 75-5-406. If no person is an interested person, then interested person includes at least one of  
34 the respondent's closest adult relatives, if any can be found. For purposes of minor  
35 guardianship, interested persons include the persons listed in Utah Code Section 75-5-207.

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

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

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

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

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

45 (2) Exceptions.

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

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

48 \_\_\_\_\_ (ii) the Office of Public Guardian; or

49 \_\_\_\_\_ (iii) a conservator licensed under Utah Code Section 7-5-2.

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

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

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

59 (34) Examination and private information record.

60 (A) Before the court enters an order appointing a guardian or conservator, the proposed  
61 guardian or conservator ~~shall~~must file a verified statement showing satisfactory completion of  
62 a court-approved examination on the responsibilities of a guardian or conservator.

63 (B) ~~After~~Before the court enters ~~an~~the order of appointment, the proposed guardian or  
64 conservator ~~shall~~must file ~~within 7 days~~ a completed and verified Private Information Record  
65 form provided by the Administrative Office of the Courts.

66 ~~(C)~~ The guardian or conservator ~~shall~~must continue to keep the court apprised of any changes  
67 to the guardian or conservator's contact information.

68 ~~(42)~~ **Recordkeeping.** The guardian ~~shall~~must keep contemporaneous records of significant  
69 events in the life of the ~~ward~~protected person and produce them if requested by the court. The  
70 conservator ~~shall~~must keep contemporaneous receipts, vouchers or other evidence of income  
71 and expenses and produce them if requested by the court. The guardian and conservator  
72 ~~shall~~must maintain the records until the appointment is terminated and then deliver them to the  
73 ~~ward~~protected person, if there is no successor, to the successor guardian or conservator, or to  
74 the personal representative of the ~~protected person~~ward's estate.

75

76 ~~(3)~~ **Definitions.**

77 (A) forms substantially conforming to the Judicial Council-approved forms ~~produced by the~~  
78 ~~Utah court website~~ are acceptable for content and format ~~for the report and accounting filed~~  
79 ~~under the Utah Uniform Probate Code~~;

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

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

83 ~~(65)~~ Information required in reports, cover sheet, and service. ~~Report information, cover sheet,~~  
84 ~~and service.~~

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

89 ~~(B)~~ The annual report and annual accounting must include the Judicial Council-approved  
90 report coversheet, which must be filed as if it were a proposed order document.

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

97 ~~(67)~~ **Annual ~~S~~status reports.**

98 ~~(6)(A)~~ The guardian ~~shall~~**must** file with the appointing court a report on the status of the  
99 ~~ward~~protected person no later than 60 days after the anniversary of the appointment. The  
100 status report must be in substantially the same form as the status report form approved by the  
101 Utah Judicial Council, including the required attachments. The guardian ~~shall~~**must** file the  
102 report with the court that appointed the guardian unless that court orders a change in venue  
103 under Utah Code Section 75-5-313. The reporting period is yearly from the appointment date  
104 unless the court changes the reporting period on motion of the guardian. The guardian may  
105 not file the report before the close of the reporting period. For good cause the court may  
106 extend the time for filing the report, but a late filing does not change the reporting period.

107 ~~(6)(B) The guardian shall serve a copy of the report on all interested persons with notice that~~  
108 ~~the person may object within 30 days after the notice was served.~~

109 ~~(6)(DC)~~ If there is no conservator, the guardian ~~shall~~**must** file the inventory and accounting  
110 required of a conservator under Utah Code Section 75-5-312.

111 ~~(78)~~ **Inventory ~~r~~reports.**

112 (A) Within 90 days after the appointment, the conservator ~~shall~~**must** file with the appointing  
113 court the inventory required by Utah Code Section 75-5-418. The inventory must be in  
114 substantially the same form as the inventory form approved by the Utah Judicial Council,  
115 including the required attachments. ~~For good cause t~~The court may extend the time for filing  
116 the inventory for good cause.

117 ~~(CB) If an interested person objects, the person shall specify in writing the entries to which~~  
118 ~~the person objects and state the reasons for the objection. The person shall file the objection~~  
119 ~~with the court and serve a copy on all interested persons. If an objection is filed, the judge~~  
120 ~~shall conduct a hearing.~~ The judge may conduct a hearing even though no objection is filed.  
121 If the judge finds that the inventory is in order, the judge ~~shall~~**must** approve it.

122 ~~(8)~~ (9) ~~Annual Accounting reports.~~

123 (A) The conservator ~~shall~~must file with the appointing court an accounting of the estate of the  
124 ~~ward~~protected person no later than 60 days after the anniversary of the appointment. The  
125 accounting must be in substantially the same form as the accounting form approved by the  
126 Utah Judicial Council, including the required attachments. The conservator ~~shall~~must file the  
127 accounting with the court that appointed the conservator unless that court orders a change in  
128 venue under Utah Code Section 75-5-403. The reporting period is yearly from the appointment  
129 date unless the court changes the reporting period on motion of the conservator. The  
130 conservator may not file the accounting before the close of the reporting period. For good  
131 cause the court may extend the time for filing the accounting, but a late filing does not change  
132 the reporting period.

133 ~~(8)(B) The conservator shall serve a copy of the accounting on all interested persons with~~  
134 ~~notice that the person may object within 30 days after the notice was served.~~

135 ~~(9)~~ (10) ~~Final accounting.~~

136 (A) The conservator ~~shall~~must file with the court a final accounting of the estate of the  
137 ~~ward~~protected person with the motion to terminate the appointment.

138 ~~(9)(B) The conservator shall serve a copy of the accounting on all interested persons with~~  
139 ~~notice that the person may object within 30 days after the notice was served.~~

140 (11) Objections.

141 (A) If an interested person objects to a report or accounting, the person must file a written  
142 objection with the court and serve a copy on all interested persons within 28 days from the  
143 date of service of the report or accounting. A request to submit must be included with ~~the~~  
144 objection ~~must include a request to submit.~~ The court may for good cause, including in order  
145 to accommodate a person with a disability, waive the requirement of a writing and document  
146 the objection and request to submit in the court record.

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

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

153 (D) If an objection is filed, the court ~~may~~ must conduct a hearing unless the court determines that  
154 a hearing is not necessary. If the court determines that a hearing is not necessary, the court  
155 must issue a minute entry or order stating why a hearing is not necessary, ~~upon the request of a party~~

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

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

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

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

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

167 (13) **Report approval.**

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

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

180 (14~~3~~) **Report on a minor.** Under Utah Code Section 75-5-209, a person interested in the welfare  
181 of a minor may petition the court for a report from the guardian on the minor's welfare or the  
182 minor's estate. If the court orders a report from the guardian, the status report must be in  
183 substantially the same form as the status report form for guardianships of adults approved by the

CJA 6-501. Amend.

Redline

Draft: ~~June 7~~February 9, 2024

184 [Utah Judicial Council, including the required attachments.](#)

185 *Effective May*~~November 1, 20\_\_~~*18*



**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"><li>(a) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity.</li><li>(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.</li><li>(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.</li><li>(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.</li></ul>	<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"><li>(a) there are separate conservatorship proceedings still pending before the court subsequent to the appointment of a guardian;</li><li>(b) there is a timely filed appeal of the appointment of the guardian or the determination of incapacity; or</li><li>(c) upon an express finding of good cause, the court orders otherwise.</li></ul>	
<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>

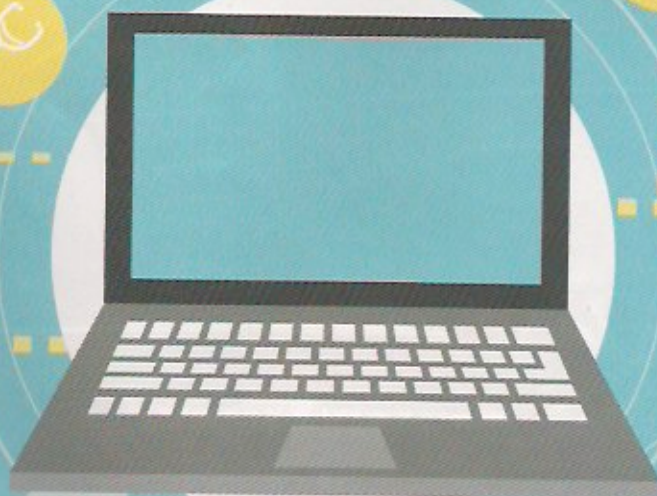
<p>established by an affidavit of the petitioner in accordance with Section 75-3-1201;</p> <p>(iii) the person appears in court with the petitioner;</p> <p>(iv) the person is given the opportunity to communicate, to the extent possible, the person's acceptance of the appointment of petitioner;</p> <p>(v) 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);</p> <p>(vi) the court is satisfied that counsel is not necessary in order to protect the interests of the person; and</p> <p>(vii) the court appoints a visitor under Subsection (4).</p>	<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 <b>each of the following criteria are met:</b>"</p> <p>(i) is there value in adjusting/adding criteria to account for parents caring for adult children between the ages of 18-21 with incapacity?</p> <p>(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?</p> <p>(iv) – What does this look like? If is expressed only during the hearing? To a Court Visitor?</p> <p>(v) – The 60 days language is confusing and should be clarified.</p> <p>(vi) – keep the "and" and the end of the sentence, in addition to adding the redline language above.</p>
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Amended by Chapter 455, 2018 General Session

# UTAH PHYSICIAN

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## Telehealth Movement in Utah



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**TAKE NOTE**  
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**UMA LEADERSHIP  
WORKSHOP A  
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**LETTER TO  
THE EDITOR**  
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# A Guide to Guardianship Medical Evaluations: A Utah Perspective

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



**P**HYSICIANS 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. ■

<sup>1</sup>Utah 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.



Norman Foster, MD, is the Director of the Center for Alzheimer's Care, Imaging and Research, Division of Cognitive Neurology, Department of Neurology, at the University of Utah. norman.foster@hsc.utah.edu; (801) 587-7236; 801-585-9983



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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

**G**uardianship 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.



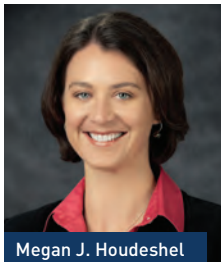
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At the summit, health care professionals talked about various difficulties they have in writing an evaluation of an individual's decision-making capacity. They do not always understand the legal terminology involved in guardianship proceedings. There 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.

***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