

Utah Working Interdisciplinary Network of Guardianship Stakeholders (WINGS)

Thursday, August 17, 2023, 12:00 pm | 2 hours |

AGENDA

	Topic	Presenter	Materials
12:00	Meeting begins		
	<ul style="list-style-type: none">Housekeeping, minutes	Judge Kelly	<ul style="list-style-type: none">– <i>WINGS Minutes (June 2023 – draft)</i>
12:10	Ongoing Projects		
	<ul style="list-style-type: none">Utah Code 75-5-303	Group Discussion	<ul style="list-style-type: none">– <i>Utah Code 75-5-303 (Approved by WINGS 12.22.22)</i>– <i>Utah Code 75-5-303 (Additional Suggestions 7.28.23)</i>– <i>Utah Code 75-5-303 (All in One 8.15.23)</i>
1:15	Stakeholder & Project Updates		
	<ul style="list-style-type: none">Report from Attorney Shortage subcommittee	Subgroup members	
1:30	Other Business		
	<ul style="list-style-type: none">Stakeholder/Agency Updates	WINGS Stakeholders	
2:00	Meeting adjourned		

Next meeting:

October 19, 2023 (via WebEx)

Effective 5/8/2018

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

(1) ~~An person alleged to be incapacitated person~~ or any person interested in the alleged incapacitated person's welfare may petition for a finding of incapacity and appointment of a guardian.

(2) (a) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity.

(b) Unless the person allegedly to be incapacitated ~~person~~ has ~~counsel of the person's own choice, chosen and retained their own counsel,~~ 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.

(3) The legal representation of the incapacitated person by an attorney shall terminate upon the appointment of a guardian, unless:

(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.

(4) ~~(a) 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 court may appoint a health care professional with expertise in the functional capabilities of the person alleged to be incapacitated. The health care professional shall submit to the court a report assessing the functional ability of the person to, with or without assistance: receive and evaluate information, make and communicate decisions, and provide for necessities, as defined in Utah Code 75-1-201(22).~~

(b) The person alleged to be incapacitated may be interviewed by a court visitor

appointed by the court.

(c) The court 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.

(5) (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.

(b) 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.

~~(bc)~~ A ~~The investigation by a~~ court visitor is not required to investigate presence at the hearing if there is clear and convincing evidence from a physician that the person alleged to be incapacitated has extended comatosis.:

~~(i) fourth stage Alzheimer's Disease;~~

~~(ii) extended comatosis; or~~

~~(iii) (A) an intellectual disability; and~~

~~(B) an intelligence quotient score under 25.~~

(d) the person alleged to be incapacitated shall be present at the hearing if counsel has not been appointed to represent the person, as described in Subsections (2) and (6).

~~(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.~~

~~(6d)~~ Counsel for the person alleged to be incapacitated, as defined in Subsection 75-1-201(22), shall only be waived ~~is not required if~~ if all of the following criteria are met:

(a) the person's appearance at the hearing has not been waived and the person appears in court with the petitioner;

(b) 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 hearing described in Subsection (2)

(c) the court appoints a court visitor under Subsection (4);

(d) the person is given the opportunity to communicate, including to the court visitor and during the hearing, the person's acceptance of the appointment of the petitioner;

(e) the person is the biological or adopted child of the petitioner;

(f) the value of the person's entire estate does not exceed \$20,000 as established by an affidavit of the petitioner in accordance with Section [75-3-1201](#); and

(g) the court is satisfied that counsel is not necessary in order to protect the interests of the person.

~~(iii) the person appears in court with the petitioner; (vii) the court appoints a visitor under Subsection (4).~~

~~(iv) the person is given the opportunity to communicate, to the extent possible, the person's acceptance of the appointment of petitioner;~~

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(7) The person alleged to be incapacitated is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the court-appointed health care professional and the court 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.

Amended by Chapter 455, 2018 General Session

Effective 5/8/2018

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

(1) A person alleged to be incapacitated or any person interested in the alleged incapacitated person's welfare may petition for a finding of incapacity and appointment of a guardian.

(2) (a) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity.

(b) Unless the person alleged to be incapacitated has chosen and retained their own counsel, 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 person and the person's parents are indigent.

(i) Counsel for the person alleged to be incapacitated shall:

(A) to the extent expressed or knowable, advocate for the person's preferences or wishes; and

(B) notify the person and the court of any actual or perceived conflict of interest with the petitioner or petitioner's counsel.

(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, unless the petition is filed by a protected person seeking to modify or terminate the protected person's guardianship.

~~(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.~~

(3) The legal representation of the incapacitated person alleged to be incapacitated by an attorney shall terminate upon the appointment of a guardian, unless:

(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.

(4) (a) The court may appoint a health care professional, as defined in Subsection 75-2a-103(15), with expertise in the functional capabilities of the person alleged to be

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Commented [ST3]: From the DLC - even though the proposed protected person did not request the proceeding, Subsection (2)(d) seems to make them pay for the privilege of having their rights restricted or removed. We urge its deletion.

Commented [AR4]: @Katie Cox There was a question about how this is defined or who is included.

Commented [KCSR4]: "health care provider" is defined in code (78B-3-403. Definitions.) as: (13)"Health care provider" includes any person, partnership, association, corporation, or other facility or institution who causes to be rendered or who renders health care or professional services as a hospital, health care facility, physician, physician assistant, registered nurse, licensed practical nurse, nurse-midwife, licensed direct-entry midwife, dentist, dental hygienist, optometrist, clinical laboratory technologist, pharmacist, physical therapist, physical therapist assistant, podiatric physician, psychologist, chiropractic physician, naturopathic physician, osteopathic physician, osteopathic physician and surgeon, audiologist, speech-language pathologist, clinical social worker, certified social worker, social service worker, marriage and family counselor, practitioner of obstetrics, licensed athletic trainer, or others rendering similar care and services relating to or arising out of the health needs of persons or groups of persons and officers, employees, or agents of any of the above acting in the course and scope of their employment.

And then 75-2a-103. Definitions. refers back to the above: (15)"Health care provider" means the same as that term is defined in Section 78B-3-403, except that "health care provider" does not include an emergency medical services provider.

incapacitated. The health care professional shall submit to the court a report assessing the functional ability of the person to, with or without assistance: receive and evaluate information, make and communicate decisions, and provide for necessities, as defined in [Utah Code 75-1-201\(22\) Subsection 75-1-201\(22\)](#).

(b) The person alleged to be incapacitated may be interviewed by a court visitor appointed by the court.

(c) The court 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.

(5) (a) The person alleged to be incapacitated shall be present at the hearing and see or hear all evidence bearing upon the person's condition.

(b) If the person alleged to be incapacitated participates in the hearing virtually, the person shall be:

(i) on their own camera;

(ii) in a private place;

(iii) able to choose who, if anyone, is present in the room with them, except for the petitioner and proposed guardian; and

(iv) able to speak freely and confidentially.

(c) If the person seeking the guardianship requests a ~~The court shall not waive presence~~ ~~waiver of presence~~ of the person alleged to be incapacitated, the court shall ~~incapacitated, unless, following an investigation by a court visitor, the court finds there is no accommodation that will enable the person to participate in the hearing, order an investigation by a court visitor, the costs of which~~ ~~The cost of the investigation~~ shall be paid by the person seeking the guardianship.

(d) A court visitor is not required to investigate the allegedly incapacitated person's ability to attend the hearing if there is clear and convincing evidence from a physician that the person ~~alleged to be incapacitated~~ is experiencing has extended comatosis.

(d) the person alleged to be incapacitated shall be present at the hearing if counsel has not been appointed to represent the person, as described in Subsections (2) and (6).

(6) Counsel for the person alleged to be incapacitated, shall only be waived if all of the following criteria are met:

Commented [ST6]: From the DLC - If a proposed protected person chooses to participate in a hearing virtually, it is vital they can speak and express their wishes and concerns freely. To this end, we recommend including language, in Subsection (5)(a), specifying a proposed protected person must be: on their own camera (so it is clear they are a separate party needing to be addressed directly); in a private place where they can speak confidentially; and able to communicate as they wish (i.e. not directed or coached, and that no one is present whom they don't, etc.).

Commented [AR7]: @Katie Cox Michelle suggests removing this because it can be a challenge in the nursing home or other facility. Also, is "communicate freely and confidentially" adequate?

Commented [KC8R7]: I guess I would say that a private place could be their room or an office or something similar. We could change the language a bit if needed to get at that concern. But probably it isn't a hill we need to die on and it could come out if it feels concerning to others. We could say "in a quiet place"? I am fine following your lead here

Commented [AR9]: @Katie Cox Michelle's suggestion.

Commented [KC10R9]: I understand the intent of this, but I worry it might be read as meaning the opposite of what is intended (like that they can exclude anyone from the room except for these people). But maybe I am being dramatic. Also, there may be times when the individual wants that person in the room with them and it doesn't seem right, if we're talking about autonomy, to say they cannot have a person they wish to have there present. Also, that person would theoretically need to be on their own video anyway bc they would be a subject or party of the proceeding.

Commented [AR11]: @Katie Cox Michelle is concerned judges are waiving presence too often or not following accommodation recommendations that would allow participation. I think this may address both concerns?

Commented [KC12R11]: How did this subpart read in our last draft?
But yes, I think this gets at the concerns!

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Commented [ST16]: What is the logic behind this particular restriction?

If cases where the respondent is turning 18 carry as much potential for being complex or incorrectly requesting a full guardianship when limited is more appropriate, why are these the only case types included in the waiver possibility? This ensures that other cases cannot be referred to the CVP, and there is no other recourse for those cases in the statute at this time.

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Commented [ST15]: Not in track-changes: subsection order has been rearranged.

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If cases where the respondent is turning 18 carry as much potential for being complex or incorrectly requesting a full guardianship when limited is more appropriate, why are these the only case types included in the waiver possibility? This ensures that other cases cannot be referred to the CVP, and there is no other recourse for those cases in the statute at this time.

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