

Utah Working Interdisciplinary Network of Guardianship Stakeholders (WINGS)

Thursday, June 20, 2024, 12:00 pm | 2 hours |

AGENDA

	Topic	Presenter	Materials
12:00	Meeting begins		
	<ul style="list-style-type: none"> Housekeeping, minutes Welcome guests and new members 	Judge Kelly	<ul style="list-style-type: none"> <i>WINGS Minutes (April 2024 – draft)</i>
12:10	Funding for Attorneys		
	<ul style="list-style-type: none"> Comment period on Virtual Hearings (URCP 87) BDJC Memo Funding proposal 	Judge Kelly Keri Sargent	<ul style="list-style-type: none"> <i>(Proposed) URCP 87 – Virtual Hearings</i> <i>BDJC Memo – Guardianship of Minors Becoming Adults</i> <i>GSP Data – Funding Need</i>
12:45	WINGS Updates		
	<ul style="list-style-type: none"> Utah Code 75-5-303 	Keri Sargent	
	<ul style="list-style-type: none"> Order on Review of Guardianship and Conservatorship Reports 	Judge Kelly Keri Sargent	
1:35	Other Business		
	<ul style="list-style-type: none"> Tantalisa Clayton Retirement & Successor 	Judge Kelly	
	<ul style="list-style-type: none"> 		
2:00	Meeting adjourned		

Next meeting:

August 15, 2024 (via WebEx)

WINGS Subcommittees

Forms Workgroup	G/C Manual & Test Workgroup	Attorney Gaps Subcommittee	
Sarah Box	Deborah Brown	Sarah Box	Judge Keith Kelly
Katie Cox	Brant Christensen	Brant Christensen	Keri Sargent
Leslie Francis	Rob Denton	Megan Connelly	Shonna Thomas
Keri Sargent	Shonna Thomas	Katie Cox	
Shonna Thomas	Katie Thomson	Leslie Francis	
	Troy Wilson	Kristen Kellems	

1 **Rule 87. In-person, remote, and hybrid hearings; requests for accommodation.**

2 (a) **Definitions.**

3 (1) "Participant" means a party, an intervenor, a person who has objected to a
4 subpoena, or an attorney for any such persons.

5 (2) "In-person" means a participant will be physically present in the courtroom.

6 (3) "In-person hearing" means a hearing where all participants appear in person.

7 (4) "Remote" or "remotely" means a participant will appear by video conference
8 or other electronic means approved by the court.

9 (5) "Remote hearing" means no participants will be physically present in the
10 courtroom and all participants will appear remotely.

11 (6) "Hybrid hearing" means a hearing at which some participants appear in person
12 and others appear remotely.

13 (b) **Setting hearing format; factors to consider.** The court has discretion to set a hearing
14 as an in-person hearing, a remote hearing, or a hybrid hearing. In determining which
15 format to use for a hearing, the court will consider:

16 (1) the preference of the participants, if known;

17 (2) the anticipated hearing length;

18 (3) the number of participants;

19 (4) the burden on a participant of appearing in person compared to appearing
20 remotely, including time and economic impacts;

21 (5) the complexity of issues to be addressed;

22 (6) whether and to what extent documentary or testimonial evidence is likely to be
23 presented;

24 (7) the availability of adequate technology to accomplish the hearing's purpose;

25 (8) the availability of language interpretation or accommodations for
26 communication with individuals with disabilities;

27 (9) the possibility that the court may order a party, who is not already in custody,
28 into custody;

29 (10) the preference of the incarcerating custodian where a party is incarcerated, if
30 the hearing does not implicate significant constitutional rights; and

31 (11) any other factor, based on the specific facts and circumstances of the case or
32 the court's calendar, that the court deems relevant.

33 **(c) Request to appear by a different format.**

34 (1) **Manner of request.** A participant may request that the court allow the
35 participant or a witness to appear at a hearing by a different format than that set
36 by the court. Any request must be made verbally during a hearing, by email, by
37 letter, or by written motion, and the participant must state the reason for the
38 request. If a participant is represented by an attorney, all requests must be made
39 by the attorney.

40 **(A) Email and letter requests.**

41 (i) An email or letter request must be copied on all parties on the
42 request;

43 (ii) An email or letter request must include in the subject line,
44 "REQUEST TO APPEAR IN PERSON, Case _____" or
45 "REQUEST TO APPEAR REMOTELY, Case _____;" and

46 (iii) An email request must be sent to the court's email address,
47 which may be obtained from the court clerk.

48 **(B) Request by written motion.** If making a request by written motion, the
49 motion must succinctly state the grounds for the request and be

50 accompanied by a request to submit for decision and a proposed order. The
51 motion need not be accompanied by a supporting memorandum.

52 (2) **Timing.** All requests, except those made verbally during a hearing, must be
53 sent to the court at least seven days before the hearing unless there are exigent
54 circumstances or the hearing was set less than seven days before the hearing date,
55 in which case the request must be made as soon as reasonably possible.

56 **(d) Resolution of the request.**

57 (1) **Timing and manner of resolution.** The court may rule on a request under
58 paragraph (c) without awaiting a response. The court may rule on the request in
59 open court, by email, by minute entry, or by written order. If the request is made
60 by email, the court will make a record if the request is denied.

61 (2) **Court's accommodation of participant's preference; factors to consider.** The
62 court will accommodate a timely request unless the court makes, on the record, a
63 finding of good cause to order the participant to appear in the format originally
64 noticed. The court may find good cause to deny a request based on:

65 (A) a constitutional or statutory right that requires a particular manner of
66 appearance or a significant possibility that such a right would be
67 impermissibly diminished or infringed by appearing remotely;

68 (B) a concern for a participant's or witness's safety, well-being, or specific
69 situational needs;

70 (C) a prior technological challenge in the case that unreasonably
71 contributed to delay or a compromised record;

72 (D) a prior failure to demonstrate appropriate court decorum, including
73 attempting to participate from a location that is not conducive to
74 accomplishing the purpose of the hearing;

75 (E) a prior failure to appear for a hearing of which the participant had
76 notice;

77 (F) the possibility that the court may order a party, who is not already in
78 custody, into custody;

79 (G) the preference of the incarcerating custodian where a party is
80 incarcerated, if the hearing does not implicate significant constitutional
81 rights;

82 (H) an agreement or any objection of the parties;

83 (I) the court's determination that the consequential nature of a specific
84 hearing requires all participants to appear in person; or

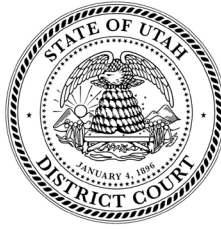
85 (J) the capacity of the court, including but not limited to the required
86 technology equipment, staff, or security, to accommodate the request.

87 (3) **Effect on other participants.** The preference of one participant, and the court's
88 accommodation of that preference, does not:

89 (A) change the format of the hearing for any other participant unless
90 otherwise ordered by the court; or

91 (B) affect any other participant's opportunity to make a timely request to
92 appear by a different format or the court's consideration of that request.

93 Effective May/November 1, 20__



BOARD OF DISTRICT COURT JUDGES

May 22, 2024

Hon. William Kendall
Chair, Third District
Hon. David Williams
Vice Chair, Second District
Hon. Brandon Maynard
First District
Hon. Joseph M. Bean
Second District

Hon. Heather Brereton
Third District
Hon. Kent Holmberg
Third District
Commissioner Russell Minas
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Fourth District

Hon. Christine Johnson
Fourth District
Hon. Matthew Bell
Fifth District
Hon. Don Torgerson
Seventh District
Hon. Clark McClellan
Eighth District

MEMORANDUM

TO: District Court Judges
FROM: Board of District Court Judges
RE: Guardianships of Minors Becoming Adults
CC: Clerks of Court, Active Senior District Court Judges

District Judges,

The Board of District Court Judges (the “BDJ”) has learned that there may be a district split regarding the requirement for an attorney in guardianship proceedings under Utah Code Ann. § 75-5-317(Minor Becoming an Incapacitated Adult). The BDJ sends this letter to have each district handle the situation consistently. It is the BDJ’s recommendation that an attorney is required unless the exceptions in Utah Code Ann. § 75-5-303(5)(d) are present, including the appointment of a courtroom visitor.

Chapter 5 of the Utah Uniform Probate Code (Title 75) contains several provisions regarding guardianships. Part 2 addresses guardians of minors and Part 3 addresses guardians of incapacitated persons (i.e. other than minors). The code sections treat minors and adults differently regarding the appointment of an attorney. For minors, section 75-5-207(4) allows a court to appoint an attorney at its discretion any time it “determines that the interests of the minor are or may be inadequately represented.” For persons other than minors, however, the Code gives the person alleged to be incapacitated the right to be represented by an attorney (Utah Code Ann. § 75-5-301.5(1)(a)) and requires the court to appoint an attorney unless the person alleged to be incapacitated has counsel of their own choice (Utah Code Ann. § 75-5-303(2)(b)) or the protections listed in section 75-5-303(5)(d) are in place.

**The mission of the Utah judiciary is to provide an open, fair,
efficient, and independent system for the advancement of justice under the law.**

Utah Code Ann. § 75-5-317 addresses guardianships for minors becoming incapacitated adults. That section allows the petitioner to begin the process when the person alleged to be incapacitated is 17 years, six months of age so the guardianship will be in effect when the person turns 18. But section 75-5-317 is silent regarding the requirement of an attorney.

The BDJ believes that section 75-5-303 applies in guardianship proceedings for minors becoming incapacitated adults and, therefore, requires an attorney unless subsection (5)(d) applies. Our belief stems from the fact that this procedure is found in part 3 of the Uniform Probate Code which, as discussed above, addresses guardianships of persons other than minors. Said differently, the only difference between guardianships of adults and guardianships of minors becoming adults is that a petitioner may commence the process for a minor becoming and adult while the proposed ward is still a minor.

The BDJ notes that the Utah Courts website may confuse those visiting the page regarding guardianship of a minor. Of note, there is very little discussion regarding section 75-5-317 on the website and what little discussion exists states:

Anyone asking to be the guardian of a respondent who will soon be an adult can do so if the respondent is at least 17 years and 6 months old. If the court grants the guardianship, it can become effective on the day the respondent turns 18. Utah Code 75-5-317(2).

That same page, however, only discusses the appointment of an attorney as it relates to a guardianship for a minor:

The judge may appoint an attorney to represent the minor if at any time s/he determines that the interests of the minor child are, or may be, inadequately represented. In such proceedings the court may give consideration to the preference of the minor if the minor is 14 or older

The BDJ is working to make changes to reflect the opinion contained in this letter.

Finally, in interpreting and applying the statute as discussed herein, there may be times when a minor becoming an incapacitated adult does not have an attorney (because they cannot afford an attorney of their choice and have not been able to secure counsel through the signature program) but a guardianship is necessary to allow the proposed ward to continue to receive services when they becomes an adult. In those instances, the BDJ recommends that courts use their discretion to comply with the statute and also accommodate a guardianship, including granting a temporary guardianship to allow the proposed ward to obtain counsel or to allow for the protections in Utah Code Ann. §75-5-303 to be put in place, including the appointment of a courtroom visitor.

1. Utah Code requires the court to appoint counsel for the respondent in specific guardianship proceedings and permits appointment of counsel in others.
 - Utah Code 75-5-303(2)(a) requires the court to appoint an attorney to represent a respondent in an adult guardianship proceeding if the respondent does not already have counsel. Therefore, all respondents in adult guardianship proceedings are expected to be represented by an attorney. This is an unfunded mandate that places the burden on the court to fulfill.
 - Utah Code 75-5-407(2) states that the court may appoint an attorney in conservatorship proceedings.
 - Utah Code 75-5-207(4) states that the court may appoint an attorney in minor guardianship proceedings if the court determines that the interests of the minor are or may be inadequately represented.
 - Utah Code 75-5-301.5(1)(a) states that the alleged incapacitated person has the right to be represented by counsel before guardianship is imposed.
 - Utah Code 75-5-301.5(2)(a) states that an incapacitated person under guardianship has the right to have counsel represent them at any time after guardianship has been established.
 - Utah Code 75-5-306(6) states that when a petition is filed to terminate a guardianship, the court shall follow the same procedures to safeguard the rights of the incapacitated person for a petition for appointment of a guardian under Section 75-5-303.
2. A recent memo by the Board of District Court Judges regarding proceedings involving allegedly incapacitated minors turning 18 recommends that district court judges treat those cases the same as adult guardianships, including the requirement for the respondent to be represented by counsel. Some districts had been treating these cases like those of a minor, wherein counsel was not required.

This recommendation will increase the number of attorney requests sent to the GSP. For example, the third district (SLC) anticipates an increase of up to 600% in the number of requests sent to the GSP each month, and the GSP has already seen a significant increase in cases from the fourth district based in part upon this recommendation.

3. Utah Code only permits waiver of the attorney requirement in adult proceedings under 75-5-303(2)(a) if all seven conditions have been met under 75-5-303(5)(d), including that the petitioner must be the parent of the respondent, the court must first allow 60 days to find an attorney using a list of volunteer attorneys, and then appoint a Court Visitor if an attorney does not volunteer.

A Court Visitor investigation can take an additional 6-8 weeks to complete and is also dependent upon the availability of volunteers. Furthermore, Court Visitor volunteers serve as the eyes and ears of the court. They do not advocate for any party in the case. Utah Code 75-5-301.5(1)(a) states that a person alleged to be incapacitated has the right to “be represented by counsel before a guardianship is imposed and have counsel represent the person during the guardianship proceeding.” A Court Visitor does not represent the respondent.

The waiver of an attorney places an undue burden on the Court Visitor Program, delays court proceedings, conflicts with the requirement to set a hearing within _ days... (need to find the rule or statute here), and could infringe on the rights of alleged incapacitated persons who do not have an advocate in the court to speak on their behalf before their rights are potentially removed. (This part of the code was a result of a lawsuit settlement between the court and the Disability Law Center in 2018.)

4. The number of attorneys who are volunteering to take on guardianship cases through the Guardianship Signature Program has steadily decreased over the years, while filings have remained consistent. (Some

filings in FY2024 have increased, but the pattern across time is consistently holding steady.) It is not sustainable to continue to rely on one unpaid attorney to cover the majority of filled requests. (See data points below to support these statements.)

5. The switch to virtual hearings during the COVID-19 pandemic allowed the GSP to reach attorneys outside the case area. This practice continues today. Although the GSP is still unsuccessful in fulfilling most of the attorney requests, if the rule changes to URCP 87 (currently out for comment) are approved, this could have a significant impact on guardianship proceedings and decrease even the small number of fulfilled requests seen now.

Utah Code 75-5-303(5)(a) states, “*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.*” During the pandemic, this in person requirement was interpreted to also permit attending the hearing virtually, as the respondent would still be able to see and hear all evidence. The proposed URCP 87 rule specifically defines “in-person” to mean a participant [a party, an intervenor, a person who has objected to a subpoena, or an attorney for any such persons] will be physically present in the courtroom. Judges may determine that this definition and the language in the statute mean that guardianship proceedings must occur in person.

It is estimated that the number of cases that attorneys currently accept would decrease by as much as 90%. Cases that are accepted would be limited mostly to those in 3rd District – SLC, leaving requests in other districts to go unfulfilled. (Funding attorneys would not necessarily solve this issue, but I included it here to show that the reliance on volunteer attorneys could be impacted by this rule change.)

6. Since its inception in 2015, the GSP has never been successful in meeting the needs of the court and community. The model utilizing the services of volunteer attorneys to accept pro bono or low bono guardianship cases does not work on a consistent, reliable basis with the volume of requests received. Many proceedings (approximately 50%) are resolved without counsel and in direct conflict with Utah Code 75-5-303(2)(a) and (5)(d). Therefore, a different model, or complementary model is needed.

Funding 2-3 attorneys to cover guardianship cases would provide a consistent resource to handle the mandate in Utah Code, allow cases to proceed through the courts in a timely and efficient manner, and provide vulnerable individuals with the legal representation needed to ensure their needs and best interests are being met.

The GSP partnership with the Utah State Bar could remain and cases could continue to be offered to attorneys looking for volunteer opportunities, but cases that go unfilled after an initial listing and limited time period could be forwarded to the paid attorneys to handle. Additionally, the GSP uses the Modest Means fee schedule to determine if attorneys accepting GSP cases are doing so pro bono or if recouping some fees is possible. The attorneys funded by this request could continue to follow the Modest Means fee schedule and bill for fees when the party has the means to pay for counsel, thereby extending the funding provided to those who are unable to pay for legal representation.

GSP FUNDING REQUEST DATA

New G/C Filings	FY2024*	FY2023	FY2022	FY2021	FY2020
Adult Guardianship	500 (Q1-Q3 = 377)	471	478	513	497
Adult Child Guardianship	496 (Q1-Q3 = 373)	428	495	453	384
Minor Guardianship	746 (Q1-Q3 = 471)	639	765	743	895
Conservatorship	146 (Q1-Q3 = 112)	137	151	133	111

* Q4 data for FY2024 is not yet available. The Q4 filing totals of 2021 - 2023 were used to obtain an estimated number of filings for FY2024 Q4, to create a projected total.

FY2025 – GSP Projection

- 4th District requests have increased –
 - 14 requests in FY2022
 - 25 requests in FY2023
 - 55 requests in FY2024
- 3rd District (SLC) requests will increase –
 - 53 requests in FY2022
 - 39 requests in FY2023
 - 49 requests in FY2024
 - 121 cases in calendar 2023 not sent to the GSP but should have been.
 - 95 requests for FY2024 have not been sent to the GSP (as of April) but could have been.
 - They anticipate 20-30 *additional* requests per month starting in July 2024, to comply with BDJC memo. (Up to a 600% increase.)
- All other districts will likely see increases in requests as a result of the BDJC memo.

FY2024 – YTD (5/31/24)

- 240 attorney requests sent to the GSP -
 - 123 of the 240 resolved without an attorney. (51%)
 - 117 of the 240 resolved with an attorney. (49%)
 - Of the 117 with an attorney:
 - Leslie Francis served as attorney on 74 cases. (63%)
 - GSP attorneys (n=9) served on 26 cases. (22%)
 - Non-GSP attorneys served on 17 cases. (15%)
- There are 42 open attorney requests on the tracking list as of 5/31/24.
- 37 Attorney Waiver cases have been completed by the Court Visitor Program.
- 15 Attorney Waiver cases are currently pending assignment in the Court Visitor Program.

FY2023

- 150 attorney requests sent to the GSP -
 - 76 of the 150 resolved without an attorney. (51%)
 - 74 of the 150 resolved with an attorney. (49%)
 - Of the 74 with an attorney:
 - Leslie Francis served as attorney on 26 cases. (35%)
 - GSP attorneys (n=8) served on 34 cases. (46%)
 - Non-GSP attorneys served on 14 cases. (19%)
- 12 Attorney Waiver cases were completed by the Court Visitor Program. (Attorney Waiver introduced as a new case type in FY2023; previously, the CVP had to label these cases as Circumstances.)

FY2022

- 155 attorney requests sent to the GSP -
 - 38 of the 155 resolved without an attorney. (25%)
 - 117 of the 155 resolved with an attorney. (75%)
 - Of the 117 with an attorney:
 - Leslie Francis served as attorney on 42 cases. (36%)
 - GSP attorneys (n=11) served on 60 cases. (51%)
 - Non-GSP attorneys served on 15 cases. (13%)