Agenda

Utah Working Interdisciplinary Network of Guardianship Stakeholders (WINGS)

August 2, 2018
12:00 to 2:00 p.m.
Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

12:00 p.m.	Welcome, minutes, introductions	Tab 1	James Brady
12:10 p.m.	Phase II report on Elder Justice Innovation grant	Tab 2	Karolina Abuzyarova
12:15 p.m.	Updated bench book, bench card and checklist: • Legislative changes 2018 • Recommendations of ACLU/Disability Law Center working group	Tab 3	Mary Jane Ciccarello
12:35 p.m.	Legislative Fact Sheet on Guardianship and the Right to Visitation, Communication, and Interaction by ABA	Tab 4	Mary Jane Ciccarello
12:45 p.m.	• Utah State Courts guardianship data for FY 2018, last quarter of FY 2018 • Possible date change to October 11th?		James Brady

Committee webpage: http://www.utcourts.gov/utc/wings

2018 meeting schedule: October 4, December 6

Tab 1

Working Interdisciplinary Network of Guardianship Stakeholders

June 7, 2018 Summary Minutes

Attendees: Shannon Alvey, Andrew Riggle, Judge David Connors, Judge Keith Kelly, Judge James Brady, Karolina Abuzyarova, Michelle Wilkes, Nancy Sylvester, Wendy Fayles, Daniel Musto, Robert Denton, Dustin Hammers, Nicholas Stiles, Senator Todd Weiler, Weiler's intern, Joanne Bueno Sayre, TantaLisa Clayton, Nels Holmgren, Kaye Lynn Wotton, Mary Jane Ciccarello, Erica Wood, Dari Pogach, Shane Bahr, Jacey Skinner

Excused: James Toledo, Kent Alderman, Nan Mendenhall

Introduction: WINGS Chair greeted the group and asked everyone to introduce themselves, so that guests from ABA know what agencies are in the room. Minutes were approved.

Uniform Guardianship, Conservatorship and other Protective Arrangements Act: Committee then went on to discuss the Uniform Act. Court Legislative Liaison, Jacey Skinner, was present, as Shane Bahr invited her suggesting that it might be helpful in light of her work. Senator Weiler and his intern were present as well. Kent Alderman was not present at the meeting that day, but takes part in the Elder Law Section and Estate Planning Section workgroup on review of the Uniform Act.

Andrew Riggle took the lead in the discussion saying that a group was formed to see what changes have to be made to Utah Probate Code based on the Uniform Act and he made himself part of the group. Senator Weiler noted that Lyle Hilliard and Lowry Snow are both working on the issue. He also noted that usually legislators are skeptical about voting on uniform law, as Commission is usually not flexible to the suggested changes. However, the legislators are likely to pass the bill.

Overview of WINGS Groups Nationwide: Erica Wood and Dari Pogach of the American Bar Association Commission on Law and Aging were on a site visit to Utah WINGS as part of the Elder Justice Innovation Grant "WINGS Focus on Court Oversight".

Erica and Dari made presentation on national WINGS network. The idea of WINGS has been around for about 35 years. As of March 2018 26 states have WINGS or WINGS-like entities. Utah was one of the first states to establish WINGS in 2013 when we received grant from National Guardianship Network together with Texas, New York and Oregon.

The goal of WINGS is to sustain a lasting guardianship reform through court-community partnerships, evaluation of "on the ground" practices and ongoing forum. Some of the challenges to a sustainable guardianship reform that Erica mentioned in her presentation were: increasing need, diverse practices, complexity of cases, staffing/turnover, stakeholder silos.

Some of the WINGS challenges identified by coordinators were: sustainability, court buy-in, funding, stakeholder engagement, collective impact, measuring success. Erica and Dari spoke about milestones in WINGS movement nationally and in Washington, including the Government Accountability Office reports on lack of guardianship oversight by the Courts, Elder Protection Act signed by the President, 49 pieces of legislation in 25 states, various magazine publications exposing guardianship-related issues around the country (New Yorker article), media attention (HBO program by John Oliver on guardianship).

GRAMP Transition: District Court Administrator, Shane Bahr, provided an update on transition of the Court Visitor Program and the staffing needs. The program being state funded starting July 1, 2018, and taking into account increasing needs of the program particularly influx of different types of cases and a backlog of cases, the caseload has to be split equally between two coordinators.

That also meant that grants needed to be wrapped up, e.g.: Elder Justice Innovation grant that focused on judicial education, and no new grant application would be pursued to e.g. implement recommendations of the Court-sponsored roundtable held in November 2017 on intersection of guardianship, essential treatment and involuntary commitment.

ASPIRE grant that connects WINGS experts with families with children with disabilities will continue until February 2019, as it is less labor intensive and coordination is only required to set up the classes and provide reimbursement to experts, as well as quarterly financial reports to the ASPIRE agency. District Court Administrative Assistant will be able to help Program Coordinator with ordering meals for ASPIRE class participants.

Shane discussed that the program started revision of policies and procedures in late spring 2018, as some of the documents are outdated. Since the inception program had about 1300 cases, currently there are a little over 50 volunteers, 22 active interview cases, 45 pending whereabouts cases that need to be assigned. Cases are becoming more complex. In addition to case management, volunteer recruitment and training need to be addressed.

GRAMP/Court Visitor Program legal update:
Nancy Sylvester provided update on collaboration and development of an MOU between the Court Visitor Program of the Administrative Office of the Courts and Adult Protective Services regarding the use of APS reports in Court Visitor reports.

Nancy also spoke about a meeting with the Juvenile Court Administrators to coordinate cases that involve minors under custody. Nancy proposed rule amendment to the Committee on the Rules of Civil Procedure in response to meeting with Juvenile Court.

Nancy noted that parties have not been advising the juvenile court that there is a minor guardianship in place when the juvenile court is entering custody orders. This creates a lot of work down the road for the district court when it loses contact with the guardian and the minor. Request to change is underlined below:

Rule 100. Coordination of cases pending in district court and juvenile court.
(a) Notice to the court. In a case in which child custody, child support or parent time is an issue, all parties have a continuing duty to notify the court:
(a)(1) of a case in which a party or the party's child is a party to or the subject of a petition or order involving child custody, child support or parent time, <u>including minor guardianship in the district court;</u>

Committee on the Rules of Civil Procedure will meet in fall 2018 and that's when the request to change will be discussed.

Next meetings: August 2, October 4, Dec. 6, 2018.

Tab 2

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

June 27, 2018

Richard H. Schwermer
State Court Administrator
Ray Wahl
Deputy Court Administrator

American Bar Association
Commission on Law and Aging
WINGS Project Staff
1050 Connecticut Ave NM, #400
Washington DC 20036

Dear Erica Wood and Lori Stiegel,

Utah Administrative Office of the Courts completed Phase I from October, 2017 until June 30, 2018 of the Elder Justice Innovation Grant "WINGS Focus on Court Oversight' and would like to report the total allowable project match of **$60,858.80.**

Match categories included in the total allowable amount are stakeholder time in the amount of $52,074.44. This amount was calculated with the time report form provided by the Commission, with the hourly rate multiplied by the number of hours contributed by each Utah WINGS member. Additional category of the match included part of Program Coordinator's salary dedicated to WINGS management and paid by the Court's one-time funds in the amount of $8,784.36. This category was calculated by 6 hours/week dedicated to WINGS coordination, in addition to 6 hours/week supported by the Elder Justice Innovation grant (see receipts attached to financial report for pays stabs with hourly rate and fringe benefits).

I certify that the donated resources are not, in any way, paid for by federal funds; the amount is accurate to the best of my knowledge; the calculated value is reasonable and in line with accepted rates; and the match amount can be substantiated.

Sincerely,

Shane Bahr
District Court Administrator
Administrative Office of the Courts
450 South State Street, P.O. Box 140241
Salt Lake City, Utah 84114-0241
shaneb@utcourts.gov
(801) 578-3971

WINGS ACL Elder Justice Innovation Grant:
Utah WINGS Phase II Program Report

This report covers activities from October 1, 2017 through June 30, 2018.
Due Date: July 31, 2018
Coordinator/Report Author: Karolina Abuzyarova, karolinaa@utcourts.gov, 801-578-3925
Date of Report: July 12, 2018

List the Utah WINGS Stakeholders, and indicate members of the Steering Committee:

1. Andrew Riggle, Disability Law Center, **Steering Committee**
2. Daniel Musto, Long-Term Care Ombudsman
3. David Connors, Second District Court Presiding Judge, WINGS Chair, **Steering Committee**
4. Dustin Hammers, University of Utah Center for Alzheimer's Care, Imaging and Research
5. James Brady, Fourth District Court Presiding Judge
6. James Toledo, Office of Indian Affairs
7. Joanne Bueno Sayre, Probate Department, Third District Court
8. Karolina Abuzyarova, WINGS and Court Visitor Program Coordinator, Utah State Courts, **Steering Committee**
9. Kaye Lynn Wootton, Medicaid Fraud Control Unit, Office of Utah Attorney General
10. Keith Kelly, Third District Court Judge
11. Kent Alderman, Elder Law Attorney, **Steering Committee**
12. Mary Jane Ciccarello, Borchard Foundation on Law and Aging, **Steering Committee**
13. Michelle Wilkes, Court Visitor Volunteer Coordinator, Utah State Courts
14. Nan Mendenhall, Adult Protective Services, **Steering Committee**
15. Nancy Sylvester, Associate General Counsel, Utah State Courts, **Steering Committee**
16. Nels Holmgren, Division of Adult and Aging Services, **Steering Committee**
17. Robert Denton, Disability and Elder Law Attorney
18. Shannon Alvey, Office of Public Guardian, **Steering Committee**
19. Wendy Fayles, National Alliance on Mental Illness.

List any Working Groups your WINGS has created:

- Subcommittee on judicial response protocol in cases of abuse, neglect and exploitation
- Subcommittee on judicial protocol in establishing limited guardianship.

What did you accomplish, what challenges did you face and what recommendations did you make to address these challenges?

- **Qualitative:**

Utah WINGS held judicial education classes in all districts except two on the subject of "Guardianship Basics". Presentations were very brief from fifteen minutes in some districts to

one hour in others. Presentations focused on the alternatives to guardianship, judicial determination of capacity of vulnerable adults, statutory preference and tools in establishing limited guardianship, need for continuous Court oversight including visitor investigations, review of guardians' annual reports and locating protected persons and guardians, as well referral of cases with alleged abuse to corresponding agencies for more in-depth investigation.

The goal of increasing limited guardianship appointments is currently not measured. However, WINGS Coordinator and District Court Administrator met with Court Services Department that is in charge of rewriting Court database and followed up on suggested changes to track number of limited guardianship cases over time. Court clerks suggested tracking the type of limited guardianship for the purpose of required annual reporting, so that the Court knows what to look for in the report. Tracking of limited guardianship is to be implemented in 2020 or later.

More important than the classes that were conducted, were the discrepancies in the system that came to light during conversations with judges, court administrators, clerks, public and professionals. These might not be considered "accomplishments", but challenges that need to be addressed continuously with dedication and commitment rather than with a one-year grant sponsored activities that come and go.

On a qualitative side, the way of daily practice remains the same with mostly cursory reviews of limitations and primarily full guardianship appointments. Utah WINGS identified a need to bridge available judicial tools and resources with the standards of practice that reflect utilization of these tools. Making education and tools available is a great opportunity. The problem arises when we ask if the tools are being utilized in daily practice.

Another problem identified is the need for continuous education of clerks. While in some districts judges rely heavily on clerks and trust the way things worked for decades, in other districts judges welcome education and rely more on attorneys filing petitions, who at the same time also need education. Probate clerks often lack education on the legal standards and need to have access to this information to flag problems.

Education for the Bar is implemented partially through the Guardianship Signature Program, partnership of the Utah State Bar and the Courts in providing pro bono or low bono representation to vulnerable adults in guardianship. Recruitment of volunteer attorneys is done through continuous legal education offered once a year.

Court leadership buy-in remains a problem. Court administrators are in charge of implementing the probate standards of practice and bridging the gap of the most innovative tools made available by WINGS group and the daily court practice. That could possibly be accomplished by incorporating guardianship education in the Judicial Institute's curriculum for judges and clerks. Another possible solution is for the WINGS findings to inform policy and procedures of the Court by communicating the identified problems and gaps to the Board of District Court Judges, Judicial Council or Management Committee that will then come up with a resolution and implementation plan if guardianship reform is identified as one of the priorities.

Change doesn't come on a rolling basis and requires paying close attention and hard work in implementing it. The fact that Court Visitor Program is funded by State of Utah as of July 1, 2018, after 7 years of one-time funds and grant support, is a great first step. However, guardianship system gaps cannot be masked with the feel-good volunteer program that is only a short term solution, is not a sustainable way of practice, and is not going to address systematic issues in the long term.

Full leadership buy-in and strategic plan identified by the Court and guardianship stakeholders and adopted by Court management and administrators who are in charge of implementing it system-wide would show commitment to serving vulnerable population.

Guardianship cases are the only increasing case type in Court filings according to the last several years of data provided by the Court Services Department. Utah's Long-Term Demographic and Economic Projections provided at the Utah Task Force for Alzheimer's Disease meeting in June 2018 by representative of the Kem C. Gardner Policy Institute at the University of Utah predict significant increase of the older population that is primarily served by the Court probate department, in addition to population with mental health conditions, developmental disabilities, etc.

Table below shows projections in how many times the population over 65 will multiply in Utah between 2018 and 2060:

Age	Total	Female	Male
65-74	2.4	2.3	2.5
75-84	3.9	3.6	4.2
85-99	4.6	4.1	5.4
100+	12.7	9.9	19.9

While we hear that probate is one of the many areas of Court business, does it mean it could be neglected or done as a side project without putting real effort in addressing the gaps in daily procedures? Or maybe Court Visitor Program is good enough, when well-intended and trained volunteers march for a good cause, pay visits, and then phase out, as it is often too much to bear for a volunteer and lack of Court follow up on cases can be truly de-motivating.

That in fact shows lack of buy-in and, if not addressed in a timely manner, will most definitely fire back. It could be expressed by way of an investigative journalism article, or when some dedicated conscientious group of citizens or an organization will take a longer look at the guardianship system in Utah and will do all in their power to keep government accountable for ease of adjudication of rights of persons subject to guardianship.

For example, as it happened in October 2017, when a respectable New Yorker magazine shed light on problems in Nevada guardianship system, where families were not notified by the Court of the filed petitions and appointments of private guardians were simply "rubber-stamped", as no one was flagging the issues, and vulnerable adult became "prisoners" of the guardianship system that cries for a reform.

Sounds familiar. In Utah we hear from judges that they trust the parties and will in most cases grant guardianship unless somebody flags the issue. Three most populated Judicial Districts in Utah have a systematic problem of not serving guardianship petition and notifying family members of the pending guardianship of a loved one. A well-known established guardianship agency in Salt Lake City represented by a well-known established attorney doesn't serve family members with the notice on guardianship, charges outrageous fees and ultimately drains resources of the protected persons under their care. The Court turns a blind eye to the issue flagged by volunteer visitors and program staff. It is easy fall in the rut of how things worked for decades, but they must change.

Or take Pennsylvania system, where a convicted felon became a "reputable" private guardian and Court granted multiple appointments without inquiring into guardian's background. This was one of the several articles published in local Pennsylvania press exposing the Court system.

Utah does not run background checks on guardians, neither we ask the proposed guardian at the hearing if he was convicted or had recent bankruptcy. Questions about past convictions or bankruptcies are new on the checklist in judicial materials prepared by WINGS experts. Question remains if the checklist and other materials will be utilized as a guideline in probate hearings and if the Utah Courts will take guardianship reform to heart.

- **Quantitative. What was produced during the project period and how have these projects been disseminated?**

WINGS meetings in this period were on:

- October 25, 2017
- December 13, 2017
- February 8, 2018
- April 5, 2018
- June 7, 2018

Steering Committee met on the following dates:

- October 13, 2017
- November 20, 2017
- January 10, 2018
- February 22, 2018
- May 14, 2018

Bench presentations on “Guardianship Basics”:

1. February 14, 2018, Third District Court, Salt Lake City
2. April 4, 2018, Second District Court, Farmington
3. April 11, 2018, Seventh District Court, Price
4. April 12, 2018, Fourth District Court, Provo
5. May 10, 2018, Fifth District Court, St. George
6. June 15, 2018, Second District Court, Ogden
7. June 29, 2018, Eighth District Court, Vernal

Judges trained:

The total number of District Court Judges is 82. Although not all district court judges were able to attend bench meeting and listen to and ask questions about adult guardianship proceedings, the updated materials were made available on the Intranet, the Court internal webpage resources for Court personnel.

There are eight judicial districts in Utah and the Board of District Court Judges recommended to reach out to all districts and have presentations at the bench meetings. Classes were conducted in six districts out of eight. First District in Northern Utah declined educational opportunity and Sixth District had a transition to a new Presiding Judge and, despite several follow up efforts on behalf of WINGS Coordinator, was not able to accommodate the request.

Materials published:

Materials were published online on the internal Court website - Intranet in the resources for the District Court Judges. Materials included: bench book with incorporated new checklist and new flowchart on abuse and neglect referral process; checklist with questions as a standalone document abstracted from the bench book, so that judges can use it easily in the proceedings; and a bench card that is a one-page document that was laminated and distributed to the judges in all districts of the Utah Courts.

Describe the status of your strategic planning process and its results:

- **Who participated?**

WINGS members and WINGS Steering Committee participated in planning. Strategic goals were first set at the annual assessment meeting in February 2016 and then were organized in a chart by the WINGS Coordinator who kept updating the chart based on the work completed. Copy of the chart was shared with administrators of the Elder Justice Innovation grant from the Commission on Law and Aging of the American Bar Association.

- **Objectives identified:**

The Subcommittees formed in winter 2017 identified two objectives that evolved during the process of working on the grant. One objective was to establish judicial protocol in referring

cases of abuse and neglect. It was accomplished by creating a chart on referrals before and after guardianship is established and judge suspects abuse, neglect and exploitation.

Another objective was to establish a protocol of crafting limited guardianship that resulted into update of the bench book and bench card expanding existing information and providing a checklist on alternatives to guardianship, inquiry about representation of the respondent, questions and concept of capacity evaluation, statutory preference of limited guardianship and guardianship oversight.

- **Strategies to reach the objectives:**

Generally probate matters are on rotation in the Third Judicial District, largest district in Utah. With 70% of the district court judges being new, it is difficult to gain expertise and improve the process within the short rotation of six month. One of the strategies that is in the works is to increase the rotation from six months to two years in the Third District. One of the District Court Judges took a proactive position and suggested the idea to the Board of District Court Judges and nobody opposed it, however there was no timeline discussed.

Aside from face to face presentations, all materials were uploaded to the Court website in the section on resources for judges and during presentations we went over how to find this information. Updated and new materials were made available, however it is not clear what the next step is and how to make the change in the current process of cursory reviews of guardianship petitions in most districts and reliance on how the process worked for decades.

An effort to track limited guardianship discussed on page 2 is to be implemented with the rewrite of the current Court database system Coris in the next 2-4 years. This might help clerks and judges to inquire whether limited guardianship was considered by the parties.

Describe the actions you have taken to ensure broad-based public participation:

Utah State Office of Indian Affairs is a current member of the Utah WINGS. Representative of the Office of Indian Affairs put together a chart that is part of the WINGS materials on what resources and contacts different tribes on the territory of Utah have that address abuse and neglect of vulnerable adults.

Describe any indicators of increased collaboration among the WINGS stakeholders:

Court Visitor Volunteer Program under the umbrella of the Administrative Office of the Courts and Adult Protective Services signed Memorandum of Understanding on sharing the information about cases. Court Visitor Volunteer Program makes regular referrals to the Attorney General's Office Medicaid Fraud Control Unit and Social Security Administration's Office of Inspector General if there is a suspected abuse of the representative payee funds or Medicaid dollars.

Tab 3

ADULT GUARDIANSHIP & CONSERVATORSHIP BENCH CARD

GUARDIANSHIPS

Respondent's Attendance at Hearing Required

The respondent must attend the hearing and see or hear all evidence about the respondent's condition unless there is clear and convincing evidence from a physician that:

- The respondent has fourth stage Alzheimer's disease;
- The respondent is in an extended coma, or
- The respondent has an intellectual disability with an intelligence quotient score under 25

Otherwise, the court must appoint a court visitor to investigate the ability of the respondent to appear. Utah Code § 75-5-303(5)(a).

Incapacity

The petitioner must prove that the respondent is incapacitated by clear and convincing evidence. *In re Boyer*, 636 P.2d 1085 (Utah 1981). Incapacity is defined in Utah Code §75-1-201(22).

The respondent *may* be examined by a physician appointed by the court and *may* be interviewed by a visitor sent by the court. Utah Code §75-5-303(4).

Right to an attorney

The respondent has the right to an attorney of their choice. Utah Code §75-5-303(2).
If the respondent does not have counsel, the court must appoint one through the Guardianship Signature Program.

An attorney is not required if the court makes these findings under Utah Code §75-5-303(5)(d):

- The respondent is the biological or adopted child of the petitioner;
- The value of the respondent's estate does not exceed $20,000;
- The respondent appears in court with the petitioner;
- The respondent is given the opportunity to communicate, to the extent possible, his or her acceptance of the appointment of petitioner;
- The court is satisfied that counsel is not necessary to protect the respondent's interests,
- No attorney from the Guardianship Signature Program is able to provide counsel within 60 days of court appointment of counsel, and
- The court appoints a court visitor.

If the court finds counsel is necessary, a second hearing will be required.

Limited vs. Full Guardianship

The court shall prefer a limited guardianship and may only grant a full guardianship if no other alternative exists. If the court does not grant a limited guardianship, a specific finding shall be made that nothing less than a full guardianship is adequate. Utah Code §75-5-304.

Continuing Jurisdiction

Court monitoring of guardians is required to ensure the welfare of incapacitated adults, identify abuses, and sanction guardians who demonstrate malfeasance. *See* NCSC, National Probate Court Standards (2013) http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/spcts/id/240/rec/5.

COURT VISITOR PROGRAM

The volunteer Court Visitor Program can be used to protect vulnerable adults under guardianship, assist guardians, and inform judges' decisions. Trained in law, nursing or social work, the visitor is a neutral party with no personal interest in the proceedings who is appointed by the court. Utah Code §75-5-308. Visitors are available in all judicial districts and provide the following services at no charge:

- Interview petitioner, respondent (in their home), respondent's care providers, et al., and prepare a report for the court.
- Conduct reviews of guardians' and conservators' reports for the court, interview guardians and conservators, and compile a report for the court identifying potential red flags.
- Locate guardians with whom the court has lost contact, educate them on their responsibilities. Provide a report with updated contact information for the guardian.

CONSERVATORSHIPS

Many of the procedures in conservatorships are the same or similar. See Utah Code §§ 75-5-401 through 433 and https://www.utcourts.gov/resources/attorney/docs/GC_Bench_Book_Adult.pdf.
Counsel in conservatorships is not required but may be appointed. Utah Code §75-5-407.

REPORTING ABUSE OR EXPLOITATION

Judges are mandatory reporters, Utah Code §62A-3-305, Utah Code § 62A-4a-403. Report suspected abuse or exploitation to DCFS (minor child) at 1-855-323-3237 or online at DCFSintake@utah.gov, or to APS (vulnerable adult) at 1-800-371-7897 or online at https://daas.utah.gov/adult-protective-services/aps-form.

This is a product of Utah WINGS. Add WINGS logo here.

This product is supported by grant No. 90EJIG0007-01-00 from the Administration for Community Living, U.S. Department of Health and Human Services (DHHS). Grantees carrying out projects under government sponsorship are encouraged to express freely their findings and conclusions. Therefore, points of view or opinions do not necessarily represent official Administration for Community Living or DHHS policy.

Utah State Courts

Bench Book for Adult Guardianship and Conservatorship

June 20, 2014

Revised October 19, 2017

Revised February 8, 2018

Revised June 29, 2018

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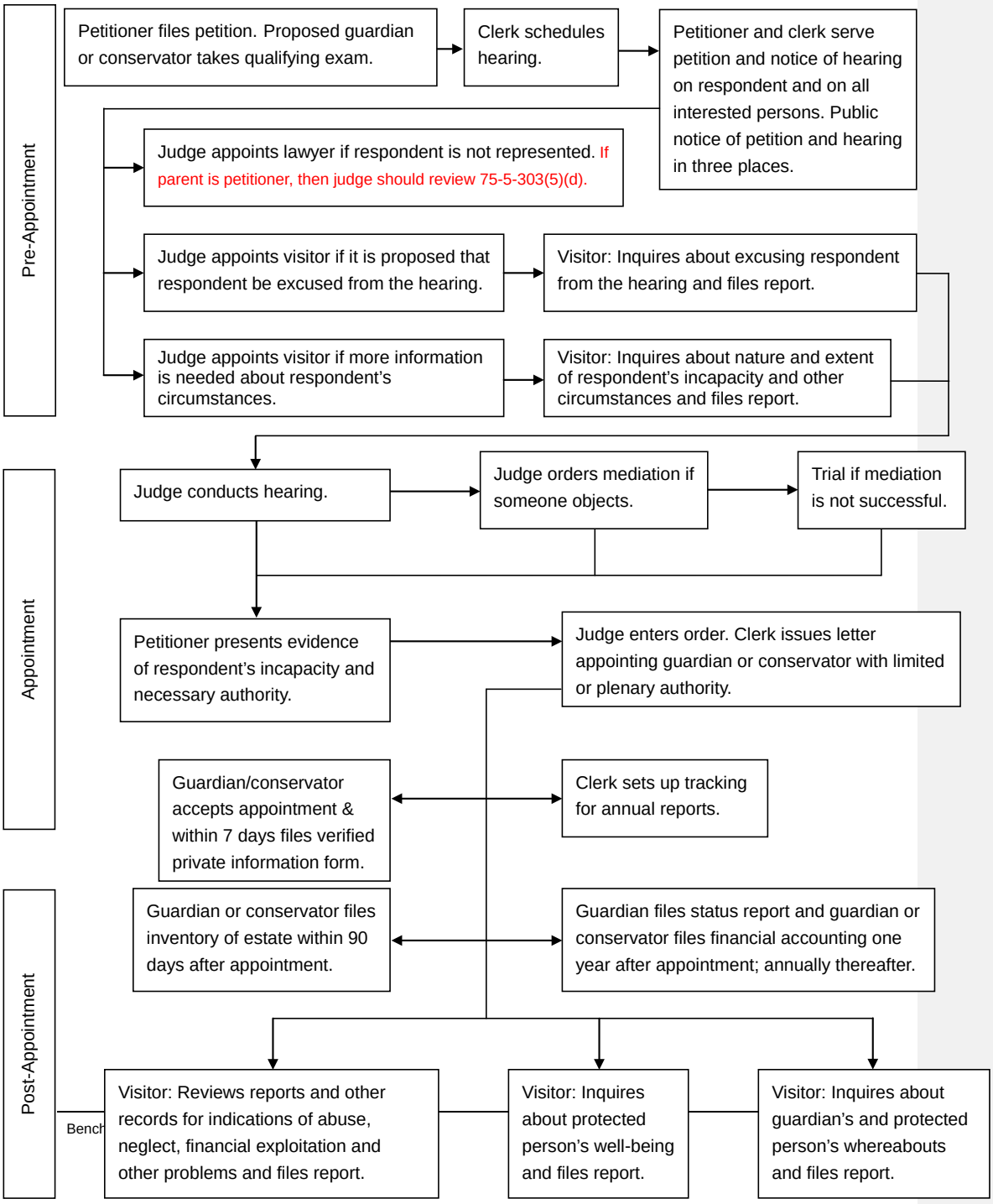
Bench Book for Adult Guardianship and Conservatorship

(1) Summary of the process (Guardianship) 5
(2) Nature of the office 6
(3) Preparing for the hearing 7
(a) Guardianship 7
(b) Conservatorship 13
(4) The hearing 15
(5) Your decision 16
(a) Guardianship 16
(b) Conservatorship 18
(6) Bond 20
(7) Reports 20
(a) The reports are required (mostly) 20
(b) Inventory of the protected person's property 20
(c) Annual status report 20
(d) Annual financial accounting 21
(e) Final accounting 21
(8) Reviewing the reports; Monitoring the guardian or conservator 21
(9) Risk Factors and Warning Signs 23
(a) Abuse 23
(b) Neglect 24
(c) Self neglect 25
(d) Sexual exploitation 26
(e) Financial exploitation 26
(f) Problem signs from the protected person 27
(g) Problem signs from the guardian and others 28
(10) Cannot locate the guardian or conservator 28
(11) Further proceedings 29
(a) Moving the protected person to a different residence 29
(b) Transferring a guardianship or conservatorship from one county to another 29

(c) Asking for instructions, changes, sanctions 29
(d) Right of Association 30
(12) Terminating the guardianship or conservatorship 30
(a) Transfer to another state 30
(b) Upon request 31
(c) Death of protected person 31
(13) Emergency guardianship; temporary guardianship and conservatorship 31
(14) Checklist to prepare for the hearing — Guardianship 33
(15) Guardianship verdict form 41
(16) Checklist to prepare for the hearing — Conservatorship 43
(17) Other resources 45

(1) Summary of the process (Guardianship)



(2) Nature of the office

Anyone 18 or older has the right to make decisions based on his or her values and beliefs, even if others disagree with those decisions. Making decisions is an essential part of adult life. Every day we make decisions for ourselves and for those who depend on us. Decision making can be burdensome, even stressful at times, but few of us would willingly give up the right to make our own decisions. But the appointment of a guardian or conservator does just that — removes the right of a person to make his or her own decisions.

A **guardian of an adult** is a person or institution appointed by a court to make decisions about the personal well-being — residence, health care, nutrition, education, personal care, etc. — of an incapacitated adult, who is called a "protected person." "Incapacity" means that an adult's ability to:

- receive and evaluate information; or
- make and communicate decisions; or
- provide for necessities such as food, shelter, clothing, health care, or safety

is impaired to the extent that the person lacks the ability, even with appropriate technological assistance, to meet the essential requirements for financial protection or physical health, safety, or self-care. Incapacity is a judicial determination, and is measured by the person's functional limitations. Utah Code Section 75-1-201.

A **conservator of an adult** is a person or institution appointed by the court to make decisions about a protected person's estate. A person does not have to be incapacitated to have a conservator appointed. A conservator may be appointed if the respondent is unable to manage his or her property effectively and a conservator is needed:

- to prevent the respondent's property from being harmed; or
- to obtain or provide funds for the respondent's support or the support of those entitled to be supported by the respondent.

The protected person's estate includes all of his or her property, personal and business. Some examples are income (such as wages, an annuity, a pension, and Social Security or other government benefits), real property (buildings and land), and personal property (such as furniture, cash, bank accounts, certificates of deposit, stocks, bonds, motor vehicles, jewelry, tools, furs and art). A conservator must use reasonable care, skill and caution to manage and invest the estate to meet the protected person's needs over his or her expected life.

Under appropriate facts, the court might appoint a guardian or a conservator or both. The guardian and the conservator might be two different people, or they might be the same person. If there is no conservator, the guardian has some of the conservator's responsibilities.

If the protected person needs help in some but not all areas of decision making, the court should order a limited guardianship. A limited guardianship is preferred, and the

court should grant a full guardianship only if nothing else is adequate. A limited guardian has only those powers listed in the court order. The court can also limit the authority of a conservator.

(3) Preparing for the hearing

The Rules of Civil Procedure do not apply to uncontested guardianship matters until after "joinder of issue," presumably after an interested person objects to the appointment. URCP 81. The Rules of Civil Procedure also do not apply to uncontested "probate" matters, which is presumably broad enough to include conservatorship, even though conservatorship proceedings are not mentioned by name. But even after issues are "joined" the Rules of Civil Procedure do not provide a good fit because the probate model of litigation is substantially different from traditional civil litigation. Until joinder of issue, Title 75, Chapter 5, Protection of Persons Under Disability and Their Property governs the proceedings. The statutes will answer many but not all procedural questions. In some circumstances, judges should expect to take what lessons they can from the statutes and the rules to craft a fair process to fit the circumstances.

(a) Guardianship

See also the form Checklist to Prepare for the Hearing at the end of this manual.

Is venue correct? The petition may be filed in any county in which the respondent resides or is present. Section 75-5-302.

Does the respondent have a lawyer? Section 75-5-303 requires that you appoint a lawyer for the respondent if the respondent does not have a lawyer. There are now lawyers on call through the Guardianship Signature Program, which is a partnership of the Utah State Bar and the courts. Your clerk will have the list of lawyers and will send an email out to the group if he or she notices in the guardianship petition that the respondent is unrepresented. The first lawyer to respond to the email will be assigned as counsel for the respondent. For more information, you may visit the Guardianship Signature Program webpage at http://www.utcourts.gov/howto/family/gc/signature/. You may also contact Karolina Abuzyarova in the Administrative Office of the Courts, by emailing karolinaa@utcourts.gov or calling (801) 578-3925, or you may contact the Access to Justice Coordinator at the Utah State Bar by calling 801-297-7027 or emailing probono@utahbar.org.

Sometimes the petitioner's lawyer will recruit a lawyer to represent the respondent. Sometimes a lawyer will ghost-write pleadings and coach the petitioner, but appear as counsel for the respondent. It is uncertain whether these arrangements violate the Rules of Professional Conduct, but they may be too cozy for your liking. Consider appointing independent counsel for the respondent through the Guardianship Signature Program if you believe the respondent is not being adequately represented.

The role of the respondent's lawyer in guardianship proceedings is the same as for any other client — independent and zealous advocate. The respondent's lawyer does not serve in the role of guardian ad litem representing the respondent's best interests. The attorney is bound by Rule of Professional Conduct 1.14, Client with Diminished Capacity.

The fees for the respondent's appointed counsel and court costs are paid by the petitioner if you determine that the petition is without merit. Otherwise, the fees for the respondent's appointed counsel are paid by the respondent, ~~.~~unless the respondent and the respondent's parents are indigent. If you appoint the petitioner or the petitioner's proposed guardian, the court costs and petitioner's reasonable attorney fees also are paid by the respondent. Section 75-5-303. Nothing prevents the petitioner from proposing a guardian, but the guardian proposed by petitioner does not stand in the priority list of guardians other than as "any competent person" at the bottom of the list. Section 75-5-311.

Is the respondent exempt from the appointment of a lawyer?

~~In 2016, House Bill 101 was enacted to exempt~~ in some circumstances, ~~s~~ adult child respondents are exempt from the requirement to have an attorney. The judge must make statutory findings before the counsel requirement is excused, though. And, the judge may determine in any case that independent legal counsel is necessary for an adult child respondent. If the respondent does not have their own lawyer, the court can utilize the Guardianship Signature Program as noted above.

Utah Code § 75-5-303(5)(d) provides that:

> Counsel for the person alleged to be incapacitated, as defined in Subsection 75-1-201(22), is not required if:
>
> (i) the person is the biological or adopted child of the petitioner;
>
> (ii) 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;
>
> (iii) the person appears in court with the petitioner;
>
> (iv) the person is given the opportunity to communicate, to the extent possible, the person's acceptance of the appointment of petitioner;
>
> (v) No attorney from the Guardianship Signature Program is able to provide counsel within 60 days of court appointment of counsel;
>
> (vi) The court is satisfied that counsel is not necessary to protect the respondent's interests, and
>
> (vii) The court appoints a court visitor.

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~~and~~

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

Will the respondent attend the hearing? Section 75-5-303 requires that the respondent attend the hearing except in a few circumstances.

If not, has a visitor been assigned? If it is proposed that the respondent not attend the hearing, either the petitioner must present clear and convincing evidence from a physician that the respondent:

- has fourth stage Alzheimer's disease;
- is in an extended coma; or
- has an intellectual disability with an IQ under 25,

Or you must order an investigation by a court visitor. The volunteer Court Visitor Program can be used to protect vulnerable adults under guardianship, assist guardians, and inform judges' decisions. Trained in law, nursing or social work, the visitor is a neutral party with no personal interest in the proceedings who is appointed by the court. Utah Code §75-5-308. Visitors are available in all judicial districts.

~~In Districts 1, 2, 3, 4, 5, and 7, contact the Coordinator for the Volunteer Court Visitor Program (email: visitor@utcourts.gov or see the court's webpage http://www.utcourts.gov/visitor/), and s/he will prepare an order assigning a volunteer court visitor. In other districts, you will have to assign someone "trained in law, nursing, or social work … with no personal interest in the proceedings." Section 75-5-308. There may be volunteer court visitors available to do interviews outside of the listed districts, but you will need to check with the Volunteer Court Visitor Program for availability.~~

Have the respondent and all interested persons been properly served with a copy of the petition and notice of the hearing? Section 75-5-309 requires that the respondent and interested persons be served with a copy of the petition and notice of hearing. The interested persons are:

- the respondent's spouse, parents and adult children;
- at least one of the respondent's closest adult relatives, if the respondent has no spouse, parents, or adult children or if they cannot be found;
- the respondent's guardian, conservator, caregiver and custodian;
- the person nominated as guardian by the respondent or by the respondent's parent, spouse, or caregiver;
- the respondent's heath care decision making agent;
- the respondent's agent under a power of attorney;

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- Adult Protective Services (required if APS has received a referral concerning the welfare of the respondent, or of the guardian/conservator, or of the proposed guardian/conservator), and
- any other interested person.

The concept of "interested persons" is meant to be fluid and controlled by you in any given case. You can direct that others be considered interested persons under the definition of that term in Section 75-1-201.

Service on the respondent must be by personal service. Service on the respondent's spouse and parents must be by personal service if they are within the state. Section 75-5-309.

Service on the respondent's spouse and parents if they are not within the state and on all other persons is by the clerk mailing a copy of the petition and notice of hearing at least 10 days before the hearing. In addition, the clerk must post notice of the hearing in at least three public places in the county at least ten days before the hearing. Section 75-1-401.

Does the respondent want to be examined by a physician or interviewed by a court visitor? Section 75-5-303 permits the respondent to demand either or both. There are no physicians on call. For a court visitor, ~~In Districts 1, 2, 3, 4, 5, and 7,~~ contact the Coordinator for the Volunteer Court Visitor Program (email: visitor@utcourts.gov or see the court's webpage http://www.utcourts.gov/visitor/), and s/he will prepare an order assigning a volunteer court visitor. ~~In other districts, you will have to assign someone "trained in law, nursing, or social work … with no personal interest in the proceedings." Section 75-5-308. There may be volunteer court visitors available to do interviews outside of the listed districts, but you will need to check with the Volunteer Court Visitor Program for availability.~~

Do you want more information about the respondent's circumstances? Section 75-5-303 permits you to direct an inquiry by a visitor into the respondent's circumstances. C~~In Districts 1, 2, 3, 4, 5, and 7, c~~ontact the Coordinator for the Volunteer Court Visitor Program (email: visitor@utcourts.gov or see the court's webpage http://www.utcourts.gov/visitor/), and s/he will prepare an order assigning a volunteer court visitor. ~~**In other districts, you will have to assign someone "trained in law, nursing, or social work … with no personal interest in the proceedings." Section 75-5-308. There may be volunteer court visitors available to do interviews outside of the listed districts, but you will need to check with the Volunteer Court Visitor Program for availability.**~~

Is an interpreter needed? Rule 3-306.04 requires that you appoint an interpreter for any person who is unable to understand or communicate in English. If an interpreter is needed, contact your court's interpreter coordinator.

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Are all of the required documents in the file? The file should contain:

- Petition to appoint
- Notice of hearing (notice must follow requirements of 75-5-309)
- List of persons to be served with the petition and notice of hearing. (If the petitioner uses court-approved forms, this is called "Schedule A", https://www.utcourts.gov/howto/family/gc/guardianship/docs/02_Schedule_A.pdf)
- Proof of service under URCP 4 of petition and notice of hearing at least 10 days before the hearing on:
    - The respondent;
    - The respondent's spouse and parents if they are within Utah;
- Certificate of service under 75-1-401 and URCP 5 of petition and notice of hearing at least 10 days before the hearing on:
    - The respondent's spouse and parents if they are not within Utah;
    - The respondent's adult children;
    - The respondent's closest adult relative if respondent has no spouse, parents, or adult children or if they cannot be found;
    - The respondent's guardian, conservator, caregiver and custodian;
    - The person nominated as guardian by the respondent or by the respondent's parent, spouse, or caregiver;
    - The respondent's health care decision making agent;
    - The respondent's agent under a power of attorney;
    - Adult Protective Services (required if APS has received a referral concerning the welfare of the respondent, or of the guardian/conservator, or of the proposed guardian/conservator), and
    - Any other interested person.
    - ~~o~~
- Clerk's certificate of posting public notice at least 10 days before the hearing;
- Physician's' report and/or other statements or affidavits about respondent's functional capabilities and/or incapacity and need for a guardian (sample Witness Affidavits are available on the court website: Witness Affidavit - PDF | Word; sample clinical reports are available on the court website: Report on Clinical Evaluation - PDF | Word; more samples are available in *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges* posted on the intranet at:).

➢ Other documents often filed with the petition, but not necessary until appointment:

- Completion of testing certificate (not required if the petitioner is a parent of the respondent or is asking to be appointed as a co-guardian with a parent of the respondent, 75-5-312).

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- Acceptance of Appointment
- Proposed findings of fact, conclusions of law, and order.
  Note that 75-5-304(2)(a) states: "The court shall prefer a limited guardianship and may only grant a full guardianship if no other alternative exists. It the court does not grant a limited guardianship, a specific finding shall be made that nothing less than a full guardianship is adequate."

  Extensive findings of fact and orders that offer limited appointment options are available on the court website. See:
  - Proposed Findings of Fact and Conclusions of Law - PDF | Word
  - Proposed Order Appointing Guardian for an Adult - PDF | Word

- Letter of guardianship. *Sample letters for both limited and plenary guardianship are available on the court website. See:*

  - Letter of Limited Guardianship - PDF | Word
  - Letter of Full Guardianship - PDF | Word

- Private Information Record. *Available on the court website:*
  Summary and Required Private Information Record - PDF | Word

➢ The file might contain:

- Waivers of filing fees;
- Waivers of notice or consents to the appointment from interested persons who would otherwise have to be served;
- Death certificates or other proof of the death of interested persons who would otherwise have to be served;
- Documents authorizing and proving alternative service (if the people required to be served cannot be served as required either under URCP 4 or 75-1-401, then the petitioner must have them served by alternative means);
- Any written objections;
- Nominations of a guardian;
- Powers of attorney and/or advance health care directives executed by the respondent;
- Email to Guardianship Signature Program attorneys;
- Any related Court Visitor filings;
- Notice of appearance of counsel;
- Proposed guardianship plan. *Sample guidelines for guardianship plans are available on the court website; see:*

  Care Planning Considerations - PDF | Word

A model plan is available in *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings*, https://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf .

Objections. If no one objects and everything is in order, you may appoint the guardian at the hearing. If there is an objection, you may refer the case for mediation or set it for trial, at which time the petitioner will have to prove the claims made in the petition. If you refer a case for mediation, the respondent's lawyer should participate, since the respondent may not be able to participate on an equal basis with the interested persons.

(b) Conservatorship

The procedures for the appointment of a conservator are similar to the procedures for the appointment of a guardian, but there are not as many protections for the respondent. Follow these procedures only if the petition is for the appointment of a conservator only. If the petition is for the appointment of a guardian and a conservator, follow the procedures in Section (3)(a).

See also the form Checklist to Prepare for the Hearing at the end of this manual.

Is venue correct? The petition must be filed in the county in which the respondent resides or, if the respondent does not reside in this state, in any county where s/he has property. Section 75-5-403.

Does the respondent have a lawyer? Section 75-5-407 permits you to appoint a lawyer for the respondent but does not require it. There are now lawyers on call through the Guardianship Signature Program, which is a partnership of the Utah State Bar and the courts. Your clerk will have the list of lawyers and can send an email out to the group if you determine that the respondent should be represented. The first lawyer to respond to the email will be assigned as counsel for the respondent. For more information, you may visit the Guardianship Signature Program webpage at http://www.utcourts.gov/howto/family/gc/signature/. You may also contact Karolina Abuzyarova in the Administrative Office of the Courts, by emailing karolinaa@utcourts.gov or calling (801) 578-3925, or you may contact the Access to Justice Coordinator at the Utah State Bar by calling 801-297-7027 or emailing probono@utahbar.org.

The role of the respondent's appointed counsel in conservatorship proceedings is that of a guardian ad litem representing the respondent's best interests. Section 75-5-407. The attorney is bound by Rule of Professional Conduct 1.14, Client with Diminished Capacity.

Will the respondent attend the hearing? There are no statutes on point. Presumably the respondent has the right to attend the hearing, but is not required to do so.

Has anyone requested notice? Section 75-5-406 permits any interested person to file a request for notice of the proceedings. The petitioner/conservator is required to give notice of any future proceedings to the person making the request.

Have the respondent and all interested persons been properly served with notice of the hearing? Service in a conservatorship proceeding is substantially different from service in a guardianship proceeding. Under Section 75-5-405 no one has to be served with a copy of the petition, only with notice of the hearing. Only the respondent and the respondent's spouse must be served. If the respondent does not have a spouse, the respondent's parents must be served. Any interested person requesting notice must also be served.

Service must be by personal service on the respondent and on the respondent's spouse and parents if they are within the state. Service on the respondent and respondent's spouse and parents if they are not within the state and on any interested person requesting notice is by the clerk mailing a copy of the notice of hearing at least 10 days before the hearing. In addition, the clerk must post notice of the hearing in at least three public places in the county at least ten days before the hearing. Section 75-5-405 and Section 75-1-401.

The concept of "interested persons" is meant to be fluid and controlled by you in any given case. You can direct that others be considered interested persons under the definition of that term in Section 75-1-201.

Do you want more information about the respondent's circumstances? Section 75-5-407 permits you to have the respondent examined by a physician or interviewed by a court visitor. For a court visitor, c~~There are no physicians on call. In Districts 1, 2, 3, 4, 5, and 7, c~~ontact the Coordinator for the Volunteer Court Visitor Program (email: visitor@utcourts.gov or see the court's webpage http://www.utcourts.gov/visitor/), and s/he will prepare an order assigning a volunteer court visitor. ~~In other districts, you will have to assign someone "trained in law, nursing, or social work … with no personal interest in the proceedings." Section 75-5-308. There may be volunteer court visitors available to do interviews outside of the listed districts, but you will need to check with the Volunteer Court Visitor Program for availability.~~

Is an interpreter needed? Rule 3-306.04 requires that you appoint an interpreter for any person who is unable to understand or communicate in English. If an interpreter is needed, contact your court's interpreter coordinator.

Are all of the required documents in the file? The file should contain:

- petition to appoint;
- notice of hearing;
- list of persons to be served with notice of hearing (If the petitioner uses court-approved forms, this is called "Schedule A.");

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- proof of service under URCP 4 on the respondent if s/he is in Utah or certificate of service under Section 75-1-401 and URCP 5 if s/he is not in Utah;
- proof of service under URCP 4 on the respondent's spouse if s/he is in Utah or certificate of service under Section 75-1-401 and URCP 5 if s/he is not in Utah;
- proof of service under URCP 4 on the respondent's parents if the respondent is not married and if they are in Utah or certificate of service under Section 75-1-401 and URCP 5 if they are not in Utah;
- certificate of service under Section 75-1-401 and URCP 5 on any interested person requesting notice at least 10 days before the hearing;
- clerk's certificate of posting public notice at least 10 days before the hearing;
- physician's report or other statements or affidavits about respondent's incapacity, disability or other need for a conservator;
- other documents often filed with the petition, but not necessary until appointment:
    - completion of testing certificate, if required;
    - acceptance of appointment;
    - proposed findings of fact, conclusions of law and order;
    - letter of conservatorship.

The file might contain:

- waivers of notice or consents to the appointment from interested persons who would otherwise have to be served;
- death certificates or other proof of the death of interested persons who would otherwise have to be served;
- documents authorizing and proving alternative service (If the people required to be served cannot be served as required either under URCP 4 or Section 75-1-401, then the petitioner must have them served by alternative means.);
- any written objections;
- nominations of a conservator;
- email to Signature Program attorneys;
- notice of appearance of counsel.

Objections. If no one objects and everything is in order, you may appoint the conservator at the hearing. If there is an objection, you may refer the case for mediation or set it for trial, at which time the petitioner will have to prove the claims made in the petition. If you refer a case for mediation, try to make sure that the respondent's lawyer participates, since the respondent may not be able to participate on an equal basis with the interested persons.

(4) The hearing

Section 75-5-303 governs a lot of the steps leading up the hearing, and it is the only statute that comes close to governing the hearing itself, but there are not many directions. The respondent is entitled to a jury trial if requested. The statute also permits the respondent to request a closed hearing. The hearing is "on the issues of incapacity."

The statute requires the respondent's presence and describes how to excuse the respondent. The statute describes the respondent's rights at the hearing, which include presenting evidence and cross-examining witnesses, so evidence at the hearing is anticipated. The hearing is considered a "formal proceeding," as that term is defined in Section 75-1-201, because it is held with notice to the interested persons. But, other than notice to interested persons, Section 75-1-201 does not describe what a formal proceeding consists of.

Beyond that, the statutes and rules give no guidance about what is supposed to happen at the hearing. What has evolved is in the nature of a consent calendar: If all of the procedural requirements have been met and if no one objects, the petition is usually granted. There is nothing improper about granting the petition if the procedural requirements have been met and no one objects, but be cautious. The interests of the interested persons do not necessarily align with the respondent's interests, and the respondent's attorney may not be adequately representing the respondent.

(5) Your decision

(a) Guardianship

The respondent is entitled to a jury trial if requested. Section 75-5-303. ~~IOf course, as a practical matter, no one ever requests a jury trial, but, if~~ the respondent requests a jury trial~~does~~, consider using the Verdict Form in Section 13 to walk the jury through the statutory requirements for appointing a guardian. If the respondent does not request a jury trial, consider using the form for your deliberation after a bench trial.

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Even if no one objects to the appointment consider whether the petition and the proposed findings of fact are sufficient to support the necessary conclusions.

Foremost, the standard of proof is clear and convincing evidence, which means the evidence leaves no serious or substantial doubt about the truth of the matter to be proved. In re Boyer, 636 P.2d 1085 (Utah 1981).

The decision to appoint a guardian can be divided into four parts:

- Is the respondent incapacitated?
- Is the appointment of a guardian necessary or desirable as a means of providing the respondent with continuing care and supervision?
- What authority should the guardian have?
- Who should be the guardian?

Incapacity is measured by the respondent's functional limitations. What is s/he able to do? What is s/he not able to do? Incapacity means that the respondent's ability to:

- receive and evaluate information; or
- make and communicate decisions; or
- provide for necessities such as food, shelter, clothing, health care, or safety

is impaired to the extent that s/he lacks the ability, even with appropriate technological assistance, to meet the essential requirements for financial protection or physical health, safety, or self-care. Utah Code Section 75-1-201 and In re Boyer, 636 P.2d 1085 (Utah 1981).

If you have determined that the respondent is incapacitated, then you must "satisfy" yourself that the appointment is necessary or desirable as a means of providing the respondent with continuing care and supervision. Section 75-5-304. Additional evidence, beyond a qualified doctor's statement, of the respondent's functional limitations can include medical, educational, and personal records.

You must then decide what authority to give to the guardian. Because incapacity is measured by functional limitations, the guardian should have authority to make decisions only in those areas in which the respondent cannot. Utah law prefers limited guardianships so that the protected person retains as much self-determination as possible. In re Boyer, 636 P.2d 1085, 1090-91 (Utah 1981). In order to give the guardian full authority, you must determine that no other alternative exists and make a "specific" finding that nothing less than a full guardianship is adequate. Section 75-5-304.

If something less than a full guardianship is adequate to provide the respondent with continuing care and supervision, you will have to describe that authority in the order and in the letter of guardianship. Some common areas of needed authority are:

- medical or other professional care, counsel, treatment, or service;
- custody and residence;
- care, comfort, and maintenance;
- training and education; and
- clothing, furniture, vehicles, and other personal effects.

If the petition requests other or additional authority, you may of course consider and grant that authority, as appropriate. You may even grant to a guardian authority typically exercised by a conservator, although third parties are often reluctant to recognize the authority of a guardian to make property, business and money management decisions.

Finally, you must decide who should be the guardian. Section 75-5-311 establishes a priority for who should be appointed:

- a person nominated by the respondent;
- the respondent's spouse;
- the respondent's adult child;
- the respondent's parent;
- a person nominated by the respondent's deceased spouse;

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- a person nominated by the respondent's deceased parent;
- any relative with whom the respondent has resided for more than six months before the petition is filed;
- a person nominated by the person who is caring for or paying benefits to the respondent;
- a specialized care professional;
- any competent person, or
- The Office of Public Guardian under Title 62A, Chapter 14, Office of Public Guardian Act.

Anyone can nominate a guardian for oneself orally or in writing. Nominating a guardian in an advance health care directive is common. If the respondent has an advance health care directive that names an agent but does not nominate a guardian, the agent's decisions take precedence over those of the guardian unless the order appointing the guardian says otherwise. Section 75-2a-112.

Section 75-5-303 speaks of "the petitioner's nominee." The petitioner can propose that someone be appointed guardian, but the petitioner can nominate a guardian for the purpose of ranking in the priority list under Section 75-5-311 only if the petitioner is the respondent's parent or spouse or the person who has been caring for or paying benefits to the respondent. Technically, the nominee of the respondent's parent or spouse has ranking only if the parent or spouse has died, but you might give the nominee favorable consideration even if the parent or spouse is living.

Section 75-5-311 allows you to appoint someone with a lower priority if a person with a higher priority is disqualified or if you find good cause why that person should not serve as guardian.

(b) Conservatorship

The decision to appoint a conservator is similar to the decision to appoint a guardian, but there are not as many protections for the respondent. Follow these procedures only if the petition is for the appointment of a conservator only. If the petition is for the appointment of a guardian and a conservator, follow the procedures in Section (5)(a).

The decision to appoint a conservator can be divided into four parts:

- Is the respondent is unable to effectively manage his or her property?
- Is the inability to effectively manage property caused by mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance or some similar cause?
- Is a conservator needed to prevent the respondent's property from being harmed? Or is a conservator needed to obtain or provide funds for the respondent's support or the support of those entitled to be supported by the respondent?

- Who should be the conservator?

Section 75-5-401.

Because the respondent's incapacity is not an issue, the standard of proof presumably is preponderance of the evidence.

The statutes give no guidance on what is ineffective property management.

A person does not have to be incapacitated in order to appoint a conservator. The only requirement is that the inability to manage property effectively be caused by one of the listed causes, one of which is "some similar cause."

The statutes give no guidance on the causal relationship between appointing a conservator and preventing harm to the respondent's property or obtaining or providing funds for support. However, if preventing harm to the respondent's property or obtaining or providing funds for support would be achieved by a person exercising the authority of a conservator, this element is probably proved.

Section 75-5-410 establishes a priority for who should be appointed. The list is somewhat different from the priority for appointment as guardian.

- a person already appointed by another court to care for the respondent's affairs;
- a person nominated in writing by another person already appointed by a court to care for the respondent's affairs;
- a person nominated by the respondent;
- the respondent's spouse or a person nominated in writing by the respondent's spouse;
- the respondent's adult child or a person nominated in writing by the respondent's adult child;
- the respondent's parent;
- a person nominated in the will of the respondent's deceased parent or someone chosen by the person nominated in the will;
- a relative with whom the respondent has resided for more than six months before the petition is filed, or someone nominated by that relative;
- a person nominated by whoever is caring for or paying benefits to the respondent;
- any competent person.

Note that in this list, except for the respondent's parents, the nominators do not have to have died in order for the nominee to be ranked among the others. Also note that the person nominated by a deceased parent can, in turn, nominate someone else but s/he is the only nominee who has this discretion. Finally, the person caring for or paying benefits to the respondent has no ranking in the list, but that person's nominee does.

Section 75-5-410 allows you to appoint someone with a lower priority if you find good cause why a person with a higher priority should not serve as conservator.

(6) Bond

Section 75-5-411 requires the conservator to file a bond unless the court waives the requirement upon a showing of good cause. The amount of the bond is the value of the property over which the conservator has unsupervised control plus one year's estimated income. Section 75-5-105 permits the court to require a bond of a guardian. Courts routinely waive the bond requirement, but there should be a statement in the order with direction one way or the other.

(7) Reports

(a) The reports are required (mostly)

Not every guardian or conservator is required to report annually, but most are. Your judicial assistant can use CORIS to distinguish the requirements and monitor compliance. Support him or her in an effort to enforce compliance because bad things can happen when the court does not remain involved after a guardian or conservator has been appointed.

No inventory, annual status report, or annual financial accounting is necessary if the guardian or conservator is the parent of the adult protected person, or if a person serves as a co-guardian with a parent of the adult protected person, Section 75-5-312(3)(f)(ix). However, you can require any of these reports from a guardian or conservator who is the parent of the adult protected person if you find it necessary for any reason. Otherwise, Section 75-5-312 and Section 75-5-417 and Rule 6-501 require that the guardian and conservator of an adult file the reports. You can impose a $5,000 penalty if they:

- willfully fail to file a report;
- make a substantial misstatement in a report; or
- are guilty of gross impropriety in handling the protected person's property.

(b) Inventory of the protected person's property

Within 90 days after being appointed, the conservator — or the guardian if there is no conservator — must identify, locate and inventory the protected person's property and file the inventory. Section 75-5-418 and Rule 6-501.

(c) Annual status report

A guardian must report annually to the court about the protected person's care and status. Section 75-5-312. The report shows what and how the protected person is doing and alerts the court to changes and possible problems.

(d) Annual financial accounting

A conservator — or the guardian if there is no conservator — must annually account to the court for the protected person's estate. Section 75-5-312 and Section 75-5-417.

If the protected person's estate is limited to payments from a state or federal agency that requires an annual accounting, the guardian or conservator may file a copy of the agency's accounting form.

(e) Final accounting

The conservator — or the guardian if there is no conservator — must file a final accounting if:

- the guardian or conservator resigns or is removed;
- the protected person dies;
- the guardianship or conservatorship ends; or
- the court transfers the guardianship or conservatorship to another state.

The reporting period will be from the date of the most recently filed accounting to the date the guardianship or conservatorship ends. Section 75-5-419.

(8) Reviewing the reports; Monitoring the guardian or conservator

Section 75-5-312 and Section 75-5-417 require the court to review and approve the reports. Although the statutes give no guidance about how thorough the review should be or what standards apply, consider this from the 2013 National Probate Court Standards:

> Standard 3.3.17 Monitoring
>
> Probate courts should monitor the well-being of the respondent and the status of the estate on an on-going basis, including, but not limited to:
>
> - Determining whether a less intrusive alternative may suffice.
> - Ensuring that plans, reports, inventories, and accountings are filed on time;
> - Reviewing promptly the contents of all plans, reports, inventories, and accountings.
> - Independently investigating the well-being of the respondent and the status of the estate, as needed.
> - Assuring the well-being of the respondent and the proper management of the estate, improving the performance of the guardian/conservator, and enforcing the terms of the guardianship/conservatorship order.

And this commentary to the Standard, citations omitted:

> Following appointment of a guardian or conservator, probate courts have an on-going responsibility to make certain that the respondent is receiving the services and care required, the estate is being managed appropriately, and the terms of the order remain consistent with the respondent's needs and condition. The review, evaluation, and auditing of the initial plans, inventories, and report and the annual reports and accountings filed by a guardian or conservator is the initial step in fulfilling this duty. Making certain that those documents are filed is a necessary precondition. … Probate courts should also have the capacity to investigate those situations in which guardian/conservators may be failing to meet their responsibilities under the order or exceeding the scope of their authority.
>
> A principal component of the review is to ensure that the guardian/conservator included all of the information required by the court in these reports. Probate courts should not permit conservators to file accountings that group expenses into broad categories, and should require that all vouchers, invoices, receipts, and statements be attached to the accounting to enable comparison. Prompt review of the guardian's or conservator's reports enables probate courts to take early action to correct abuses and issue a show cause order if the guardian/conservator has violated a provision of the original order.

Reviewing the reports is important. Your approval of an annual report adjudicates the conservator's liability for matters considered in connection with the report. Section 75-5-419. Although limited on its face to conservators, the principle probably applies to reports by guardians as well. Similarly, approval of the final accounting adjudicates all previously unsettled liabilities.

Perhaps more important, an incapacitated person is at risk of being abused, neglected and financially exploited. That harm might come from the guardian or conservator or from someone else because the guardian or conservator is not doing a good job of protecting the protected person. Indications of harm and risk of harm might be in the annual reports.

Utah law requires any person who has reason to suspect abuse of a vulnerable adult to report immediately to appropriate law enforcement or Adult Protective Services (62A-3-305). If you have any reason to believe that the respondent or protected person is being abused, neglected or financially or sexually exploited, then you should report this to Adult Protective Services. Reports can be made by telephone or online. Telephone intake is 1-800-371-7897. This number is for emergency and non-emergency calls. An APS intake worker will respond Monday through Friday, 8 a.m. to 5 p.m. After 5 p.m. and on weekends, leave a message and an APS intake worker will call back the following business day. In case of emergency, call 911. Online referrals can be made at https://daas.utah.gov/adult-protective-services/aps-form/.

A volunteer court visitor can help to review reports for indications of problems. In all districts, you may contact the Coordinator for the Volunteer Court Visitor Program (email: visitor@utcourts.gov or see the court's webpage

http://www.utcourts.gov/visitor/), and s/he will prepare an order assigning a volunteer court visitor.

In any district, with or without an objection to the report, you can schedule a hearing and personally interview the guardian or conservator, the protected person, and others in the protected person's life. CJA 6-501.

Ultimately, whether the conclusion is based on your review, your clerk's review, a visitor's review or a hearing, you should be satisfied that the guardian and conservator are performing their duties and exercising their authority and discretion in accordance with law and your orders. If they are not, sanctions against the guardian or conservator may be appropriate, or it may be appropriate to appoint a successor.

(9) Risk Factors and Warning Signs

~~(9)~~ The information below describes abuse, neglect, and exploitation of vulnerable adults. For definitions and further guidance, see Title 62A, Chapter 3, Part 3 Abuse, Neglect, or Exploitation of a Vulnerable Adult.

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(a) Abuse

Abuse means:

- causing physical injury to the protected person;
- causing or attempting to cause harm to the protected person or placing the protected person in fear of imminent harm;
- using physical restraint, medication, or isolation that causes harm to the protected person and that conflicts with a physician's orders; or
- depriving the protected person of life-sustaining treatment, except with the protected person's informed consent or under the protected person's Advance Health Care Directive.

Examples of abuse include:

- physical abuse: striking (with or without an object), hitting, beating, pushing, shoving, shaking, slapping, kicking, pinching, and burning; inappropriate use of drugs and physical restraints; force-feeding; and physical punishment;
- sexual abuse: non-consensual sexual contact of any kind; unwanted touching; all types of sexual assault or battery, such as rape, sodomy, and coerced nudity; and
- emotional or psychological abuse: infliction of anguish, pain, or distress through verbal or nonverbal acts; verbal assaults, insults, threats, intimidation, humiliation, and harassment; treating the protected person like an infant; isolating the protected person from his or her family, friends, or regular activities; giving the protected person the "silent treatment;" and enforced social isolation.

Signs of physical abuse include:

- frequent use of the emergency room or hospital or frequent changes in health care providers
- injury from an implausible cause, contradictory explanations
- injury that has not been properly cared for
- pain upon touching
- bruises, black eyes, welts, cuts, burns, and rope marks
- sprains, dislocations, and internal injuries or bleeding
- injuries in various stages of healing
- presence of old and new bruises at the same time
- broken eyeglasses, signs of being punished, signs of being restrained
- eye problems, retinal detachment
- bone fractures and skull fractures
- overdose or under-utilization of prescribed medication

Signs of sexual abuse include:

- bruises around the breasts or genital area
- venereal disease or genital infections
- vaginal or anal bleeding
- torn, stained, or bloody underclothing

(b) Neglect

Neglect means:

- failure of a caretaker to provide nutrition, clothing, shelter, supervision, personal care, or dental or other health care, or failure to provide protection from health and safety hazards or failure to provide protection from maltreatment;
- failure of a caretaker to provide care that a reasonable person would provide;
- failure of a caretaker to carry out a prescribed treatment plan that results or could result in injury or harm;
- a pattern of conduct by a caretaker that deprives the protected person of food, water, medication, health care, shelter, cooling, heating, or other services necessary to maintain the protected person's well-being, without the protected person's informed consent; or
- abandonment by a caretaker.

Examples of neglect include:

- refusal or failure of the guardian to provide or pay for necessary care and life necessities, such as food, water, clothing, shelter, personal hygiene, medicine, comfort, personal safety, and other essentials; and
- abandonment.

Signs of neglect include:

- unattended or untreated health problems
- inadequate or inappropriate administration of medication
- lack of necessary medical aids, such as eyeglasses, hearing aids, dentures, walkers, canes, and bedside commodes
- bed sores and signs of confinement (tied to furniture, locked in a room)
- lack of food in the home
- dehydration, malnutrition, weight loss, pallor, sunken eyes or cheeks
- homelessness or grossly inadequate housing
- unsanitary living conditions and poor personal hygiene (for example, dirt, fleas or lice on person, insect bites, soiled clothing or bedding, fecal/urine smell, inadequate clothing)
- unsafe conditions in the home (improper wiring, inadequate plumbing, no heat or running water no railings on stairs, etc.)
- hoarding
- animals in feral conditions
- deserting the protected person at a hospital, nursing facility, shopping center or other location

(c) Self neglect

Self neglect means the failure of a protected person to obtain for himself/herself food, water, medication, health care, shelter, cooling, heating, safety, or other services necessary to maintain one's own well being.

Self-neglect does not include a mentally competent person who, understanding the consequences, makes a conscious and voluntary decision to engage in acts that threaten his or her health or safety. Choice of lifestyle and living arrangements are not, by themselves, evidence of self-neglect. However, a protected person for whom a guardian has been appointed, being incapacitated, is not legally permitted to make these decisions. A guardian is obligated to protect a protected person from self neglect.

The signs of self neglect are similar to the signs of neglect. (See the list above.) The principal difference is that the protected person is denying himself or herself the care and necessities to maintain one's own well being.

(d) Sexual exploitation

Sexual exploitation means:

- the protected person's guardian permits the protected person to be a part of vulnerable adult pornography.

Examples of sexual exploitation include:

- producing, viewing or possessing pornographic photos or videos of a vulnerable adult; and
- allowing the protected person to pose for pornographic photos or videos.

(e) Financial exploitation

Financial exploitation means:

- improperly using the protected person's money, credit, property, power of attorney or guardianship for the benefit of someone other than the protected person.

Examples of financial exploitation include:

- cashing the protected person's checks without permission;
- forging the protected person's signature;
- misusing or stealing the protected person's money or possessions;
- coercing or deceiving the protected person into signing any document; and
- improperly using authority under a conservatorship, guardianship, or power of attorney.

Signs of financial exploitation include:

- large or frequent withdrawals of the protected person's money
- withdrawal for implausible reasons or with contradictory explanations
- withdrawals by a person accompanying the protected person
- withdrawals in spite of penalties
- increased activity on debit and credit cards
- unexplained disappearance of funds
- missing personal belongs, such as art, silverware, or jewelry
- co-mingling of funds: putting the protected person's money in the guardian's (or another's) bank account
- activity in bank accounts that is unusual for the protected person
- activity, events, and transactions unusual for the protected person or inconsistent with the protected person's ability
- change in account beneficiaries

- new authorized signers on accounts
- unexplained transfer of the protected person’s assets to someone else
- recent change of title in the protected person’s house or car
- new or refinanced loan
- paying for services that are not necessary
- unpaid or overdue bills
- lack of common amenities that the protected person can afford
- care or living arrangements not commensurate with what the protected person can afford
- the protected person's signature being forged
- a new person is involved in the protected person's life, with no logical reason for being there, such as
    - a new boyfriend or girlfriend much younger than the protected person
    - recent acquaintances expressing strong affection for the protected person
    - previously uninvolved relatives claiming rights to the protected person's affairs and possessions
    - abrupt change of the protected person’s physician, lawyer, or accountant
- change in the protected person’s will, power of attorney, trust, or other legal document
- promises of life-long care in exchange for all of protected person’s money or property

(f) Problem signs from the protected person

The protected person may mention problems to you or to others. These reports need to be considered seriously.

- the protected person’s report of being physically, sexually, verbally or emotionally abused or mistreated
- the protected person’s report of being ignored, mistreated or abandoned
- the protected person’s report of being a part of vulnerable adult pornography
- the protected person’s report of financial exploitation

The protected person’s sudden change in behavior might also indicate a problem of abuse, neglect or financial exploitation:

- fear, apprehension
- helplessness, resignation, withdrawal, depression
- non-responsive, reluctance to talk openly
- implausible stories, contradictory statements

- anger, denial, agitation, anxiety
- confusion
- confusion about financial transactions
- unusual behavior usually attributed to dementia (for example, aggressiveness, sucking, biting, rocking)

(g) Problem signs from the guardian and others

Key indicators of abuse, neglect and exploitation are described above. Those indicators focus on the protected person's actions and circumstances. There may also be signs of problems from the actions and circumstances of the guardian and others:

- the guardian isolates the protected person from friends and family
  - the guardian says the protected person is not willing or able to accept visits or calls
  - the guardian tells the protected person that no one wants to see him or her
  - the guardian often speaks for the protected person, even when the protected person is present
  - the guardian will not allow the protected person to participate in normal activities
- the guardian seems overly concerned about the protected person's finances
- the guardian is concerned that too much is spent on protected person's care
- the guardian has no means of support other than the protected person's income
- the guardian exhibits a lifestyle beyond of his or her means
- the guardian has problems with alcohol or drugs
- the guardian has been charged with or convicted of abuse, neglect or exploitation of someone other than the protected person
- the guardian blames the protected person (for example, accusation that incontinence is a deliberate act)
- the guardian exhibits aggressive behavior (anger, threats, insults, harassment), sexual behavior (flirtation, coyness), or indifference toward the protected person
- the guardian is unwilling or reluctant to comply with service providers in planning and implementing care
- the protected person's family give conflicting accounts of events

(10) Cannot locate the guardian or conservator

If it comes to your attention that the guardian or conservator has moved, try to re-establish contact immediately. The guardian and conservator are supposed to notify the court if they move, but they often do not do so. The most common scenario is that the

guardian or conservator has failed to file an annual report, and the court's OSC has been returned as undeliverable, but there may be other circumstances.

If you cannot find the guardian or conservator, contact one of the coordinators for the Volunteer Court Visitor Program (email: visitor@utcourts.gov or see the court's webpage http://www.utcourts.gov/visitor/), and s/he will prepare an order assigning a volunteer court visitor to try to re-establish contact. This service is available for all districts.

(11) Further proceedings

(a) Moving the protected person to a different residence

The guardian does not need the court's permission to move the protected person to another residence, even to another county within Utah, but the guardian and conservator must notify the court if they or the protected person moves.

(b) Transferring a guardianship or conservatorship from one county to another

The guardian does need the court's permission to transfer the guardianship or conservatorship to another county. If it would be more convenient to report to the district court in a county other than the one that made the appointment, the guardian or conservator can file a motion to change venue. Section 75-5-302 and Section 75-5-403.

Moving the protected person to another residence within Utah, even if the residence is in a different county, is different from transferring the guardianship or conservatorship itself to another county. It is possible for the protected person to move without transferring the guardianship or conservatorship, and it is possible to transfer the guardianship or conservatorship without moving the protected person.

(c) Asking for instructions, changes, sanctions

The guardian or conservator, the protected person, or someone interested in the protected person may file a petition or motion. Some possible circumstances:

- Most of the guardian's and conservator's decisions do not have to be approved by you, but there are some that do. Or the guardian or conservator might want the extra protection of having a particularly controversial decision approved by an independent authority.
- If the protected person's incapacity becomes better or worse, the guardian or conservator may need less or more authority than given in the previous order and letter of guardianship or letter of conservatorship.
- If the guardian or conservator has harmed the protected person, you can impose sanctions. The harm might have been physical, emotional or financial.

Section 75-5-307, Section 75-5-415, Section 75-5-426.

(d) Right of Association

~~In 2016, the legislature passed Senate Bill 111, which places limitations on the power of a guardian to prohibit association between an~~Except as otherwise provided by court order, a guardian may not restrict or prohibit the right of an adult under guardianship to associate with a relative or qualified acquaintance of the adult ward. Section 75-5-312. Section 75-5-312.5 governs ~~adult ward and a relative of the adult ward or certain other individuals ; provides for~~ proceedings to challenge, alter or enforce any limitations on association~~those limitations ;~~ and provides~~des~~ for the award of attorney fees and sanctions.

~~fees and sanctions. *See* Utah Code §§ 75-5-312, 75-5-312.5~~

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(12) Terminating the guardianship or conservatorship

(a) Transfer to another state

To transfer a guardianship or conservatorship to another state, the guardian or conservator must petition the Utah district court for permission. Notice of the petition must be served on the persons who would be entitled to notice of a petition for the appointment of a guardian or conservator.

The Utah court may hold a hearing and will issue an order provisionally granting the petition to transfer if the court is satisfied that:

- the guardianship or conservatorship will be accepted by the other state;
- the protected person is present in or is reasonably expected to move permanently to the other state, or, if the proceeding is a conservatorship, the protected person has a significant connection to the other state;
- there is no objection to the transfer, or the objector has not established that the transfer would be contrary to the protected person's interests; and
- plans for the protected person in the other state are reasonable and sufficient, and arrangements for management of his or her property are adequate.

The order will direct the guardian or conservator to petition for guardianship or conservatorship in the other state. The Utah court will issue a final order confirming the transfer and terminating the Utah guardianship or conservatorship upon receipt of an order from the court of the other state accepting the proceeding and the documents required to terminate the Utah guardianship or conservatorship.

Section 75-5b-301.

Transferring a guardianship or conservatorship from another state into Utah is essentially the reverse of these procedures. Section 75-5b-302. Or the guardian or conservator from the other state can file a regular petition for appointment in this state.

(b) Upon request

The protected person or anyone interested in the protected person's welfare may file a motion or letter asking that the court terminate the guardianship or conservatorship. Section 75-5-307 and Section 75-5-430. Anyone who knowingly interferes with this request may be guilty of contempt of court. Section 75-5-307.

If the order appointing the guardian specifies a minimum period of time during which no one is permitted to claim that the protected person is not incapacitated, the person who wants to file the motion or letter will first have to ask the court for permission to do so. The minimum period can be up to one year. Section 75-5-307.

If the appointment is of a guardian, the court will follow the same procedures as provided in Section 75-5-303. Since the protected person's incapacity is at issue, the court is required to appoint an attorney to represent the protected person. If the appointment is of a conservator, the court will follow the same procedures as provided in Section 75-5-407.

(c) Death of protected person

If the protected person dies, the guardian or conservator must file a motion to terminate the guardianship and notify the interested persons. The motion to terminate should include a copy of the death certificate. If a protected person dies, the conservator must also:

- deliver the protected person's will to the court and inform the executor or a beneficiary named in the will that s/he has done so;
- continue to pay the protected person's obligations and protect the estate from harm; and
- deliver the balance of the estate to the protected person's personal representative or to others who are entitled to it.

Section 75-5-425.

(13) Emergency guardianship; temporary guardianship and conservatorship

Under Section 75-5-310, the court may appoint an emergency guardian if:

- an emergency exists; and
- the respondent's welfare requires immediate action; and
- the respondent has no guardian or the guardian is not effectively performing their duties.

The appointment of an emergency guardian is not a determination of the respondent's incapacity. The appointment of an emergency guardian can be without notice to anyone. The order will designate a period of days (not to exceed 30 days) during which the emergency guardian has authority to make decisions on the respondent's behalf. The order might limit the areas in which the emergency guardian can make decisions.

Upon request by an interested person after the appointment of an emergency guardian, the court shall hold a hearing within 14 days and begin the process to determine the respondent's incapacity.

Under Utah Code Section 75-5-310.5, the court may appoint a temporary guardian, convert an emergency guardian to a temporary guardian, or appoint a different person as temporary guardian to replace the emergency guardian. Unless the respondent has already obtained counsel in this proceeding or an attorney has been already appointed for the person, the court shall appoint an attorney to represent the person in the proceeding.

Until a full hearing and further order of the court, the temporary guardian is responsible for the protected person's care and custody and must not permit the protected person to leave Utah. The authority of any previously appointed guardian is suspended so long as a temporary guardian has authority.

A temporary guardian may be removed at any time, and shall obey all orders and make any reports required by the court.

A temporary guardian has all of the powers and duties of a permanent guardian as set forth in Section 75-5-312.

There is no time limit set by statute for the duration of a temporary guardianship. You should consider setting a time limit for the temporary appointment and hold as soon as possible a full hearing to determine whether a permanent guardian should be appointed.

Under Utah Code Section 75-5-408(3), the court may appoint a temporary conservator to serve until further order of the court. A temporary conservator, if appointed, has all of the powers and duties of a conservator as set forth in Sections 75-5-417, 75-5-418, 75-5-419, and 75-5-424.

(14)

~~(14)~~(15) Checklist to prepare for the hearing — Guardianship

This checklist may be used for an initial appointment proceeding or subsequent proceedings including restoration of capacity.

Procedural Questions to Address ~~Before~~before the Hearing:

- ☐ Is venue correct? The Petition may be filed in any county in which the respondent resides or is present. 75-5-302. o Yes.
  - o No. Hearing cannot proceed without further determination of proper venue.

- ☐ Will the respondent attend the hearing? 75-5-303.
  - o Yes.
  - o No. o If not, has a court visitor been assigned?
  - o Yes. Has the visitor's report been filed? o No; Petitioner claims clear and convincing evidence from a physician that respondent has fourth stage Alzheimer's disease, extended coma, or an intellectual disability with an IQ of less than 25.
  - o No; Petitioner has not claimed clear and convincing evidence. Assign a court visitor.

- ☐ Does the respondent have a lawyer? 75-5-303.
  - o Yes.
  - o No. Appoint a lawyer. See bench card on appointing a lawyer (https://www.utcourts.gov/intranet/dist/distjudge.htm).
  - o No. Petitioner meets exemption requirements under 75-5-303(5)(d). See bench card and bench book for further details (https://www.utcourts.gov/intranet/dist/distjudge.htm).

- ☐ Does the respondent want to be examined by a physician or interviewed by a court visitor? 75-5-303. o Yes. Assign physician or court visitor. Has the report been filed? o No.

- ☐ Have the respondent and all interested persons been properly served with a copy of the petition and notice of the hearing? 75-5-309 requires that the respondent and interested persons be served with a copy of the petition and

notice of hearing. The notice shall be in plain language and large type and the form shall have the final approval of the Judicial Council. The notice shall indicate the time and place of the hearing, the possible adverse consequences to the person receiving notice of rights, a list of rights, including the person's own or a court appointed counsel, and a copy of the petition. (Court-approved forms of the notices are available on the court public website: https://www.utcourts.gov/howto/family/gc/guardianship/docs/03_Notice_of_Hearing_Respondent.pdf; https://www.utcourts.gov/howto/family/gc/guardianship/docs/04_Notice_of_Hearing_Int_Pers.pdf)

☐ Do you want more information about the respondent's circumstances? 75-5-303.

o Yes. Assign a court visitor.

- o Has the court visitor's report been filed? o No

☐ Is an interpreter needed? RJA 3-306.04. o Yes. What language? _____. Contact your local court's interpreter coordinator. o No.

☐ Are all the required documents in the file?

The file should contain:

- o Petition to appoint
- o Notice of hearing (notice must follow requirements of 75-5-309)
- o List of persons to be served with the petition and notice of hearing. (If the petitioner uses court-approved forms, this is called "Schedule A", https://www.utcourts.gov/howto/family/gc/guardianship/docs/02_Schedule_A.pdf);
- o Proof of service under URCP 4 of petition and notice of hearing at least 10 days before the hearing on:
  - o The respondent;
  - o The respondent's spouse and parents if they are within Utah;
- o Certificate of service under 75-1-401 and URCP 5 of petition and notice of hearing at least 10 days before the hearing on:
  - o The respondent's spouse and parents if they are not within Utah;
  - o The respondent's adult children;

- The respondent's closest adult relative if respondent has no spouse, parents, or adult children or if they cannot be found;
- The respondent's guardian, conservator, caregiver and custodian;
- The person nominated as guardian by the respondent or by the respondent's parent, spouse, or caregiver;
- The respondent's health care decision making agent;
- The respondent's agent under a power of attorney;
- Adult Protective Services (Required if APS has received a referral concerning the welfare of the respondent, or of the guardian/conservator, or of the proposed guardian/conservator.), and
- Any other interested person.

- Clerk's certificate of posting public notice at least 10 days before the hearing;
- Physician's' report and/or other statements or affidavits about respondent's functional capabilities and/or incapacity and need for a guardian (sample Witness Affidavits are available on the court website: Witness Affidavit - PDF | Word; sample clinical reports are available on the court website:

Report on Clinical Evaluation - PDF | Word; more samples are available in *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges*, https://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf).

Other documents often filed with the petition, but not necessary until appointment:

- Completion of testing certificate (not required if the petitioner is a parent of the respondent or is asking to be appointed as a co-guardian with a parent of the respondent, 75-5-312).
- Acceptance of Appointment
- Proposed findings of fact, conclusions of law, and order. Note that 75-5-304(2)(a) states: "The court shall prefer a limited guardianship and may only grant a full guardianship if no other alternative exists. It the court does not grant a limited guardianship, a specific finding shall be made that nothing less than a full guardianship is adequate."

Extensive findings of fact and orders that offer limited appointment options are available on the court website. See:

- Proposed Findings of Fact and Conclusions of Law - PDF | Word
- Proposed Order Appointing Guardian for an Adult - PDF | Word

o Letter of guardianship. *Sample letters for both limited and plenary guardianship are available on the court website. See:*

- Letter of Limited Guardianship - PDF | Word
- Letter of Full Guardianship - PDF | Word

o Private Information Record. *Available on the court website:*

Summary and Required Private Information Record - PDF | Word

The file might contain:

o Waivers of filing fees;
o Waivers of notice or consents to the appointment from interested persons who would otherwise have to be served;
o Death certificates or other proof of the death of interested persons who would otherwise have to be served;
o Documents authorizing and proving alternative service (if the people required to be served cannot be served as required either under URCP 4 or 75-1-401, then the petitioner must have them served by alternative means);
o Any written objections;
o Nominations of a guardian;
o Powers of attorney and/or advance health care directives executed by the respondent;
o Email to Guardianship Signature Program attorneys;
o Any related Court Visitor filings;
o Notice of appearance of counsel;
o Proposed guardianship plan. *Sample guidelines for guardianship plans are available on the court website; see:*

Care Planning Considerations - PDF | Word

A model plan is available in *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings*, https://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf.

Questions a judge should consider in determining capacity, appropriate guardian, and limited guardianship:

- Is the respondent's ability to receive and evaluate information; or make and communicate decisions; or provide for necessities such as food, shelter, clothing, health care of safety impaired to the extent that the respondent lacks the ability, even with appropriate technological assistance, to meet the essential requirements for financial protections or physical health, safety, or self-care? 75-1-201(22)

- Is the appointment of a guardian necessary or desirable as a means of providing the respondent with continuing care and supervision? 75-5-304

- Remembering that Utah law prefers a limited guardianship and that incapacity is measured by functional limitations, is anything less than a full guardianship adequate to provide the respondent with continuing care and supervision? 75-5-304

- Have alternative approaches been explored? *Extensive information and sample power of attorney and advance healthcare directive forms are available on the court website at:* https://www.utcourts.gov/howto/family/gc/options.html

- Alternatives for financial decision making:

  - Use of a representative payee appointed by the Social Security Administration or other federal agency or a fiduciary appointed by the Department of Veterans Affairs to handle government benefits
  - Use of a single transaction protective order
  - Use of a properly drawn trust
  - Use of a properly drawn durable power of attorney
  - Establishment of a joint bank account with a trusted person

- Electronic bill paying and deposits

- Alternatives for health care decision making:

  - Use of a properly drawn advance health care directive
  - Use of a properly drawn power of attorney for medical decisions
  - Alternatives for crisis intervention and daily needs
  - Use of mediation, counseling and respite support services
  - Engagement of community-based services

- Alternatives for other decision making, including such issues as residence, education, religion, and personal relationships:

  - Use of supported decision making

    (See: National Resource Center for Supported Decision-Making, http://www.supporteddecisionmaking.org/)
  - Use of mediation and counseling
  - Engagement of community-based services

- If any of these alternatives exist, why are they not sufficient to support and protect the respondent?

- Is the respondent aware of what a guardianship means?

- Does the respondent agree to _____ serving as guardian? 75-5-303(5)(d)(iv)

- What decision making authority should the guardian have to accommodate the respondent's functional limitations? 75-5-304, 75-5-312

  - Medical or other professional care, counsel, treatment, or service

- Custody and residence
- Care, comfort, and maintenance
- Training and education
- Clothing, furniture, vehicles, and other personal effects
- Other

- The petitioner proposes that _____be appointed guardian. Utah law (75-5-311) establishes the following priority for who should be appointed guardian:
  - A person nominated by the respondent;
  - The respondent's spouse;
  - The respondent's adult child;
  - The respondent's parent;
  - A person nominated by the respondent's deceased spouse;
  - A person nominated by the respondent's deceased parent;
  - Any relative with whom the respondent has resided for more than six months before the petition is filed;
  - A person nominated by the person who is caring for or paying benefits to the respondent;
  - A specialized care provider;
  - Any competent person, or
  - The Office of Public Guardian under Title 62A, Chapter 14, Office of Public Guardian Act.

- Is the person asking to be appointed guardian on the priority list?
- Are there good reasons to appoint _____even though someone else is higher on the priority list?
- Are there good reasons not to appoint _____ and to appoint someone lower on the list?
- Has every person who has the right to notice had the opportunity to object or agree to the appointment of a guardian?
- Who should be appointed? _____

Questions a judge might want to ask at a hearing in determining capacity, appropriate guardian, and limited guardianship:

- Why is a guardianship necessary in this case?
- Have alternative approaches been explored? *Extensive information and sample power of attorney and advance healthcare directive forms are available on the court website at:* https://www.utcourts.gov/howto/family/gc/options.html
- If any of these alternatives exist, why are they not sufficient to support and protect the respondent?
- Why do you want to be the respondent's guardian?
- Do you have any criminal convictions?
- If appointed, what is your plan for the respondent? How will you support the respondent's abilities to make his/her own decisions? Keep in mind that Utah law, 75-5-312(7), requires a guardian, to the extent practicable, to encourage the person under guardianship to participate in decisions, exercise self-determination, act on their own behalf, and develop or regain the capacity to manage their own personal affairs. The guardian shall consider the person's expressed desires and personal values when making decisions on behalf of the person.
- Do you understand your responsibilities as a guardian?
- Does the respondent have questions about what it means to be a person under a guardianship?
- You must file an inventory of the respondent's estate within 90 days of appointment and you must file annual reports on the person's well being and annual financial accountings of the person's estate. These annual reports are due on the anniversary of your appointment.

- Do you understand these responsibilities and are you able to carry them out?

- You can find information and forms on the court website at www.utcourts.gov.

~~(15)~~(16) Guardianship verdict form

The respondent is entitled to a jury trial if requested. ~~Of course no one ever requests a jury trial, but, l~~if the respondent requests a trial~~does~~, consider using this verdict form to walk the jury through the statutory requirements for appointing a guardian. If the respondent does not request a jury trial, consider using the form for your deliberation after a bench trial. Even if no one objects to the appointment consider whether the petition and the proposed findings of fact are sufficient to support the necessary conclusions.

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Members of the jury:

Please answer the following questions in the order they are presented. If you find that the issue has been proved by clear and convincing evidence, answer "Yes," if not, answer "No." Clear and convincing evidence means the evidence leaves no serious or substantial doubt about the answer to the question.

At least six jurors must agree on the answer to all of the required questions, but they need not be the same six on each question. When six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and advise the bailiff that you have reached a verdict.

(1) Is the respondent's ability to • receive and evaluate information; or • make and communicate decisions; or • provide for necessities such as food, shelter, clothing, health care, or safety impaired to the extent that the respondent lacks the ability, even with appropriate technological assistance, to meet the essential requirements for financial protection or physical health, safety, or self-care.	Yes ☐	No ☐

If you answered all parts of (1) "No," proceed no further. Your foreperson should sign and date the form and advise the bailiff that you have reached a verdict. If you answered any part of (1) "Yes," proceed to (2).

(2) Is the appointment of a guardian necessary or desirable as a means of providing the respondent with continuing care and supervision?	Yes ☐	No ☐

If you answered (2) "No," proceed no further. Your foreperson should sign and date the form and advise the bailiff that you have reached a verdict. If you answered any of the causes "Yes," proceed to (3).

(3) Remembering that Utah law prefers a limited guardianship and that incapacity is measured by functional limitations, is anything less than a full	Yes ☐	No ☐

guardianship adequate to provide the respondent with continuing care and supervision?		

If you answered (3) “No,” the judge will appoint a guardian who has the same powers, rights, and duties respecting the respondent that a parent has for that parent’s minor child. Do not answer (4) and proceed to (5). If you answered (3) “Yes,” proceed to (4) and (5).

(4) What decision making authority should the guardian have to accommodate the respondent’s functional limitations?		
• medical or other professional care, counsel, treatment, or service	Yes ☐	No ☐
• custody and residence	Yes ☐	No ☐
• care, comfort, and maintenance	Yes ☐	No ☐
• training and education	Yes ☐	No ☐
• clothing, furniture, vehicles, and other personal effects	Yes ☐	No ☐
• other (describe)	Yes ☐	No ☐

(5) The petitioner proposes that _____ be appointed guardian. Utah law establishes the following priority for who should be appointed guardian: • a person nominated by the respondent; • the respondent's spouse; • the respondent's adult child; • the respondent's parent; • a person nominated by the respondent's deceased spouse; • a person nominated by the respondent's deceased parent; • any relative with whom the respondent has resided for more than six months before the petition is filed; • a person nominated by the person who is caring for or paying benefits to the respondent; • a specialized care professional; • any competent person.		
(5)(a) Is _____ the highest on this priority list?	Yes ☐	No ☐
(5)(b) Are there good reasons to appoint _____ even though someone else is higher?	Yes ☐	No ☐
(5)(c) Are there good reasons not to appoint _____ and to appoint someone lower on the list?	Yes ☐	No ☐
(5)(d) If you answered (5)(c) “Yes,” who should be appointed?		

If six or more of you have agreed on the answer to each question that is required to be answered, you are finished with your deliberations. Thank you for your service. Your foreperson should sign and date the form and advise the bailiff that you have reached a verdict.

~~(16)~~(17) Checklist to prepare for the hearing — Conservatorship

The procedures for the appointment of a conservator are similar to the procedures for the appointment of a guardian, but there are not as many protections for the respondent. Follow these procedures only if the petition is for the appointment of a conservator only. If the petition is for the appointment of a guardian and a conservator, follow the procedures in Section (4)(a) and Section (5)(a) and see the checklist in Section (12).

- ☐ Is venue correct?
  - o Yes
  - o No
- ☐ Will the respondent attend the hearing?
  - o Yes
  - o No
- ☐ Does the respondent have a lawyer?
  - o Yes
  - o No (Do you want to appoint a lawyer?)
- ☐ Does the respondent want to be examined by a physician or interviewed by a court visitor?
  - o Yes (Assign physician or court visitor. Has the report been filed?)
  - o No
- ☐ Do you want more information about the respondent's circumstances?
  - o Yes (Assign court visitor. Has the report been filed?)
  - o No
- ☐ Is an interpreter needed?
  - o Yes — What language? _____. (Contact interpreter coordinator.)
  - o No
- ☐ Are all of the required documents in the file?

  The file should contain:
  - ☐ petition to appoint;
  - ☐ notice of hearing;
  - ☐ list of persons to be served with notice of hearing (If the petitioner uses court-approved forms, this is called "Schedule A.");
  - ☐ proof of service under URCP 4 on the respondent if s/he is in Utah or certificate of service under Section 75-1-401 and URCP 5 if s/he is not in Utah;
  - ☐ proof of service under URCP 4 on the respondent's spouse if s/he is in Utah or certificate of service under Section 75-1-401 and URCP 5 if s/he is not in Utah;
  - ☐ proof of service under URCP 4 on the respondent's parents if the respondent is not married and if they are in Utah or certificate of service under Section 75-1-401 and URCP 5 if they are not in Utah;

- ☐ certificate of service under Section 75-1-401 and URCP 5 on any interested person requesting notice at least 10 days before the hearing;
- ☐ clerk's certificate of posting public notice at least 10 days before the hearing;
- ☐ physician's report or other statements or affidavits about respondent's incapacity, disability or other need for a conservator;
- ☐ other documents often filed with the petition, but not necessary until appointment:
    - o completion of testing certificate, if required;
    - o acceptance of appointment;
    - o proposed findings of fact, conclusions of law and order;
    - o letter of conservatorship.

The file might contain:

- ☐ waivers of notice or consents to the appointment from interested persons who would otherwise have to be served;
- ☐ death certificates or other proof of the death of interested persons who would otherwise have to be served;
- ☐ documents authorizing and proving alternative service (If the people required to be served cannot be served as required either under URCP 4 or Section 75-1-401, then the petitioner must have them served by alternative means.);
- ☐ any written objections;
- ☐ nominations of a conservator;
- ☐ email to Signature Program attorneys;
- ☐ notice of appearance of counsel.

☐ Is an interpreter needed?

- o Yes — What language? _____. (Contact interpreter coordinator.)
- o No

~~(17)~~(18) Other resources

Utah State Court Resources

- Utah State Courts Bench Book on Adult Guardianship and Conservatorship:
  http://www.utcourts.gov/intranet/dist/distjudge.htm#benchbooks

  A 34-page summary of both adult guardianship and conservatorship with links to relevant statues. The summary describes court proceedings from initial hearings to post-appointment proceedings. Also included are checklists and sample jury instructions for guardianship trials.

- Bench card for appointment of legal counsel and court visitor in guardianship cases: http://www.utcourts.gov/intranet/dist/distjudge

  A one-page description of the initial guardianship hearing with details for the appointment of legal counsel and a court visitor

- Abuse Flow Chart: http://www.utcourts.gov/intranet/dist/distjudge

  A one-page chart with links to relevant statutes on how to handle issues involving abuse, neglect, self-neglect and financial exploitation of vulnerable adults that might occur in post-appointment guardianship proceedings. The chart includes references to how to handle exploitation of Social Security benefits.

- Guardianship Proceedings Flow Chart:
  https://www.utcourts.gov/visitor/resources/docs/Summary.pdf

  Also found in the Bench Book:
  http://www.utcourts.gov/intranet/dist/distjudge.htm#benchbooks

  A basic chart of how a guardianship case moves through the court system. The chart is published on the Utah State Courts public website.

- Court's public webpage:
  https://www.utcourts.gov/howto/family/gc/

  There is a wealth of resources published on this page including online training modules in English and Spanish about guardianship and alternatives to guardianship, options to consider before turning to guardianship (e.g., power of attorney), guardianship and conservatorship proceedings, post-appointment reporting requirements, materials on how to function as a guardian, and forms.

- Stand-alone, approved court forms:
  https://www.utcourts.gov/howto/family/gc/guardianship/#forms

  This is an extensive list of forms for all aspects of guardianship and conservatorship proceedings available in downloadable Word and PDF format.

- OCAP programs for adult guardianship and guardianship of an adult child:
  www.utcourts.gov/ocap

This is an interactive document production program similar to Turbo Tax. OCAP produces initial pleadings for a petitioner and post-appointment reports. The documents produced are similar to the stand-alone forms posted on the court site but the stand-alone forms do offer more details especially concerning the functional capacities of the respondent and limited guardianship pleadings.

- Guardianship Signature Program (for the appointment of lawyers for respondents):
  http://www.utcourts.gov/howto/family/gc/signature/
- Volunteer Court Visitor Resources:
  http://www.utcourts.gov/visitor/resources/

National Resources

- Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges:
  https://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf

  This is an excellent tool published by the ABA, the American Psychological Association and the National College of Probate Judges for judges to use in determining capacity issues in adult guardianship proceedings and includes checklists and sample forms (e.g., guardianship plan and limited guardianship order). The handbook is also posted on the court intranet site with resources for judges.
- 2013 National Probate Court Standards:
  http://ncsc.contentdm.oclc.org/cdm/ref/collection/spcts/id/240

  This 100-page book presents national standards for state court guardianship practice. It is detailed and extensive. Downloading the pdf may take a few minutes.
- National Center for State Courts Guardianship/Conservatorship Resource Guide:
  http://www.ncsc.org/Topics/Children-Families-and-Elders/Guardianship-Conservatorship/Resource-Guide.aspx

  An extensive listing of research and helpful resources for more in-depth investigation of guardianship issues.
- ABA Commission on Law & Aging:
  https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html

  The Commission is the ABA's group dedicated to law and aging issues and is a national leader in this area. The link above is to the page on guardianship law

practice and offers extensive materials including up-to-date information on such issues as supported decision making.

This bench book was revised in February 2018 by Utah WINGS. (insert logo here)

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Tab 4

AMERICAN BAR ASSOCIATION
Commission on Law and Aging

Legislative Fact Sheet

Guardianship and the Right to Visitation, Communication, and Interaction

Introduction

Defining the right to visitation, communication, and interaction under guardianship is an important issue in elder and disability rights law. This issue recently gained media attention when the adult children of incapacitated celebrities such as Casey Kasem and Peter Falk petitioned the courts for the right to visit their parents over a guardian's objections, and then advocated for legislative change. These high-profile visitation cases highlight an unknown but anecdotally frequent number of instances nationally. In addition, as more state legislatures codify protections for the rights of people with guardians, and the public becomes more aware of the potential risks of guardianship — including isolation from friends, family, and community — more states are debating hotly contested visitation bills.

Estrangement from family, friends, and acquaintances can be a precursor and a consequence of guardianship. The factors that led to the appointment of a guardian – mental illness, dementia, poverty, abuse, and exploitation – may have also led to unwanted isolation. Family, friends, and professionals should all be aware of the potentially devastating effects of isolation on the

person; loss of ties to friends, family, and social networks can have a negative effect on anyone's physical and mental health.[1]

Traditionally, a guardian has the power to encourage or limit important relationships and connections. Recently, national standards and state laws have charged guardians with encouraging and supporting visitation in accordance with a person's values and preferences. Still, a guardian may have to weigh the important benefits of visitation with the need to restrict contact due to family dysfunction, undue influence, neglect, abuse, and/or financial exploitation.

The American Bar Association's Commission on Law and Aging, with generous funding from the Borchard Foundation Center on Law and Aging, offers this Legislative Fact Sheet to help lawyers, bar associations, allied professionals, legislative staff, and advocates make policy recommendations, improve practice, and raise professional awareness. For further information on visitation, communication, and interaction in guardianship, contact dari.pogach@americanbar.org. More information on guardianship law, policy, and research is available on the Commission on Law and Aging's website.

Visitation FAQs

1. Does a person subject to guardianship have the right to visit, communicate, and interact with others? Yes and no. This difficult question embodies the larger debate over guardianship: how can a guardian preserve as much of an individual's autonomy as possible while ensuring protection from harm and exploitation? Historically, guardianships transferred most or all of an individual's rights to a guardian, including the right to visitation, communication, and interaction. Recent guardianship reforms, national standards, an increasing number of state statutes, and a key model law reject the wholesale transfer of visitation and communication rights to the guardian. These reforms and laws charge guardians with balancing the tension between autonomy and protection, and maximizing communication according to the person's values and preferences if possible.

2. What are the guardianship standards of practice for visitation and communication? Under the National Guardianship Association (NGA) *Standards of Practice* the guardian shall:

[1] Isolation leads to an increased risk for depression, cognitive decline and dementia, and even premature death. Julianne Holt-Lunstad, The Potential Public Health Relevance of Social Isolation and Loneliness: Prevalence, Epidemiology, and Risk Factors. Public Policy & Aging Report, *The Gerontological Society of America*, Vol. 27 No. 4 at 128 (2017).

- Promote social interactions and meaningful relationships consistent with the preferences of the person and encourage and support the person in maintaining contact with family and friends, as defined by the person, unless it will substantially harm the person. (Standard #4).

Supporting this priority on visitation and communication are other NGA Standards that require the guardian to:

- Identify and advocate for the person's goals, needs, and preferences. (Standard #7).
- Ask the person what he or she wants. (Standard #7).
- Weigh the risks and benefits and develop a balance between maximizing the independence and self-determination of the person and maintaining the person's dignity, protection, and safety. (Standard #8).
- Encourage the person to participate, to the maximum extent of the person's abilities, in all decisions that affect him or her. (Standard #9).
- Acknowledge the person's right to interpersonal relationships. (Standard #10).
- Consider the proximity of those people and activities that are important to the person when choosing a residential setting. (Standard #12).

3. What recent state legislation has addressed the right to visitation and communication? From 2015 - 2018, several states addressed the right to visitation and communication in legislation. State laws differ widely in approach. Several states expressly grant the right to visitation to people subject to guardianship. Others do not use the language of "rights" at all, instead focusing on the need to maintain connections.

- 2015: Texas, Iowa, and California (and provisions in Florida and Ohio).
- 2016: Arizona, Hawaii, Illinois, Indiana [study], Louisiana, New York, South Dakota, Tennessee, Utah, Virginia.
- 2017: Nebraska, Nevada, Rhode Island, Virgin Islands, West Virginia.
- 2018: Maine, New Mexico, Nebraska.[2]
- For a more detailed description of these laws, see the Commission on Law and Aging's annual guardianship legislative summaries.

Examples of recent additions or amendments to statutory visitation laws:

- California: "Every adult in this state has the right to visit with and receive mail and telephone or electronic communication from whomever he or she so chooses, unless a court has specifically

[2] Visitation provisions were included in bills adopting the Uniform Guardianship Conservatorship and other Protective Arrangements Act (UGCOPAA).

ordered otherwise. The control of the conservator does not reach to visitation, unless directed to do so by the court." Cal. Prob. Code §§ 2351 & 2361.

- Arizona: A guardian shall encourage and allow contact between the person with a guardian and other individuals. The guardian should include the person in decisions to allow or limit contact if the person has the mental capacity to make an "intelligent decision." If the guardian denies contact, the person or another individual can petition the court for a contact order. Ariz. Rev. Stat. § 14-5316.

- Nevada: A guardian cannot, with several exceptions, restrict the right of a person subject to guardianship to communicate, visit or interact with a relative or a "person of natural affection." Modes of communication include telephone, mail, and electronic means. Nev. Senate Bill 433 (to be codified in Nev. Rev. Stat. 159).

- New Mexico: A guardian shall not restrict the ability of a person to communicate, visit, or interact with another person. If the guardian has good cause to restrict contact, the guardian may do so for no more than seven days with family members or someone with a pre-existing social relationship or no more than 60 days with someone who is not family nor had a pre-existing social relationship. NM Stat. § 45-5-312(f)(effective July 2018).

4. Which states have passed broad-based bills of rights for people subject to guardianship that include the right to communication? At least five states have enacted such bills of rights, including communication rights. These rights are not absolute — there are always exceptions when a guardian or court may prohibit visitation if it would cause harm to the person. Some states vest the guardian with the authority to restrict visitation, while others require a court order (see below):

- Florida: A person who has been found incapacitated retains the right to visits and communication. However, the right to make decisions about social environment and other social aspects of life may be removed and delegated to the guardian. Fl. Stat. §§ 744.3215(1)(m), (3)(g).

- Minnesota: The protected person retains all rights not restricted by court order and these rights must be enforced by the court, including: "communication and visitation with persons of the ward's or protected person's choice, provided that if the guardian has found that certain communication or visitation may result in harm to the ward's or protected person's health, safety, or well-being, that communication or visitation may be restricted but only to the extent necessary to prevent the harm." Minn. Stat. § 524.5-120 (10).

- Nevada: A "Wards' Bill of Rights" guarantees the right to telephone calls, personal mail, and visitors, unless the guardian and court determine that correspondence with a particular visitor would cause harm. Nev. SB 360 (to be codified in Nev. Rev. Stat. 159).

- South Carolina: The Court vests the guardian with the right to consent or refuse consent to visitation. The statute does not include a standard, as many other states laws do, that the guardian must first find such visits would cause substantial harm before restricting them. S.C. Prob. Code § 62-5-304A(B)(3)(effective January 2019).

- Texas: A person with a guardian retains all rights under law, unless subject to court order, including the right to "unimpeded, private, and uncensored" visits and communication. if the guardian determines certain interactions would cause harm, the guardian may restrict visitation, but only to the extent necessary to prevent substantial harm. The person subject to guardianship may request a court hearing to remove restrictions. Tex. Estates Code §§ 1151.351 (a), (b)(16).

5. How does the new Uniform Law address visitation and communication? The Uniform Law Commission develops and promotes for adoption by state legislatures model laws that bring "clarity and stability to critical areas of state statutory law." In 2017, the Commission approved a new model law on guardianship, replacing an earlier 1997 version. The new act is called the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA). UGCOPPA prioritizes visitation as important to the well-being of people subject to guardianship. The Act's Prefatory Note states:

"[R]ecognizing that individuals subject to guardianship and conservatorship benefit from visitation and communication with third parties, the Act sets forth specific rights to such interactions. In recent years, some family members of individuals subject to guardianship have raised concerns that guardians have unreasonably restricted the ability of individuals subject to guardianship to receive visitors and communicate with others, and family advocates have encouraged legislative responses to address this concern. The Act includes a variety of provisions addressing this concern." Prefatory Note, p. 3.

The Act's strong provisions on visitation, communication and interaction include §§ 311, 314, 315, 316, 502, 503. Of note, the Act:

- Sets out the right of the individual to receive notice of the right to communicate, visit or interact with others, including in-person visits, phone calls, personal mail, electronic communications, and social media. § 311(b)(6).

- Prohibits the guardian from restricting visitation, unless: (1) the restriction is authorized by court; (2) there is a protective order or protective arrangement that limits contact; or (3) the guardian "has good cause to believe the restriction is necessary – Because interactions with a specified person poses a risk of significant physical, psychological or financial harm," AND the restriction is for no more than seven business days if the person with whom contact is restricted has a family or pre-existing social relationship or for 60 days if a family or social relationship does not exist. §§311(b)(6); 315(c).

- Requires the guardian to file a mandatory plan for the care of the individual (within 60 days of appointment and when there is a significant change in circumstances or the guardian seeks to deviate significantly from the plan). The plan must include information about persons with whom the individual has a close personal relationship or a relationship involving regular visitation, and how the guardian will facilitate visits. §316(a)(3).

- Allows the court to order a "protective arrangement" instead of a guardianship. Under this Article, the court may direct visitation or supervised visitation; or restrict access "by a person whose access places [the individual] at serious risk of physical or psychological harm" – or by a person who uses fraud, coercion, duress or deception and control.

- Requires 14 days of notice to the person subject to guardianship of any change in dwelling that would result in restrictions on the person's access to visitors, unless the change is in the guardian's plan or authorized by court order. §311(b)(4).

- Directs the guardian to prioritize the least restrictive living arrangement that will allow the adult subject to guardianship to interact with people who are important to the adult. §314(e)(2).

- Includes requirements that family members and others receive key information about important changes in the person's condition or circumstances. The Act "establishes a default that the adult children and spouse of an adult subject to guardianship or conservatorship are entitled to notice of key events, including a change in the adult's primary residence, the adult's death, or a significant change in the adult's condition." Prefatory Note, p. 3. See §310(e); 411(e).

6. What if the person subject to guardianship cannot consent to visits, communication, and interactions? A guardian can encourage positive relationships even if the person subject to guardianship cannot consent to visits or express interest in visits. Several states specify that evidence of prior relationships is a sufficient basis to presume consent or refusal to consent to visits.

- South Dakota: Consent or refusal to consent to visits can be presumed based on proof of the nature of the prior relationship with an individual. SDCL § 29A-5-422.

- Virgin Islands: Consent may be presumed based on prior history with the person. 34 Vir. Is. Code § 662.

- Rhode Island: Consent may be presumed based on the prior relationship history with the person. R.I. Gen. Laws. § 33-15-18.1(a).

7. Who has the authority to restrict visits, communication, and interactions – the guardian or court? Traditionally, state statutes gave guardians unfettered authority to restrict visits and communication to protect individuals under their care. However, recent legislation in some jurisdictions gives the court exclusive authority to set the terms of visitation. The guardian must seek a court order to restrict visitation, with limited exceptions. For example:

- South Dakota: The guardian "may not restrict a protected person's right of communication, visitation or interaction with other persons, including the right to receive visitors, telephone calls, or personal mail, unless the restriction is authorized by a court order." The guardian may petition the court for a communication restriction. See citation for factors court must consider. SDCL §29A-5.

- Rhode Island: A guardian is prohibited from restricting an individual's right of communication, visitation or interaction with others...The guardian may move the court to restrict communication/visitation for good cause, including: issuance of a protective order; whether abuse, neglect or exploitation of the individual by the person seeking access has occurred or is likely; and any documented wishes of the individual to reject the communication/visitation. R.I. Gen. Laws. §33-15-18.1.

- Tennessee: The court must specifically remove the individual's right to communication, visitation, or interaction with persons. Tenn. Code Ann. § 34-3-107(2)(P).

8. Can a guardian be sanctioned for unnecessarily limiting visitation? Several states provide that a guardian may be sanctioned and even removed for preventing a person from visiting, communicating, and interacting with others.

- Louisiana: Failure of the curator (guardian) to allow visitation may result in removal of the curator. La. Code Civ. Proc. Ann. Art. 2995.

- Rhode Island: The court, upon motion or its own initiative, shall sanction a guardian who knowingly isolated a person. Sanctions include an order to pay court costs and reasonable attorneys' fees of the other party or parties. Sanctions shall not be paid out of the person subject to guardianship's estate. R.I. Gen. Laws. §33-15-18.1(f)(2).

- Virgin Islands: A guardian who has willfully isolated a person can be discharged and replaced. 34 Vir. Is. Code § 665(b).

9. What are the procedural protections for orders granting or restricting visitation? Protections include the right to a hearing, time limits, notice, standard of proof, attorneys' fees. For example:

- Nevada: An interested party, including the person subject to guardianship, may petition the court to grant or deny access to the person subject to guardianship, modify the duties of the

guardian or remove the guardian. The court shall schedule a hearing no later than 63 days after the petition was filed. The court may issue an order for an emergency hearing as soon as practicable but no later than 7 days after the petition was filed. Nev. SB 433 (2017)(to be codified in Nev. Rev. Stat. 159).

- Rhode Island: A person subject to guardianship or any other interested party may request a hearing in court to object to the guardian's decision to limit visits and communication. The court must hold the hearing within 30 days after filing, or within 10 days if the person subject to guardianship is extremely ill and/or death is imminent. The Court may award court costs and reasonable attorneys' fees to the prevailing party, but the fees may not come out of the person's estate. R.I. Gen. Laws. §33-15-18.1.

- Nebraska: A family member who is denied visitation may petition the court. If the individual has a guardian, the petition is to be filed in the county court with jurisdiction over the guardianship case. If the individual's health is in decline, the court shall hold an emergency hearing. Neb. LB 845 (2018)(to be codified in Neb. Rev. Stat. §§42-1302 – 1303).

- Virgin Islands: The court must schedule a hearing on a motion that visitation has been unnecessarily limited within 30 days of filing and 10 days if the person is gravely ill or death may be imminent. If the court issues a scheduling order, it must also issue supervised visitation until the hearing. Notice must be provided to the person with a guardian. The court may award attorneys' fees to the prevailing party, but they may not come out of the person's estate. Vir. Is. Code 34 §§666, 667.

- West Virginia: A relative may petition the court for access to and information about a protected person. The court must schedule a hearing within 60 days of the motion or as soon as practicable if death is imminent. If the court grants the motion it may retain jurisdiction over the matter and modify the order in the best interests of the person subject to guardianship. W. Va. Code §44A-3-17.

10. Do family members or other interested parties have a right to visitation? Some states grant family members the right to petition for visitation in court if it has been denied by the guardian. For example:

- Texas: An adult child of an individual subject to guardianship has the right to file an application for visitation in court and have a hearing. Tex. Est. Code § 1151.055.

- Florida: Interested parties may file for the court to review the guardian's decisions about visitation. Fl. Stat. Ann. §744.3715.

- Arizona: An individual with a significant relationship may petition for a contact order. Ariz. Rev. Stat. § 14-5101.

- Utah: Unless provided otherwise by court order, a guardian may not restrict the right of a person to associate with a relative or qualified acquaintance. Relatives or qualified acquaintances may petition the court to rescind or modify a visitation order. Utah Code Ann. § 75-5-312.5.

11. Do family members have the right to information about significant changes in condition or circumstances of the individual? Even if the guardian must seek the court's consent to restrict visitation, a guardian could achieve the same effect of limiting visits by withholding from family and friends, information about a permanent change of residence, admission to acute or long-term care, or significant changes in health condition. As noted above, the new Uniform Guardianship, Conservatorship and Other Protective Arrangements Act includes a right to information for relatives and/or loved ones. Several states have similar provisions:

- Arizona: A guardian must notify family members if the individual subject to guardianship dies or is in the hospital for more than three days. Ariz. Rev. Stat. Ann. § 14-5317.

- Texas: Relatives have the right to notification of changes in circumstances, provided they "elected in writing to receive the notice..." Changes include: change of residence; admission to a medical facility for acute care for three days or more; location other than residence for more than one week; or; death, funeral arrangements and location of final resting place. Tex. Estates Code §1151.056.

- West Virginia: Relatives who have been granted access by court order to the person subject to guardianship are entitled to notice of death and funeral arrangements, admission to medical facility, and change of location. W. Va. Code §44A-3-18.

12. Do individuals subject to guardianship have the right to visitation in nursing homes? Federal nursing home regulations specify that the resident has the right to visitation, and the facility must provide immediate access to any resident by immediate family members or other relatives, subject to the resident's right to deny or withdraw consent at any time. The resident also has a right to communicate with a long-term care ombudsman, as well as a representative of a protection and advocacy agency. The law does not specify whether the appointment of a guardian transfers these rights to the guardian. Regardless, the nursing facility cannot prohibit visitation. 42 C.F.R. § 483.10.

13. Is there a role for mediation in addressing visitation? Yes. A mediator may be able to resolve visitation disputes without going to court. If a dispute cannot be addressed through mediation, a new dispute resolution process called Eldercaring Coordination may be useful in resolving the increasingly common high conflict "family feud" situations. According to the Association for Conflict Resolution, Eldercaring Coordination is "a dispute resolution option specifically for high-conflict cases involving the care, needs and safety of elders." See the Association for Conflict Resolution (ACR) Guidelines for Eldercaring Coordination, which includes ethical principles for Eldercaring Coordinators, training protocols, and a court pilot project template.

Conclusion

Guardians, lawyers, bar associations, professionals, family and friends can preserve and improve the well-being of people with guardians by advocating for their access to visitation, communication, and interaction. This Legislative Fact Sheet offers key background information.

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The mission of the American Bar Association Commission on Law and Aging is to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of elders. It carries out this mission through research, policy development, technical assistance, advocacy, education, and training. The Commission consists of a 15-member interdisciplinary body of experts in aging and law, including lawyers, judges, health and social services professionals, academics, and advocates.

The views expressed herein have not been approved by the American Bar Association House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

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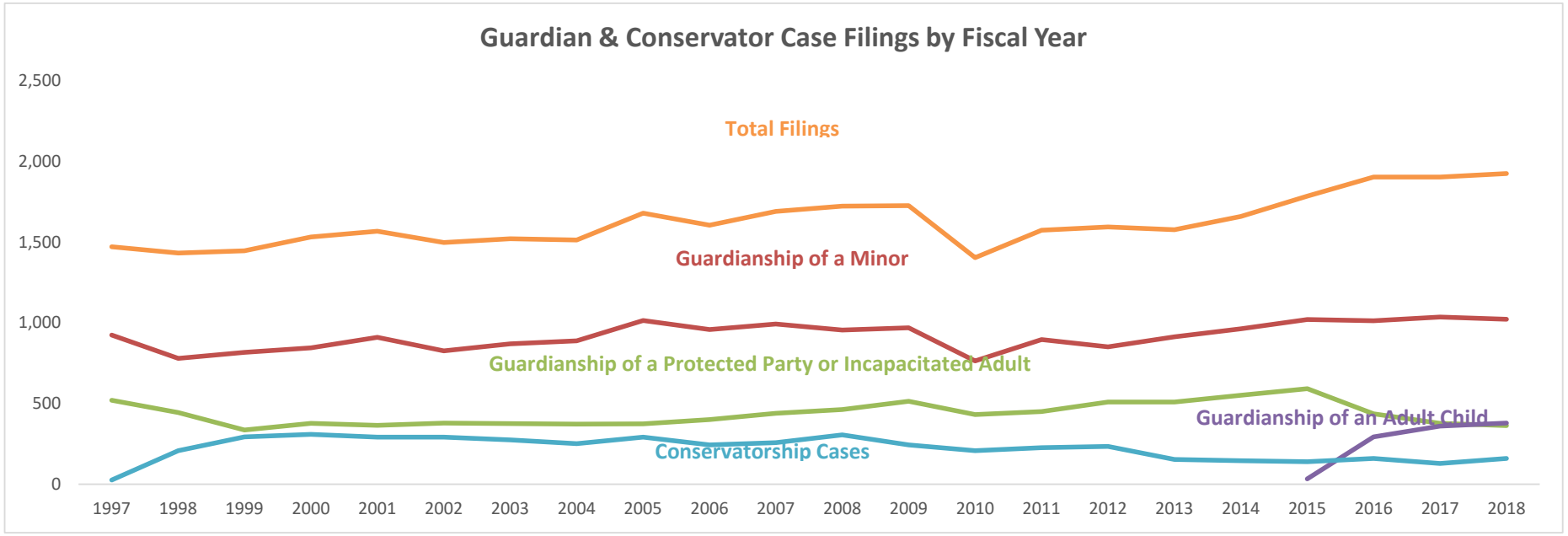
Guardian & Conservator Case Filings by Fiscal Year

Case Filings from FY1997 to FY2018 as of July 5, 2018

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Guardianship Cases	1,445	1,224	1,153	1,223	1,276	1,206	1,246	1,262	1,388	1,361	1,433	1,417	1,484	1,196	1,348	1,360	1,424	1,514	1,645	1,743	1,774	1,765
Guardianship of a Minor	925	780	817	845	911	827	870	889	1,014	959	993	955	970	764	897	851	914	963	1,020	1,013	1,036	1,022
Guardianship of a Protected Party or Incapacitated Adult	520	444	336	378	365	379	376	373	374	401	440	462	514	432	451	509	510	551	592	437	378	364
Guardianship of an Adult Child										1									33	293	360	379
Conservatorship Cases	26	208	293	309	292	292	275	251	291	244	258	306	243	208	226	234	153	146	140	160	129	160
Total Filings	**1,471**	**1,432**	**1,446**	**1,532**	**1,568**	**1,498**	**1,521**	**1,513**	**1,679**	**1,605**	**1,691**	**1,723**	**1,727**	**1,404**	**1,574**	**1,594**	**1,577**	**1,660**	**1,785**	**1,903**	**1,903**	**1,925**



Guardianship & Conservator Cases Filed Q4 of FY2018

Apr 1, 2018 to Jul 1, 2018

		Guardian-Minor	Guardian-Adult Child	Guardian-Adult	Guardianship
District 1	Brigham City	7		3	
	Logan	3	3		
	District 1	**10**	**3**	**3**	
District 2	Farmington	7	11	6	
	Morgan		1		
	Ogden	15	8	8	
	District 2	**22**	**20**	**14**	
District 3	Salt Lake City	87	36	42	
	Silver Summit	1		1	
	Tooele	5	2	3	
	West Jordan				1
	District 3	**93**	**38**	**46**	**1**
District 4	American Fork	1			
	Fillmore		2		
	Heber City		2	2	
	Nephi	1			
	Provo	25	30	12	
	Spanish Fork				
	District 4	**27**	**34**	**14**	
District 5	Cedar City	5	4	3	1
	St. George	14	8	7	
	District 5	**19**	**12**	**10**	**1**
District 6	Kanab	1			
	Manti	1	2		
	Richfield	2			
	District 6	**4**	**2**		
District 7	Castle Dale	1			
	Moab			1	
	Price	1	2	1	1
	District 7	**2**	**2**	**2**	**1**
District 8	Duchesne	2	1		
	Manila				
	Roosevelt				
	Vernal	1		3	
	District 8	**3**	**1**	**3**	
Total		**180**	**112**	**92**	**3**