

# **Guardianship Signature Program Lawyer Training**

**1 hour CLE credit**

## **Welcome and Overview**

Welcome. This online training is for attorneys who are interested in volunteering to represent guardianship and conservatorship respondents as part of the Guardianship Signature Program. This training is eligible for 1 hour of CLE credit and it contains four sections. Quiz questions appear throughout this training.

The first section introduces you to the program and also a scenario that we modify throughout the training in order to illustrate several different ways in which these cases may present themselves. The second section provides an overview of the basic procedures of an initial guardianship proceeding. The third section guides you through the role of the respondent's attorney, and the fourth and final section provides additional resources.

## **1<sup>st</sup> Section: Introduction to the Signature Program**

The Guardianship Signature Program, which is endorsed by the Board of District Court Judges and the Bar Commission, provides to judges a cadre of attorneys who have volunteered to represent in guardianship and conservatorship proceedings a respondent who does not have counsel of his or her own choice. If the respondent's income falls below the 125% poverty threshold, the attorney's representation will be free; above 125% and up to 300%, the representation is on the Modest Means sliding scale, and above 300% of the federal poverty guidelines, the representation is provided based upon a reasonable and necessary hourly rate. Initially, the attorney will assume that this is a pro bono appointment and any fees will be determined at the end of the proceeding.

To volunteer for the Signature Program, attorneys must go to the Utah State Bar's "Check YES! Campaign." Attorneys may select the district in which he or she is willing to accept appointments, and to participate, must:

- 1) be admitted to practice law in Utah and be a member of the Utah State Bar in good standing;
- 2) maintain malpractice insurance;
- 3) accept the fee limits established for the Bar's Pro Bono and Modest Means programs;
- 4) certify as to competence in guardianship and conservatorship law and procedures, or certify that they have completed this course;

- 5) comply with the Rules of Professional Conduct; and
- 6) comply with [Rule 14-301](#), Standards of Professionalism and Civility.

## **Richard**

The scenario that we modify throughout this training involves your client, Richard, who is an 84 year old veteran of the Korean War. He is a widower with one living daughter, Pamela, and has no advanced planning. Richard has been living alone, but he recently fell and broke a hip. Richard was able to consent to surgery but he is now facing rehabilitation and other medical treatment decisions. His daughter is concerned because he has been delirious since coming out of surgery. She wonders if he is more cognitively impaired than she realized. She also needs to pay his bills, including the medical bills that are now piling up. She heard that a guardianship might give her authority to make some of these decisions, so she petitions to be his guardian.

(QUIZ) True or false: If a client's income is less than 125% of the federal poverty guidelines, your representation will be pro bono.

True: If a client's income falls below the 125% poverty threshold, the representation will be free; above 125% and up to 300%, the representation is on the Modest Means sliding scale, and above 300% of the federal poverty guidelines, the representation is provided based upon a reasonable and necessary hourly rate.

## **2<sup>nd</sup> Section: The Basics: A Guardianship Has Been Initiated**

We will now enter the second section of this training and go over the basics of how a guardianship proceeds through the court system. Now that Pamela has filed a guardianship petition with the courts, Richard must be represented by independent counsel. See [Utah Code § 75-5-303](#).

Upon the filing of a petition, the judicial assistant will confirm if the respondent has an attorney. If not, the judicial assistant will send an email message to the Signature Program attorney volunteers in the judicial district where the case is filed. You are the first attorney to volunteer, so you are selected. You enter your appearance, the court issues an order appointing you Richard's attorney, and the court schedules a hearing in approximately five weeks. Pamela serves the petition and a notice of hearing on Richard and on his 80 year old sister, Sally, who may be an interested person. If you have already been appointed Richard's attorney by the court, then you can accept service on behalf of your client. Because Richard does not have a living spouse, living parents, other adult children, a current guardian or conservator, caregiver or custodian, or guardian nominated by his parents' will or his spouse, Pamela has properly served the appropriate parties. Pamela had Richard personally served pursuant to [Utah Rule of Civil Procedure 4](#). However, his sister, Sally, was served pursuant to [Utah Rule of Civil Procedure 5](#). Service of process in adult guardianship and conservatorship proceedings follow the probate code requirements found in [Utah Code § 75-5-309](#) and [Utah Code § 75-1-401](#). Further information is available on the Utah State Courts [website](#).

Because Richard is hospitalized, Pamela files a motion to excuse Richard from the hearing. Richard does not have fourth stage Alzheimer's disease, extended comatosis, or an intellectual disability and an intelligence quotient score under 20 to 25, so the judge appoints a visitor from the Court Visitor Program to visit Richard and find out if he should be excused. The visitor meets with Richard to see whether he can attend the hearing. If the court so orders, the visitor may also gather information from other contacts, such as his care providers. See [Utah Code § 75-5-303\(5\)](#) and the Utah State Courts [website](#).

As you prepare for Richard's hearing, you keep in mind several things that the judge must consider: Whether

1. the petitioner has the necessary claims and proof concerning the respondent's incapacity;
2. the proposed guardian is the appropriate person to serve as guardian;
3. a limited or plenary guardianship should be ordered;
4. proper notice of the petition and hearing has been given to both the respondent and interested parties;
5. the respondent is present or has been excused from attending the hearing;
6. there is a need to appoint a court visitor;
7. the necessary documents have been filed;
8. Pamela, the proposed guardian, is willing to serve;
9. Pamela is required to take the guardianship test and file the declaration of completion of testing; and
10. whether there are any objections to Pamela's petition, including any objections by Richard.

You also consider what Pamela must prove in order to be appointed as Richard's guardian. The judge must make the legal determination of Richard's incapacity before appointing a guardian. "Incapacitated" or "incapacity" is measured by functional limitations. The judicial determination is based on clear and convincing evidence that Richard's ability to receive and evaluate information; make and communicate decisions; or provide for necessities such as food, shelter, clothing, health care, or safety is impaired to the extent that 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 § 75-1-201\(22\)](#) ; See also, *In re Boyer*, 636 P.2d 1085, 1089 (Utah 1981).

You look to see if Pamela has included affidavits or statements of any witnesses who are familiar with Richard and/or evaluations by his physician or other medical care providers that would provide clear and convincing evidence of this incapacity. An [example](#) of a clinical evaluation and also [instructions](#) for the evaluator completing it are found on the Utah State Courts website at <https://www.utcourts.gov/howto/family/GC/guardianship/index.html#forms> You also look to see what kind of authority Pamela is requesting, whether full authority or limited, and if limited, which specific areas Pamela has requested as necessary or desirable as a means of providing continuing care and supervision for Richard . See [Utah Code § 75-5-304](#); <https://www.utcourts.gov/howto/family/gc/authority-guardian.html#guardians> .

You are not completely convinced that Richard needs either a full or limited guardianship because there may be less restrictive alternatives to taking away Richard's independence that would still accomplish what Pamela needs to do to care for her father. So you meet with Richard and do some investigating of your own.

(QUIZ) Which of the following parties must be served the guardianship petition and notice of hearing:

- a. Respondent;
- b. Respondent's spouse;
- c. Respondent's parents;
- d. Respondent's adult children;
- e. Respondent's closest adult relative if no one listed above can be found;
- f. Respondent's current guardian and conservator;
- g. Respondent's caregiver or custodian (which may include an agent appointed by the respondent in an advance healthcare directive or power of attorney); or
- h. Respondent's guardian nominated by the will of respondent's parent or spouse?

ANSWER: All of the above, if applicable.

(QUIZ) True/False: Richard and his sister must be served with the petition and notice of hearing pursuant to URCP 5.

False: Richard must be personally served pursuant to URCP 4 and his sister must be served pursuant to URCP 5. According to [Utah Code § 75-5-309\(3\)](#) "Notice shall be served personally on the alleged incapacitated person and the person's spouse and parents if they can be found within the state. Notice to the spouse and parents, if they cannot be found within the state, and to all other persons except the alleged incapacitated person shall be given as provided in [Utah Code § 75-1-401](#)."

(QUIZ) True/False: There is only one alternative to a full guardianship for an incapacitated person, and that is a conservatorship.

False: There are many alternatives to a full guardianship, which invokes the *parens patriae* authority of the state delegated to the courts. Other alternatives may include:

- Advance health care directive;
- Representative payee;
- Power of attorney; trust; joint ownership, etc.;
- Person centered planning and supported decision making;
- Limited guardianship; and
- Conservatorship.

## **3<sup>rd</sup> Section: The Role of the Respondent's Attorney**

### **Scenario 1**

A lawyer participating in the Guardianship Signature Program will be appointed by court order to represent the respondent. It is important to have the court order to obtain information about your

client. For example, you may need to contact Pamela to find out where Richard is at the moment and when you can visit him. Keep in mind that it may become necessary to visit your client more than once to gather the information you will need.

You learn from Pamela that Richard is still in the hospital recovering from hip surgery. In this scenario, Richard is not able to communicate at all. All medical information indicates that his inability to make decisions is not temporary due to delirium but has longstanding medical bases. Under [Utah Rule of Professional Conduct 1.14](#), which deals with clients with diminished capacity, you must maintain as reasonably possible a normal attorney client relationship with Richard. You may need to communicate with others under 1.14(b) to determine what kind of protection your client needs even though he is clearly incapacitated.

After visiting with Richard, maybe even more than once to see if there is any change in his situation, you see that he is not able to communicate any decisions about himself and he needs protective arrangements. You present no objection to the court for Pamela to be his full guardian after reviewing carefully Richard's circumstances, the evidence presented by Pamela to the court concerning her father's cognitive abilities and need for protection, and determining that Pamela is a person with priority to act as her father's guardian See [Utah Code § 75-311](#).

(QUIZ): True/False: The judge must determine beyond a reasonable doubt that the respondent is incapacitated in order to issue a guardianship.

False: "Incapacitated" or "incapacity" is measured by functional limitations and means a judicial determination after proof by **clear and convincing evidence** that an adult's ability to do the following is impaired to the extent that the individual lacks the ability, even with appropriate technological assistance, to meet the essential requirements for financial protection or physical health, safety, or self care:

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

## Scenario 2

Your meeting with Richard indicates that his delirium was temporary and he is now articulating clearly his wishes. He understands that he will need some help but wants to work with his daughter to establish a care plan. He thinks he may be eligible for veterans' benefits, like Aid and Attendance, and medications. You establish his income (SS retirement and a small pension), his assets (car, home and one checking account), his health insurance coverage (Medicare A, B, and Medigap policy), and discuss his ability to manage his assets, expenses, and health care issues. Richard knows he needs help in managing his affairs, but his decision making capacity is not impaired. You and Richard also speak with his primary physician who confirms that Richard is not cognitively impaired. You and Richard agree that he does not need a guardianship or conservatorship but that he wants to work out a care plan with Pamela. You are able to discuss Richard's position with Pamela and she agrees to work on a care plan rather than pursue a guardianship.

You represent Richard at the hearing where Pamela moves to dismiss the guardianship petition. You and Richard can determine whether or not you will represent him any further in working out a care

plan. A care plan in Richard's case, for example, might include Richard executing a general durable power of attorney and an advance health care directive. The plan also could include selling his car and his house, and having Richard move into an assisted living facility if the time comes. In the meantime, the care plan's goal could include having him move into a rehabilitation center for several weeks until his hip heals and he gets appropriate physical and occupational therapy, and then for him to go back home if possible. You can also refer Pamela and Richard to further resources on the court's website, like this sample [http://www.utcourts.gov/howto/family/gc/docs/25F.Plan\\_Form.pdf](http://www.utcourts.gov/howto/family/gc/docs/25F.Plan_Form.pdf). Other referrals can be to the local area agency on aging, the VA, and an elder law attorney. See the final section of this training for additional resources.

(QUIZ) True/False: A respondent who is sick or injured but is clearly able to articulate his wishes and manage his assets and health care issues still probably needs a guardianship.

False: There are likely alternatives to a guardianship that would be much less restrictive than a guardianship for a person who is injured or sick, including a care plan, a durable power of attorney, and/or an advance healthcare directive.

### Scenario 3

At your meeting with Richard, he is able to say that he doesn't think he needs the guardianship but he is not oriented to time and place. He has to be reminded repeatedly who you are. He knows his daughter and sister but he does not understand why he is in the hospital or what the nature of his situation is. You gather more medical information. He needs rehabilitation and therapy for the hip after surgery and then more assessment of his cognitive abilities after he has recovered more from this acute episode. You discuss the situation more with Richard and while he is able to tell you that he trusts his daughter and wants her involved with his life, you are not sure that he can comprehend the seriousness of his situation. He cannot articulate to you his wishes for the treatment he must have or the potential consequences of not receiving treatment. You discuss with him the possibility of a limited guardianship and conservatorship. You also try to explain that it is possible to have his daughter appointed with limited authority and to ask the court for a review in a certain period of time. Richard is not convinced or is not able to give you clear directions. In addition, you learn that Sally has filed an objection (pro se). She, too, is not opposed to Pamela's involvement with Richard but doesn't believe Richard needs a full guardian and conservator. You appear at the hearing and represent your client's position. In the 3<sup>rd</sup> District, where guardianship petitions are first heard on a consent calendar, your case will be sent to mediation because it is contested (see: [https://www.utcourts.gov/mediation/adr\\_prob.html](https://www.utcourts.gov/mediation/adr_prob.html)). In other districts, the case may be sent to mediation or rather immediately to a further evidentiary hearing. Presumably, at an evidentiary hearing, the issue will be whether Richard is incapacitated and if so, what is the extent of authority needed by the guardian to protect him.

Note that Richard is entitled to a jury trial and to access to all evidence and witnesses, etc. See [Utah Code § 75-5-303](#).

Ultimately, it may result from the findings of fact and conclusions of law that a limited guardianship is adequate to meet Richard's need. In representing your client's interests, you should make sure that accurate findings, a final order, and possibly a care plan or guardianship plan are entered into the record. These should be entered into the record for all cases and not just ones where an objection has

been filed. It may also be helpful to ask the court for a review hearing after a period of weeks or months. [Utah Code § 75-5-304](#) .

At the end of the final hearing, the case may be dismissed, or the court may appoint a guardian with limited or plenary authority. The volunteer lawyer should file a notice of withdrawal. Keep in mind that the guardian must file an inventory within 90 days of appointment as well as a financial accounting and a status report on the protected person every year within 60 days of the anniversary of the appointment. Parents who serve as guardians of their adult children are exempt from the reporting requirements.

(QUIZ) True/False: When the respondent and/or an interested party files an objection to a guardianship petition, the court will just ask the respondent what they want to do in open court.

False: Depending on the district, the case will either be sent to mediation or set for an evidentiary hearing to determine the protected person's incapacity and the appropriate level of protection.

(QUIZ) True/False: The respondent is entitled to a jury trial and access to all evidence and witnesses when a guardianship petition is filed.

True: Due process requires that the respondent be entitled to a jury trial (if requested) and access to all evidence and witnesses before a guardianship may be imposed. An adult is presumed to have the legal capacity to make his or her own decisions. This presumption may be overcome and a substitute decision maker may be appointed only upon a sufficient showing that the individual is mentally unable to participate in a rational decision-making process. A legal finding of incapacity signifies that a person cannot care adequately for person or property. Such a finding most likely will result in the court ordering the appointment of a guardian for the individual.

## 4<sup>th</sup> Section: Resources

For further resources, please see the following links.

### **Utah Resources:**

Utah advance healthcare directive materials:

<http://aging.utah.edu/programs/utahcoa/directives/index.php>

Utah Division of Aging and Adult Services, including Adult Protective Services, Area Agencies on Aging, and LongTerm Care Ombudsman:

<http://daas.utah.gov/>

Utah Division of Services for People with Disabilities:

<http://www.hsdspd.utah.gov/>

Utah State Courts Bench Book for Adult Guardianship and Conservatorship:

[http://www.utcourts.gov/resources/attorney/docs/GC\\_Bench\\_Book\\_Adult.pdf](http://www.utcourts.gov/resources/attorney/docs/GC_Bench_Book_Adult.pdf)

Utah State Courts guardianship and conservatorship webpages:  
<https://www.utcourts.gov/howto/family/gc/index.html>

Utah State Courts Guardianship Signature Program Webpage:  
<https://www.utcourts.gov/howto/family/gc/signature/index.html>

Utah State Courts guardianship testing webpage:  
[https://www.utcourts.gov/howto/seniors/g\\_and\\_c.asp](https://www.utcourts.gov/howto/seniors/g_and_c.asp)

Utah State Courts volunteer court visitor program:  
<https://www.utcourts.gov/visitor/index.html>

Utah State Courts webpage on post-appointment forms:  
<https://www.utcourts.gov/howto/seniors/index.asp#Guardianship>

WINGS articles on medical evidence and person centered planning in the Utah Bar Journal:  
*WINGS: Improving Service Delivery to Protected Persons and Their Guardians*  
[https://www.utahbar.org/wp-content/uploads/2014/05/2014\\_edition\\_03\\_may\\_jun.pdf#page=38](https://www.utahbar.org/wp-content/uploads/2014/05/2014_edition_03_may_jun.pdf#page=38)

*WINGS: The Challenges of Submitting Competent Medical Evidence of Incapacity in Guardianship Proceedings*  
[https://www.utahbar.org/wp-content/uploads/2014/05/2014\\_edition\\_03\\_may\\_jun.pdf#page=44](https://www.utahbar.org/wp-content/uploads/2014/05/2014_edition_03_may_jun.pdf#page=44)

*WINGS: Person Centered Planning and Supported Decision-Making*  
[https://www.utahbar.org/wp-content/uploads/2014/05/2014\\_edition\\_03\\_may\\_jun.pdf#page=48](https://www.utahbar.org/wp-content/uploads/2014/05/2014_edition_03_may_jun.pdf#page=48)

### **National Resources:**

ABA Assessment of Older Adults with Diminished Capacity:  
(Handbook for Judges)  
<http://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf>

(Handbook for Lawyers)  
<https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>

(Handbook for Psychologists)  
<http://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf>

ABA Commission on Law & Aging:  
[http://www.americanbar.org/groups/law\\_aging.html](http://www.americanbar.org/groups/law_aging.html)

Center for Social Gerontology elder mediation & guardianship materials:  
<http://www.tcsg.org/>

Elder caring Coordination Guidelines:  
[http://www.americanbar.org/publications/bifocal/vol\\_36/issue\\_1\\_october2014/acr\\_eldercaring\\_guide\\_lines.html](http://www.americanbar.org/publications/bifocal/vol_36/issue_1_october2014/acr_eldercaring_guide_lines.html)

National Center for State Courts Guardianship/Conservatorship Resource Guide:

<http://www.ncsc.org/Topics/Children-Families-and-Elders/Guardianship-Conservatorship/Resource-Guide.aspx>

National Guardianship Association:

<http://www.guardianship.org/>

Social Security Administration:

<https://www.ssa.gov/>

Third National Guardianship Summit 2011 Standards and Recommendations:

<http://epubs.utah.edu/index.php/ulr/article/view/833/642>

Veterans Affairs:

<http://www.va.gov/>

## **5<sup>th</sup> Section: End**

Thank you for participating in the Guardianship Signature Program online training. Please click on the "Proceed" button to access your certificate of completion. In order to receive 1 hour of CLE credit for this training, you will need to submit your certificate, along with Self Study Form 5 (<http://www.utahbar.org/mcle/mcle-forms-library/>) to the Utah State Bar's MCLE Department. A written script of this online training program is available on the Utah State Courts Guardianship Signature Program webpage at <http://www.utcourts.gov/howto/family/gc/signature/>.