

Time for a Change: Modernizing Utah’s Guardianship and Voting Laws to Align with Federal Standards and Best Practices

by Kathie Brown Roberts

In 2022, Utah took a significant step forward by enacting “Rights of a person alleged to be incapacitated” in Utah Code Section 75-5-301.5. This legislation clarified the personal and fundamental rights retained by individuals subject to guardianship in Utah. Under Utah Code Section 75-5-301.5(2)(k), an incapacitated person for whom a guardian has been appointed may “engage in any activity that the court has not expressly reserved for the guardian, including marriage or domestic partnership, traveling, working, or having a driver license.”

However, this code section does not explicitly mention voting rights, due to language in Article IV, Section 6 of the Utah

Constitution that restricts voting by “incompetent” persons. This discrepancy presents an opportunity for Utah to review and update its approach to voting rights for individuals under guardianship.

Article IV, Section 6 of the Utah Constitution states that “[a]ny mentally incompetent person” is not permitted to vote. The word “incompetent” is neither a defined term in Article IV, Section 6 of the Utah Constitution nor Utah’s guardianship statutes. Assuming that at the time of drafting the Utah Constitution, the use of the word “incompetent” was synonymous with the definition of “incapacitated” currently set forth under Utah Code Section 75-1-201(24), this blanket disenfranchisement based on guardianship status fails to account for the varying capabilities of individuals under guardianship and conflicts with

more modern understandings of capacity and disability rights. Many states have already amended their constitutions and guardianship statutes to better protect this fundamental right by requiring a specific finding of fact by clear and convincing evidence by the court. This article considers Utah’s current approach, reviews developments in federal law and best

practices from other states, and proposes specific reforms to bring Utah’s laws into alignment with contemporary standards.

Considerations Regarding Utah’s Current Approach

Utah’s constitutional provision regarding voting rights for people under guardianship raises several points for consideration:

1. It fails to recognize that guardianship is not an all-or-nothing status and that many people under guardianship retain significant decision-making abilities. See Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 McGEORGE L. REV. 931, 960 (2007).

Currently in Utah, the guardianship statutes provide no requirement that the court find by clear and convincing evidence that an adult lacks the ability to engage in voting, marriage, or travel.

KATHIE BROWN ROBERTS is a Certified Elder Law Attorney (National Elder Law Foundation) and the only Utah member of the Special Needs Alliance, an invitation-only national alliance of Special Needs Practitioners. She practices in the areas of estate planning, special needs planning, and adult guardianships.



2. It creates an irrebuttable presumption of incapacity to vote based solely on guardianship status, violating due process. *See Doe v. Rowe*, 156 F. Supp. 2d 35, 56, 59 (D. Me. 2001). Additionally, the failure of Utah’s guardianship statutes to impart notice that a ward could face disenfranchisement is a failure of procedural due process. *See Utah Code Ann. § 75-5-312*.
3. It is overbroad, potentially disenfranchising people who have the capacity to vote. *See Missouri Prot. & Advoc. Servs., Inc. v. Carnahan*, 499 F.3d 803, 808–09 (8th Cir. 2007).
4. It conflicts with the Americans with Disabilities Act’s integration mandate by unnecessarily segregating people with disabilities from the voting process. *See 28 C.F.R. § 35.130(d); Olmstead v. L.C.*, 527 U.S. 581, 592 (1999).
5. It is out of step with modern guardianship practice, which emphasizes tailored orders and retained rights. *See UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROTECTIVE ARRANGEMENTS*

ACT § 301(b) (UNIF. L. COMM’N 2017); *see also* Accessible Voting Act of 2024, S. 3748, 118th Cong. (2024), <https://www.congress.gov/bill/118th-congress/senate-bill/3748/text/is#id82E539A400334C3CB31DAC61616AD72D>.

In addition to the problems set forth above relating to the Utah Constitution’s outdated wording, the Utah Code’s outline of a guardian’s powers provides that “[e]xcept as provided in this Subsection (1), a guardian has the same powers, rights, and duties respecting the ward that a parent has respecting the parent’s unemancipated minor.” Utah Code Ann. § 75-5-312(1)(c) (emphases added). This vague sentence is the backbone of plenary guardianships in Utah, which allows for the divesting of *all* fundamental rights of a protected person without a specific finding of lack of capacity to engage in fundamental rights such as voting or possibly even marriage contrary to U.C.A. section 75-5-301.5 (2)(k). Currently in Utah, the guardianship statutes provide no requirement that the court find by clear and convincing evidence that an adult lacks the ability to engage in voting, marriage, or travel.

Developments in Federal Law and Best Practices

Federal courts have struck down similar state laws disenfranchising broad categories of people under guardianship. *See, e.g., Doe*, 156 F. Supp. 2d at 59. The Help America Vote Act of 2002 also requires that state programs allow “the same opportunity for access and participation (including privacy and independence) as for other voters.” 52 U.S.C. § 21081(a)(3)(A).


The Accessible Voting Act of 2024 introduced as H.R. 7389 in Congress this year provides:

A State shall not determine that an individual lacks the capacity to vote in an election for Federal office on the ground that the individual is subject to guardianship, unless a court of competent jurisdiction issues a court order *finding by clear and convincing evidence that the individual cannot communicate, with or without accommodations, a desire to participate in the voting process.*

S.3748, 118th Cong. (2024) (emphasis added), <https://www.congress.gov/bill/118th-congress/senate-bill/3748/text/is#id82E539A400334C3CB31DAC61616AD72D>. Many states have updated their laws to better protect voting rights while still


Helping attorneys & their clients for four decades

- A real estate broker who understands all the aspects of an estate sale, from working with court appointed representatives to the myriad of heirs of the deceased. One third of my business is estate sales. Divorce cases don’t scare me and I’m able to get the property sold following court orders and if necessary, testifying before the judge.
- I have the complete team of estate liquidators, from appraisers, cleaners, contractors, and movers for the smallest to the largest homes or condominiums.
- Referrals available of other attorneys that I have worked with in Utah. I own my own firm and am reasonably priced with no hidden transaction fees to your clients. 40 years full time experience and in the top 5% of sales agents in the Salt Lake Board of REALTORS. Also member of the Washington County and Park City Boards of REALTORS.



Babs De Lay,
Principal Broker

Urban Utah
Homes & Estates



babs@urbanutah.com | 801.201.8824

allowing for individualized determinations of capacity when warranted. The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA), approved by the Uniform Law Commission in 2017, provides that:

The court shall grant a guardian . . . only those powers necessitated by the demonstrated needs and limitations of the respondent and issue orders that will encourage development of the respondent’s maximum self-determination and independence. The court may not establish a full guardianship if a limited guardianship, protective arrangement instead of guardianship, or other less restrictive alternatives would meet the needs of the respondent.

UGCOPAA § 301(b). Regarding voting rights specifically, the UGCOPAA requires that a court order establishing guardianship for an adult must:

state whether the adult subject to guardianship retains the right to vote and, if the adult does not retain the right to vote, include findings that support removing that right [which must include a finding that the adult cannot communicate, with or without support, a specific desire to participate in the voting process].

Id. § 310(a)(3) (alteration in original). In 2006, experts from the University of the Pacific, McGeorge School of Law, the Borchard Foundation Center on Law and Aging, and the American Bar Association Commission on Law and Aging met at a symposium, in part, to develop a standard on removal of voting rights for people with cognitive impairments. See *Symposium, Facilitating Voting As People Age: Implications of Cognitive Impairment*, 38 McGEORGE L. REV. 843, 845 (2007). This symposium recommended:

To promote the democratic process to the fullest extent possible, no governmental entity should exclude any otherwise qualified person from voting on the basis of medical diagnosis, disability status, or type of residence. A person’s capacity to vote should be presumed regardless of guardianship status.

Recommendations of the Symposium, 38 McGEORGE L. REV. 861, 862–63 (2007).

The symposium further recommended that if states do allow for exclusion based on incapacity, such exclusion should only occur after:

1. A determination by a court of competent jurisdiction;

MEDIATION SERVICES



STEPHEN P. HORVAT of Anderson & Karrenberg

- Practicing lawyer in Utah since 1996
- Focus on general commercial litigation with specific experience in litigating cases involving:

– contracts	– professional liability
– business torts	– probate
– partnerships	– property and boundary disputes
– oil and gas	– governmental immunity
– legal malpractice	

**For information or to book a mediation, contact:
(801) 232-0469 | shorvat@aklawfirm.com**

2. Appropriate due process protections; and
3. A finding by clear and convincing evidence that the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process. *Id.* at 863.

Potential Reforms for Utah to Consider

Based on these developments and best practices, Utah should consider making the following changes to its constitution and guardianship laws:

1. Amend Article IV, Section 6 of the Utah Constitution to remove the categorical ban on voting by “mentally incompetent” persons. Replace the categorical ban with language more in line with the Accessible Voting Act of 2024 providing that there is no presumption that an individual lacks the capacity to vote in an election for federal office on the ground that the individual is subject to guardianship, unless a court of competent jurisdiction

issues a court order finding by clear and convincing evidence that the individual cannot communicate, with or without accommodations, a desire to participate in the voting process.

2. Amend the Utah Uniform Probate Code to:
 - a. Require that guardianship orders specifically address whether the right to vote (and other fundamental rights) is retained or removed.
 - b. Establish a clear standard for removal of voting rights, such as: “The court may remove the right to vote only upon a finding by clear and convincing evidence that the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process.”
 - c. Require that the court consider less restrictive alternatives before removing voting rights.
 - d. Create a process for restoration of voting rights if capacity improves.
3. Develop training and guidelines for judges, guardians, and long-term care facilities on preserving voting rights and providing assistance.
4. Ensure that voter registration and voting processes are accessible to people with disabilities, including cognitive impairments.

Conclusion

Utah has an opportunity to review its approach to voting rights for people under guardianship. By considering the reforms outlined above, Utah could further protect the fundamental right to vote while still allowing for removal of voting rights in appropriate individual cases. These changes would align Utah’s laws with federal requirements and national best practices, recognizing that many people under guardianship may retain the capacity to participate in the democratic process.

The views and opinions expressed in this article are those of the author and do not necessarily represent the views or opinions of the Utah State Bar or the Utah Bar Journal.

Law Firm Golf League

Presented by



This past summer, eight law firms competed in the second year of the Law Firm Golf League. We would like to give a special thanks to all those who participated this past summer.

We are excited to continue this in 2025. If your law firm is interested in joining the Law Firm Golf League or would simply like more details, please contact Cole Crowther (cole.crowther@dentons.com) or Matt Orme (matt.orme@dentons.com)

© 2024 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates, including Dentons Durham Jones Pinegar. No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers. Please see [dentons.com](https://www.dentons.com) for Legal Notices.