

Agenda

Ad Hoc Committee on Probate Law and Procedure

August 17, 2007
12:00 to 2:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Executive Dining Room

Approval of minutes.	Judge Sheila McCleve
Representation of person in need of protection.	Tim Shea
	Steve Mikita
	Mary Jane Ciccarello
Definition of incapacity.	Maureen Henry
Improving medical evidence.	Committee

Committee Web Page: <http://www.utcourts.gov/committees/adhocprobate/>

Meeting Schedule

September 21, 2007
October 19, 2007
November 16, 2007
December 21, 2007
January 18, 2008
February 15, 2008
March 21, 2008
April 18, 2008
May 16, 2008
June 20, 2008
July 18, 2008
August 15, 2008
September 19, 2008

MINUTES
Ad Hoc Committee on Probate Law and Procedure
Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114-0241
June 15, 2007 - 12:00 p.m.

ATTENDEES

Kent Alderman
Kerry Chlarson
Richard Howe
Judge Sheila McCleve, Presiding
Steve Mikita
Julie Rigby
Kathy Thyfault

EXCUSED

Mary Jane Ciccarello
Reese Hansen
Judge George Harmond
Maureen Henry
Judge Gary Stott

STAFF

Diana Pollock
Tim Shea

I. WELCOME AND APPROVAL OF MINUTES

Judge McCleve welcomed the committee members to the meeting. With one correction the minutes of the May 21, 2007 meeting were approved. Judge McCleve noted that there would not be a committee meeting in July.

Tim Shea noted that discussions from the last committee meeting included the work of the Commission on Uniform Laws. Mr. Shea stated that the commission is working in the guardianship area, however, it is a jurisdictional statute only. The process for the appointment and responsibilities of the guardian will not be affected by the new uniform law.

II. REPRESENTATION OF PERSON IN NEED OF PROTECTION

Kerry Chlarson reported that he researched the ways other states have handled similar representation issues. The results of that research included:

- Providing a regulated list of attorneys.
- Providing an informal list.
- Public defender method - consists of contracts and agreements.

Mr. Chlarson stated it is this committee's task to see that the wards receive proper

representation. After much discussion, some of the committee's suggestions included:

- Using Utah law school students.
- Setting up a clinic to allow the law students to interact with clients.
- Utilize other disability law centers.
- Public defender model - public appropriation by the Legislature.
- Pro bono attorney list.
- Representation divided between wards whose estates can pay for counsel and wards who are not able to pay.

Tim Shea stated that Steve Mikita's approach of categorizing may be beneficial. Mr. Shea stated that to recommend a public defender model to the Legislature would require an appropriation of funds for lawyers who bid on the contract for representation of indigent wards. Mr. Shea suggested that perhaps with the regulated list model, there could be a requirement that lawyers who want to be on the list take a set number of pro bono cases.

Tim Shea questioned whether the Office of Public Guardian would be a better place for the responsibility of the public defender model. Steve Mikita stated that he was in favor that it being handled in individual districts.

Kathy Thyfault reported that judges in the Second Judicial District would like a pool of lawyers who are familiar with the procedures for representing wards. The judges would also like the doctors to be involved by submitting an affidavit stating the manner and degree to which the ward is incapacitated. The judges would like an attorney to be appointed before the hearing so that everyone involved with the ward has an opportunity to object or contest to who is appointed.

After more discussion the committee expressed the following concerns and suggestions:

- If stricter guidelines are required for guardianship that it would put more of a burden on the ward.
- Due process rights of the ward are not protected.
- Ability of attorneys representing wards to evaluate capacity.
- The line between plenary and limited guardianship.
- The lawyer needs to thoroughly interview the ward and medical staff and research records.
- Prepare a certified or regulated list with minimum qualifications approved by the court.
- Requirement of a minimum number of pro bono hours to be on the list.
- The court would make the appointment from the list.
- If the estate is indigent, the service and representation would be funded by the state. If the estate is not indigent, it would be funded by the estate. If the estate is somewhere in the middle, tap into the pro bono.
- If the estate desires to hire their own attorney, have a process whereby the judge can evaluate the attorney.

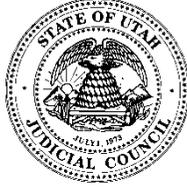
- Can the Disability Law Center provide training to ensure competency on the part of counsel?
- Renew certification every 2 to 3 years.
- If there is appointment from the list, there needs to be a process by which the court can appoint from off the list.
- Sworn affidavit from the attorney that they have the qualifications to represent the ward.
- Improve the quality of medical testimony or affidavits.

Tim Shea stated that the qualifications of the lawyer could be regulated by a rule of the Judicial Council or the Supreme Court. Mr. Shea noted that being on the list would be an assurance to the court that the attorney qualifies to represent the ward. Mr. Shea noted that in order to obtain funding a statute is needed. Tim Shea will return to the next meeting with a draft statute for the committee's review.

III. DEFINITION OF INCAPACITY

There was not sufficient time for the definition of the incapacity issue. However, Steve Mikita gave a brief definition of incapacity that is in Utah Probate Code § 71-2-22. Mr. Mikita stated that the Office of Public Guardians' definition of incapacity leans towards the national trend of what a person can and cannot do. The issue was tabled until the next committee meeting.

The meeting adjourned at 2:10 p.m.



Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

MEMORANDUM

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

To: Probate Committee
From: Tim Shea *TS*
Date: August 13, 2007
Re: Representation of Person in Need of Protection

In this committee and in other contexts, people have been struggling with how to refer to the ward. I think it would be helpful to find a single phrase for guardianships (whether minor or adult) and conservatorships. As some point, someone suggested "person in need of protection," and I have used that phrase here. But if there is a better and simpler reference, I do not mean to preempt the discussion.

From my notes of the discussion at the last meeting, I developed a model for representation for the person in need of protection that I shared with Kerry Chlarson and Steve Mikita. With their further input, I made some adjustments and drafted statutes and rules. I've attached the model outline and the draft statutes and rules for your consideration. Statutes and rules can be disjointed at times, especially where, as here, there are different laws regulating different parts of the program. With any luck, the outline will help you see the big picture. Although not underlined, all of the statutes and rules would be new.

I believe we will need legislation because we will need money to pay for the program. That legislation probably will have to be relatively detailed because the Legislature has a legitimate interest in governing how the public's money is appropriated.

I have attached the program to the Supreme Court, rather than the Judicial Council, because the Court regulates the practice of law. This program appears more closely related to the practice of law than to the administration of the courts.

The committee will have to struggle at some point with the many details. At this early stage, resolving the general concept will be most beneficial.

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

REPRESENTATION FOR PERSON IN NEED OF PROTECTION

- 1) Money
 - a) General Fund appropriation for attorney fees, costs and extraordinary expenses if the person is indigent.
 - b) General Fund appropriation for costs and extraordinary expenses if the person is qualified indigent. Lawyer represents person pro bono, which means a sliding scale based on ability to pay.
- 2) Roster
 - a) Roster of lawyers maintained by the Bar/Supreme Court
 - b) Qualifications
 - i) Training, Observation, Mentoring, MCLE
 - ii) Minimum pro bono hours
 - c) Process to get on and stay on the roster
 - d) Complaints and sanctions handled through the regular OPC process.
 - e) Benefits to being on the list
 - i) Presumed qualified. Clients with incomes above qualified indigent might select a lawyer from this list.
 - ii) Payment from state appropriation if the person is indigent or qualified indigent.
 - iii) Immunity under certain conditions. (Immunity from malpractice action. Still subject to bar discipline.)
- 3) Appointments
 - a) Court determines whether person is indigent or qualified indigent
 - i) Use criminal standard for indigent
 - ii) Use modified criminal standard for qualified indigent
 - b) If person is indigent, the court appoints a lawyer from the roster.
 - c) If person is qualified indigent, the court appoints a lawyer from the roster unless the person is represented by a lawyer of the person's own choice.
 - d) If income is above qualified indigent, person will have to provide and pay his or her own lawyer.
 - e) Presumed qualified if on the roster
 - i) Person can select a lawyer from the roster
 - ii) Need fair method for court to select a lawyer from the roster
 - iii) Vet for independence
 - f) Prove qualifications if not on the roster
 - i) Unless the lawyer is of the person's own choice. If the lawyer is of the person's choice, independence can be presumed. May have to discount qualifications.
 - ii) Standards and process to vet for qualifications
 - iii) Standards and process to vet for independence
- 4) Payments
 - a) Supreme Court (Bar) to set fees for standard services.
 - i) List of standard services may be detailed.
 - ii) Need process to keep the fees up to date.

1 **Part 6. Representation of Persons in Need of Protection.**

2 **75-5-601. Legislative findings.**

3 (1) The Legislature finds that:

4 (a) the law requires that a person alleged to be in need of protection must be
5 represented by a lawyer;

6 (b) a person alleged to be in need of protection is subject to losing important
7 individual rights and liberties, and

8 (c) a person alleged to be in need of protection often will not be able to assist in his
9 or her representation.

10 (2) Therefore, the state has a legitimate interest in helping to provide representation
11 by a lawyer who meets minimum qualifications and will represent the person
12 independently and zealously.

13 **75-5-602. Definitions.**

14 (1) "Account" means the Person in Need of Representation Account.

15 (2) "Attorney fees" means fees of a lawyer and staff for advising and representing a
16 person at every stage of the trial court proceedings and the first appeal of right.

17 (3) "Costs" means court costs allowable under Utah Rule of Civil Procedure 54.

18 (4) "Extraordinary expense" means an expense over \$500 for any particular service
19 or item such as experts, investigators, or demonstrative evidence, but not including
20 overhead.

21 (5) "Indigence" and "Indigent" mean that a person:

22 (a) does not have sufficient income, assets, credit, or other means to pay the
23 probable attorney fees, costs, extraordinary expenses and other expenses of legal
24 services without depriving the person or the person's family of food, shelter, clothing,
25 and other necessities; or

26 (b) has an income level at or below 150% of the poverty level; and

27 (c) has not transferred or otherwise disposed of assets with the intent of establishing
28 eligibility for the appointment of counsel.

29 (6) "Person" means a person alleged to be in need of protection.

30 (7) "Poverty" means the United States poverty level as defined by the most recently
31 revised poverty income guidelines published by the United States Department of Health
32 and Human Services.

33 (8) "Pro bono" means that a lawyer represents a person for no cost or for no more
34 than 1% of the attorney fees established by the Supreme Court for every 1% that the
35 person's income level is above 150% of the poverty level up to 250% of the poverty
36 level.

37 (9) "Qualified indigence" and "qualified indigent" mean that a person has an income
38 level at or below 250% of the poverty level, and has not transferred or otherwise
39 disposed of assets with the intent of establishing eligibility for the appointment of
40 counsel.

41 (10) "Roster" means the list of lawyers, established by the Supreme Court under this
42 part, presumed qualified to represent a person.

43 **75-5-603. Roster -- Person in Need of Protection Representation Account.**

44 (1) The Supreme Court shall establish a roster of lawyers presumed qualified to
45 represent a person alleged to be in need of protection. Lawyers on the list must meet
46 qualifications established by the Supreme Court, one of which will be pro bono
47 representation of persons alleged to be in need of protection. Only lawyers on the roster
48 may be paid from the Account. Only lawyers on the roster qualify for immunity under
49 Section 75-5-607.

50 (2) There is created in the General Fund a restricted account known as the Person
51 in Need of Protection Representation Account. The Legislature shall appropriate money
52 from the Account to the Supreme Court for payment of attorney fees, costs and
53 extraordinary expenses of lawyers on the roster representing indigent and qualified
54 indigent persons.

55 (3) The Account shall be funded by

56 (a) legislative appropriations;

57 (b) \$ from filing fees; and

58 (c) grants and contributions.

59 **75-5-604. Payments from the Account.**

60 (1) If the person is indigent, the Account shall pay attorney fees reasonably and
61 necessarily incurred according to the scale established by the Supreme Court.

62 (2) If the person is indigent or qualified indigent, the Account shall pay extraordinary
63 expenses reasonably and necessarily incurred and approved by the trial court. Unless
64 there are exigent circumstances, the lawyer shall file a motion to approve the
65 extraordinary expense before the expense is incurred.

66 (3) If the person is indigent or qualified indigent, the Account shall pay court costs
67 awarded by the court.

68 **75-5-605. Rates to be established by the Supreme Court.**

69 (1) The Supreme Court shall establish, annually review and adjust as necessary
70 attorney fees for legal services of lawyers on the roster, taking into account:

- 71 (a) the complexity of the service;
- 72 (b) the prevailing market rates for the service; and
- 73 (c) the ability of the person to pay.

74 (2) The attorney fees approved by the Supreme Court shall be no more than 50% of
75 the prevailing market rates for the service.

76 (3) The total compensation for attorney fees, costs and extraordinary expenses may
77 not, without prior court approval, exceed: (EXAMPLES FROM CRIMINAL
78 PROCEDURES)

79 (a) \$3,500 for each assigned attorney in a case in which one or more felonies is
80 charged;

81 (b) \$1,000 for each assigned attorney in a case in which only misdemeanors or
82 lesser offenses are charged; or

83 (c) \$2,500 for each assigned attorney in the representation of an indigent in an
84 appellate court on a first appeal of right.

85 **75-5-606. Appointment of counsel -- Qualification for payment from the**
86 **Account.**

87 (1) Upon request, the court shall determine whether the person is indigent or
88 qualified indigent. The court shall enter the findings on the record. The court may
89 determine or review indigence or qualified indigence at any stage of the proceedings or
90 within one year after the final order or decree.

91 (2) If the person is indigent, the court shall appoint a lawyer from the roster to
92 represent the person. If the person is qualified indigent and has not retained a lawyer of
93 the person's choice, the court shall appoint a lawyer from the roster to represent the
94 person.

95 (3) A person claiming to be indigent or qualified indigent and that person's
96 representative have a continuing duty to inform the court of any material change in
97 circumstances that may affect the determination.

98 (4)(a) If the court finds within one year after the final order or decree that a person
99 was erroneously determined to be indigent, the attorney general may proceed against
100 the person for the amount paid from the Person in Need of Protection Representation
101 Account.

102 (b) If the court finds within one year after the final order or decree that a person was
103 erroneously determined to be qualified indigent, the lawyer from the roster representing
104 the person may proceed against the person for the reasonable value of the legal
105 services rendered to the person.

106 **75-5-607. Pro bono representation -- Liability limits.**

107 A lawyer on the roster is immune from suit if:

108 (1) the person is indigent and the lawyer provides legal services paid for from the
109 Account; or

110 (2) the person is qualified indigent and the lawyer provides legal services pro bono;
111 and

112 (3) the lawyer provides the legal services without gross negligence or willful
113 misconduct.

114

1 **Rules Regulating the Utah State Bar.**

2 **Rule 14-808. Lawyer qualified to represent a person in need of protection.**

3 (a) Words in this rule have the same meaning as in Utah Code Section 75-5-602.

4 (b) The executive director shall maintain and publish a roster of lawyers presumed
5 qualified to represent a person alleged to be in need of protection. The roster shall
6 provide each lawyer's name, business address, phone, fax and email, and the counties
7 in which the lawyer will undertake representation.

8 (c) To qualify for the roster, a lawyer must:

9 (c)(1) be admitted to the practice of law in Utah for at least two years and, within the
10 preceding four years:

11 (c)(1)(A) have acquired at least 24 hours of MCLE or 24 hours of accredited law
12 school education in the law and procedures for representing persons in need of
13 protection;

14 (c)(1)(B) have observed a mentor representing at least one person in need of
15 protection, which may be satisfied under Rule 14-807, Law student assistance;

16 (c)(1)(C) have served as co-counsel with a mentor representing at least one person
17 in need of protection, which may be satisfied under Rule 14-807, Law student
18 assistance;

19 (c)(1)(D) have served as lead counsel with a mentor representing at least one
20 person in need of protection;

21 (c)(2) be recommended by one's mentor; and

22 (c)(3) represent indigent and qualified indigent persons in accordance with the
23 attorney fees established under this rule.

24 (d) To be retained on the roster, at the time of a lawyer's MCLE compliance report,
25 the lawyer must submit to the executive director a report identifying:

26 (d)(1) at least three hours of MCLE in the law and procedures for representing
27 persons in need of protection;

28 (d)(2) representation of at least two persons in need of protection; and

29 (d)(3) representation pro bono of at least two persons in need of protection.

30 (e) Except maximum attorney fees, the executive director may waive any initial
31 requirement if the lawyer demonstrates by education and experience proficiency in the

32 law and procedures for representing persons in need of protection. Except for maximum
33 attorney fees, the executive director may waive any continuing requirement upon
34 application and a showing of good cause.

35 (f) The executive director shall develop and publish application forms, reporting
36 forms, and forms for requesting a waiver.

37 (g) A mentor may charge for the service.

38 (h) A lawyer may be removed or suspended from the roster as part of a sanction
39 under Article 5, Lawyer Discipline and Disability.

40 (i) List of services and fees.

41 NOTE: This is anticipated to be a service by service rate, which may get complex.

42 Interview client: \$\$\$\$

43 Interview visitor: \$\$\$\$

44 Interview medical personnel: \$\$\$\$

45 Legal research: \$\$\$\$

46 ETC.

47

1 **Utah Rule of Civil Procedure**

2 **Rule 76. Lawyer qualified to represent a person in need of protection.**

3 A person alleged to be in need of protection has the right to a qualified lawyer
4 independent of the petitioner’s lawyer. A lawyer on the roster maintained by the
5 executive director of the Utah State Bar is presumed qualified. If the person in need of
6 protection is not represented by a lawyer of the person’s own choice, the court must
7 make a finding on the record whether the lawyer representing the person is qualified
8 and independent of the petitioner’s lawyer. In making the finding, the judge should
9 consider whether:

10 (a) the lawyer has the knowledge, skill, thoroughness and preparation necessary to
11 candidly advise and zealously represent the person with undivided loyalty;

12 (b) the lawyer has demonstrated by education and experience proficiency in the law
13 and procedures for representing persons in need of protection, especially in relation to
14 the complexity of the case;

15 (c) any other factor that may be relevant.

16

Some of the traits that would improve Utah's law

- (1) Define capacity in functional terms, allowing a particular function to be placed in the hands of a guardian only if the individual lacks the capacity to perform that function. The key element is executive function-- the ability to manage, arrange for, plan, anticipate, direct, choose, and mitigate for one's own deficits.
- (2) Ensure that physicians and other qualified professionals (LCSWs, Psychologists, NPs, visitors) are educated in the legal definition and can present evidence relevant to the definition.
- (3) Approve the petition only if pre-incapacity planning through POAs for health care and finances/trusts, etc., fails.
- (4) Focus the limited guardianship on the function that the person cannot perform.
- (5) Consider whether the definition should be in rule, rather than statute, so that it can change as research informs our understanding.

Possible New Utah Definition Based on Wisconsin Law

(1) "Incapacity" means the inability of an individual effectively to receive and evaluate information, to perceive and meet daily needs, or to make or communicate a decision with respect to the exercise of a right or power. Unless the individual is unable to communicate decisions effectively in any way, incapacity must be based on an impairment and not based on mere old age, eccentricity, poor judgment, or physical disability.

(2) Before determining incapacity or what powers are appropriate for the guardian to exercise, the court shall determine whether medical, psychological, social, vocational, or educational evaluation evidence other than that offered by the parties is necessary for the court to make an informed decision.

(3) The court shall order the guardian to exercise only those powers that are necessary to provide for the individual's personal needs and property management and to exercise the powers in a manner that is appropriate to the individual and that constitutes the least restrictive form of intervention.

(4) A court may appoint a guardian of the person or a guardian of the estate, or both, only if the court finds by clear and convincing evidence that all of the following are true:

(a) The individual is at least 18 years of age.

(b) For purposes of appointing a guardian of the person, the individual is incapacitated to the extent that the individual is unable to meet the essential requirements for his or her physical health and safety.

(c) For purposes of appointing a guardian of the estate, the individual is incapacitated to the extent that:

(i) the individual has property that will be dissipated in whole or in part;

(ii) the individual is unable to provide for his or her support; or

(iii) the individual is unable to prevent financial exploitation.

(d) The individual's need for assistance in decision making or communication is unable to be met effectively and less restrictively through appropriate and reasonably

available training, education, support services, health care, assistive devices, or other means that the individual will accept.

(5) In determining incapacity or what powers are appropriate for the guardian to exercise, the court shall consider all of the following:

(a) the report of the guardian ad litem (visitor?);

(b) the medical and psychological evidence;

(c) whether the individual has engaged in any advance planning for financial and health care decision making that would avoid guardianship, including a durable power of attorney, a power of attorney for health care, a trust, or a jointly held account;

(d) whether other reliable resources are available to provide for the individual's personal needs or property management, and whether appointment of a guardian is the least restrictive means to provide for the individual's need for a substitute decision maker;

(e) the preferences, desires, and values of the individual with regard to personal needs or property management;

(f) the nature and extent of the individual's care and treatment needs and property and financial affairs;

(g) whether the individual's situation places him or her at risk of abuse, exploitation, neglect, or violation of rights;

(h) whether the individual can adequately understand and appreciate the nature and consequences of his or her impairment;

(i) the individual's management of the activities of daily living;

(j) the individual's understanding and appreciation of the nature and consequences of any inability he or she may have with regard to personal needs or property management;

(k) the extent of the demands placed on the individual by his or her personal needs and by the nature and extent of his or her property and financial affairs;

(l) any physical illness of the individual and the prognosis of the individual;

(m) any mental disability, alcoholism, or other drug dependence of the individual and the prognosis of the mental disability, alcoholism, or other drug dependence;

(n) any medication with which the individual is being treated and the medication's effect on the individual's behavior, cognition, and judgment;

(o) whether the effect on the individual's evaluative capacity is likely to be temporary or long term, and whether the effect may be ameliorated by appropriate treatment; and

(p) other relevant evidence.