

Agenda

Ad Hoc Committee on Probate Law and Procedure

September 21, 2007
12:00 to 2:00 p.m.

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

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| Approval of minutes. | Judge Sheila McCleve |
| | Kent Alderman Mary Jane Ciccarello Maureen Henry Steve Mikita |
| Definition of incapacity. | |
| Representation of putative ward. | Kerry Chlarson Tim Shea |
| Developing a guardianship model. | Committee |

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

Meeting Schedule

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
August 17, 2007 - 12:00 p.m.

ATTENDEES

Kent Alderman
Mary Jane Ciccarello
Richard Howe
Judge Sheila McCleve, Presiding
Steve Mikita
Julie Rigby
Kathy Thyfault

EXCUSED

Kerry Chlarson
Reese Hansen
Judge George Harmond
Maureen Henry
Judge Gary Stott

STAFF

Marianne O'Brien
Diana Pollock
Tim Shea

I. WELCOME AND APPROVAL OF MINUTES

Judge McCleve welcome the committee members to the meeting. Steve Mikita noted one correction to the minutes. After the correction the minutes were approved.

Tim Shea welcomed and introduced Marianne O'Brien as a new employee to the AOC's legal department. Ms. O'Brien will assist Mr. Shea as staff to the committee. The committee welcomed Ms. O'Brien.

II. REPRESENTATION OF PERSON IN NEED OF PROTECTION

Based on the discussions at the last meeting, Tim Shea drafted an outline and statutes and rules for the representation of a person in need of protection. Mr. Shea stated that the program appears more closely related to the practice of law than to the administration of the courts and so placed the program under the Supreme Court and the Utah State Bar. The outline is as follows:

Money

- General fund appropriation for attorney fees if the person is indigent.
- General fund appropriation for extraordinary expenses if the person is qualified indigent.
- Lawyer represents person pro bono or a sliding scale based on ability to pay.

Roster

- Maintained by the Bar and Supreme Court
- Minimum education requirements, including MCLE
- Observation, Mentoring
- Minimum pro bono hours
- Waiver provision
- Biannual renewal at time of MCLE submission
- Complaints and sanctions handled through the regular OPC process
- Benefit to being on the list:
 - Presumed qualified. Clients with incomes might select a lawyer from this list.
 - Payment from state appropriation if the person is indigent or qualified indigent.
 - Immunity from malpractice action, however, still subject to bar discipline.

Tim Shea asked whether the language should state that the lawyer be more of a guardian ad litem or advocate. Should the lawyer serve both functions? Some of the committee's comments:

- It is crucial for the ward to have a lawyer.
- Leave role of the ward's attorney as an advocate.
- The lawyer should zealously advocate for the ward.
- Even a zealous advocate does not need to litigate every point.
- Differentiate the visitor from the attorney.

Appointments:

- If the ward does not have a lawyer of his or her personal choice, the judge would appoint someone from the roster.
- Need to develop a fair rotation method.
- The putative ward can select an attorney of his or her choice.
- Petitioner does not have the option to select from off the list.

Payments:

- Indigent - State appropriation would pay for the lawyer.
- With Funds - Estate would pay.
- Qualified indigent - Lawyer appointed from list would appear pro bono, includes "no cost" and "low cost."
- Determination of indigency - Need to develop a form for judge to review.

Tim Shea asked whether there should be a schedule of fees that attorneys may charge. Some of the committee's comments:

- The fee should be based on the ability to pay.
- If a maximum fee is established there may be lawyers who would charge that much even though they might otherwise have charged less.

- If a case needs ongoing attention should that fee be limited?
- If the fee is approved by the court, this will allow flexibility.
- Establish criteria to determine the fee to be charged.

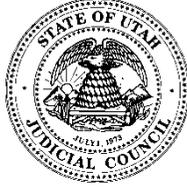
Mr. Shea would incorporate today's discussion into the draft for the next meeting.

III. DEFINITION OF INCAPACITY

Steve Mikita summarized the committee's agreement to develop a functional definition of incapacity. Mary Jane Ciccarello asked that a smaller group meet to discuss the Wisconsin proposal before addressing this issue. Steve Mikita would like input from the judges who were not present at the meeting today. This item will be placed at the top of the agenda next time. The discussion was tabled until the next committee meeting.

IV. ADJOURN

The committee adjourned at 2:00 p.m. The next meeting is scheduled for September 21, 2007.



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: September 14, 2007
Re: Incapacity

Kent Alderman, Mary Jane Ciccarello, Maureen Henry and Steve Mikita met to review the definitions from many states. The attached document includes the several components, not just definition, that the group developed. Since evidence, in particular, affects the health care and personal care communities, we should include presentations from them as we explore incapacity.

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.

Incapacity

Definition

(22) "Incapacity" means a judicial determination that an adult lacks the ability, even with assistance, to

- (a) receive and evaluate information,
- (b) make and communicate decisions,
- (c) provide for necessities such as food, shelter, clothing, health care or safety,
- (d) carry out the activities of daily living, or
- (e) manage his or her property

to such an extent that substantial physical or financial harm to the person may occur. Incapacity is a legal status, not a medical disability, and is measured by functional limitations.

Factors

In making a finding of incapacity, in determining whether to appoint a guardian and in determining the guardian's authority, the court may consider and weigh, as appropriate:

(1) whether the person can manage the activities of daily living through training, education, support services, health care, medication, therapy, assistants, assistive devices, or other means that the person will accept;

(2) whether the person has planned for surrogate health care and financial decision making, such as an advance health care directive, a power of attorney, a trust, or a jointly held account;

(3) the person's preferences and values;

(4) the person's condition, limitations and level of functioning and how they affect his or her ability to provide for personal needs;

(5) whether the person is able to evaluate the consequences of alternative decisions;

(6) the nature and extent of the demands placed on the person by the need for care;

(7) the nature and extent of the demands placed on the person by his or her property;

(8) whether the person:

- (a) has property that will be dissipated;
- (b) is unable to provide for his or her support;
- (c) is at risk of being financially exploited;
- (d) is at risk of being abused or neglected; or
- (e) is at risk of having his or her rights violated;

(9) whether the incapacity is likely to be temporary;

(10) whether the person has a physical or mental illness, disability, condition, or syndrome and the prognosis for the person; and

(11) other relevant factors.

Evidence

(1) In making a finding of incapacity, in determining whether to appoint a guardian and in determining the guardian's authority, the court may require additional medical, psychological, social, vocational, or educational evidence from the parties in order to make an informed decision.

(2) A finding of incapacity must be supported by clear and convincing evidence of recurring acts or occurrences or statements that indicate imminent acts or occurrences.

(3) An act, occurrence or statement is not evidence of incapacity if the act, occurrence or statement is the product of an informed judgment. A finding of incapacity may not be based on mere old age, eccentricity, poverty, poor judgment, medical diagnosis or physical disability. A finding of incapacity may not be based on an isolated act, occurrence or statement.

Limited guardianship

(1) The court shall order the guardian to exercise only those powers necessary to assist with the ward's particular inability to:

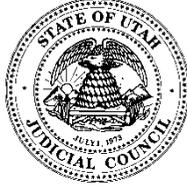
(a) receive and evaluate information;

(b) perceive and meet needs for food, clothing, shelter, health care or safety;

(c) manage property; or

(d) make and communicate decisions.

(2) The court shall order the guardian to exercise the powers in a manner that is appropriate to the ward and that is the least restrictive form of intervention.



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: September 14, 2007
Re: Representation of Ward

I've incorporated the committee's changes from the last meeting. Money remains the key issue, but I talked with Dan Becker, our state court administrator, and he said not to be afraid to advance sound policy, even if it costs money. If, after further discussion, the committee remains comfortable with this approach, I would like to invite Legal Aid Society, Legal Services and perhaps others to a future meeting to offer some critical analysis of the proposal.

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efficient, and independent system for the advancement of justice under the law.

REPRESENTATION FOR WARD

- 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.
- 2) Roster of lawyers.
 - a) Maintained by the Bar/Supreme Court.
 - b) Qualifications.
 - i) Training, Observation, Mentoring, MCLE.
 - ii) Minimum pro bono, which means a sliding scale based on ability to pay.
 - 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) Court appoints from the list unless the proposed ward has a lawyer of his or her personal choice.
 - ii) Clients might select a lawyer from this list because of the presumed qualifications.
 - iii) Payment from state appropriation if the person is indigent or qualified indigent.
 - iv) Immunity under certain conditions. (Immunity from malpractice action. Still subject to bar discipline.)
- 3) Appointments.
 - a) Court appoints from the list unless the proposed ward has a lawyer of his or her personal choice.
 - b) Need fair method for court to select a lawyer from the roster.
- 4) Payment from state funds.
 - a) To qualify for payment from state funds, the court determines whether proposed ward is indigent or qualified indigent.
 - i) Use criminal standard for indigent.
 - ii) Use modified criminal standard for qualified indigent.
 - b) If income is above qualified indigent, the proposed ward will have to pay his or her own lawyer.

1 **Part 6. Representation of Proposed Ward of the Court.**

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

3 (1) The Legislature finds that a proposed ward of the court:

4 (a) must be represented by a lawyer;

5 (b) is subject to losing important civil rights and liberties, and

6 (c) often will not be able to assist in his or her representation.

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

10 **75-5-602. Definitions.**

11 (1) "Account" means the Proposed Ward of the Court Account.

12 (2) "Attorney fees" means fees of a lawyer and staff for investigating, advising and
13 representing a proposed ward at every stage of the trial court proceedings and the first
14 appeal of right.

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

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

19 (5) "Indigence" and "Indigent" mean that a proposed ward:

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

24 (b) has an income level at or below 150% of the poverty level as defined by the most
25 recently revised poverty income guidelines published by the United States Department
26 of Health and Human Services; 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) "Qualified indigence" and "qualified indigent" mean that a proposed ward has an
30 income level at or below 250% of the 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, and has not transferred or otherwise disposed of assets with the
33 intent of establishing eligibility for the appointment of counsel.

34 (7) "Roster" means the list of lawyers, established by the Supreme Court under this
35 part, presumed qualified to represent a proposed ward.

36 **75-5-603. Roster – Proposed Ward of the Court Account.**

37 (1) The Supreme Court shall establish a roster of lawyers presumed qualified to
38 represent a proposed ward of the court. Lawyers on the roster must meet qualifications
39 established by the Supreme Court, one of which will be pro bono representation of
40 proposed wards. Only lawyers on the roster may be paid from the Account. Only
41 lawyers on the roster qualify for immunity under Section 75-5-607.

42 (2) There is created in the General Fund a restricted account known as the
43 Proposed Ward of the Court Account. The Legislature shall appropriate money from the
44 Account to the [Supreme Court] [Office of Public Guardian] [Division of Aging and Adult
45 Services] for payment of attorney fees, costs and extraordinary expenses of lawyers on
46 the roster representing indigent and qualified indigent proposed wards of the court.

47 (3) The Account shall be funded by

48 (a) legislative appropriations;

49 (b) \$ from filing fees; and

50 (c) grants and contributions.

51 **75-5-604. Payments from the Account.**

52 (1) If the proposed ward is indigent, the Account shall pay attorney fees approved by
53 the court, reasonably and necessarily incurred, taking into account the complexity of the
54 service and the prevailing market rates for the service.

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

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

61 **75-5-605. Appointment of counsel -- Qualification for payment from the**
62 **Account.**

63 (1) Upon request, the court shall determine whether the proposed ward is indigent or
64 qualified indigent. The court shall enter the findings on the record. The court may
65 determine or review indigence or qualified indigence at any stage of the proceedings or
66 within one year after the final order or decree.

67 (2) A person claiming to be indigent or qualified indigent and that person's
68 representative have a continuing duty to inform the court of any change in
69 circumstances that may affect the determination.

70 (3)(a) If the court finds within one year after the final order or decree that a person
71 was erroneously determined to be indigent, the attorney general may proceed against
72 the person for the amount paid from the Account.

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

77 **75-5-606. Pro bono representation -- Liability limits.**

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

79 (1) the proposed ward is indigent and the lawyer provides legal services paid for
80 from the Account; or

81 (2) the lawyer provides legal services without charge or at a reduced charge based
82 on the person's ability to pay; and

83 (3) the lawyer provides the legal services without gross negligence or willful
84 misconduct.

85

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

2 **Rule 14-808. Lawyer qualified to represent a proposed ward of the court.**

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 proposed ward of the court. The roster shall provide each
6 lawyer's name, business address, phone, fax and email, and the counties in which the
7 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 proposed ward, which
15 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
17 proposed ward, which may be satisfied under Rule 14-807, Law student assistance;

18 (c)(1)(D) have served as lead counsel with a mentor representing at least one
19 proposed ward;

20 (c)(2) be recommended by one's mentors;

21 (c)(3) agree to represent indigent proposed wards for the attorney fees, costs and
22 extraordinary expenses approved by the court; and

23 (c)(4) agree to represent qualified indigent proposed wards for attorney fees, costs
24 and expenses based on the person's ability to pay and for no more than 50% of the
25 prevailing market rates for the service.

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

28 (d)(1) at least three hours of MCLE in the law and procedures for representing
29 proposed wards; and

30 (d)(2) representation of at least two indigent or qualified indigent proposed wards.

31 (e) Except maximum attorney fees, costs, expenses and extraordinary expenses,
32 the executive director may waive any initial requirement if the lawyer demonstrates by
33 education and experience proficiency in the law and procedures for representing
34 proposed wards. The executive director may waive any continuing requirement upon
35 application and a showing of good cause.

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

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

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

41

1 **Utah Rule of Civil Procedure**

2 **Rule 76. Appointment of lawyer to represent a proposed ward of the court.**

3 (a) A proposed ward of the court has the right to be represented by a qualified
4 lawyer 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 proposed ward is
6 not represented by a lawyer of the person’s own choice, the court shall appoint a lawyer
7 from the roster to represent the person.

8 (b) Upon motion by a party or upon the court’s own motion, the court may determine
9 whether the lawyer representing the proposed ward is qualified and independent of the
10 petitioner’s lawyer. In making the finding, the judge should consider whether:

11 (b)(1) the lawyer has demonstrated by education and experience proficiency in the
12 law and procedures for representing proposed wards of the court, especially in relation
13 to the complexity of the case;

14 (b)(2) the lawyer has the knowledge, skill, thoroughness and preparation necessary
15 to candidly advise and zealously represent the person with undivided loyalty;

16 (b)(3) any other factor that may be relevant.

17