

Agenda

Ad Hoc Committee on Probate Law and Procedure

October 19, 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.	Tab 1	Judge Sheila McCleve
Representation of proposed ward	Tab 2	Anne Milne Executive Director, Utah Legal Services
Definition of incapacity	Tab 3	Kent Alderman Mary Jane Ciccarello Maureen Henry Steve Mikita
Duties and limited authority of guardian	Tab 4	Tim Shea

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

Meeting Schedule

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

Tab 1

MINUTES
Ad Hoc Committee on Probate Law and Procedure
Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114-0241
September 21, 2007 - 12:00 p.m.

PRESENT

Kerry Chlarson
Mary Jane Ciccarello
Judge George Harmond
Reese Hansen
Maureen Henry
Richard Howe
Judge Sheila McCleve, Presiding
Steve Mikita
Julie Rigby

EXCUSED

Kent Alderman
Judge Gary Stott

I. WELCOME AND APPROVAL OF MINUTES

Judge McCleve welcomed the committee members to the meeting, noting that the next committee meeting will be October 19, 2007 at 12:00 p.m. Steve Mikita made a motion to approve the minutes of the August 17, 2007 meeting. Mary Jane Ciccarello seconded the motion. The motion carried unanimously.

II. DEFINITION OF INCAPACITY

Judge McCleve noted that a subcommittee consisting of Kent Alderman, Mary Jane Ciccarello, Maureen Henry and Steve Mikita met to study the definition of "incapacity." Mr. Mikita stated that incapacity is a legal status, not a medical disability, and is measured by functional limitations. Mr. Mikita reported that the subcommittee arrived at a definition of "incapacity" to mean a judicial determination that an adult lacks the ability to:

- receive and evaluate information
- make and communicate decisions
- provide for necessities such as food, shelter, etc.
- carry out the activities of daily living, or
- manage his or her property.

It was explained that only one of the five categories are required to authorize the judge to order guardianship. The committee discussed several factors the judge can use when making a finding of incapacity, when deciding whether to appoint a guardian, and deciding the guardian's authority. Some committee discussion:

- This requires the judge to decide what is appropriate to help this person.

- Practitioners, judges and family members have struggled with the ambiguity of definitions of guardianship and the guardian’s responsibilities.
- Focus on the functional limitations of the ward.
- Make a clear distinction from medically incapacitated.
- In the factors section, the judge “should” consider the factors rather than “may” consider.
- The “risk” language should parallel Vulnerable Adult Abuse Act.
- Differentiate the factors for determining whether the ward is incapacitated from the factors for determining whether the guardianship should be put into place and the authority of the guardian.

After more discussion Mary Jane Ciccarello stated that the subcommittee did not look at statutes, such as California’s, where a state did not define incapacity. Ms. Ciccarello suggested the committee research this issue more. Some discussion of the committee:

- It is essential to have the ward determined to be incapacitated.
- If there is no finding of incapacity, how does the judge determine the need and level of protection?
- The statute should put significant weight on the limitations of the guardian’s authority.
- Without a threshold finding of incapacity might the ward’s rights be taken away when not necessary?
- With the new statute, the judge will have factors to consider for deciding whether to appoint a guardian.
- If there is an issue that cannot be resolved, have the parties present more evidence.

Kerry Chlarson made a motion to take this issue back to the subcommittee for further study of other states. Mary Jane Ciccarello seconded the motion. The motion carried unanimously.

III. REPRESENTATION OF PUTATIVE WARD

Kerry Chlarson reviewed the changes that Tim Shea made in the proposed language and is pleased with them. Mr. Chlarson stated that he is in favor of allowing others to give feedback to the committee. Mr. Chlarson proposed to invite the Legal Aid Society and others to a future meeting to offer an analysis of the proposal. The main issues of the model are:

- Money - Dan Becker recommended that if a sound public policy is identified, to go ahead and pursue it.
- Have Legal Services and the Legal Aid Society review.
- How will the model affect the existing system?
- Concern with ongoing obligation for the attorney to file, inventory, annual reports, etc.
- If the ward’s condition improves, the ward needs representation to terminate the

guardianship.

- Prohibit transfer of assets to establish eligibility for the appointment of counsel.
- 24 Hours of CLE may be excessive. Mr. Chlarson will come back with a recommendation for minimum CLE.

Tim Shea will invite those with an interest to the next meeting to see how representation is currently occurring.

IV. DEVELOPING A GUARDIANSHIP MODEL

Tim Shea stated that some members on the subcommittee studying the definition of incapacity expressed difficulty with the definition when the committee had not developed an overall model for guardianships. The approach taken so far is to develop the individual issues that have been identified. Judge McCleve asked whether the committee wanted to explore and construct a model for guardianship. Some of the issues discussed:

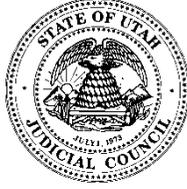
- Definition of incapacity is part of the big picture.
- Commission on Aging concerned with reconciling and having the guardianship and the commitment statutes work together better.
- The Commission on Aging and this committee should work together, and the Commission on Aging is the agency to deal with issues outside the courts.

Maureen Henry will take the liaison role of working with the Commission.

V. ADJOURN

The meeting adjourned at 2:00 p.m.

Tab 2



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: October 16, 2007
Re: Representation of proposed ward

I've incorporated the changes from the committee's last meeting. I have shared this draft with representatives of the Estate Planning Section of the Bar, the Committee on Law and Aging of the Bar, Utah Legal Services and Legal Services of Salt Lake, and I have invited them to attend and offer their comments. I hope that those who cannot meet with us in October will be able to do so in November.

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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 proposed ward is indigent.
 - b) General Fund appropriation for costs and extraordinary expenses if the proposed ward 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 until the final
14 order or decree and the first 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 **75-5-604. Payments from the Account.**

49 (1) If the proposed ward is indigent, the Account shall pay attorney fees approved by
50 the court, reasonably and necessarily incurred, taking into account the complexity of the
51 service and the prevailing market rates for the service. The court may approve attorney
52 fees reasonably and necessarily incurred up to 50% of the prevailing market rates for
53 the service.

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

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

60 **75-5-605. Appointment of counsel -- Qualification for payment from the**
61 **Account.**

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

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

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

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

76 **75-5-606. Pro bono representation -- Liability limits.**

77 A lawyer on the roster is immune from suit relating to legal services provided to the
78 proposed ward if:

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

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

83 (3) the lawyer provided 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 ?? hours of MCLE or ?? hours of accredited law
12 school education in the law and procedures for representing proposed wards;

13 (c)(1)(B) have observed a mentor representing at least one proposed ward, which
14 may be satisfied under Rule 14-807, Law student assistance;

15 (c)(1)(C) have served as co-counsel with a mentor representing at least one
16 proposed ward, which may be satisfied under Rule 14-807, Law student assistance;

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

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

20 (c)(3) agree to represent indigent proposed wards for the attorney fees, costs and
21 extraordinary expenses approved by the court under Utah Code Section 75-6-604; and

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

25 (d) To be retained on the roster, the lawyer shall agree to represent indigent and
26 qualified indigent proposed wards as provided in subsection (c) and, at the time of a
27 lawyer's MCLE compliance report, the lawyer must submit to the executive director a
28 report identifying:

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

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

32 (e) Except maximum attorney fees, costs, expenses and extraordinary expenses,
33 the executive director may waive any initial or continuing requirement if the lawyer
34 demonstrates by education and experience proficiency in the law and procedures for
35 representing proposed wards. The executive director may waive (d)(2) if there were not
36 at least two indigent or qualified indigent proposed wards to be represented.

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

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

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

42

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:

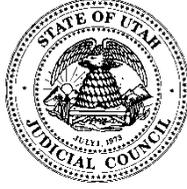
11 (b)(1) the lawyer has demonstrated by education and experience proficiency in the
12 law and procedures for representing proposed wards of the court, especially in relation
13 to the complexity of the case;

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

Tab 3



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: October 16, 2007
Re: Definition of incapacity

At its last meeting, the Committee asked the subcommittee to consider the value of the California approach, which is to create a threshold for appointing a guardian without using the word "incapacity." After consideration, the subcommittee recommends against such an approach. The subcommittee did, however, make a few refinements to the definition.

Also, as the Committee requested, I have assigned the several factors to the decisions to which they relate. This latter task is very subjective so the resulting lists should be seen only as a point to start the discussion.

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

Incapacity

Definition

75-1-201. General definitions.

...

(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 the person is at substantial risk of physical or financial harm. Incapacity is a judicial decision, not a medical decision, and is measured by functional limitations.

....

(Note: In re Boyer, 636 P.2d 1085 (Utah 1981), does not use "substantial" risk. Sections 62A-3-301(26) and 62A-14-107 do. Therefore, I have used "substantial" risk in this definition.)

Finding of incapacity

The court shall enter findings in which the court identifies the functional limitations that cause the ward to be incapacitated. In making a finding of incapacity, the court should consider and weigh, as appropriate:

- (1) whether the person is at substantial risk of:
 - (a) his or her property being dissipated;
 - (b) being unable to provide for his or her support;
 - (c) being financially exploited;
 - (d) being abused or neglected; or
 - (e) having his or her rights violated;
- (2) whether the person has a physical or mental illness, disability, condition, or syndrome and the prognosis for the person;
- (3) the person's condition, limitations and level of functioning and how they affect his or her ability to provide for personal needs;
- (4) whether the person is able to evaluate the consequences of alternative decisions;

(5) 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;

(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; and

(8) other relevant factors.

Finding of need for guardian

The court shall make findings in which the court determines whether appointment of a guardian is the least restrictive means of providing for the proposed ward's need for a substitute decision maker. In determining whether to appoint a guardian, the court should 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) whether the incapacity is likely to be temporary; and

(5) other relevant factors.

(Note: This section appears to be new to Utah law. In theory at least, it anticipates that a person might be incapacitated, yet does not need a guardian. Do we want to create that possibility?)

Order of appointment and guardian's authority

The court shall appoint a guardian if the court concludes that the proposed ward is incapacitated and that a guardian is the least restrictive means of providing for the proposed ward's need for a substitute decision maker. The appointment order shall limit the guardian to only those powers necessary to assist with the ward's particular functional limitations. The court shall order the guardian to exercise those powers in a manner that is consistent with the ward's preferences and values and that is the least restrictive form of intervention. The ward retains all rights, authority, power and discretion not expressly awarded to the guardian. In determining the guardian's authority, the court should consider and weigh, as appropriate:

(1) whether the person is at substantial risk of:

(a) his or her property being dissipated;

(b) being unable to provide for his or her support;

(c) being financially exploited;

(d) being abused or neglected; or

(e) having his or her rights violated;

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

(3) 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;

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

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

(6) 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;

(7) whether the incapacity is likely to be temporary; and

(8) other relevant factors.

Tab 4



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: October 16, 2007
Re: Duties and limited authority of guardian

Because the issue of the definition of incapacity was returned to the subcommittee, I concluded we should wait on the issue of evidence of incapacity. Therefore, I want to propose beginning a discussion on the duties and authority of a guardian. From the discussion so far, I believe everyone anticipates that, under the program we build, limited guardianships will be the rule, rather than the exception. Current law, Section 75-5-304, directs the court to prefer a limited guardianship, but then proceeds as if most appointments will be plenary appointments. From the discussion so far, practice has evolved in that direction. That is understandable, since the current statute offers no assistance in drafting the authority for a limited guardianship.

The purpose of this memo, is to ask the committee: How is the concept of limited authority best described in a statute? We can start with the provisions suggested in the short paper on the definition of incapacity. The section on limited authority would require that the appointment order limit the guardian's authority to that which is necessary to assist with the ward's particular limitation. That is a good general direction, but does not provide any examples. A statute cannot anticipate every circumstance, yet it should give some guidance to help the judge include appropriate authority.

Guardian's duties under §75-5-312

(1) A guardian ... has only the powers, rights, and duties ... granted in the order of appointment

(2) Absent a specific limitation on the guardian's power in the order of appointment, the guardian has the same powers, rights, and duties respecting the ward that a parent has respecting the parent's unemancipated minor child

(3) The guardian shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of the ward is in need of protection.

(4) The guardian is required to report the condition of the ward and of the ward's estate.

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

(5) The guardian must exercise care to conserve any excess property for the ward's needs.

Guardian's authority under §75-5-312

(1) A guardian ... has only the powers, rights, and duties ... granted in the order of appointment

(2) Absent a specific limitation on the guardian's power in the order of appointment, the guardian has the same powers, rights, and duties respecting the ward that a parent has respecting the parent's unemancipated minor child

(3) The guardian is entitled to custody of the person of the ward and may establish the ward's place of abode.

(4) If entitled to custody of the ward the guardian shall provide for the care, comfort, and maintenance of the ward and, whenever appropriate, arrange for the ward's training and education.

(5) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service.

(6) If no conservator has been appointed, the guardian may:

(a) institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform that duty;

(b) receive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward;

(c) not use funds from the ward's estate for room and board which the guardian, the guardian's spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court.

(7) If a conservator has been appointed, the guardian must:

(a) pay to the conservator all of the ward's estate in excess of funds expended to meet current expenses for support, care, and education of the ward, and the guardian must account to the conservator for funds expended,

(b) control the custody and care of the ward and is entitled to receive reasonable sums for services and for room and board furnished to the ward.