

# Agenda

## Ad Hoc Committee on Probate Law and Procedure

November 16, 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	Elizabeth Conley, Chair, Committee on Law and Aging. Joanna Sagers, Legal Society of Salt Lake
Definition of incapacity	Tab 3	Kent Alderman Mary Jane Ciccarello Maureen Henry Steve Mikita
Powers of guardian	Tab 4	Tim Shea

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

### Meeting Schedule

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  
October 19, 2007 - 12:00 p.m.

**ATTENDEES**

Kent Alderman  
Kerry Chlarson  
Mary Jane Ciccarello  
Judge George Harmond  
Maureen Henry  
Richard Howe  
Judge Sheila McCleve, Presiding  
Steve Mikita

**EXCUSED**

Reese Hansen  
Julie Rigby  
Gary Stott

**GUESTS:**

Ann Milne, Utah Legal Services  
David Sloan,

**STAFF**

Diana Pollock  
Tim Shea

**I. WELCOME AND APPROVAL OF MINUTES**

Judge McCleve welcomed the committee members to the meeting. Judge McCleve welcomed guests Ann Milne and David Sloan. Kent Alderman noted one correction in the September minutes. With that correction, Maureen Henry moved to approve the minutes. Kerry Chlarson seconded the motion. The motion carried unanimously.

**II. REPRESENTATION OF PROPOSED WARD**

David Sloan reported that the Estate Planning Section supports the direction that the committee is going, including the roster of attorneys for appointment of counsel.

Anne Milne questioned the scope of the problem and asked if the problem exists in the area of the indigent ward requiring representation or is it across the board including wards who are not indigent.

Ms. Milne explained the workings of Utah Legal Services:

- Focus on federal funding for people who are below 125% of poverty.
- A few contracts for people above age 60 regardless of income.
- Success with pro bono coordination.
- Utah Legal Services include assets when qualifying clients. Sometimes, older people's income is limited, but they have assets.

- Utah Legal Services pays attorneys around the state \$50/hour to provide representation to clients who qualify for Utah Legal Services.

Ms. Milne asked questions about the committee’s proposal:

- Does the roster apply only to indigent cases or all cases?
- Does the attorney have to agree to pro bono to be included on the roster?
- Two years admission seems excessive.
- Can a standard rate target the cases that are the most difficult?
- Can the mentor charge, and if so whom?

Some of the points in the committee’s discussion were:

- The proposal requires the court to appoint counsel from the roster in all cases, unless the ward has his or her own attorney.
- There is no mechanism for finding which attorney has the experience required for the ward.
- If a certain income level is met in the pro bono cases there would be a rate determined by the court to be paid by the state or by the estate.
- Individuals above that income level would have to pay market rates.
- Interest was expressed in the gap between estates large enough to pay reasonable rates for a lawyer and indigent people who are served by Utah Legal Services’ lawyers.
- The gap was identified as people under 60 who are not indigent.
- The current proposal is to pay appointed counsel from a state fund if the ward’s income is below 150% of poverty and does not have sufficient assets.
- Above 150% of poverty but below 250% of poverty, the lawyers would charge the estate based on the ability to pay, but no more than a defined maximum.
- The market rate of lawyers will be difficult to calculate.
- Use local lawyers on the roster and spread the burden out among the Bar.
- Clerks cannot give referrals to particular attorneys, so having the list solves the problem.
- The requirement of 4 hours initial training and 2 hours of continuing education every 2 years to be on the roster.

Mr. Shea will prepare another draft based on the comments. There will be further comments at the next meeting.

### **III. DEFINITION OF INCAPACITY**

The subcommittee met and recommends not adopting the California approach and to continue to use the word “incapacitated.” There was still concern about whether the phrase “even with assistance” should be included. Some of the points in the discussion were:

- Concern expressed about weakening the requirement that a person be incapacitated before a guardian can be appointed.
- The need for a threshold test.
- “Substantial risk” is a phrase not used in Boyer.
- Focus on the ward’s functional limitations.
- Whether a person is at risk of harm may depend on whether the person takes their medication.
- Include in the order or plan the ups and downs of the wards in treatment for mental illness who do not take their medication.
- Limited guardianship where the guardian is authorized to make decisions only until the person is on an even road.

Maureen Henry expressed concern that the current statute is vague in terms of mental health issues. Ms. Henry feels that the guardianship statute cannot be looked at without looking at the mental health commitment statute to make them work better together.

Judge Harmond stated that an order to consult with a physician could be done under the guardianship statute if the attorneys involved are willing to be flexible. Judge Harmond stated that the statute gives the judge authority, but not much direction.

The committee decided that Mr. Shea will prepare another draft based on the discussion.

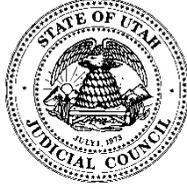
#### **IV. DUTIES AND LIMITED AUTHORITY OF A GUARDIAN**

Tim Shea stated that committee members have been objecting to the common use of plenary guardianships which in turn is influencing some of the discussion on other topics. It is Mr. Shea’s observation that, as the statute is currently written, it prefers a limited guardianship, but there is nothing to support the judges and lawyers in creating a limited guardianship. Mr. Shea asked the committee how it wanted to design guidance for the judges and lawyers to develop limited guardianships.

There was a brief discussion, but, because of the time, this issue was tabled until the next meeting.

The meeting adjourned at 2:00 p.m. with the next meeting scheduled November 16, 2007.

# 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:** November 2, 2007  
**Re:** Representation of proposed ward

Elizabeth Conley, Chair of the Committee on Law and Aging, and Joanna Sagers of the Legal Society of Salt Lake will attend our meeting to offer their comments on our proposed program for providing lawyers for proposed wards, particularly indigent wards.

From my notes of the speakers' comments at the last meeting:

Comment	Change
Does not include assets in the formula for calculating indigency.	I've not made any change yet. Assets are included in the definition of "indigent." (Statutes, Lines 19-28.) Assets are not included in the definition of "qualified indigent." (Statutes, Lines 29 – 33.) My thinking was that if a person did not have "sufficient income, assets, credit," etc. to afford the probably cost of an attorney, the person would qualify for indigent. The only purpose of "qualified indigent" is to have the state pay extraordinary expenses. Perhaps the concept adds a level of complexity that should be avoided.
Can we control for lawyers who work and charge for more hours than are necessary on a particular case?	Under the current draft a judge decides whether the time is necessary. I have added "and the lawyer's experience." (Statutes, Lines 49-51.)

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Comment	Change
Charging half the market rate will be difficult to calculate and may create disputes over amounts due.	I have set the rate at \$50/hour, as suggested by Ms. Milne, with a method for keeping up with inflation. It is the same method as adjusting the cap on non-economic damages under §78-14-7.1. (Statutes, Lines 52-62.)
No need for limited liability. Insurance is available.	This provision was simply copied from the criminal statute, and I've made no change. But it may be something the committee wants to discuss. (Statutes, Lines 85-93.)
Should not have to be admitted to the Bar for two years to be on the roster.	Removed. (Bar Rule 14-808.)
Some qualified attorneys willing to represent indigent wards may not want to represent non-indigent wards pro bono.	No change. (Bar Rule 14-808. Line 31.)
Not clear who the mentor charges.	Amended to state that the mentor charges the person mentored. (Bar Rule 14-808. Line 39.)
Does appointment from the roster apply in all cases or only cases of indigent wards?	No change. I believe this question is adequately answered in the current draft. The judge would appoint from the roster in all cases, unless the ward has a lawyer of his or her own choosing. (URCP 76, Lines 5-7.) The lawyer would be paid by the state if the ward is indigent or qualified indigent. (Statutes, Lines 49-51; 63-66.)
How will appointments from the roster work?	I've not made any changes. I think the committee should discuss whether we want to try to control this in proposed URCP 76 or leave it to local discretion. The decision of whom to appoint is probably going to be more complex than "who's next in the batting order?" There will be a lot of factors to consider: Who is willing to work in the county? How difficult is the case? Who is next in order? What other demands are there on the lawyer's time?

## 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.
  - c) Want to focus on the gap between estates that can pay reasonable market rates and those who are indigent but whose needs are met by existing programs.
- 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 the lawyer from the estate. Lawyer can represent person at no fee or a reduced fee.

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 who 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) "Pro bono" means representation at no charge or at a reduced charge based on  
30 the person's ability to pay.

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

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

38 **75-5-603. Roster – Proposed Ward of the Court Account.**

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

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

49 (3) The Account shall be funded by ??????????

50 **75-5-604. Payments from the Account. Attorney fees adjusted for inflation.**

51 (1) If the proposed ward is indigent, the Account shall pay attorney fees approved by  
52 the court, reasonably and necessarily incurred, taking into account the complexity of the  
53 service and the lawyer's experience.

54 (2)(a) Attorney fees may not exceed \$50.00 per hour in fiscal year 2010 and may not  
55 exceed \$50.00 per hour adjusted for inflation in fiscal year 2011 and thereafter.

56 (b) Beginning July 1, 2010 and each July 1 thereafter, the state treasurer shall adjust  
57 the limit for attorney fees by the seasonally adjusted consumer price index for all urban  
58 consumers as published by the Bureau of Labor Statistics of the United States  
59 Department of Labor.

60 (c) By July 15 of each year, the state treasurer shall calculate the inflation-adjusted  
61 limit, round the result to the nearest dollar, and inform the Administrative Office of the  
62 Courts of the rounded limit.

63 (d) The rounded limit shall apply to attorney fees for cases in which the petition is  
64 filed on or after July 1 of that fiscal year and before July 1 of the next fiscal year.

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

69 (4) If the person is indigent or qualified indigent, the Account shall pay court costs  
70 awarded by the court.

71 **75-5-605. Appointment of counsel -- Qualification for payment from the**  
72 **Account.**

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

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

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

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

87 **75-5-606. Pro bono representation -- Liability limits.**

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

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

92 (2) the lawyer provided legal services pro bono; and

93 (3) the lawyer provided the legal services without gross negligence or willful  
94 misconduct.

95

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)(A) have acquired at least four hours of MCLE or four hours of accredited law  
10 school education in the law and procedures for representing proposed wards;

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

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

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

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

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

20 (c)(4) agree to represent qualified indigent proposed wards for attorney fees, costs  
21 and expenses based on the person's ability to pay and for no more than is allowed for  
22 representing an indigent client under Utah Code Section 75-6-604.

23 (c)(5) agree to represent proposed wards who are not indigent or qualified indigent  
24 for attorney fees, costs and expenses based on the person's ability to pay.

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 two 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 the person mentored 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:

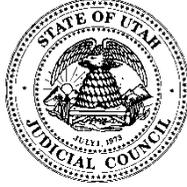
11       (b)(1) the lawyer has demonstrated by education and experience proficiency in the  
12 law and procedures for representing proposed wards of the court, especially in relation  
13 to the complexity of the case;

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:** November 2, 2007  
**Re:** Definition of incapacity

As a result of the discussion in October, I have tried to draft the definition (Lines 4 – 12) so that the work of the subcommittee more closely parallels *In re Boyer*, 636 P.2d 1085 (Utah 1981). So that you can compare the two, here is the holding in that case:

We hold that under 75-1-201(18) a determination that an adult cannot make “responsible decisions concerning his person” and is therefore incompetent, may be made only if the putative ward’s decision-making process is so impaired that he is unable to care for his personal safety or unable to attend to and provide for such necessities as food, shelter, clothing, and medical care, without which physical illness or harm may occur.

Boyer speaks only of a person’s “decision-making process” being impaired. The subcommittee recommends expanding that to include impairment of a person’s ability to do (a), (b), (c), (d), or (e), (Lines 6 – 10), which is consistent with other states and with other parts of the Utah Code, such as Sections 62A-3-301(26) and 62A-14-107.

Boyer speaks only of the possibility “physical illness or harm” occurring as a result of the inability. The subcommittee recommends that we add financial harm. (Line 11).

The final sentence of the definition, (Lines 11 – 12) although not part of Boyer, is consistent with the law of other states and is, I believe, our primary goal.

This draft does not use “substantial.” Looking more closely at Sections 62A-3-301(26) and 62A-14-107, which had in part been the basis for earlier drafts, “substantial” in those statutes modifies the person’s inability, not the person’s risk of harm. I believe that the concept of “substantially unable” is captured by the phrase, based on Boyer, “ability ... is so impaired.” (Line 4 – 11).

I’ve attempted to assign the various factors, which are drawn from Wisconsin, to each of the three decisions that the judge is called upon to make: 1) Is the person incapacitated? 2) Does the person need a guardian? and 3) What should be the guardian’s authority? My suggestions are intended only to start the discussion. The last of the three has been incorporated into the statutes governing the appointment order

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.

and the guardian's duties and authority. The second 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, as some states have? Or should we delete that section, which would be more in keeping with current Utah law? If we delete that section, the decision that a person is incapacitated necessarily includes the decision to appoint a guardian. We would still have, however, the (soon-to-be) realistic presumption that the appointment would be a limited guardianship with particularly prescribed authority.

1       **Incapacity**

2       **75-1-201. General definitions.**

3       ...

4       (22) "Incapacity" means a judicial determination that an adult's ability, even with  
5 assistance, to

6       (a) receive and evaluate information,

7       (b) make and communicate decisions,

8       (c) provide for necessities such as food, shelter, clothing, health care or safety,

9       (d) carry out the activities of daily living, or

10       (e) manage his or her property

11       is so impaired that illness or physical or financial harm may occur. Incapacity is a  
12 judicial decision, not a medical decision, and is measured by functional limitations.

13       ....

14       **75-5-###. Finding of incapacity**

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

18       (1) whether the ward's condition, limitations and level of functioning leave the ward  
19 at risk of:

20       (a) his or her property being dissipated;

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

22       (c) being financially exploited;

23       (d) being abused or neglected; or

24       (e) having his or her rights violated;

25       (2) whether the proposed ward has a physical or mental illness, disability, condition,  
26 or syndrome and the prognosis;

27       (3) whether the proposed ward is able to evaluate the consequences of alternative  
28 decisions;

29       (4) whether the proposed ward can manage the activities of daily living through  
30 training, education, support services, mental and physical health care, medication,

31 therapy, assistants, assistive devices, or other means that the proposed ward will  
32 accept;

33 (5) the nature and extent of the demands placed on the proposed ward by the need  
34 for care;

35 (6) the nature and extent of the demands placed on the proposed ward by his or her  
36 property; and

37 (7) other relevant factors.

38 **75-5-###. Finding of need for guardian**

39 The court shall make findings in which the court determines whether appointment of  
40 a guardian is the least restrictive means of providing for the proposed ward's need for a  
41 substitute decision maker. In making a finding of whether to appoint a guardian, the  
42 court should consider and weigh, as appropriate:

43 (1) whether the proposed ward can manage the activities of daily living through  
44 training, education, support services, mental and physical health care, medication,  
45 therapy, assistants, assistive devices, or other means that the proposed ward will  
46 accept;

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

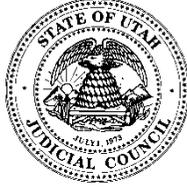
50 (3) the proposed ward's preferences and values;

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

52 (5) other relevant factors.

53

# 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:** November 2, 2007  
**Re:** Authority of guardian

I've taken the brief discussion at the last meeting and a little bit of research to offer this first draft of sections dealing with the guardian's authority. The factors the judge would consider have been moved here, as has reservation of the ward's rights. I've added the requirement of a guardianship plan.

I've also added a provision on voting, but the committee should discuss whether I got it right. Alaska, for example, would not permit the court to withhold the right to vote or drive. I've not said anything about wills and trusts. In the Uniform Act, the authority to make a will or create a trust on a ward's behalf would be granted to or withheld from a conservator.

In this draft, the guardian has duties as stated in statute, and the court can add to those duties in the order. One of the guardian's duties is to exercise his or her authority, but the statutes do not provide the guardian with any authority directly. Authority comes exclusively from the order. The statutes provide a menu of authority from which the judge can choose, and the judge is permitted to choose only those items necessary to accommodate the ward's particular functional limitations. You will not find anywhere in this draft: "the same powers, rights, and duties respecting the ward that a parent has respecting the parent's unemancipated minor child...."

In drafting the sections on authority, I tried to be particular enough to give direction to the judges and lawyers and broad enough not to hamstring them because of an omission. The collection of all authority probably should be the equivalent of a parent's authority over a minor child. (There will be cases in which a plenary appointment is appropriate.)

The states differ on whether to permit or prohibit items in the list of the guardian's authority. Alaska, for example, prohibits withholding consents necessary for marriage and divorce. The Uniform Act permits the guardian to make, and presumably to withhold, that consent. So the committee should discuss potentially every item of authority and decide what should and should not be permitted.

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.

Some of the guardian's authority depends on whether the court appoints a conservator. If we are going to maintain a difference between a guardian and a conservator, there should be some things that only a conservator is permitted to do. If a ward needs a surrogate decision maker for such things, the court should appoint a conservator, either a separate fiduciary or the guardian serving both roles. In this draft, the court can authorize the guardian to make routine property decisions without appointing the person as a conservator. The committee should discuss "what is routine?" How extensive should the guardian's authority be for decisions normally made by a conservator?

An alternative approach is to eliminate the distinction between a guardian and a conservator and simply include – or not – the authority traditionally held by conservators in the guardian's appointment order.

I've proposed some things that the guardian cannot do or cannot do without a court order. I propose that the guardian not be able to revoke a power of attorney or advance healthcare directive that designates an agent for healthcare decisions. And I propose that the agent's healthcare decisions always take precedence. In the Uniform Act and in some state codes, both of these are subject to court order. It seemed to me that, if the ward made the advance arrangements before becoming incapacitated, the court should not be permitted to overrule them. The committee should discuss all of the items in these lists as well.

In this draft, I have said simply that the guardian must report the condition of the ward to the "satisfaction of the court." The courts have a form for the annual report, and presumably that would meet the test, unless the judge in a particular case wanted to get more information. But the statute could easily be more detailed about the report's content. I have not yet included a parental exception for the plan or the annual report. Under current law, a parent of a ward does not have to file the annual reports of a guardian, §75-5-312(2)(e)(vi), or a conservator, §75-5-417(5). The committee should discuss whether a parent should be exempt from filing the plan or the annual reports. I could not find a parental exemption in the 1997 Uniform Act.

1       **Limited Guardianships**

2       **75-5-###. Appointment of guardian – Retention of rights – Guardianship plan –**  
3 **Considerations.**

4       (1) The court shall appoint a guardian if the court concludes that the proposed ward  
5 is incapacitated and that a guardian is the least restrictive means of providing for the  
6 proposed ward's need for a substitute decision maker.

7       (2) The ward retains all rights, power, authority and discretion not expressly granted  
8 to the guardian by statute or court order. If the court concludes that the ward is unable  
9 to receive and evaluate information or to make and communicate decisions to such an  
10 extent that the ward is incapable of voting, the court may specify in the order that the  
11 ward may not vote, but the court may not grant to the guardian the authority to vote on  
12 the ward's behalf.

13       (3) In determining the guardian's authority, the court should consider and weigh, as  
14 appropriate:

15       (a) whether the ward's condition, limitations and level of functioning leave the ward  
16 at risk of:

17       (i) his or her property being dissipated;

18       (ii) being unable to provide for his or her support and personal needs;

19       (iii) being financially exploited;

20       (iv) being abused or neglected; or

21       (v) having his or her rights violated;

22       (b) whether the ward can manage the activities of daily living through training,  
23 education, support services, mental and physical health care, medication, therapy,  
24 assistants, assistive devices, or other means that the ward will accept;

25       (c) the nature and extent of the demands placed on the ward by the need for care;

26       (d) the nature and extent of the demands placed on the ward by his or her property;

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

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

31       (g) other relevant factors.

32 **75-5-###. Guardian's authority limited to court order.**

33 (1) The guardian has the duties specified by statute or court order. The guardian has  
34 only the authority specified by court order. The order shall limit the guardian's authority  
35 to make surrogate decisions, give consents and spend the ward's money necessary to  
36 accommodate the ward's particular functional limitations.

37 (2) The court may grant to the guardian the authority to make surrogate decisions,  
38 give consents and spend the ward's money necessary to:

39 (a) provide for the ward's custody and dwelling place;

40 (b) provide professional services, including mental health care, physical health care,  
41 treatment, medication, counseling, therapy and legal advice, for the ward;

42 (c) provide support services, including assistants and assistive devices, for the ward;

43 (d) provide for the support, care, comfort, education and welfare of the ward;

44 (e) allow adoption, marriage or divorce of the ward;

45 (f) delegate decisions to the ward, if reasonable under the circumstances.

46 (3) If the court does not appoint a conservator, the order may grant to the guardian  
47 the authority to make surrogate decisions, give consents and spend the ward's money  
48 necessary to:

49 (a) apply for, receive and compel delivery of property due the ward;

50 (b) protect the ward's estate and bring protective proceedings;

51 (c) manage the ward's estate, including purchases, sales, investments and savings;

52 (d) prosecute, defend and settle legal actions, including administrative proceedings,  
53 on behalf of the ward;

54 (e) pay the ward's debts;

55 (f) file tax returns on behalf of the ward and pay taxes owed by the ward;

56 (g) execute contracts for the ward; and

57 (h) provide for the support, care, comfort, education and welfare of a person the  
58 ward is legally obligated to support.

59 **75-5-###. Restrictions on the guardian's authority.**

60 (1) The guardian may not:

61 (a) commit the ward to a mental health care institution except in accordance with  
62 Title 62A, Chapter 15, Part 6, Utah State Hospital and Other Mental Health Facilities;

63 (b) revoke a power of attorney or advance health care directive designating an agent  
64 for health care decisions;

65 (c) consent on behalf of the ward to termination of the ward's parental rights; or

66 (d) except as provided in Subsection 75-5-###(3), exercise the duties or authority of  
67 a conservator unless appointed as a conservator.

68 (2) Unless permitted by a court order the guardian may not:

69 (a) establish or move the ward's dwelling place outside of Utah;

70 (b) consent to electroconvulsive therapy or other shock treatment, experimental  
71 treatment, sterilization, forced medication with psychotropic drugs, abortion,  
72 psychosurgery, removal of bodily organs, unless necessary to prevent death or serious  
73 impairment of health, or a procedure that restricts the ward's rights;

74 (c) purchase property of the ward at fair market value; or

75 (d) give gifts to family, friends or charities who would be likely recipients of gifts from  
76 the ward.

77 (3) If a guardian's duty or authority requiring a court order is not contained in the  
78 appointment order, the guardian may file a motion for the order under the Utah Rules of  
79 Civil Procedure and give notice to interested persons.

80 (4) If there is a power of attorney or advance health care directive designating an  
81 agent for health care decisions, the agent's health care decisions take precedence over  
82 those of the guardian. If the power of attorney or advance health care directive does not  
83 designate an agent for health care decisions, the guardian may make health care  
84 decisions but must follow the ward's wishes expressed in the directive.

85 (5) A guardian may not consent on behalf of the ward to cessation of lifesaving  
86 procedures. However, a guardian is not required to oppose the cessation of lifesaving  
87 procedures when those procedures will serve only to prolong the dying process and  
88 offer no reasonable expectation of a cure or relief from the illness or condition being  
89 treated unless the ward has clearly stated that lifesaving procedures not be withheld. A  
90 guardian is not civilly liable for acts or omissions under this paragraph unless the act or  
91 omission constitutes gross negligence or reckless or intentional misconduct.

92 **75-5-###. Guardian's duties.**

93 The guardian shall:

94 (1) within 90 days after appointment, file with the court a guardianship plan,  
95 conforming to the appointment order, that describes in detail how the guardian will act  
96 as surrogate decision maker for the ward;

97 (2) report the condition of the ward to the satisfaction of the court annually or as  
98 required by court rule or court order;

99 (3) immediately notify the court if the ward dies, becomes capable of exercising  
100 rights previously removed or changes dwelling place, or if the guardian changes  
101 dwelling place;

102 (4) make surrogate decisions and consents as authorized by the court order and as  
103 necessary to accommodate the ward's particular functional limitations;

104 (5) exercise authority in a manner that is the least restrictive form of intervention and  
105 that is consistent with the ward's preferences and values known to the guardian;

106 (6) try to learn the ward's preferences and values;

107 (7) encourage the ward to participate in decisions, to act on the ward's own behalf,  
108 and to overcome the functional limitations that resulted in the ward's incapacity:

109 (8) act in the ward's best interest;

110 (9) exercise the degree of care, diligence, and good faith when acting on behalf of  
111 the ward that an ordinarily prudent person exercises in his or her own affairs;

112 (10) exhibit the utmost trustworthiness, loyalty, and fidelity to the ward;

113 (11) become and remain personally acquainted with the ward and maintain sufficient  
114 contact with the ward to know of the ward's capabilities, limitations, needs,  
115 opportunities, and physical and mental health;

116 (12) conserve for the ward's future needs any of the estate that exceeds the ward's  
117 current needs or, if a conservator has been appointed, pay the excess to the  
118 conservator at least annually;

119 (13) if a conservator has been appointed, account to the conservator for the ward's  
120 income and expenses and for any of the ward's estate in the guardian's possession;

121 (14) if a conservator has not been appointed and if the guardian's authority includes  
122 responsibility for the ward's estate, file with the court an inventory and accounting of the  
123 ward's estate as would a conservator; and

124 (15) at the termination of the guardianship, deliver any of the ward's estate in the  
125 guardian's possession to the those entitled to it.

126 **75-5-###. Guardian's rights.**

127 (1) A guardian is entitled to reasonable compensation for services as guardian. A  
128 guardian, someone affiliated with the guardian, or someone within the third degree of  
129 relationship to the guardian is entitled to reimbursement for room, board, and clothing  
130 provided to the ward. The compensation or reimbursement must be approved by the  
131 conservator, if one has been appointed. If there is no conservator or if the conservator is  
132 the guardian, someone affiliated with the guardian, or someone within the third degree  
133 of relationship to the guardian, the compensation or reimbursement must be approved  
134 by the court.

135 (2) A guardian need not use personal funds for the ward's expenses.

136 **75-5-###. Guardian's immunities.**

137 (1) A guardian is not liable to third persons for acts of the ward solely by reason of  
138 the guardianship relationship.

139 (2) If the guardian performs the responsibilities of the guardianship with the degree  
140 of care, diligence, and good faith that an ordinarily prudent person exercises in his or  
141 her own affairs, the guardian is immune from civil liability for acts or omissions in  
142 performing the responsibilities of the guardianship.

143 (3) If the guardian selects a third person with the degree of care, diligence, and good  
144 faith that an ordinarily prudent person exercises in his or her own affairs to perform a  
145 service for the ward, the guardian is immune from civil liability for injury to the ward  
146 resulting from the wrongful conduct of third person.

147