

# Agenda

## Ad Hoc Committee on Probate Law and Procedure

January 18, 2008  
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 George Harmond
Powers of guardian	Tab 2	Tim Shea
Open or closed records	Tab 3	Tim Shea

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

### Meeting Schedule

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  
November 16, 2007 - 12:00 p.m.

**ATTENDEES**

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

**EXCUSED**

Reese Hansen  
Maureen Henry  
Gary Stott

**GUESTS:**

Elizabeth Conley  
Joanna Sagers

**STAFF**

Marianne O'Brien  
Diana Pollock  
Tim Shea

**I. WELCOME AND APPROVAL OF MINUTES**

Judge McCleve welcomed the committee members to the meeting. Judge McCleve welcomed guests Elizabeth Conley and Joanna Sagers. Kathy Thyfault and Steve Mikita noted two corrections in the October minutes. With those corrections Kent Alderman moved to approve the minutes. The motion was seconded. The motion carried unanimously.

**II. REPRESENTATION OF PROPOSED WARD**

Joanna Sagers stated that the people coming into the Legal Society of Salt Lake who file guardianships pro se, do not understand that the proposed ward needs an attorney. Ms. Sagers feels this committee is headed in the right direction and that a roster of attorneys will be helpful.

Elizabeth Conley expressed the questions and concerns of the Committee on Law and Aging:

- Is the petitioner able to select someone from the roster of attorneys?
- Could a conflict of interest exist?
- Is there background available for the new legislation or is it a means for an indigent or near indigent proposed ward to receive representation?

- If a pro bono case becomes difficult what additional resources are available?
- Should there be a fixed rate for indigent cases?
- Who determines the level of education and experience to be on the roster?
- What is the anticipated number of pro bono clients?
- There should be safeguards to prevent aggressive attorneys from exploiting the estate.
- Will attorneys on the roster be losing money with these cases?
- What is the incentive to be on the roster?
- Who will administer and maintain the roster?

Some of the committee members responded to Ms. Conley's concerns:

Kerry Chlarson stated that it is his experience that a conflict of interest does not exist, however, he is finding that the references or referrals are not always done by an experienced attorney especially in pro bono cases. Mr. Chlarson stated that the work done on behalf of the ward is not always what it should be.

Tim Shea stated that the purpose for legislation is to get away from the need for a petitioner's attorney to try to recruit a representative for the proposed ward. The court would make that appointment as part of the initiation of the case.

Tim Shea stated that the pro bono requirement is for the attorney to accept two cases every two years. If a proposed ward qualifies as indigent, the proposal is that the state would pay the proposed ward's attorney at the rate of \$50.00. The appointment would come from the list in all cases. Those wards who have estates would pay market rates. If the ward is indigent, the state would pay the attorney the defined rate.

Tim Shea stated that in the current draft, the roster would be maintained by the Bar with express minimum qualifications to be on the roster. The roster would be publically available, but the actual selection of the ward's lawyer would come from the court. In regards to the question of whether the petitioner could select the ward's attorney, Mr. Shea stated that this was previously discussed, and it was decided not to go that direction. If the ward has chosen his or her own attorney, which does not happen very often, that would be honored.

Committee discussion included:

- Have a set rate for select services but allow a motion to award more in difficult cases.
- Attorneys would come up in rotation with some mechanism for a lawyer to decline because of a conflict of interest or scheduling problem.
- A proposed ward needs a lawyer for protection against family members who may not have the ward's best interest at heart.
- Roster will assure judges of the level of competency of the lawyers.
- Minimum requirements will protect against well-meaning lawyers who do not understand the responsibilities of representing a proposed ward.
- What happens if the legislation passes without funding?

- Raise the awareness of both the profession and the bar and train both practitioners and the judiciary.
- Mechanism for the judge to use when appointing the lawyer.

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

Mr. Shea discussed Maureen Henry's observations on the definition of incapacity. Mr. Shea suggested addressing the amendments first rather than the underlying legislation. Steve Mikita circulated a memo explaining why the more cognitive definition of incapacity should not be used.

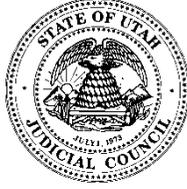
The committee discussed the factors the judge should consider when appointing a guardian.

- Differentiate between the capacity for financial decisions but not health care decisions.
- Maintain the blend of cognitive and functional considerations.
- Current draft allows the distinction between the capacity to appoint a health care agent and the capacity to make a health care decision.
- The current statute provides that the decision of the health care agent supercedes that of the guardian, unless the court determines otherwise.

The committee decided not to adopt the proposed changes.

The committee 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:** January 11, 2008  
**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 more information. But the statute could 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 incapacity through training, education, support  
23 services, mental and physical health care, medication, therapy, assistants, assistive  
24 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 ward retains capacity to appoint a financial agent or create a trust for  
31 the management of assets;

- 32 (g) whether the incapacity is likely to be temporary; and
- 33 (h) other relevant factors.

34 **75-5-###. Guardian's authority limited to court order.**

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

39 (2) The court may grant to the guardian the authority to make surrogate decisions,  
40 give consents and manage the ward's estate necessary to:

- 41 (a) provide for the ward's custody and dwelling place;
- 42 (b) provide professional services, including mental health care, physical health care,  
43 treatment, medication, counseling, therapy and legal advice, for the ward;
- 44 (c) provide support services, including assistants and assistive devices, for the ward;
- 45 (d) provide for the support, care, comfort, education and welfare of the ward;
- 46 (e) allow adoption, marriage or divorce of the ward;
- 47 (f) delegate decisions to the ward, if reasonable under the circumstances.

48 (3) If the court does not appoint a conservator, the order may grant to the guardian  
49 the authority to make surrogate decisions, give consents and manage the ward's estate  
50 necessary to:

- 51 (a) apply for, receive and compel delivery of property due the ward;
- 52 (b) protect the ward's estate and bring protective proceedings;
- 53 (c) manage the ward's estate, including purchases, sales, investments and savings;
- 54 (d) prosecute, defend and settle legal actions, including administrative proceedings,  
55 on behalf of the ward;
- 56 (e) pay the ward's debts;
- 57 (f) file tax returns on behalf of the ward and pay taxes owed by the ward;
- 58 (g) execute contracts for the ward; and
- 59 (h) provide for the support, care, comfort, education and welfare of a person the  
60 ward is legally obligated to support.

61 **75-5-###. Restrictions on the guardian's authority.**

62 (1) The guardian may not:

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

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

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

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

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

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

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

76 (c) purchase property of the ward [at less than fair market value]; or

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

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

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

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

94 **75-5-###. Guardian's duties.**

95 The guardian shall:

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

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

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

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

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

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

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

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

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

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

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

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

121 (13) keep the ward's estate separate from all other money and property;

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

124 (15) if a conservator has not been appointed and if the guardian's authority includes  
125 responsibility for the ward's estate, file with the court an inventory and accounting of the  
126 ward's estate as would a conservator; and

127 (16) at the termination of the guardianship, deliver any of the ward's estate in the  
128 guardian's possession to the those entitled to it.

129 **75-5-###. Guardian's rights.**

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

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

139 **75-5-###. Guardian's immunities.**

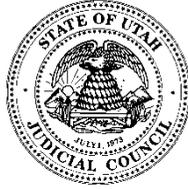
140 (1) A guardian is not liable to third persons for acts of the ward solely by reason of  
141 the guardianship relationship.

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

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

150

# 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:** January 11, 2008  
**Re:** Should Guardianship and Conservatorship records be public or private?

The Policy and Planning Committee of the Judicial Council has recommended that the inventory and annual reports of guardians and conservators be classified as private, but deferred to this committee the question of whether the balance of guardianship and conservatorship records should be private. A private record can be viewed and copied by the parties and lawyers in the case but not by the public.

Guardianship and conservatorship records have historically been public. Probably not because of any deliberate decision, but because no one ever asked whether they should be private. To classify the records as private, the Council would need to designate them as private in Rule 4-202.02.

A Committee on Privacy and Public Records recommended rule changes in 2005 that described several public and non-public records. These particular records did not come up, but the committee did recommend that financial records be public and that medical records be private. Guardianship and conservatorship cases contain a combination of private and public information.

The ad hoc committee developed a balancing test, based on constitutional, statutory and common law, by which a judge (or, in this case, the Probate Committee) could decide whether records should be public or private. See Rule 4-202, which is attached.

Marianne has investigated the laws of several states. Montana makes a case-by-case decision. Of the rest, and it appears that the split is about even.

Public	Private
Arizona	Alaska
Arkansas	California
Connecticut	Colorado
Illinois	Delaware
Indiana	Florida
Iowa	Georgia
Kansas	Idaho

Public	Private
Louisiana	Kentucky
Nebraska	New Mexico
Nevada	South Dakota
Oregon	Hawaii - Guardian
Washington	
Wyoming	
Hawaii - Conservator	

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.

Rule 4-202. Purpose.

Intent:

To recognize the delicate balance of interests served by open and closed court records.

Applicability:

This rule applies to the judicial branch.

Statement of the Rule:

(1) This list of interests served by public court records is not exhaustive but is meant to illustrate the important objectives of open government:

(1)(A) to obtain information concerning the conduct of the public's business;

(1)(B) to educate the public about the workings of government and the decisions being made on the public's behalf;

(1)(C) to contribute to informed debate;

(1)(D) to hold public officers and employees accountable;

(1)(E) to increase public confidence;

(1)(F) to give notice of important claims, rights and obligations; and

(1)(G) to provide material for independent research on improving government policy.

(2) This list of interests served by non-public court records is not exhaustive but is meant to illustrate the important objectives protected by selectively closing court records:

(2)(A) to protect personal privacy;

(2)(B) to protect personal and public safety;

(2)(C) to protect a property interest that would be lost or devalued if opened to public view;

(2)(D) to promote the rehabilitation of offenders, especially youthful offenders; and

(2)(E) to protect non-parties participating in the court process, such as victims, witnesses, and jurors.