

Agenda

Ad Hoc Committee on Probate Law and Procedure

February 15, 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
Evidence of incapacity		Dr. Cherie Brunker Dr. Kelly Davis Garrett
Authority and duties of guardian	Tab 2	Tim Shea
Representation of proposed ward	Tab 3	Tim Shea
Monitoring program	Tab 4	Tim Shea
Schedule		See below

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

Meeting Schedule

Meeting	Conclude	Introduce
February 15, 2008	Powers, Representation	Evidence, Monitoring
March 21, 2008	Evidence, Monitoring	Probate judge or commissioner, role of clerks, role of mediation
April 18, 2008	Probate judge or commissioner, role of clerks, role of mediation	Conflicting laws and procedures between juvenile court & district court
May 16, 2008	Conflicting laws and procedures between juvenile court & district court	Emergency appointments, Model Code of Conduct
June 20, 2008	Emergency appointments, Model Code of Conduct	Conservatorships
July 18, 2008	Conservatorships	Forms & Information, Report
August 15, 2008	Forms & Information	Report
September 19, 2008	Report	

Tab 1

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MINUTES

Ad Hoc Committee on Probate Law and Procedure

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114-0241
January 18, 2008 - 12:00p.m.

ATTENDEES

Mary Jane Ciccarello
Judge George Harmond
Maureen Henry
Richard Howe
Julie Rigby
Kathy Tryfault

EXCUSED

Kent Alderman
Kerry Chlarson
Steve Mikita
Judge Gary Stott

STAFF

Marianne O'Brien
Diana Pollock
Tim Shea

I. WELCOME AND APPROVAL OF MINUTES

Judge Harmond welcomed the committee members to the meeting. Judge McCleve asked to be relieved of her committee assignments, and Judge Harmond will serve as the new committee chair. Julie Rigby made a motion to accept the minutes of the November 16, 2007 committee meeting. Kathy Tryfault seconded the motion. The motion carried unanimously.

II. POWERS OF GUARDIAN

Tim Shea stated that his approach in drafting this statute is that the statute would give the guardian duties. However, the statute itself does not give the guardian any authority. The authority would come from the order of court.

Mr. Shea provided in the draft that the guardian would not be able to revoke a power of attorney or advance health care directive. Mr. Shea asked for comments to the draft.

- The new Health Care Directive law makes it clear that a guardian does not trump an agent, "unless ordered by the court."
- In the Health Care Directive law, unless the principal denies authority to an agent, the agent has the ability to make end of life decisions for the ward.
- If a health care agent is not appointed, then the guardian should have similar authority as a health care agent.

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- There was concern with making the decision for the ward to be committed. Currently, if there is a guardian, mental health facilities will accept their consent to admission.

Tim Shea will research and integrate the Advance Health Care Directive statute into the proposed draft to ensure that the same model applies to both statutes.

Voting.

- If the ward is incapable of voting, the court may order that the ward may not vote. The court may not grant authority to the guardian to vote in behalf of the ward.
- What is the standard by which the court will make the determination that the ward is not capable of voting? Mr. Shea will integrate the ABA standard into the draft.

Mental Health.

- The mental health community understands the commitment process that has been in place for a long time. Many providers view it as the only way to provide mental health treatment for someone who disagrees with their care.
- If the guardian can consent to mental health treatment against a person's wishes, it would require reeducating providers. Providers have been trained that the only way to keep someone against their will is the commitment process.
- The guardian must understand that having the ability to consent to treatment does not give the authority to order treatment.
- A guardian cannot prevent commitment of a ward if the provider seeks it and it is ordered by the court.
- Commitment requires that the person be a danger to self or others.
- Commitment and admission to a mental health facility are different processes.
- Under the Advance Health Care Directive statute, the agent can consent on behalf of the principal to admission and recommended treatment if the principal agrees. The agent cannot consent to commitment.
- The requirements of commitment have been established so that people are not committed against their will. The guardian does not have the authority to consent to commitment, but must go through the involuntary commitment process.

Authority for the estate.

Mr. Shea proposed some basic financial authority that a guardian could exercise without being appointed as a conservator. Mr. Shea asked what is routine that would not require the expertise or authority of a conservator?

- Is there a point where an estate is so extensive that there should be a conservator?
- The guardian can hire an investment counselor without being a conservator.
- Real-property transactions should require that the guardian be appointed as

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conservator. Especially for the ward's home.

- The guardian can open a bank account for routine transactions.
- Should the guardian be able to prosecute, defend and settle legal actions? Or should this be authority for a conservator?

Restrictions on the guardian's authority.

- The guardian would not be permitted to consent to termination of parental rights.
- The guardian should follow the process for a court order for sterilization.
- Be explicit regarding consent to be a living donor of body organs.
- Require court approval for the guardian to purchase the ward's property.
- Unless permitted by order, the guardian may not give gifts on the ward's behalf.

Guardian's duties

- File a guardianship plan with the court .
- File a status report and, if responsible for the ward's estate, a financial report.
- Exercise guardian's authority.
- The term "best interest" is a different standard from "substituted judgment."
- At termination of the guardianship, deliver any of the ward's estate in the guardian's possession "as directed by the court."

III. OPEN OR CLOSED RECORDS

Tim Shea stated there is concern that when the courts move to electronic filing, the internet becomes the court's filing cabinet. Very sensitive information would be on the public internet. If the records are defined as private, the parties would still be able to view the record, but the public would not. The Policy & Planning Committee has recommended that the annual reports of guardians and conservators be private and has deferred to this committee the question of whether the balance of the records should be private. Mr. Shea noted that the definition of private has been amended to include an "interested person" under the Probate Code.

After discussion, the committee concluded that the records contain very sensitive information on the status of the ward's estate, the ward's incapacity, and how to contact the wards. Wards are, by definition, incapacitated and especially at risk of being victimized. It is important that the appointment process be open to public scrutiny, but open hearings should achieve that objective. The committee recommended that records in guardianship and conservatorship cases be classified as private. Mr. Shea recommended that the appropriate rule change be effective as soon as possible. Judge Harmond will report this recommendation to the Judicial Council at their next meeting.

The meeting adjourned at 2:05 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: February 7, 2008
Re: Authority of guardian

I've amended the draft legislation to include the changes from the January meeting.

Lines 9-10. Integrate the ABA standard on denying the right to vote. The bracketed text is in the ABA wording, but it appears to add to no value.

Lines 41-42. The best way to coordinate with the Advance Health Care Directive Act seemed to be simply to include it within the scope of the guardian's authority. I have deleted what were Lines 65-66 and Lines 82 – 93 from the January 11 draft. The matters that they governed are already governed in the Advance Health Care Directive Act and do not need to be restated here. I have allowed one exception: to provide in this statute the limits on a surrogate (in our circumstances, a guardian) to consent to short-term admission. Compare §75-2a-110, which requires the consent of the ward, with Lines 43-44 & 77-78, which require the approval of the court.

Lines 45-46. I've retained for the time being the more general text regarding healthcare in subsection (b). The reference to the Advance Health Care Directive Act alone may be sufficient, but, being unfamiliar with it, I don't know whether it's sufficient to govern routine healthcare: dental work; flu shots; eye glasses; and the like.

Lines 39-40 & 54-55. In order to limit the guardian's authority for managing the ward's estate, I've deleted what were lines 53 and 58 from the January 11 draft and added the authority to enter into contracts as needed to exercise authority granted by court order.

Line 51. Authority to give gifts.

Lines 70-71. Specific reference to the sterilization statutes.

Lines 72-73. Clarify that the prohibition on consenting to termination of parental rights goes both directions.

Line 81. Consent to be a living organ donor.

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.

Lines 101-103. I did not remove the “best interest” consideration. Instead I limited it to situations in which the guardian does not know what the ward would have done. There is a similar provision in the Advance Health Care Directive Act.

I’ve not yet defined “surrogate decision,” as Chief Justice Howe suggested. I recommend that we accumulate the various words and phrases that we want to define and develop those toward the end of the drafting process.

The committee did not discuss, but I do not want to lose track of, whether there should be a parental exception to the annual reporting requirement.

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 surrogate 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 finds that the ward is unable to
9 communicate [with or without accommodation] the [specific] desire to [participate in the]
10 vote[ing process], the court may specify in the order that the ward may not vote, but the
11 court may not grant to the guardian the authority to vote on the ward's behalf.

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

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

16 (i) his or her property being dissipated;

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

18 (iii) being financially exploited;

19 (iv) being abused or neglected; or

20 (v) having his or her rights violated;

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

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

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

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

29 (f) whether the ward retains capacity to appoint a financial agent or create a trust for
30 the management of assets;

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

32 (h) other relevant factors.

33 **75-5-###. Guardian's authority limited to court order.**

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

38 (2) The court may grant to the guardian the authority to make surrogate decisions,
39 give consents, execute contracts, except contracts for the purchase or sale of real
40 estate, and manage the ward's estate necessary to:

41 (a) exercise authority under Title 75, Chapter 2a, Advance Health Care Directive Act,
42 if the ward has not appointed an agent;

43 (b) provide short-term admission to a licensed health care facility for assessment,
44 rehabilitative care or respite care;

45 (c) provide for professional services, including any procedure, care, treatment,
46 medication, counseling, therapy, or advice for the ward's physical or mental condition;

47 (d) provide for legal advice and representation for the ward;

48 (e) provide support services, including assistants and assistive devices, for the ward;

49 (f) provide for the support, care, comfort, education and welfare of the ward;

50 (g) allow the adoption, marriage or divorce of the ward;

51 (h) give gifts, donations or contributions; and

52 (i) provide for the ward's custody and dwelling place.

53 (3) If the court does not appoint a conservator, the order may grant to the guardian
54 the authority to make surrogate decisions, give consents, execute contracts, except
55 contracts for the purchase or sale of real estate, and manage the ward's estate
56 necessary to:

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

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

59 (c) prosecute, defend and settle legal actions, including administrative proceedings,
60 on behalf of the ward;

61 (d) pay the ward's debts;

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

63 (f) provide for the support, care, comfort, education and welfare of a person the ward
64 is legally obligated to support.

65 **75-5-###. Restrictions on the guardian's authority.**

66 (1) The guardian may not:

67 (a) consent to commitment of the ward to a mental health care institution, but may
68 petition the court for an order in accordance with Title 62A, Chapter 15, Part 6, Utah
69 State Hospital and Other Mental Health Facilities;

70 (b) consent to sterilization of the ward, but may petition the court for an order in
71 accordance with Title 62A, Chapter 6, Sterilization of Handicapped Person; or

72 (c) consent to termination of the parental rights in the ward or of the ward's parental
73 rights in another;

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

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

77 (a) admit the ward to a licensed health care facility for long-term custodial
78 placement;

79 (b) consent to electroconvulsive therapy or other shock treatment, experimental
80 treatment, forced medication with psychotropic drugs, abortion, psychosurgery, a
81 procedure that restricts the ward's rights, or to be a living organ donor;

82 (c) establish or move the ward's dwelling place outside of Utah; or

83 (d) purchase property of the ward.

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

87 **75-5-###. Guardian's duties.**

88 The guardian shall:

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

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

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

97 (4) exercise duties and authority authorized by statute and the court order as
98 necessary to accommodate the ward's particular functional limitations;

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

102 (6) exercise duties and authority based on an objective determination of the ward's
103 best interest if the guardian does not know, and has no reason to know, the ward's
104 preferences and values;

105 (7) become and remain personally acquainted with the ward and maintain sufficient
106 contact with the ward to know of the ward's preferences, values, capabilities, limitations,
107 needs, opportunities, and physical and mental health;

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

110 (9) exhibit the utmost trustworthiness, loyalty, and fidelity to the ward;

111 (10) conserve for the ward's future needs any of the estate that exceeds the ward's
112 current needs or, if a conservator has been appointed, pay the excess to the
113 conservator at least annually;

114 (11) keep the ward's estate separate from the guardian's money and property;

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

117 (13) if a conservator has not been appointed, file with the court an inventory and
118 accounting of the ward's estate as would a conservator; and

119 (14) if reasonable under the circumstances, encourage the ward to participate in
120 decisions, to act on the ward's own behalf, and to overcome the functional limitations
121 that resulted in the ward's incapacity;

122 (15) at the termination of the guardianship, deliver any of the ward's estate in the
123 guardian's possession as directed by the court.

124 **75-5-###. Guardian's rights.**

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

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

133 **75-5-###. Guardian's immunities.**

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

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

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

144

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: February 7, 2008
Re: Representation for the proposed ward

In the November meeting, the committee raised three points for further review.

1) Since the ward may not have the capacity to do so and the guardian may not have the incentive, the court should review and approve attorney fees and expenses. I have proposed paragraph (d) in Rule of Civil Procedure 76.

2) Describe the method by which lawyers will be appointed from the roster. I have established the initial order in Bar Rule 14-808 and the process and reordering in URCP 76. The committee should consider whether to accomplish this objective by rule or by some less formal method.

3) Rather than a dollar per hour attorney fee, develop a schedule of charges for common services. I have proposed an amendment to the statute that directs the Supreme Court to approve such a schedule. The schedule itself would be in Rule 76.

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.

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 for no more than the schedule of charges approved by the~~
31 Supreme Court under Section 75-5-604.

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

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

39 **75-5-603. Roster – Proposed Ward of the Court Account.**

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

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

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

51 **75-5-604. Payments from the Account. Attorney fees adjusted for inflation.**

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

55 (2)(a) ~~Attorney fees may not exceed \$50.00 per hour in fiscal year 2010 and may not~~
56 ~~exceed \$50.00 per hour~~ The Supreme Court shall establish a schedule of charges for
57 services adjusted for inflation in fiscal year 2011 and thereafter.

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

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

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

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

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

73 **75-5-605. Appointment of counsel -- Qualification for payment from the**
74 **Account.**

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

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

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

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

89 **75-5-606. Pro bono representation -- Liability limits.**

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

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

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

95 (3) the lawyer provided the legal services without gross negligence or willful
96 misconduct.

97

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. A lawyer will be added to the list in the order in
8 which he or she certifies to meeting the minimum requirements.

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

10 (c)(1)(A) have acquired at least four hours of MCLE or four hours of accredited law
11 school education in the law and procedures for representing proposed wards;

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

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

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

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

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

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

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

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

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

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

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

38 (f) The executive director shall develop and publish ~~application-appropriate~~ forms,
39 ~~reporting forms, and forms for requesting a waiver~~ to implement this rule.

40 (g) A mentor may charge the person mentored for the service.

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

43

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) When a petition for the appointment of a guardian or a conservator is filed, the
9 clerk will offer the appointment to the first lawyer in order on the roster willing to accept
10 assignments in that county. The lawyer will review the case for conflicts of interest and
11 any other factor that might impede the lawyer from independent and zealous
12 representation of the proposed ward. If the lawyer declines the appointment, the clerk
13 will offer the appointment to the next lawyer on the roster. Upon accepting or declining
14 the appointment, the clerk will move the lawyer's name to the bottom of the roster. Upon
15 acceptance of the appointment, the judge will enter an order appointing the lawyer. If a
16 lawyer agrees to represent an indigent or qualified indigent proposed ward on a pro
17 bono basis, the judge will acknowledge this in the appointment order. The judge can
18 remove a lawyer from a case.

19 (c) Upon motion by a party or upon the court's own motion, the court may determine
20 whether the lawyer representing the proposed ward is qualified and independent of the
21 petitioner's lawyer. In making the finding, the judge should consider whether:

22 (c)(1) the lawyer has demonstrated by education and experience proficiency in the
23 law and procedures for representing proposed wards of the court, especially in relation
24 to the complexity of the case;

25 (c)(2) the lawyer has the knowledge, skill, thoroughness and preparation necessary
26 to candidly advise and zealously represent the person with undivided loyalty;

27 (c)(3) any other factor that may be relevant.

28 (d) Whether or not the proposed ward is indigent or qualified indigent, the attorney
29 for the proposed ward shall request attorney fees in accordance with Rule 73 and serve
30 the parties and interested persons with the request. The ward, an interested person, the
31 guardian or the conservator may object to the request. The court shall review and

32 approve costs, expenses and attorney fees, reasonably and necessarily incurred, taking
33 into account the complexity of the service and the lawyer's experience.

34 (e) Schedule of charges. A lawyer appointed to represent an indigent or qualified
35 indigent proposed ward of the court may charge in accordance with this schedule, as
36 adjusted for inflation under Utah Code Section 75-5-604, unless a higher amount is
37 approved by the court for good cause.

38 (e)(1) Client interview: \$

39 (e)(2) Fact witness interview: \$

40 (e)(3) Fact witness deposition: : \$

41 (e)(4) Expert witness interview: \$

42 (e)(5) Expert witness deposition: \$

43 (e)(6) Communication with petitioner and/or petitioner's attorney: \$

44 (e)(7) Communication with interested persons: \$

45 (e)(8) Legal research: \$

46 (e)(9) Document preparation: \$

47 (e)(10) Trial preparation – uncontested: \$

48 (e)(11) Trial preparation – contested: \$

49 (e)(1) Trial preparation – jury: \$

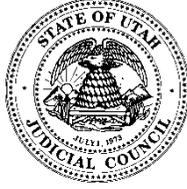
50 (e)(12) Trial – uncontested: \$

51 (e)(13) Trial – contested: \$

52 (e)(14) Trial – jury: \$

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: February 7, 2008
Re: Monitoring guardians and conservators

One of the issues the committee identified at the start was a method for protecting the ward from misconduct by the guardian or conservator. The statutes already provide for the ward or an interested person to petition to remove the fiduciary. And the statutes already provide that the court can order or an interested person can request more detailed reports by the fiduciary. We might want to reinforce those statutes in our proposed legislation, but in concept they appear adequate.

When the Judicial Council established the program for monitoring and enforcing the post-appointment reporting requirements, they recognized that objections to annual reports by interested persons do not adequately protect some wards and that independent verification is needed. Some states have a program in which the court – through staff, contractors or volunteers – stays in contact with the ward in order to provide independent verification that the ward and the ward's estate are properly cared for.

The ABA and the AARP have recently prepared a monograph of best practices for a volunteer program. That report is available if you want it. I have summarized their recommendations and added a few of my own, based on our very successful program of CASA volunteers, people who help the guardian ad litem attorney represent victims of child abuse or neglect.

This proposal builds on the "visitor" appointed by the court under current law. Either by statute or rule we could expand the visitor's pre-trial duties and establish new, post-trial duties.

The success of any volunteer program is the support given to it. Under this proposal, the courts would hire a coordinator to ensure adequate support. We do not need a statute or rule establishing such a position, only a budget, which I hope will be funded by the fees from filing the annual accounting, and a job description incorporating the best practices.

Encl. Program outline

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.

Monitoring Program for Protecting a Ward of the Court

Volunteers

Scope of responsibilities

Visitor (before appointment - per statute)

Interview the proposed ward

Interview the proposed guardian

Visit the proposed ward's current residence

Visit the proposed ward's proposed residence

"Investigate" if the petitioner requests that the proposed ward not be present at the trial

Report to the court

Is this sufficient?

Visitor (after appointment - proposed)

Interview the ward at current residence

Interview the guardian

Interview interested persons

Review annual status reports

Review inventory and annual financial accounting reports

Report to the court

Attend hearings

????????????

Volunteer coordinator

Develop partnerships (AARP, CPAs, Lawyers, Law students, Law enforcement, social workers, etc.)

Recruit volunteers from among partners

Develop training materials

Develop and conduct training classes for volunteers (initial and continuing)

Develop and conduct training classes for judges & court staff.

Assign cases

Supervise volunteers

Recognize volunteers

Maintain time sheets

Reimburse expenses

Troubleshoot problems
Develop checklists, forms, & other aids
Record and report outcomes
Contract for auditor or investigator beyond volunteer program
As needed