

Agenda

Ad Hoc Committee on Probate Law and Procedure

March 21, 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		Gloria Jensen-Sutton, Regional Ombudsman, Dept of Human Services
Authority and duties of guardian	Tab 2	Kent Alderman, Mary Jane Ciccarello Maureen Henry
Forms for clinical evidence	Tab 3	Tim Shea
Monitoring program	Tab 4	Tim Shea
Role of mediation	Tab 5	Kathy Elton
Role of clerks		Julie Rigby, Kathy Thyfault
Probate judge or commissioner		Tim Shea

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

Meeting Schedule

Meeting	Conclude	Introduce
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

MINUTES

Ad Hoc Committee on Probate Law and Procedure

Administrative Office of the Courts

450 South State Street

Salt Lake City, Utah 84114-0241

February 15, 2008 - 12:00p.m.

ATTENDEES

Kent Alderman
Kerry Chlarson
Mary Jane Ciccarello
Maureen Henry
Steve Mikita
Julie Rigby

EXCUSED

Judge Reese Hanson
Judge George Harmond
Justice Richard Howe
Judge Gary Stott
Kathy Tryfault

GUESTS

Dr. Cherie Brunker
Dr. Kelly Davis Garrett

STAFF

Diana Pollock
Tim Shea

I. WELCOME AND APPROVAL OF MINUTES

Because Judge Harmond was unable to attend, Tim Shea welcomed the committee members to the meeting. One correction was noted in the minutes. With the correction Mary Jane Ciccarello made a motion to accept the minutes from the January 18, 2008. Kent Alderman seconded the motion. The motion carried unanimously.

II. EVIDENCE OF INCAPACITY

Mr. Shea introduced Dr. Cherie Brunker and Dr. Kelly Davis Garrett. They will be addressing ways to explore the evidence of incapacity. Although it is a legal decision, it is nevertheless based on medical and other evidence.

Dr. Brunker explained her professional background to the committee. Dr. Brunker read a common case scenario to the committee. The key points she made:

- The consequences of decision play a large role in the assessment of someone's judgment.
- Partnerships between medicine and law would help both entities understand each other's processes and decisions.

- The ward may score high on some evaluations, however everyday living may be difficult.
- Would a counter-test prove to be a more thorough assessment?
- Could judges rely on the Mini Mental Status Exam?
- The point for medical consent is understanding the options and weighing the risks and benefits of the decision. The Mini Mental Exam does not address this.

Kent Alderman stated that in a normal situation an application for a guardianship is usually perceived as a non-adversarial proceeding. Family members perceive that the individual has declined in function, and there is a need to appoint a guardian.

- Is summary information available to allow the judge to be comfortable stating that a particular case should be a non-adversarial proceeding? The judge could then grant guardianship after an abbreviated proceeding rather than having a full trial with experts on both sides presenting evidence.
- The Code provides for a court-appointed physician to do an evaluation. What level of information in the report would allow the judge to make a determination that the person should have a guardian?

Dr. Brunner proposed that a conceptual model be used and introduced a template to the committee. Dr. Kelly Garrett stated that her area of expertise has focused on the cognition of older adults. Concerns of Dr. Garrett and the committee:

- Capacity for what? The possibility of a limited guardianship to help with particular functional limitations.
- It is Dr. Garrett's experience that requests for clinical evaluations are too vague.
- The ABA Judicial Determination of Capacity in Adults would be helpful to a clinician by focusing the questions.
- The model clinical evaluation was discussed.
- Can clinicians recommend what functions are necessary for an individual to do a specific task?
- The assessment of capacity will be difficult because of the need to focus on the ability of a particular person in a particular situation.
- Using a basic form may not be appropriate if the issues are beyond the physician's training to evaluate.

- There is a need for an evaluation form that will enable the medical care provider to give basic information for the judge to examine.
- If a model report is used, the petitioner could have it completed before filing or upon court order.
- The statute provides that the parties can request an evaluation, and the model report would be helpful in directing the physician's inquiry.
- The model report would provide basic information. If the judge needs more information, the judge could request more.
- Using a court-ordered report would protect the doctor in releasing information about the patient.
- If done outside of a visit, Medicare/Medicade might not pay for a doctor's time for filling out the report.

It was a consensus of the committee that a form would be helpful. There was committee discussion regarding whether the form should be filed with the petition or wait until a court order. There was a recommendation that the form be amended to include the most critical information.

III. AUTHORITY OF GUARDIAN

Tim Shea stated that he incorporated into the draft statute the suggestions made at the last meeting. There was one additional point with regard to the Mental Health Directive and the Human Services Code. Committee discussion included:

- Having things scattered throughout the Code is not a good idea.
- Can we change the title of an act from "handicapped" to "disabled"?
- Difference between "commitment" and "admission." In the Advance Health Care Directive Law, an agent does have the authority to consent to admission to a mental health facility. Commitment is a different legal status. In setting up an advance mental health care directive, a person can authorize his or her agent to consent to commitment for a short period of time.
- Advance health care directives are used for routine medical decisions, not just for emergencies.
- The order should specify particular authority from the Advance Health Care Statute, not just a general reference.
- Include that the guardian should file an inventory within 90 days after appointment.
- Whether the ward can vote should be specified.

A subcommittee of Maureen Henry, Mary Jane Ciccarello, and Kent Alderman will discuss this section and bring back recommendations.

IV. REPRESENTATION OF PROPOSED WARD

Tim Shea stated that he had made the changes to the draft statute and rules that the committee had asked for. He said he was comfortable with everything except the delineation of fees for particular services. The fee as originally drafted would be \$50.00 per hour, and the judge could review whether the estate or the state will pay this. The committee had wanted to consider a set fee for particular services. Mr. Shea asked for direction with this issue. Committee discussion:

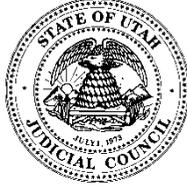
- The fee should be an hourly fee approved by the court.
- The rule provides that if counsel is of the ward's choosing, the court would not appoint anyone.
- The court can review the qualifications of the ward's choice.

V. MONITORING PROGRAM

Mr. Shea stated that the Policy and Planning Committee recommended that this committee pursue a program where volunteers would have the responsibility to periodically visit the ward and to review the annual reports. This would give the judge some independent verification that the ward is being treated well. The coordinator would be a paid position, (a court staff person) whose job is to recruit and train volunteers.

The committee adjourned at 2:35 p.m. The next meeting is March 21, 2008 at 12:00 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: March 17, 2008
Re: Authority of guardian

I've amended the draft to include most of the changes from the last meeting.

Lines 8-11. It was suggested that the provision on the ABA standard on denying the right to vote be moved to the section on findings, but after reviewing that section, I recommend that it remain here. Although the court has to make findings, the provision is a better fit in the retention-of-rights section.

Line 19. Include self-abuse.

Lines 33-34. Require that the judge make findings that the guardian's authority is the least restrictive means of accommodating the ward's particular functional limitations.

Line 67, 68 & 71. Change "may not" to "cannot" and "may" to "must."

Lines 134-136. Add the deadlines in which the guardian must file the inventory and annual report. The committee did not discuss, but I do not want to lose track of, whether there should be a parental exception to the inventory and annual reporting requirements.

Kent Alderman, Mary Jane Ciccarello and Maureen Henry met to discuss the authority and duties. Their discussion eliminated a lot of the previous draft. This is the first time they have seen this draft, so let me mention that I omitted one of their provisions. It was intended as a limit on the authority to make healthcare decisions. In essence the guardian would not have authority for healthcare decisions if the ward had appointed a health care agent. But the court could find that the agent is unable or unwilling to serve disqualify the agent or determine that the appointment was not valid.

I omitted it because priority between the guardian and the healthcare agent is already established, §75-2a-112, and I could not find anything in the Advance Health Care Directive Act that would permit a court to disqualify or invalidate an appointment. If that authority is to be established, it should not be done here.

The section on the guardianship plan came from a few points made during the subcommittee meeting and my subsequent research.

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 **Limited Guardianships**

2 **75-5c-313. Appointment of guardian – Retention of rights – Considerations –**
3 **Findings.**

4 (1) The court shall appoint a guardian if the court finds, based on clear and
5 convincing evidence, that the proposed ward is incapacitated and that a guardian is the
6 least restrictive means of accommodating the ward's particular functional limitations.

7 (2) The ward retains all rights, power, authority and discretion not expressly granted
8 to the guardian by statute or court order. The ward retains the right to vote unless the
9 court finds that the ward is unable to communicate with or without accommodation the
10 specific desire to participate in the voting process. The court may not grant to the
11 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, including self-abuse; 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 (4) The court shall enter findings that the guardian's authority is the least restrictive
34 means of accommodating the ward's particular functional limitations.

35 **75-5c-314. Guardian's authority limited to court order.**

36 (1) The guardian has the duties specified by statute or court order. The guardian has
37 only the authority specified by court order. The order shall limit the guardian's authority
38 to what is necessary to accommodate the ward's particular functional limitations.

39 (2) If supported by the findings, the court may grant to the guardian the authority to:

40 (a) except as provided in Section 75-5c-315, make health care decisions using the
41 substituted judgment standard or the best interest standard, whichever applies in the
42 circumstances;

43 (b) consent to admission to a licensed health care facility for short term placement
44 for the purpose of assessment, rehabilitative care, or respite care;

45 (c) make arrangements for the support, care, comfort, education and welfare of the
46 ward;

47 (d) take custody of the ward and make arrangements for a dwelling place;

48 (e) take reasonable care of the ward's personal effects;

49 (f) file an action for the appointment of a conservator or entry of a protective order;
50 and

51 (g) make other decisions and give other consents on behalf of the ward as specified
52 in the order and as necessary to accommodate the ward's particular functional
53 limitations.

54 (3) If the court does not appoint a conservator, and if supported by the findings, the
55 order may grant to the guardian the authority to:

56 (a) take control of and manage a savings account or checking account;

57 (b) apply for, start proceedings for, receive and compel delivery of property due the
58 ward or benefits to which the ward may be entitled, of not more than \$10,000 per year;

59 (c) obtain legal advice and representation on behalf of the ward;

60 (d) pay the ward's debts;

61 (e) except as provided in subsection 75-5c-315(3), give gifts, donations or
62 contributions on behalf of the ward;

- 63 (f) file tax returns on behalf of the ward and pay taxes owed by the ward; and
- 64 (g) provide for the support, care, comfort, education and welfare of a person the
- 65 ward is legally obligated to support.

66 **75-5c-315. Restrictions on the guardian's authority.**

67 (1) The guardian cannot:

68 (a) consent to commitment of the ward to a mental health care institution, but must

69 petition the court for an order in accordance with Title 62A, Chapter 15, Part 6, Utah

70 State Hospital and Other Mental Health Facilities;

71 (b) consent to sterilization of the ward, but must petition the court for an order in

72 accordance with Title 62A, Chapter 6, Sterilization of Handicapped Person;

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

74 rights in another; or

75 (d) except as provided in Subsection 75-5-314(3), exercise the duties or authority of

76 a conservator unless appointed as a conservator.

77 (2) A ward or a person interested in the welfare of a ward may file a motion or

78 petition to permit the guardian the following authority. Unless permitted by the court the

79 guardian cannot:

80 (a) admit the ward to a licensed health care facility for long-term custodial

81 placement;

82 (b) admit the ward to a psychiatric hospital or other mental health care facility;

83 (c) consent to abortion, serious medical intervention, participation in medical

84 research, electroconvulsive therapy or other shock treatment, experimental treatment,

85 forced medication with psychotropic drugs, abortion, psychosurgery, a procedure that

86 restricts the ward's rights, or to be a living organ donor;

87 (d) consent to termination of life-sustaining treatment if the ward has never had

88 health care decision making capacity;

89 (e) consent to name change, adoption, marriage, annulment or divorce of the ward;

90 (f) prosecute, defend and settle legal actions, including administrative proceedings,

91 on behalf of the ward;

92 (g) establish or move the ward's dwelling place outside of Utah; or

93 (h) restrict the ward's physical liberty, communications or social activities [more than
94 reasonably necessary to protect the ward or others from substantial harm];

95 (3) Unless permitted by the conservator, if one has been appointed, or, if there is no
96 conservator or if the conservator is the guardian, someone affiliated with the guardian,
97 or someone within the third degree of relationship to the guardian, unless permitted by
98 the court:

99 (a) the guardian, someone affiliated with the guardian, or someone within the third
100 degree of relationship to the guardian cannot purchase the ward's property; and

101 (b) the guardian cannot give gifts, donations or contributions on behalf of the ward to
102 the guardian, someone affiliated with the guardian, or someone within the third degree
103 of relationship to the guardian.

104 **75-5c-316. Guardian's duties.**

105 The guardian shall:

106 (1) within 14 days after appointment, serve on the ward and all other persons
107 entitled to notice of the hearing on the petition a copy of the order of appointment and
108 notice of the right to request termination or modification;

109 (2) file a guardianship plan with the court within 90 days after appointment;

110 (3) report the condition of the ward to the satisfaction of the court annually or as
111 required by court rule or court order;

112 (4) immediately notify the court if the ward dies, becomes capable of exercising
113 rights previously removed or changes dwelling place, or if the guardian changes
114 dwelling place;

115 (5) exercise duties and authority authorized by statute and the court order as
116 necessary to accommodate the ward's particular functional limitations;

117 (6) make health care decisions using the substituted judgment standard or the best
118 interest standard, whichever applies in the circumstances;

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

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

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

125 (10) petition for the appointment of a conservator or for a protective order if
126 necessary to protect the ward's property;

127 (11) conserve for the ward's future needs any of the estate that exceeds the ward's
128 current needs or, if a conservator has been appointed, pay the excess to the
129 conservator at least annually;

130 (12) keep the ward's estate separate from the guardian's money and property;

131 (13) if a conservator has been appointed, account to the conservator for the ward's
132 income and expenses and for any of the ward's estate in the guardian's possession or
133 control;

134 (14) if a conservator has not been appointed, file with the court an inventory of the
135 ward's estate within 90 days of appointment and an annual accounting of the ward's
136 estate as would a conservator;

137 (15) if reasonable under the circumstances, encourage the ward to participate in
138 decisions, to act on the ward's own behalf, and to overcome the functional limitations
139 that resulted in the ward's incapacity; and

140 (16) at the termination of the guardianship, deliver any of the ward's estate in the
141 guardian's possession as directed by the court.

142 **75-5c-317. Guardian's rights.**

143 (1) A guardian is entitled to reasonable compensation for services as guardian.

144 (2) If a person or entity who renders goods or services to the ward is the guardian,
145 someone affiliated with the guardian, or someone within the third degree of relationship
146 to the guardian the compensation or reimbursement must be approved by the
147 conservator, if one has been appointed. If there is no conservator or if the conservator is
148 the guardian, someone affiliated with the guardian, or someone within the third degree
149 of relationship to the guardian, the compensation or reimbursement must be approved
150 by the court.

151 (3) A guardian has no legal obligation to use personal funds for the ward's expenses
152 solely by reason of the guardianship.

153 **75-5c-318. Guardian's immunities.**

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

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

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

164 **75-5c-319. Guardianship plan.**

165 (1) The guardian shall, to the extent reasonable, involve the ward in developing the
166 guardianship plan to outline the strategies that will be used to implement the court
167 order. Even if legal consent is not possible, the opinions of the ward should be sought.

168 (2) The guardianship plan shall describe:

169 (a) how the rights retained by the ward will be ensured;

170 (b) the ward's religious, moral, conscientious, or cultural values that will guide
171 decisions;

172 (c) how the guardian will implement any restrictions permitted by court order on the
173 ward's physical liberty, communications or social activities;

174 (d) the ward's residential setting and any recommended changes;

175 (e) the health care, personal care, social, educational and related services for the
176 ward;

177 (f) any physical or mental examinations necessary to determine the ward's health
178 care needs;

179 (g) the insurance and any other benefits to which the ward may be entitled to meet
180 the costs of the health care, personal care, social, educational and related services for
181 the ward;

182 (h) short term and long term goals;

183 (i) any issues, concerns or unmet needs; and

184 (j) if a conservator or health care agent has been appointed, the planned nature and
185 frequency of communications and the method to be used for resolving disputes;

186 (3) If there is no conservator, the guardianship plan shall describe:

187 (a) the estate plan, if any, and how the guardian intends to preserve it;

188 (b) the ward's estimated annual income and expenditures, and estimated total
189 assets; and

190 (c) how the ward's financial needs will be met, including whether assets will need to
191 be sold.

192 (5) The guardianship plan must contain a certificate of whether the guardian has
193 consulted with the ward and that in making decisions the guardian will make the
194 decision that the ward would have made when competent unless:

195 (a) following the ward's wishes would cause the ward substantial harm;

196 (b) the guardian cannot determine the ward's wishes; or

197 (c) the ward has never had capacity,

198 and if:

199 (d) following the ward's wishes would cause the ward substantial harm;

200 (e) the guardian cannot determine the ward's wishes; or

201 (f) the ward has never had capacity, make the decision that is the least intrusive,
202 least restrictive, and most normalizing course of action to accommodate the ward's
203 particular functional limitations.

204 (6) A guardianship plan must be based on the court order. A guardianship plan takes
205 effect when approved by the court and continues until the court approves a replacement
206 plan. A guardianship plan may allow for minor changes without court approval, but the
207 guardian must request court approval of any substantial change. The guardian may file
208 a motion to approve a replacement plan based on a substantial change.

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215 **75-5c-102. Definitions.**

216 As used in this chapter:

217 (1) "Best Interest" means the guardian or conservator, after considering the ward's
218 expressed wishes, makes the decision that is the least intrusive, least restrictive, and
219 most normalizing course of action to accommodate the ward's particular functional
220 limitations. Best interest is the decision-making standard used when:

221 (a) following the ward's wishes would cause the ward substantial harm;

222 (b) the guardian or conservator cannot determine the ward's wishes; or

223 (c) the ward has never had capacity.

224 (2) "Substituted judgment" means the guardian or conservator makes the decision
225 that the ward would have made when competent. Substituted judgment is the decision-
226 making standard used in all circumstances except those that permit the best interest
227 standard to be used.

228

Tab 3

In the District Court of Utah, _____ Judicial District
_____ County

Court Address _____

In the matter of

(Respondent)

Order to Evaluate Respondent
Case Number _____
Judge _____
Commissioner _____

Findings

(1) The petitioner has filed a motion to order the examination of the Respondent under Utah Code Section 75-5-303. The court has considered:

- the motion and statements in support of the motion;
- the statements in opposition to the motion;
- the arguments of counsel or the parties; and
- the testimony of the following people at a hearing held on _____.

Name	Relation to Respondent	Name	Relation to Respondent

(2) The court, now being fully informed, finds that:

- the mental and physical condition of the Respondent is in controversy;
- _____, who is the proposed examiner, is suitably licensed or certified; and
- good cause for the examination has been show because

Court Order

To _____ (Respondent)

(3) You are to submit to a physical and mental examination by the above-named examiner. You may schedule the examination at a time convenient to you, but not later than _____. (date)

(4) The purpose of this examination is to help the court to determine whether you are incapacitated under Utah law, whether you need a guardian, whether your needs could be met by a less restrictive alternative, and, if a guardian is appointed, what authority the guardian should have.

(5) For the purpose of appointing a guardian, “‘Incapacity’ means a judicial determination that an adult’s ability, even with assistance, to

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

is so impaired that illness or physical or financial harm may occur. Incapacity is a judicial decision, not a medical decision, and is measured by functional limitations.” Utah Code Section 75-1-201(22).

(6) The court requests that the examiner provide a clinical evaluation on the attached form.

(7) The examiner should address the following elements.

(7)(A) Describe mental or physical conditions that affect everyday functioning, including: diagnosis, severity of illness, prognosis, history, medications. Describe any medical or psychosocial factors that may cause temporary and reversible impairment, such as depression, malnutrition, dehydration, transfer trauma, polypharmacy, alcohol or drug use, or other factors. Describe any mitigating factors that cause this person to appear incapacitated and that could improve with time, treatment or assistive devices.

(7)(B) Describe this person’s cognitive functioning, and psychiatric or emotional functioning.

(7)(C) Describe this person's strengths and weaknesses for:

- Care for self
- Care for personal finances
- Medical decision making
- Home and community life
- Business, civil and legal matters

(7)(D) Describe the extent to which this person's current choices are consistent with his or her long-held commitments and values. Describe this person's values or preferences that should be considered in the guardianship decision and plan. Explain whether this person's educational potential, adaptive behavior, or social skills enhance current or future functioning. Describe the most appropriate housing situation.

(7)(E) Describe the immediate and ongoing risk of harm to this person, the social and environmental demands and supports that increase or decrease the risk, and the level of supervision needed to prevent serious harm.

(7)(F) Whenever possible, this court will try to find a less restrictive alternative to guardianship and to limit any guardianship orders, providing the guardian with authority only in the areas in which this person needs decisional or functional assistance. Describe the treatments and services that might help this person. Describe any needs that can be met with a less restrictive alternative to guardianship.

(7)(G) Recommend whether this person should attend the hearing, and if so, recommend the accommodations to maximize this person's participation.

(8) Describe the sources of information for the evaluation.

Date _____ Sign here ► _____
District Court Judge _____

Certificate of Service		
I certify that I mailed a copy of this Order to Evaluate Respondent to the following people.		
Person's Name	Address	Date Sent

Date _____ Sign here ► _____

Court Clerk _____

My Name _____
Address _____
Phone _____
Email _____

In the District Court of Utah, _____ Judicial District
_____ County

Court Address _____

In the matter of _____
(Respondent)

Report on Clinical Evaluation of
Respondent – Long Form

Case Number _____

Judge _____

(1) Physical Condition

(1)(A) This person's overall physical health is
 Excellent Good Fair Poor

(1)(B) What are your diagnoses of this person's physical condition?

(2) Mental Condition

(2)(A) This person's overall mental health is
 Excellent Good Fair Poor

(2)(B) This person's overall mental health will
 Improve Be Stable Decline Uncertain

(2)(C) This person should be re-evaluated in _____ days.

(2)(D) What are your diagnoses of this person's mental condition?

(2)(E) Have temporary reversible causes of mental impairment been evaluated and treated? (e.g., depression, malnutrition, dehydration, transfer trauma, polypharmacy, alcohol or drug use, etc.) Yes No Uncertain

Comments

(2)(F) Are there mitigating factors that cause this person to appear incapacitated and that could improve with time, treatment or assistive devices? (e.g., hearing, vision or speech impairment, bereavement, etc.) Yes No Uncertain

Comments

(3) History. Focusing on the diagnoses most affecting functioning, describe this person's relevant history. (e.g., When did the problem start? Have there been any recent medical or social events? What treatments and services have been tried?)

(4) Medication

Name	Dosage	Schedule	May Impair Mental Functioning		
			<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Uncertain
			<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Uncertain
			<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Uncertain
			<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Uncertain

Overall Impairment					(5) Cognitive Functioning			
None	Mild	Moderate	Severe	Not Evaluated		Do symptoms vary in frequency, severity or duration?		
						Yes	No	Uncertain
<input type="checkbox"/>	(5)(A) Sensory acuity (detection of visual, auditory, tactile stimuli)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(5)(B) Motor activity and skills (active, agitated, slowed, gross and fine motor skills)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(5)(C) Attention (attend to a stimulus; concentrate on a stimulus over short time periods)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(5)(D) Working memory (attend to verbal or visual material over short time periods; hold more than 2 ideas in mind)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(5)(E) Short term memory and learning (ability to encode, store, and retrieve information)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(5)(F) Long term memory (remember information from the past)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(5)(G) Understanding (“receptive language”; comprehend written, spoken, or visual information)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(5)(H) Communication (“expressive language”; express self in words, writing, signs; indicate choices)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(5)(I) Arithmetic (understand basic quantities; make simple calculations)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(5)(J) Verbal reasoning (compare two choices and to reason logically about outcomes)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(5)(K) Visual-spacial and Visual-constructional reasoning (visual-spatial perception, visual problem solving)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(5)(L) Executive functioning (plan for the future, demonstrate judgment, inhibit inappropriate responses)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				

Comments

Overall Impairment					(6) Emotional and Psychiatric Functioning			
None	Mild	Moderate	Severe	Not Evaluated		Do symptoms vary in frequency, severity or duration?		
						Yes	No	Uncertain
<input type="checkbox"/>	(6)(A) Disorganized thinking (rambling thoughts, nonsensical, incoherent thinking)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(6)(B) Hallucinations (seeing, hearing, smelling things that are not there)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(6)(C) Delusions (extreme suspiciousness; believing things that are not true against reason or evidence)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(6)(D) Anxiety (uncontrollable worry, fear, thoughts, or behaviors)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(6)(E) Mania (very high mood, disinhibition, sleeplessness, high energy)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(6)(F) Depressed mood (sad or irritable mood)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(6)(G) Insight (ability to acknowledge illness and accept help)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(6)(H) Impulsivity (acting without considering the consequences of behavior)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				
<input type="checkbox"/>	(6)(I) Noncompliance (refuses to accept help)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				

Comments

Level of Functioning					(7) Daily Functioning
Independent	Needs Support	Need Assistance	Needs Total Care	Not Evaluated	
					(7)(A) Care for Self
<input type="checkbox"/>	Maintain adequate hygiene, including bathing, dressing, toileting, dental				
<input type="checkbox"/>	Prepare meals and eat for adequate nutrition				
<input type="checkbox"/>	Get adequate exercise				
<input type="checkbox"/>	Employ assistants or caregivers				
<input type="checkbox"/>	Avoid environmental dangers such as stove, poisons, etc.				
<input type="checkbox"/>	Be left alone without danger				
<input type="checkbox"/>	Contact help if ill or in an emergency				
<input type="checkbox"/>	Identify abuse or neglect and protect self from harm				
<input type="checkbox"/>	Resist exploitation, coercion, undue influence				
<input type="checkbox"/>	Other:				
					(7)(B) Care for Personal Finances
<input type="checkbox"/>	Protect and spend small amounts of cash				
<input type="checkbox"/>	Manage and use checks				
<input type="checkbox"/>	Establish and use credit				
<input type="checkbox"/>	Give gifts and donations				
<input type="checkbox"/>	Deposit, withdraw, dispose, invest money				
<input type="checkbox"/>	Employ financial advisers				
<input type="checkbox"/>	Other:				
					(7)(C) Medical Decision Making
<input type="checkbox"/>	Give or withhold medical consent				
<input type="checkbox"/>	Select and admit self to health facility				
<input type="checkbox"/>	Direct caregivers				
<input type="checkbox"/>	Manage medications				
<input type="checkbox"/>	Other:				
					(7)(D) Home and Community Life
<input type="checkbox"/>	Choose and establish residence				
<input type="checkbox"/>	Maintain safe and clean residence				
<input type="checkbox"/>	Drive or use public transportation				
<input type="checkbox"/>	Make and communicate choice about roommates				

(8) Values, Preferences and Patterns

(8)(A) Does this person want a guardian? Yes No

(8)(B) If yes, who does this person want to be guardian?

(8)(C) Does this person prefer that decisions be made alone or with others? With whom?

(8)(D) Where does this person want to live? With whom?

(8)(E) What is important to this person in a home environment?

(8)(F) What makes life meaningful for this person?

(8)(G) What have been this person's most valued relationships and activities?

(8)(H) What over-arching concerns drive this person's decisions? (e.g., concern for family, desire to live near family, preserve finances, worries about pain, maintaining privacy, living as long as possible, living with dignity, etc.)

(8)(I) What are this person's important religious beliefs or cultural traditions?

(8)(J) What are this person's strong likes, dislikes, hopes, and fears?

(8)(K) What specific preferences has this person expressed regarding decisions about personal care, financial, medical, or living situation?

(8)(L) Describe this person's relations with family and friends.

(8)(M) Do this person's educational potential, adaptive behavior, and social skills enhance current or future functioning?

(9) Risk of Harm and Level of Supervision Needed

(9)(A) Is there an immediate risk of serious harm to or by this person?

Yes No Uncertain

(9)(B) Has this person been the victim of abuse or neglect?

Yes No Uncertain

(9)(C) Describe the significant risks that this person faces and whether these risks are due to this person's condition and/or to another person harming or exploiting him/her.

(9)(D) Describe the social factors that decrease or increase the risk.(e.g., people, supports, environment, etc.)

(9)(E) How severe is the risk of harm to self or others?

- None Mild Moderate Severe

(9)(F) How likely is the risk of harm to self or others?

- None Mild Moderate Severe

(9)(G) Level of Supervision Needed

In my opinion, this person needs

- No Supervision Some Supervision
 24-hour Supervision Locked Facility

In my opinion, this person's needs could be met by a

- Full Guardianship Limited Guardianship Less Restrictive Alternative

Comments

(10) Means to Enhance Capacity (Elements of Guardianship Plan)

Would this person benefit from

- Education, training or rehabilitation? Yes No Uncertain
Mental health treatment? Yes No Uncertain
Occupational, physical or other therapy? Yes No Uncertain
Home services or social services? Yes No Uncertain
Assistants or assistive devices? Yes No Uncertain
Medical treatment, operation or procedure? Yes No Uncertain
Medication? Yes No Uncertain

Other: (describe)

Describe any specific recommendations:

(11) Should this person attend the hearing? Yes No Uncertain

If yes, how much will this person understand and what accommodations are necessary to help participation? If no, describe the supporting facts.

(12) Sources of Information

My answers in this report are based on the following sources of information.

My examination of this person on _____ (date) for the purpose of assessing capacity. On that date I spent approximately _____ minutes with this person.

My general clinical knowledge of this person, who I last saw on _____ (date). On that date I spent approximately _____ minutes with this person.

Review of this person’s medical records.

Discussion with healthcare professionals involved in this person’s care.

Discussion with this person’s family or friends.

Tests that I conducted. Tests the results of which I am familiar.

Describe Test	Date Conducted

Other Source (describe)

I am a Physician Psychologist Other _____ licensed to practice in the state of _____. This report is complete and accurate to the best of my information and belief. I am qualified to testify regarding specific functional capacities addressed in this report. If directed to do so, I am prepared to present to the court, by affidavit or testimony, my qualifications and my evidence.

Date _____ Sign here ► _____

Typed or printed name _____

License type, number and date _____

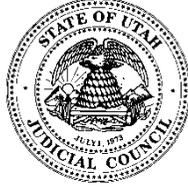
Certificate of Service
I certify that I mailed a copy of this Report on Clinical Evaluation of Respondent to the following.

Person's Name	Address	Date Sent

Date _____ Sign here ► _____

Typed or printed name _____

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: March 17, 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

Tab 5

Alternative Dispute Resolution in Probate

A Pilot Project of the Third District Court, Utah

1. Parties to probate disputes are required to participate in alternative dispute resolution, sometimes called ADR (Rule 4-510 of the Rules of Judicial Administration). Because probate procedure differs from usual civil procedure, the Third District Court has adapted some of the ADR rules to probate cases.
2. All probate disputes that are not resolved by the law and motion judge are automatically referred by the court to the ADR program at the time the case is referred to a judge for trial. By default, the form of ADR is mediation but parties may agree to substitute non-binding arbitration or binding arbitration. The rules provide that mediation shall be commenced within 30 days of the date of referral. To exit ADR prior to completing the process, a motion to withdraw from probate mediation ([ADR Deferral Notice](#)) and a request for a scheduling conference must be filed with the assigned judge.
3. The fees of the mediator are to be paid in advance. If a Personal Representative, Trustee, Guardian or Conservator with liquid assets is a party, the estate or trust will pay the mediator's fees. Otherwise, the earliest petitioner in the matter(s) referred to mediation will pay but is entitled to reimbursement from the estate or trust. Ultimate responsibility for reimbursing the mediator's fees is reserved for the court to determine absent agreement of the parties. If the parties cannot afford mediator fees or there is another good reason, a pro bono mediator may be appointed through the Director of Dispute Resolution, Administrative Office of the Courts. Telephone: Kathy Elton, 801-578- 3982. Fax: 801-578-3843. e-mail: kathye@email.utcourts.gov.
4. Discovery may proceed during mediation proceedings (URCADR Rule 101(f)). However, the initial disclosure and the discovery and scheduling conference provisions of Rule 26(a)(1) and (f) of the Utah Rules of Civil Procedure are automatically stayed by the court for 60 days following the referral to ADR. This stay ends when a motion to withdraw from probate mediation is filed.
5. ADR is expected to be completed within 60 days from the date of the automatic referral. If the parties agree to a different date, notice of the new date should be filed with the court. Only the assigned judge can change the 60 day suspension of Rule 26(a)(1) and (f).
6. Upon completion of ADR, the plaintiff is required to notify the court of the outcome on a form provided by the court. This is required for purposes of both case management and tracking the results of mediation. All parties should understand that to give an agreement the force of a judgment, a motion must be made and a judgment entered by the assigned judge.
7. The "plaintiff" in probate proceedings is presumed to be the earliest petitioner in the matter(s) referred to mediation and may have duties under Rule 4-510 and Rule 26. A motion to designate another party as "plaintiff" should be brought before the assigned judge.
8. Before a motion to withdraw from Probate mediation is filed, the parties and attorneys must view a [short videotape on ADR](#) which has been prepared by the court. The video is also available on the website as well as for purchase for \$10 from the Director of Dispute Resolution.

9. To assist parties in choosing a mediator, the court maintains a [roster of mediators for probate disputes](#).
10. The probate forms are available from the probate clerk and from this website.

Probate Mediation in Utah: Where did it Come From, Where is it Now, Where is it Going?¹

Gary L. Schreiner

Introduction

For some disputes, trials will be the only means, but for many claims, trials by the adversary contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.

-- Chief Justice Warren E. Burger.

The use of alternative dispute resolution (ADR) has been growing in Utah.²

Recently, there has been a concerted effort to utilize mediation in the often-complicated area of probate conflicts. The Third District Court has adopted a pilot program aimed at utilizing mediation to resolve probate conflicts without litigation.

This article will explore the genesis, development, and future of probate mediation in Utah. The primary focus is on the Third District Court's pilot ADR program for probate disputes; however, other districts are also utilizing ADR, and the research behind this article was done with an eye towards the future spread of the probate mediation program to other judicial districts.

Where Did it Come From?

History

The use of alternative dispute resolution in inheritance matters has a surprisingly early history in the United States. For example, George Washington's will contained what

¹ The contents of this article are excerpted from research paper submitted to the University of Utah College of Law and the Office of Alternative Dispute Resolution. © 2001 Gary L. Schreiner

² See generally, James R. Holbrook & Laura M. Gray, *Court-Annexed Alternative Dispute Resolution*, 21 J. Contemp. L., 1995, at 1.

was essentially an ADR clause for settling any disputes arising from the administration of his estate:

[T]hat all disputes (if unhappily they should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants each having the choice of one, and the third by those two -- which three men thus chosen shall, unfettered by law or legal constructions, declare their sense of the Testator's intention, and such decision is, to all intents and purposes, to be as binding on the parties as if it had been given in the Supreme Court of the United States.³

Despite Washington's early example, it has only been relatively recently that the use of ADR has taken hold in court systems. In Utah, the courts did not seriously begin to study the use of ADR in the court system until 1986. In December 1986, the Utah Judicial Council created an ADR task force to study the need or desirability of establishing ADR programs for the state courts.⁴ The taskforce reviewed court workloads and costs, benefits to litigants, and existing court and state ADR programs. It determined that the development of an ADR program would be beneficial.⁵

Since that time, legislation and judicial rules have been enacted to promote the use of ADR through many aspects of the court system. Mediation is used widely in the area of divorce, and nine formal programs have been established by the Office of Alternative Dispute Resolution.⁶

³ Quoted in Brian C. Hewitt, *Probate Mediation: A Means to an End*, 40-AUG Res Gestae 41 (1996).

⁴ James R. Holbrook & Laura M. Gray, *Court-Annexed Alternative Dispute Resolution*, 21 J. Contemp. L., 1995, at 1, 11.

⁵ *Id.*

⁶ The following programs have been established: Court-Annexed ADR, Co-parenting Mediation, Juvenile Victim-Offender Mediation, Adult Victim-Offender Mediation, Child Welfare Mediation, Landlord-Tenant Mediation, Truancy Mediation, Small Claims Mediation, and Probate Mediation.

In 1991 in the Utah Legislature enacted the Alternative Dispute Resolution Act.⁷ In 1994 the Legislature repealed the act and enacted new legislation under the same name, which was amended in 1997 and 2000.⁸

Statute and rules work together to form a framework for ADR in the courts. The legislature's purpose was to:

[O]ffer an alternative or supplement to the formal processes associated with a court trial and to promote the efficient and effective operation of the courts of this state by authorizing and encouraging the use of alternative methods of dispute resolution to secure the just, speedy, and inexpensive determination of civil actions filed in the courts of this state.⁹

The statute authorizes the judicial council to "establish experimental and permanent ADR programs administered by the Administrative Office of the Courts under the supervision of the director of Dispute Resolution Programs"¹⁰ as limited by the Act,¹¹ and the council may limit application of its rules to particular judicial districts.¹²

The Judicial Council established UT ST J Admin Rule 4-510 which applies to the Second, Third, and Fourth Judicial Districts.¹³ It also enacted the Utah Rules of Court-Annexed Alternative Dispute Resolution that apply to all court-annexed ADR proceedings in the state, and which includes a code of ethics for ADR providers. However, Rule 4-510 has not been strictly adhered to, and the need was seen for further structure when the Probate ADR Pilot program was developed.¹⁴ Therefore, Probate ADR in the Third District

⁷ Utah Code Ann. § 78-31b-1 *et seq.* (repealed 1994).

⁸ Utah Code Ann. § 78-31b-1 *et seq.* (2000).

⁹ Utah Code Ann. § 78-31b-3(1) (2000).

¹⁰ Utah Code Ann. § 78-31b-5(1) (2000).

¹¹ Utah Code Ann. § 78-31b-5(2)-(3) (2000).

¹² Utah Code Ann. § 78-31b-5(2)-(3) (2000).

¹³ UT ST J ADMIN 4-150 statement of applicability.

¹⁴ Interview with Charles Bennett, Blackburn & Stoll, LC, Salt Lake City, Utah (July 12, 2001).

is further governed by rules adopted by the Third District judges who are ultimately responsible for the program.¹⁵

Many practitioners seem to have the mistaken impression that mediation has been made mandatory in many types of civil cases, including probate. It is true that contested probate cases are automatically referred to mediation; however, automatic referral does not equate to mandatory mediation.

The wording of the ADR statute is silent on whether ADR proceedings can be made mandatory. However, it is implied by 78-31b-3 and 78-31b-5(1),(2),(3)(e), which state that the purpose is to provide ADR proceedings as an "alternative or supplement to formal processes associated with a court trial."¹⁶ Further, "the Judicial Council *may* establish experimental and permanent ADR programs" with rules based upon the purposes of the act and which ensure "that no party or its attorney is prejudiced for *electing, in good faith not to participate in an optional ADR procedure.*"¹⁷

The following judicial rules explicitly provide opt out provisions: Code of Judicial Administration Rule 4-510(6)(A), Utah Rules of Court-Annexed Alternative Dispute Resolution (URCADR) Rule 101(g), and the Probate Pilot Program rules. Within the Probate ADR Pilot Program, parties may make a motion to withdraw from mediation after watching an ADR videotape provided by the courts.

The legislature further recognized that "preservation of the confidentiality of ADR procedures will significantly aid the successful resolution of civil actions in a just, speedy, and inexpensive manner."¹⁸ The Alternative Dispute Resolution Act provides:

¹⁵ See, <http://courtlink.utcourts.gov/mediation/adr_prob.htm> and probate mediation packet.

¹⁶ Utah Code Ann. § 78-31b-3(1) (2000).

¹⁷ Utah Code Ann. § 78-31b-5(1)-(3) (e) (2000) (emphasis added).

¹⁸ Utah Code Ann. § 78-31b-3(2)(b) (2000).

1. Everything is confidential unless the parties agree otherwise.¹⁹
2. Evidence regarding the fact, conduct, or result of an ADR proceeding is not subject to discovery or admissible at trial.²⁰
3. No information obtained during an ADR proceeding may be subject to discovery or admissible in trial unless discovered from an independent source.²¹
4. With limited exceptions, the ADR provider may not disclose information about the proceeding to anyone outside the proceeding, including judges.²²

These statutory conditions are emphasized and elaborated upon in URCADR Rule 103. UCJA Rule 4-510 further provides that “No ADR provider may be required to testify as to any aspect of an ADR proceeding except as to any claim of violation of URCADR Rule 104²³ which raises a substantial question as to the impartiality of the ADR provider and the conduct of the ADR proceeding involved.”

Vision/Genesis of the Third District pilot program.

Having seen the success of mediation in family disputes, and understanding that probate cases are just "family cases in a nutshell,"²⁴ members of the court community began contemplating its use in the area of probate. The ADR office felt it was time to add another program, judges were talking to divorce commissioners, and there was discussion among the Judicial Council ADR Committee; in short, the parties just felt the time was right time to bring everyone together.²⁵

¹⁹ Utah Code Ann. § 78-31b-8 (1),(4),(5) (2000).

²⁰ Utah Code Ann. § 78-31b-8(2) (2000).

²¹ Utah Code Ann. § 78-31b-8(3) (2000).

²² Utah Code Ann. § 78-31b-8(5) (2000).

²³ The ADR Provider Code of Ethics.

²⁴ Interview with Michelle Royball, ADR Administrator for the US District Court - District of Utah, Salt Lake City, Utah (April 9, 2001).

²⁵ Id.

District Court Judge William Bohling, chair of the Judicial Council ADR Committee is credited with being the driving force behind the establishment of the program.²⁶ Judge Bohling does not remember who first suggested probate as an area for mediation, but says, "It was evident to all of us [that it would be] an appropriate area for mediation."²⁷

The ADR committee formed an ad hoc committee to develop a pilot program for ADR in probate.²⁸ Earl Tanner, Jr. and other attorneys jumped right in.²⁹ Mr. Tanner in particular is credited with being a very active participant in the process.³⁰ Other members of the committee included Judge Bohling as chair, Probate Clerk Hal Reuckert, Kathy Elton, Director of Alternative Dispute Resolution, Karin Hobbs, former Chief Appellate Mediator for the Utah Court of Appeals, and Commissioner Tom Arnett. Commissioner Arnett lent a great deal of expertise to the process and was very positive about the impact mediation had had on divorce disputes.³¹

The parties combined their expertise from research and experience in other areas to formulate a probate ADR procedure.³² It was a collaborative effort, of which the ADR Committee is proud.³³

During the committee meetings, attorneys brought up practical concerns such as how to deal with clients, the structure of process, and time frames.³⁴ The committee spent a lot of time discussing how to deal with the requirements of URCP Rule 26.³⁵ Everyone

²⁶ Interview with Karin Hobbs, Chief Appellate Mediator, Utah State Court of Appeals, and Kathy Elton, Director Alternative Dispute Resolution Programs, Administrative Office of the Courts, Salt Lake City, Utah (February 7, 2001).

²⁷ Interview with Hon. William Bohling, Third District Court Judge, Salt Lake City, Utah (March 8, 2001).

²⁸ Id; Bennett, *Supra* note 14.

²⁹ Judge Bohling, *Supra* note 27; Hobbs and Elton, *Supra* note 26.

³⁰ Hobbs and Elton, *Supra* note 40.

³¹ Bennett, *Supra* note 14.

³² Hobbs and Elton, *Supra* note 26.

³³ Id.

³⁴ Royball, *Supra* note 24.

³⁵ Bennett, *Supra* note 14.

believed in the potential for probate cases to settle, but the question was how much to push and when.³⁶ There was a sharp divide over who should conduct the mediation sessions. Some lawyers were adamant that the mediator should be a lawyer. There was a discussion of co-mediation, where there would be a substantive expert and a process expert. In fact, the process itself "started to mimic a mediation."³⁷ Eventually, the committee decided to have a roster of trained mediators, lawyer and non-lawyer alike, and let the parties choose.³⁸

Added to this mix was the expertise and experience of the mediators. Of Kathy Elton, Director of Alternative Dispute Resolution, and Karin Hobbs, Chief Appellate Mediator, Judge Bohling says:

Well, Karin and Kathy, they have been instrumental in this program. They're terrific. They've both put effort into it and [lent] their interest and wisdom, and I have really appreciated what they've done. They're to be commended for the wonderful work in getting this put into place.³⁹

Attorney Laurie Hart, another member of the committee, sums up the decision to establish a pilot program this way, "Most probate litigation does not really turn on legal arguments; they are just family squabbles."⁴⁰

Where is it Now?

Current Process/Procedures.

The process is a simple one. All contested probate matters are referred to mediation. A packet is provided to parties to a probate dispute explaining the procedure. The basic provisions are as follows:⁴¹

³⁶ Royball, *Supra* note 24.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Judge Bohling, *Supra* note 27.

⁴⁰ Telephone Interview with Laurie Hart, Callister Nebeker & McCullough, Salt Lake City, Utah (February 21, 2001)

1. All probate disputes that are not resolved by the probate judge are automatically referred to the ADR program.
2. The default form of ADR is mediation, but arbitration may be substituted.
3. ADR must commence within 30 days and be completed within 60 days of referral.
4. All other procedural timelines, including URCP Rule 26, are stayed during this 60-day period unless otherwise changed by the court.⁴²
5. The parties have the responsibility for selecting the mediator or arbitrator, but a roster is maintained by the court to assist the parties in this.
6. The earliest petitioner in the matter referred to mediation reports the results.
7. Parties may opt out of ADR by filing a motion to withdraw and by viewing an ADR videotape.

Current Progress.

Perceptions of the Program

Judicial

The value of alternative dispute resolution has been recognized by the United States Supreme Court for some time. In 1985 the Los Angeles Times quoted Chief Justice Warren Burger as saying:

We must move toward taking a large volume of private conflicts out of the courts and into the channels of arbitration, mediation and conciliation.⁴³

More recently, Justice Sandra Day O'Conner, speaking at the dedication of a new community dispute resolution center said:

In the context of cases in the courts, alternatives to full adjudication are numerous and accessible. For example, litigants have the option of seeking resolution through neutral evaluation, negotiation, arbitration, mediation, or even summary jury trials. This range of alternative dispute resolution options have benefited the legal system not only relieving some congestion in the dockets of courts, but also by providing an

⁴¹ Third District Court, Alternative Dispute Resolution in Probate: A Pilot Program of the Third District Court, Utah (Undated)

⁴² See also, UT ST J ADMIN Rule 4-510(6)(C)

⁴³ Los Angeles Times, August 21, 1985

effective, less costly, and often more satisfying means to resolve the disputes.⁴⁴

Third District Judge William Bohling seems to have a similar vision. He describes himself as "fairly enthusiastic about ADR" and believes that it "does all the right things."⁴⁵

Regarding the Probate Mediation Program he stated:

Well, I think you've really captured the real benefit: it maintains the family relationships and allows a peaceful resolution. But, I guess the other side is that it is an economic benefit. The horror of a lot of these disputed estates is that by the time the parties finish the dispute, the resources of the estate, the assets, have been expended on legal fees and there is nothing left. [T]his is a way to avoid that. To a person that doesn't have any interest at all in mediation, ...economic reasons alone justif[y] it.

. . .

I think it is a pretty good program. I don't have any criticism at this point. It seems to be working. I'm impressed by the probate bar. They have really come through in this area. And I think by their nature they're not litigators -- they're more problem solvers -- and it has been in part because of their motivations and . . . their temperament that I think that this program has been so successful.⁴⁶

Attorney

In the summer of 2001, members of the Estate Planning Section responded to a survey regarding probate mediation. Many of those who responded provided comments about mediation. The comments were both positive and negative. Those comments are summarized below:

Table 1

What did you like about the mediation process?	What would you change about the mediation program?	Other comments:
Helped both sides understand [illegible] from viewpoint of a neutral third party.	Make it voluntary. Mediator needed to have probate	By the time a party is willing to file an action in probate, the relationship between parties has deteriorated, and

⁴⁴ Justice Sandra Day O'Connor, Address at the Dedication Ceremony for the Friends Building of the Western Justice Center Foundation (February 8, 1999).

⁴⁵ Judge Bohling, *Supra* note 27.

⁴⁶ *Id.*

<p>Brought the parties together</p> <p>Makes clients think compromise & see possibility of resolution in significantly shorter time than litigation.</p> <p>The case is very close to being resolved. A trained 3rd party perspective is most useful.</p> <p>Makes clients face realities rather than right vs. wrong.</p> <p>Informality and independent party encouraging settlement</p> <p>It allowed the parties to talk and at least feel they gave ADR a chance.</p> <p>Mediation resolved a 2-yr old probate litigation matter that was headed to trial. It helped to get the attorneys out of the way and let the clients be heard.</p> <p>Rules of evidence do not generally apply -- we can get at real feelings & truth.</p> <p>Quicker resolution - reduced expense.</p> <p>Gave the parties a chance to state their positions and issues in a non-binding setting.</p>	<p>experience.</p> <p>The mediator should be more firm in expressing the negatives of both sides' positions and more effective in moving both to a center position</p> <p>At this point - nothing - too soon.</p> <p>My impression is that most of the attorneys certified at probate mediation are not very experienced in the area. We should encourage experienced probate & trust attorneys to be certified -- More attorneys would use mediation if more experienced mediators.</p> <p>Sometimes a judge will refer a dispute to mediation in order to delay making a ruling, which results in increased costs to the clients. For example, if an objection can't survive a motion to dismiss, it should be dismissed. If it can survive a motion to dismiss, there are likely substantive issues that can be effectively resolved through mediation. Mediation is extremely useful in some areas, in others it does more harm and incurs more cost than just litigating.</p>	<p>in my opinion it is time to get the issues formally resolved, bindingly resolved, To this end required mediation or even strong pushes toward mediation result in torturous wastes of time. Let us get to the judges and move on.</p> <p>While I believe in ADR, and particularly in mediation, I think it is very useful to evaluate its effectiveness in general as well as in each case. Some cases are more expediently resolved in litigation, while others can be effectively mediated.</p> <p>The process worked to the point that we almost had a resolution with one point left to resolve. The mediator excused herself at that point, expressing her confidence that that point would be resolved. (She had a prior commitment!) That point was not resolved and everything fell apart. Needless to say, we were very disappointed.</p>
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Laurie Hart, who was a member of the ad hoc committee that established the pilot program, thought implementation of a probate mediation program was "a great idea." She felt that formal mediation some time during the process would make a case more likely to settle.⁴⁷

Ms. Hart tells of a case that had gone through two years of litigation. She thought mediation would be a good idea. She knew that if the parties did not settle it would be a long and ugly trial. Ms. Hart felt that if they could just mediate and get the attorneys out of the way the parties could resolve it. However, the opposing counsel felt there was no way it would settle. Eventually though, with the blessing of the judge over the case, the parties went to mediation. The parties were related only by marriage, and Ms. Hart was quick to

⁴⁷ Hart, *Supra* note 40.

emphasize that there was "no relationship to be saved." However, much to the surprise of opposing counsel, the parties reached a settlement. Of the experience, Ms. Hart says, "Would I do it again? In a heartbeat."

Mediator

As to be expected, mediators are very enthusiastic about mediation. The pervading attitude was that people should at least try mediation. "A good mediator can get people past their attitudes," says Karin Hobbs, former Chief Appellate Mediator. Kathy Elton, Director of Alternative Dispute Resolution, adds that parties will have "at least more of an understanding of the issues in the case."⁴⁸

Probate mediation draws on family strength.⁴⁹ Hobbs says, "You can't put a dollar value on a relationship. ... The value of it cannot be underestimated."⁵⁰ "Family is family; you can't just quit doing business with a family member," says Elton.⁵¹ There are emotional interests that cannot be dealt with in litigation.⁵² Mediation allows parties to get to underlying, often non-legal, issues that are the key to the resolution of the case.⁵³

The two mediators were quick to list the benefits, but the only weakness they could think of was that the program is new and people do not know how to utilize it to help them.⁵⁴

Michelle Royball, ADR Administrator for the US District Court - District of Utah, who attended the subcommittee meetings, is a bit more cautious about the program. "For clients of a court system [mediation] is an unheard of concept," she says. Clients and

⁴⁸ Hobbs and Elton, *Supra* note 26.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

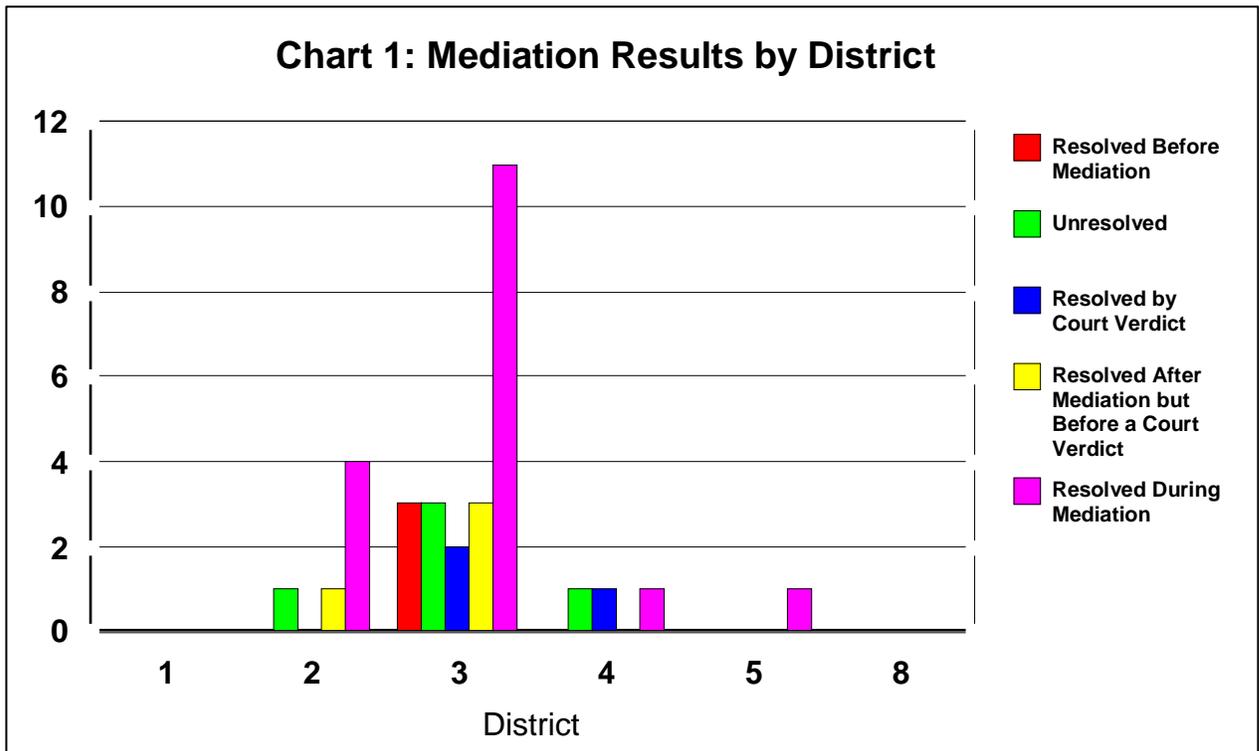
⁵² *Id.*

⁵³ *Id.*

attorneys can be uncomfortable with the lack of structure. Attorneys are used to the strict rules of court, and clients have a certain picture of how the legal process works. Clients often expect mediation to be a form of arbitration that they can win. While she believes the program is a good idea and that it will be highly beneficial to parties involved, she emphasizes that you need to be careful with something new.⁵⁵

Statistics

During the spring and summer of 2001, a survey was prepared with the input of Professor Charles Bennett, Kathy Elton, Karin Hobbs, and the Estate Planning Section Executive Committee. The survey was then sent to all the members of the Estate Planning section. The results of the survey are summarized below.

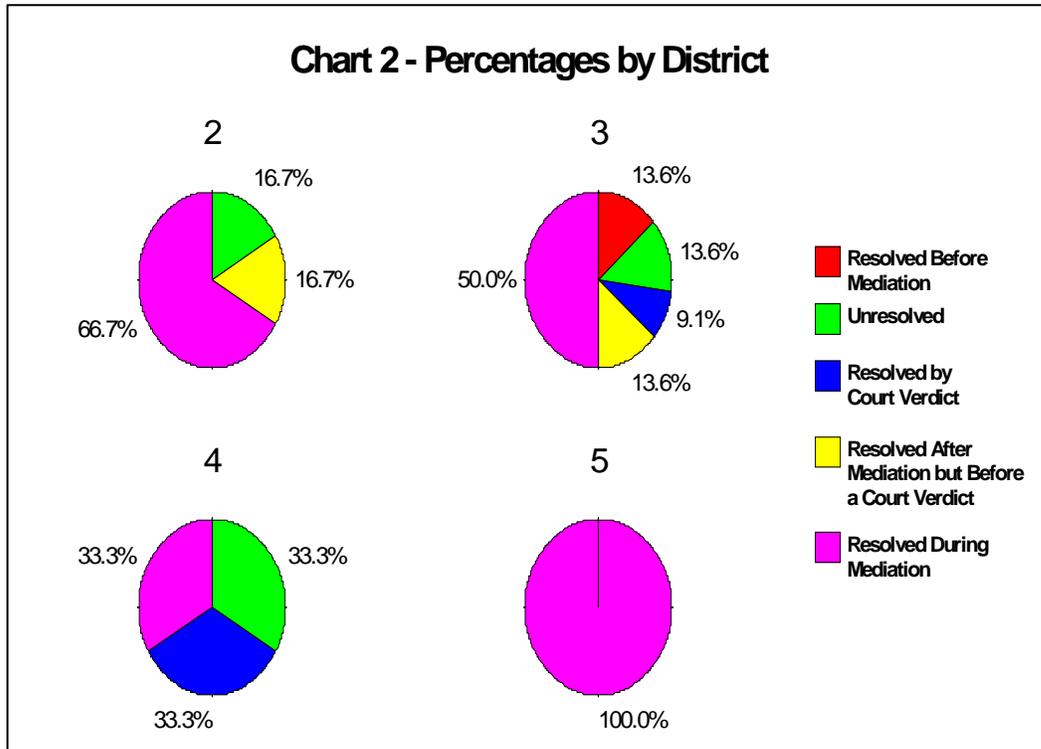


⁵⁴ Id.

⁵⁵ Royball, *Supra* note 24.

Of the 32 reported mediations:

- 3 were resolved before mediation,
- 17 were resolved during mediation,
- 4 were resolved after mediation but before a court verdict,
- 3 were resolved by court verdict, and
- 5 remained unresolved at the time of the survey.



A full 75% of reported cases were settled without a court verdict. Would the cases have settled anyway? Because pre-program settlement rates are unavailable, it is impossible to tell. However, the attorneys' responses to the survey questions indicate that mediation has left them with a generally favorable impression. A few of the highlights:

- 84% of respondents felt the mediator was effective.
- 73% of respondents felt that mediation was useful.
- 63% of respondents felt that the time the process took was just right.
- 68% of respondents say they are likely to use mediation if the need arises.

- 63% of respondents were satisfied with the results of mediation.

Interestingly, only 44% of the attorneys believed their clients were satisfied with the results.

Where is it Going?

Involved parties' views.

There is certainly talk of expansion. Both Karen Hobbs and Kathy Elton expect the probate mediation program to expand to Ogden and Provo soon.⁵⁶ As the program evolves, there will be "continual tweaking" as administrators get feedback from practitioners.⁵⁷ The program's evolution will depend on a collaborative effort between all those involved.⁵⁸

Judge Bohling sees a broad future for probate mediation. He believes that the program's usefulness will enable the program to continue to grow in experience and acceptance.⁵⁹ The judicial education programs of the Administrative Office of the Courts often bring successful programs in one district to the attention of other districts. Judge Bohling indicates that there is a good opportunity for this with the probate mediation program.⁶⁰

Independent Analysis and Recommendations.

The Probate ADR Pilot Program began with high hopes for success. Those involved believed it would be beneficial to parties and to the court system. Are the benefits being realized? How "successful" has the program been to date?

Cathy A. Costantino and Christina Sickles Merchant in their book *Designing Conflict Management Systems* recommend evaluating two distinct aspects of a conflict

⁵⁶ Hobbs and Elton, *Supra* note 26.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

resolution program: effectiveness (focus on outcome), and administration (focus on mechanics). Effectiveness is broken down into three elements: efficiency, effectiveness, and satisfaction. Administration is likewise broken down into three elements: functional organization, service delivery, and program quality. The Probate Mediation Program scores well in each of these categories; however, there is room for improvement.

Improvements may be made in the areas of education, mediator training, options, and party input.

Education

One thing that has been mentioned time and time again is that the program is new and that people do not know how to best utilize it to their benefit. Outside of the legal profession, people are largely unaware of what mediation or even ADR in general are.⁶¹ Attorneys and their clients can be educated by time and trial by fire, or they can be educated by proactive efforts through the court system.

The educational outreach of the Probate ADR Pilot Program, as well as mediation programs in general may be improved by (1) providing clear, easy to understand information packets that explain the program and the mediation process to parties and attorneys, (2) offering information sessions for those referred to mediation, and (3) providing mediation advocacy training for attorneys. These educational efforts may be coordinated with organizations such as the Utah Bar Association and Utah Dispute Resolution.

⁶⁰ Id.

⁶¹ Even within the legal profession there are still some who do not understand ADR in general and mediation in particular. There is often great confusion about the differences between mediation and arbitration, for example.

Mediator Training

Research has shown that one area where the program is lacking is the regulation of mediators. The Office of Dispute Resolution and the Judicial Council ADR Committee are currently evaluating options for improving the standards regulating mediators.

For the protection of the parties, the integrity of the system, and the integrity of mediation as a profession, there should be more quality control when it comes to mediators. Some attorney comments from the 2001 survey illustrate the need for qualified and competent mediators:

"Mediator needed to have probate experience."

"My impression is that most of the attorneys certified at probate mediation are not very experienced in the area. We should encourage experienced probate & trust attorneys to be certified -- More attorneys would use mediation if more experienced mediators."

"The process worked to the point that we almost had a resolution with one point left to resolve. The mediator excused herself at that point, expressing her confidence that that point would be resolved. (She had a prior commitment!) That point was not resolved and everything fell apart. Needless to say, we were very disappointed."

Most of those who design conflict management systems are devoted to the concept of empowering the parties and providing them with as much autonomy as is reasonable. Under such a concept, it is important that parties be able to choose the mediator that they want. However, there are two steps the program can take to assure the parties that they are getting a reasonably qualified mediator:

(1) Provide stricter requirements for inclusion on the roster of probate mediators. The mediator should understand probate and tax law and should have an understanding of family mediation principles.

(2) Require periodic assessment of roster mediators by Office of Alternative Dispute Resolution personnel. Such assessment could include surveys completed by parties and attorneys following mediation, as well as in-person observation by an AOC mediator.

Options

Utah law authorizes a substantial amount of flexibility in designing ADR processes. Section 78-31b-2(4),(7)-(9). If the program and those involved truly want to empower parties, they should explore allowing the parties to choose ADR options other than mediation and arbitration. This may also help address concerns that some cases are not suited for mediation.

There is a whole continuum of established ADR processes. These include mediation, settlement conferences, early neutral evaluation, mini-trials, summary jury trials, and arbitration. There are also "new" processes such as talking circles, family group conferences and "michigan mediation" that should be explored as well. Each process gives parties different levels of autonomy and neutral intervention.

If the court system is truly trying to cut back on the amount of litigation in Utah courts by promoting alternative means of resolving disputes, then prophylactic measures should be explored as well. These measures occur at the estate planning stage. Education programs should be developed that inform attorneys and the public about ADR options both before and after a dispute arises. ADR agreements can be incorporated into estate plans, such as the provision in George Washington's will, providing case-specific means of resolving any resulting disputes.

Party Input

The design stage of the program included all stakeholders (judges, attorneys, mediators, and clerks) except those who have the most at stake -- the parties. In order to be

successful, the program needs to have an understanding of the needs of the parties, not just those who make their career in the law. The low level of client satisfaction indicates that there are some needs that are not being met. At this point we do not know why they are dissatisfied nor do we know what the parties would like to help them through the process. An effort must be made to obtain input from parties who have participated in mediation.

Conclusion

Overall, the Probate ADR Pilot Program has been well designed. In the short time it has been operating it has seen significant success and shows great promise for the future. However, like any program designed to meet the needs of society, it must be continually evolving and evaluating itself.