

# Agenda

## Ad Hoc Committee on Probate Law and Procedure

May 16, 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
Probate "court"	Tab 2	Tim Shea
Conflicting laws and procedures between juvenile court & district court	Tab 3	Tim Shea
Emergency appointments	Tab 3	Tim Shea
Regulation of professional guardians; Model Code of Conduct.	Tab 3	Tim Shea

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

### Meeting Schedule

Meeting	Conclude	Introduce
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

April 18, 2008 - 12:00p.m.

#### ATTENDEES

Kent Alderman

Kerry Chlarson

Mary Jane Ciccarello

Judge George Harmond

Justice Richard Howe

Steve Mikita

Marianne O'Brien

Kathy Thyfault

#### EXCUSED

Judge Reese Hanson

Maureen Henry

Julie Rigby

Judge Gary Stott

#### GUESTS

Kathy Elton

#### STAFF

Diana Pollock

Tim Shea

### I. WELCOME AND APPROVAL OF MINUTES

Judge Harmond welcomed the committee members to the meeting. There was a motion to accept the minutes of the March, 2008 committee meeting. The motion was seconded. The motion carried unanimously.

### II. EVALUATION REPORT FORMS

Tim Shea prepared a draft of two forms with the information given by Gloria Jensen-Sutton and the medical practitioners. Mr. Shea's draft is based on the ABA's clinical evaluation form with an addition of a motion and order. The committee discussed the evaluation forms. Some of the committee's points:

- The statute gives the court the authority to appoint a physician. The forms need not rely on Rule of Civil Procedure 35. A motion to complete the examination and report might not be necessary. The judge can order an exam without a motion.
- The clinical report is not to take the place of the special visitor.
- The purpose of the report form is to provide the judge with enough evidence to make a factual determination about incapacity. The form should not restrict the exam. The form should not complicate what might be a simple exam.
- Should the petitioner generate this type of evidence before the petition is filed or should a petition be filed and the judge orders the exam?

- Medical practitioners feel it would be beneficial if there is a court order because of doctor-patient privilege.
- With a sound process and sound standards, decision-making should be left to the judgment of the players.
- The form might be more efficient if it was broken into areas of concern or a summary form.
- The form might not be used in some cases. Just parts of the inquiry might be needed in others. And a global assessment might need to be done for some.
- The form organizes the report of the physician or the evaluator, rather than telling the judge what to do. The form is meant to report observations and opinions.
- Is the focus on the physician or is it on the putative ward?
- The form would help protect the ward because physicians don't always look at the ward's mental capacity.
- Should the word "motion" or "petition" be used? The Probate Code provides that it is a "petition" because it hasn't been put at issue. Once the matter is put at issue, the rules of civil procedure apply. Perhaps "request" is best.
- The committee's report should recognize that the form is not expected in every case and is intended for guidance.
- The form anticipates some level of cooperation of the ward.
- The language "should the person attend this meeting?" should be changed to "would attending this hearing cause the person undue distress?"

Tim Shea will redraft the evaluation forms to include the committee's proposed changes.

### **III. AUTHORITY AND DUTIES OF GUARDIAN**

Tim Shea made the changes that the committee asked for. There were a few brief edits.

- Use the phrase "self neglect" rather than "self abuse." "Self injurious behavior" would cover both abuse and neglect.
- Appears to be no confusion that the guardian may admit the ward but not commit the ward. To commit the ward, the guardian must petition for involuntary commitment.
- Specify that the protective order a guardian may seek is a protective order under the Probate Code.
- Develop a section that identifies all of the post-appointment issues.
- The guardian should be able to act in behalf of the ward for routine medical attention without going to the court for approval.
- Inventory would have to be filed by the guardian if there isn't a conservator. Parents serving as guardians or conservators should file an annual report.

Tim Shea developed a statute outlining the contents for a guardianship plan. This statute would identify what the minimum requirements would be.

- A guardianship plan ensures the guardian has given some thought to the ward's future life.
- The statute balances the ward's rights and the ease of appointing a guardian.
- A statute requiring a guardianship plan is needed.
- Best interest decision-making and substitute judgment decision-making are used here and defined in a separate section of the code.

#### **IV. ROLE OF MEDIATION**

Kathy Elton, the Mediation Director, was introduced to the committee. Ms. Elton stated that the ADR Committee feels that this is an area in which mediation could be utilized. Ms. Elton explained the mediation program to the committee.

- A pilot program was conducted in Ohio, Florida, Wisconsin and Oklahoma. The pilot program found that when mediation was used in contested guardianship cases, approximately 75% of the cases were resolved.
- National reports show that the mediation success rate is between 75% and 80%.
- The mediation program in Utah is not well integrated or coordinated within the judiciary. This is an improvement that could be made in the courts.
- The greatest barrier to success of mediation in guardianship cases is a lack of education and understanding by judges and attorneys.
- Under certain circumstances, such as in domestic abuse cases, people can opt out of mediation at their discretion.

The committee agreed to recommend mediation in contested guardianship cases, provided there is not good cause to opt out.

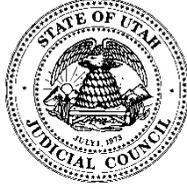
#### **V. MONITORING PROGRAM**

Tim Shea proposed developing a program in which a paid staff person would recruit, train and support community volunteers to review annual reports. It would be similar to the court's very successful CASA program. The ABA and AARP have recently published a report on this approach, summarizing the features that make them successful. Dan Becker will recommend that the Judicial Council set aside some money to hire a volunteer coordinator. If initially successful, the program might grow to include visiting the ward on a regular basis and serve as court-appointed visitors before a guardian is appointed. The committee recommended that Mr. Shea go forward with the monitoring program.

#### **VI. ADJOURN**

The committee meeting adjourned at 2:15 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:** May 6, 2008  
**Re:** Probate "court"

One of the issues you asked to consider is the possibility of appointing a specialized probate judge or commissioner. Given the relatively small caseload and considerable territory to cover, I don't think that is realistic. However, it may be possible to recruit a handful of judges to be assigned contested probate matters, which essentially is the model for the tax court. The tax court is established by statute, but that says more about the influence of the tax lobby than the need for legislation. We could easily establish a probate court by rule.

In the vernacular, the name will likely be "probate court," but it would not be a separate court, nor even a division within the district court. It would be a program for assigning one of the volunteer judges to contested probate cases. To avoid venue issues, the case would remain in the county in which it is filed, and the judge would be assigned to that case. Out-of-county assignments like this occur regularly; probate court would simply be a special program that uses that mechanism.

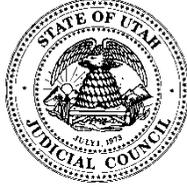
The number of judges should be large enough that they can cover the state regionally, but small enough to develop expertise. Special education is critical. We have an extensive education department, but in this area, we may need to look to the Bar for course curriculum and presenters.

We would not need any special procedural rules. The case itself would be processed in the normal course. There would simply be a judge with special probate training assigned to the case. We may need an administrative rule to regulate the timing of the assignment and resolve other administrative issues for which we want regularity. Existing rules permit participants to attend hearings electronically. That might be a simple telephone conference or a video conference. We are slowly building our capability to access records electronically. So actual travel by the judge to the county in which the case is pending might be relatively rare.

The committee should decide whether there are enough benefits in this approach to merit recommending it to the Judicial Council.

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

# 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:** May 6, 2008  
**Re:** Issues

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#### **Conflicting laws and procedures between juvenile court & district court**

This item was raised at the start of the committee's work, but I am not familiar with the nature of the issue. The juvenile court routinely appoints guardians for minors in the course of abuse, neglect and dependency cases and, to a lesser extent, in delinquency cases. However, the few juvenile court judges I spoke with do not appoint guardians for young adults, people who have "aged out" of the juvenile court system. That happens at age 18, although in delinquency cases, the court can retain jurisdiction to age 21 for the purpose of collecting fines, fees, and restitution.

Commitment of a minor or an adult to a mental retardation facility are both governed by the same sections, (§§ 62A-3-311 and -312) but are handled in separate courts. Commitment of a minor to a mental health facility is governed by provisions (Title 62A, Chapter 15, Part 7) separate from those for adults, (Title 62A, Chapter 15, Part 6) but both seem to be beyond the scope of this committee's work.

I may have misinterpreted something said at our initial planning meeting. But if there are issues here that I am overlooking, please raise them at the meeting.

#### **Emergency appointments**

The committee wanted to examine the adequacy of the law regulating emergency appointments. I have attached §75-5-310, which currently governs, and the law and comments from the 1997 Uniform Guardianship and Protective Proceedings Act. I did not include §75-5-316, which appears to be a special expedited process for a very limited purpose if the Ward resides at the Utah Development Center.

#### **Regulation of professional guardians; Model Code of Conduct.**

The committee wanted to examine the adequacy of laws regulating professional guardians and the application of the Model Code of Ethics and the Model Standards of Practice. (I have not attached these documents, but they are available on the website of

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

the National Guardianship Association, <http://www.guardianship.org/>.) In Utah professional guardians are not directly licensed as such. To be a professional guardian, one must be a licensed health care provider or “designated as a provider of guardianship services by a nationally recognized guardianship accrediting organization.” (§75-5-311)

According to the National Guardianship Association “Certification entitles the guardian to represent to the courts and the public that he or she is eligible to be appointed, is not disqualified by prior conduct, agrees to abide by universal ethical standards governing a person with fiduciary responsibilities, submits to a disciplinary process, and can demonstrate through a written test an understanding of basic guardianship principles and laws.”

Certification as either a Registered Guardian or a Master Guardian is administered through the Center for Guardianship Certification (CGC), and “allied foundation” of the National Guardianship Association. According to the Center “CGC has developed a two-tiered certification process, certifying Registered Guardians (RG) at the entry level and Master Guardians (MG) with a higher level of experience and responsibility. The eligibility standards, as well as content and level of difficulty of the core competencies tested, for the Master Guardian certification are much higher. Nevertheless, both the RG and MG must affirm they will abide by the NGA Model Code of Ethics and maintain a high level of conduct to be re-certified. The same process is used to determine if either certificate should be withheld or revoked.”

Presumably, certification in this manner would qualify as a designation under the Utah Code. The questions for the committee might be:

- Whether the statute can be interpreted to permit less than this level of competency, and whether that should be permitted?
- Whether licensing as a health care provider should be sufficient to qualify as a professional guardian.

I have attached the statute that regulates professional guardians. It lists several health care providers, but, even on its face, the list is not necessarily exhaustive. Below the statute, I have listed all of the professions regulated by the Division of Professional Licensing that might be considered “health care providers” and so qualify as professional guardians.

Encl. §75-5-310

Excerpt from 1997 Uniform Guardianship and Protective Proceedings Act

§75-5-311

Excerpt from DOPL licensing list

### **75-5-310. Temporary guardians.**

(1) If an incapacitated person has no guardian and an emergency exists or if an appointed guardian is not effectively performing his duties and the court further finds that the welfare of the incapacitated person requires immediate action, it may, without notice, appoint an appropriate official as temporary guardian for the person for a specified period not to exceed 30 days pending notice and hearing.

(2) The court shall, in all cases in which a temporary guardian is appointed, hold a hearing within five days pursuant to Section 75-5-303. Unless the allegedly incapacitated person has already obtained counsel, the court may appoint an appropriate official or attorney to represent that person in the proceeding. Until the full hearing and order of the court, the temporary guardian shall be charged with the care and custody of the ward and shall not permit the ward to be removed from this state. The authority of any permanent guardian previously appointed by the court is suspended so long as a temporary guardian has authority. A temporary guardian may be removed at any time, and shall obey such orders and make such reports as the court requires.

## **1997 UNIFORM ACT**

### **Section 312. Emergency guardian.**

(a) If the court finds that compliance with the procedures of this [article] will likely result in substantial harm to the respondent's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the respondent's welfare, may appoint an emergency guardian whose authority may not exceed [60] days and who may exercise only the powers specified in the order. Immediately upon receipt of the petition for an emergency guardianship, the court shall appoint a lawyer to represent the respondent in the proceeding. Except as otherwise provided in subsection (b), reasonable notice of the time and place of a hearing on the petition must be given to the respondent and any other persons as the court directs.

(b) An emergency guardian may be appointed without notice to the respondent and the respondent's lawyer only if the court finds from affidavit or testimony that the respondent will be substantially harmed before a hearing on the appointment can be held. If the court appoints an emergency guardian without notice to the respondent, the respondent must be given notice of the appointment within 48 hours after the appointment. The court shall hold a hearing on the appropriateness of the appointment within [five] days after the appointment.

(c) Appointment of an emergency guardian, with or without notice, is not a determination of the respondent's incapacity.

(d) The court may remove an emergency guardian at any time. An emergency guardian shall make any report the court requires. In other respects, the provisions of this [Act] concerning guardians apply to an emergency guardian.

## Comment

There are limited circumstances where there is no one else willing or able to act when following the normal process for appointment of a guardian would, due to the time involved to follow the procedures, likely lead to substantial harm to the respondent's health, safety or welfare. The classic example of when an emergency guardianship is needed is when the respondent needs a medical procedure, lacks capacity to consent, has no health care power of attorney, and no one else is willing or in a position to make the health-care decision. This section of the Act requires appointment of counsel for the respondent.

An emergency guardian may only be appointed without prior notice when there is testimony that the respondent would be immediately and substantially harmed before the hearing on the appointment. In such case, notice must be given within forty-eight hours and a hearing held within five days. (Section 113 provides the procedures for giving notice.)

States enacting this Act should look at their requirements for an ex parte hearing and determine whether to adopt the time limit contained in this section or whether to impose different time limits. Five days seems to be the most common time period for a return hearing following an ex parte appointment. If the enacting state uses a different time period for a hearing following an ex parte appointment of a guardian, the time period used should be relatively short.

The National Probate Court Standards, Standard 3.3.6 "Emergency Appointment of a Temporary Guardian" (1993) provides:

(a) Ex parte appointment of a temporary guardian by the probate court should occur only:

(1) upon the showing of an emergency;

(2) in connection with the filing of a petition for a permanent guardianship;

(3) where the petition is set for hearing on the proposed permanent guardianship on an expedited basis; and

(4) when notice of the temporary appointment is promptly provided to the respondent.

...

This Act deviates from the above standard by permitting an emergency guardian to be appointed without the need of filing a petition for a permanent appointment. The drafting committee was concerned that requiring the filing of a petition for a permanent appointment would lend an air of inevitability that a permanent guardian should be appointed. Frequently, the need for an emergency guardian is temporary only and the respondent's long-term needs can be met by mechanisms other than guardianship. Consistent with this, subsection (c) provides that the appointment of an emergency guardian is in no way a finding of incapacity. For purposes of appointing a regular guardian, the same quantum of proof is required whether or not an emergency guardian has been appointed.

Unless stated to the contrary in this section, other sections of this Act apply to an emergency guardian appointed under this section, including the provisions relating to the duties of guardians.

### **Section 313. Temporary substitute guardian.**

(a) If the court finds that a guardian is not effectively performing the guardian's duties and that the welfare of the ward requires immediate action, it may appoint a temporary substitute guardian for the ward for a specified period not exceeding six months. Except as otherwise ordered by the court, a temporary substitute guardian so appointed has the powers set forth in the previous order of appointment. The authority of any unlimited or limited guardian previously appointed by the court is suspended as long as a temporary substitute guardian has authority. If an appointment is made without previous notice to the ward or the affected guardian, the court, within five days after the appointment, shall inform the ward or guardian of the appointment.

(b) The court may remove a temporary substitute guardian at any time. A temporary substitute guardian shall make any report the court requires. In other respects, the provisions of this [Act] concerning guardians apply to a temporary substitute guardian.

#### **Comment**

This section differs from Section 312 since this section is used when there is a guardian, but the guardian is not discharging the functions of office. The role of the temporary substitute guardian, as the name implies, is to literally fill in for the regular guardian, whose powers are suspended for the duration of the appointment. This section also differs from Section 204(d). A temporary guardian for a minor is appointed under Section 204(d) in situations where there is no guardian, whereas under this section, the temporary substitute guardian is temporarily substituted for another non-performing guardian.

The standard for appointment under this section is that the ward's welfare requires immediate action and that the appointed guardian is not effectively performing the duties of office. This is not the same as the best interest standard applied in the selection of the original guardian. The standard instead invokes the sense of urgency usually involved in these cases, most of which involve possible abuse by the regularly-appointed guardian.

If, at the end of the six months, the ward still needs a guardian, the court should appoint a permanent guardian rather than granting an extension to the temporary substitute guardian. A temporary substitute guardian does not automatically have preference to be appointed as guardian in such cases.

In some cases, circumstances may dictate the appointment of the temporary substitute guardian without notice being given to the ward or current guardian. If that occurs, within five days of the appointment of the temporary substitute guardian, the court must inform either the ward or the guardian. Since the authority of the regularly-appointed guardian is suspended by the appointment of the temporary substitute guardian, the court should make every effort to inform the guardian of the appointment. In keeping with the concept of limited guardianship and empowerment of the ward, the

court should also notify the ward of the appointment of the temporary substitute guardian if the ward has the ability to understand.

States adopting this Act are free to enact a notice period of less than five days but are encouraged to not enact a notice period of more than five days.

This section is based on Section 2-208(b) of the 1982 Act (U.P.C. Section 5-308(b) (1982)).

**75-5-311. Who may be guardian -- Priorities.**

(1) As used in this section:

(a) "Specialized care professional" means a person who:

(i) has been certified or designated as a provider of guardianship services by a nationally recognized guardianship accrediting organization;

(ii) is licensed by or registered with the Division of Occupational and Professional Licensing as a health care provider including, but not limited to, a registered nurse licensed under Section 58-31b-301, a social service worker, certified social worker, or clinical social worker licensed under Section 58-60-205, a marriage and family therapist licensed under Section 58-60-305, a physician licensed under Title 58, Chapter 67, or a psychologist licensed under Title 58, Chapter 61; or

(iii) has been approved by the court as one with specialized training and experience in the care of incapacitated persons.

(b) "Suitable institution" means any nonprofit or for profit corporation, partnership, sole proprietorship, or other type of business organization that is owned, operated by, or employs a specialized care professional.

(2) Any competent person or suitable institution may be appointed guardian of an incapacitated person.

...

(4) Except as provided in Subsection (3), persons who are not disqualified have priority for appointment as guardian in the following order:

...

(g) a specialized care professional, so long as the specialized care professional does not:

(i) profit financially or otherwise from or receive compensation for acting in that capacity, except for the direct costs of providing guardianship or conservatorship services; or

(ii) otherwise have a conflict of interest in providing those services.

## **DOPL Licenses**

A

Acupuncture

Athletic Trainer

Audiology

C

Certified Dietitian

Certified Medication Aide

Certified Nurse Midwifery

Chiropractic

D

Dentistry

Dietitian - Certified

Direct-Entry Midwifery

E

Electrology

G

Genetic Counseling

H

Health Facility Administration

Hearing Instrument

M

Marriage and Family Therapy

Massage Therapy

Medication Aide - Certified

Midwifery - Certified Nurse

Midwifery - Direct-Entry

N

Nail Technician

Naturopathy

Nursing

O

Occupational Therapy

Optometry

Osteopathy

P

Pharmacy

Physical Therapy

Physician and Surgeon

Physician Assistant

Podiatry

Professional Counseling

Psychology

R

Radiology

Recreation Therapy

Respiratory Care

S

Social Work

Speech Language Pathology

Substance Abuse Counseling

V

Veterinary