

# Agenda

## Ad Hoc Committee on Probate Law and Procedure

June 20, 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
Emergency appointments	Tab 2	Tim Shea
Background checks of professional guardians.		Mary Jane Ciccarello
Conservatorships	Tab 3	Tim Shea

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

### Meeting Schedule

Meeting	Conclude	Introduce
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

May 16, 2008 - 12:00p.m.

#### ATTENDEES

Kerry Chlarson  
Mary Jane Ciccarello  
Judge George Harmond  
Marianne O'Brien  
Julie Rigby  
Kathy Thyfault

#### EXCUSED

Kent Alderman  
Judge Reese Hanson  
Maureen Henry  
Justice Richard Howe  
Steve Mikita  
Judge Gary Stott

#### STAFF

Diana Pollock  
Tim Shea

### I. WELCOME AND APPROVAL OF MINUTES

Judge Harmond welcomed the committee members to the meeting. Kathy Thyfault made a motion to accept the minutes of the April 18, 2008 meeting. The motion was seconded. The motion carried unanimously.

### II. PROBATE COURT

Tim Shea stated that because of the relatively small caseload, any recommendation to create a probate court will probably not be successful. Mr. Shea stated that it may be possible to recruit a few judges to be assigned contested probate matters. Mr. Shea recommended waiting to see what the new environment is like after the other programs are in place. Committee discussion was as follows:

- Specialized divisions within the district court would be more favorable.
- Special education is critical.
- Look to the Bar for course curriculum and presenters.
- Would probate judges that travel the circuit be required to hear contested guardianship matters?
- The possibility for commissioners to hear probate cases in the larger districts.
- Local courts should decide how to assign cases.

### **III. CONFLICTING LAWS AND PROCEDURES BETWEEN JUVENILE COURT AND DISTRICT COURT.**

- Juvenile court judges appoint guardians for minors as part of child welfare proceedings and sometimes delinquency. But the orders expire when the minor turns 18.
- Currently there is a rule that requires the parties to notify the court of other litigation involving the parties.
- Access to CARE would be helpful to probate clerks.
- Clerks can request access to CARE from their TCE.

### **IV. EMERGENCY APPOINTMENTS**

The committee discussed the adequacy of the law regulating emergency appointments.

- Is the 30 day appointment sufficient?
- Should something be added to allow for a substitute appointment?
- Current code does not provide for a standby appointment.
- Add a provision for a guardian to be removed.
- Identify circumstances warranting a standby guardian.
- Temporary guardian statute is cumbersome. The emergency guardian provision under the Uniform Act is better.
- The court must set a hearing within 5 days after issuing an emergency appointment order.
- Emergency guardianship should be treated similar to a temporary restraining order or a preliminary injunction.
- Should the temporary/emergency guardian have financial and conservator duties?

Tim Shea will prepare a draft to include:

- A hearing required within 5 days after the emergency appointment.
- The appointment itself can go for as long as 60 days and then is terminated.
- The emergency appointment would be made only in connection with the petition for regular appointment.
- Develop substitute guardian provision.
- Develop a standby provision.

### **V. REGULATION OF PROFESSIONAL GUARDIANS; MODEL CODE OF CONDUCT.**

The committee discussed the adequacy of laws regulating professional guardians and the application to the Model Code of Ethics and Model Standard of Practice.

- Currently: Certified or designated by a nationally recognized accrediting organization. Or anyone approved by the court as one with specialized training

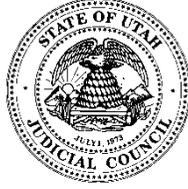
and experience. Anyone licensed or registered with DOPL as a health care provider qualifies as a professional guardian.

- Should DOPL regulate the profession of guardian independent of the other professions?
- Professional guardians should probably have a background check.
- Regulating professions is not a court issue, but it affects the court.
- Recommendation that DOPL regulate professional guardians.
- A strong public policy argument can be made.

Mary Jane Ciccarello will research other state statutes to see if background checks are done on professional guardians and examples taken on this profession.

The meeting adjourned at 2:00 p.m.

# Tab 2



## Administrative Office of the Courts

Chief Justice Christine M. Durham  
Utah Supreme Court  
Chair, Utah Judicial Council

### MEMORANDUM

Daniel J. Becker  
State Court Administrator  
Myron K. March  
Deputy Court Administrator

**To:** Probate Committee  
**From:** Tim Shea *TS*  
**Date:** June 16, 2008  
**Re:** Emergency, Substitute, and Successor Appointments; Post appointment proceedings

---

At the last meeting the committee asked that I draft statutes regulating emergency, substitute, and successor appointments. To come up with the attached, I used the decisions made by the committee and what I thought was the best of the 1997 Uniform Act and our current statutes.

The committee also asked for a statute permitting the removal of a guardian. I had been working on a statute that tries to collect all of the post appointment litigation, so that is included as well.

Encl. Draft statutes

1       **Section #####. Emergency appointment.**

2       (1) As part of a petition for the appointment of a guardian, the petitioner may request  
3 the appointment of an emergency guardian. The court may grant the request if after a  
4 hearing the court finds that:

5       (a) following the procedures of this Chapter would likely result in substantial harm to  
6 the respondent's health or safety;

7       (b) no other person appears to have authority to act;

8       (c) the welfare of the respondent requires immediate action; and

9       (d) the appointment would be in the respondent's best interest.

10       (2) Appointment of an emergency guardian is not a determination of the  
11 respondent's incapacity.

12       (3) Unless the respondent has counsel of the respondent's choice, the court shall  
13 immediately appoint an attorney from the roster established by the Supreme Court.

14       (4) Notice of the petition and hearing, using the method most likely to give prompt  
15 actual notice, shall be served on the interested persons. The court may dispense with  
16 notice and the hearing if it finds that the respondent will be substantially harmed before  
17 a hearing can be held. If the emergency guardian is appointed without notice and  
18 hearing, notice of the appointment must be served on the interested persons within 2  
19 days after the appointment and a hearing on the appropriateness of the appointment  
20 must be held within 5 days after the appointment.

21       (5) The court may appoint an emergency guardian for a specified period not to  
22 exceed 60 days, and the court may remove an emergency guardian at any time. The  
23 appointment terminates on the date specified by the court.

24       (6) The emergency guardian may exercise only the authority specified in the order.  
25 The emergency guardian shall make any report the court requires. The provisions of  
26 this Chapter concerning guardians apply to an emergency guardian.

27       **Section #####. Temporary substitute appointment.**

28       (1) A ward or a person interested in the welfare of a ward may file a request or  
29 petition for appointment of a temporary substitute guardian. Notice of the request or  
30 petition shall be served on the interested person in the manner provided in Section  
31 #####.

32 (2) The court may make the appointment if after a hearing the court finds that:

33 (a) the guardian is not effectively exercising authority or performing duties;

34 (b) the welfare of the ward requires immediate action; and

35 (c) the appointment would be in the best interests of the ward.

36 (3) The court may appoint a temporary substitute guardian for a specified period not  
37 to exceed 180 days, and the court may remove a temporary substitute guardian at any  
38 time. The appointment terminates on the date specified by the court. Before that date  
39 the court shall reinstate the guardian or appoint a successor guardian.

40 (4) Unless otherwise ordered by the court, a temporary substitute guardian has the  
41 authority and duties in the previous order of appointment. The authority of a previously  
42 appointed guardian is suspended as long as a temporary substitute guardian has  
43 authority.

44 (5) A temporary substitute guardian shall make any report the court requires. The  
45 provisions of this Chapter concerning guardians apply to a temporary substitute  
46 guardian.

47 (6) Within 5 days after the appointment, the temporary substitute guardian shall  
48 serve a copy of the order on the interested persons in the manner provided in Section  
49 #####.

50 **Section #####. Successor or additional guardian or conservator.**

51 The court may appoint a successor guardian in the event of a vacancy and may  
52 appoint an additional guardian to serve immediately or upon some designated event. A  
53 successor or additional guardian may file an acceptance of appointment any time after  
54 the appointment but not later than 30 days after the vacancy or designated event  
55 occurs. The successor or additional guardian is eligible to act upon the occurrence of  
56 the vacancy or designated event or upon filing an acceptance of appointment,  
57 whichever occurs last. Unless otherwise ordered by the court, a successor guardian has  
58 the authority and duties in the previous order of appointment.

59 **Section #####. Proceedings after appointment.**

60 (1) A ward or a person interested in the welfare of a ward may file a petition or  
61 request to:

62 (a) require, increase, or decrease a bond or collateral;

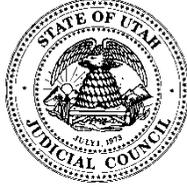
- 63 (b) require an accounting or other report;
- 64 (c) direct distribution;
- 65 (d) instruct the guardian or conservator;
- 66 (e) modify the authority of the guardian or conservator because authority previously
- 67 granted is excessive or insufficient or because of a change in the ward's incapacity or
- 68 disability;
- 69 (f) permit the guardian or conservator to exercise authority requiring a court order;
- 70 (g) terminate the guardianship or conservatorship because:
- 71 (i) the ward has died, married, or been adopted;
- 72 (ii) if the ward is a minor, the ward is emancipated or has attained the age of
- 73 majority; or
- 74 (iii) the incapacity or disability that warranted the appointment of the guardian or
- 75 conservator has ceased;
- 76 (h) order the guardian or conservator to show cause why the guardian or
- 77 conservator should not be held in contempt for:
- 78 (i) violating a duty imposed by statute or court order;
- 79 (ii) violating the authority in the order of appointment; or
- 80 (iii) decisions and acts by the guardian that the court finds to be substantially
- 81 contrary to the guardianship plan;
- 82 (iv) decisions and acts by the conservator that the court finds to be substantially
- 83 contrary to the estate plan;
- 84 (i) appoint a successor guardian or conservator in the event of a vacancy; or
- 85 (j) grant other appropriate relief.
- 86 (2) A guardian or conservator may file a motion for:
- 87 (a) permission to resign and to appoint a successor;
- 88 (b) instructions concerning the fiduciary responsibility;
- 89 (c) approval of a guardianship plan or an estate plan; or
- 90 (d) other appropriate relief.
- 91 (3) A request or petition filed under this Section shall be served on the interested
- 92 persons in the manner provided in Section #####.

93       (4) A ward is entitled to the same rights and procedures in proceedings under this  
94 Section as in an original proceeding for the appointment of a guardian or conservator.

95       (5) Sanctions for contempt of court include removal of the guardian or conservator  
96 and imposing on the guardian or conservator personal responsibility for any financial  
97 loss caused by the guardian's or conservator's wrongful conduct.

98

# 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:** June 16, 2008  
**Re:** Conservatorship issues

---

At the close of the last meeting I said that my question of you about conservatorships would be simply: "Is there a reason not to adopt for conservatorships any of the principles that we have adopted for guardianships?" To give that question a little more focus, I have listed several features of conservatorships that appear to be different either from guardianships as they exist now or from guardianships as we have proposed them.

The authority of a conservator needs to be significantly different from that of a guardian, so those differences are not listed. And there may be other features of guardianships that should not apply to conservatorships. For example, the 1997 Uniform Act argues that a temporary or emergency conservator is not an appropriate office, while a temporary or emergency guardian is.

Some of the items are summarized. For some of them, I have quoted from the current statutes or from our proposals. You can see from the comparison that some of the differences are modest. The conservatorship statute regulating the appointment of a visitor, for example, uses words different from the guardianship statute, but the end result is the same: the court can enter the order. Some of the differences are significant: the grounds for appointment, for example; whether the court must or may appoint a lawyer to represent the respondent; or whether the court administers the ward's estate directly or through a conservator. And some fall in the middle. In both guardianships and conservatorships the court can order that the respondent be examined, but the authority in the conservatorship process is conditional upon the nature of the alleged disability.

Encl. Comparison of Guardianship and Conservatorship Laws

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.

Comparison of Guardianship and Conservatorship Laws

Guardian Current	Guardian Proposed	Conservator Current
<p><b>Grounds:</b> "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority, to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.</p>	<p>"Incapacity" means a judicial determination that an adult's ability, even with assistance, to</p> <ul style="list-style-type: none"> <li>(a) receive and evaluate information,</li> <li>(b) make and communicate decisions,</li> <li>(c) provide for necessities such as food, shelter, clothing, health care or safety,</li> <li>(d) carry out the activities of daily living, or</li> <li>(e) manage his or her property</li> </ul> <p>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.</p>	<p>"if the court determines that the person:</p> <ul style="list-style-type: none"> <li>(a) is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and</li> <li>(b) has property which will be wasted or dissipated unless proper management is provided or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person and protection is necessary or desirable to obtain or provide funds." </li></ul>
<p><b>Alternative arrangements made by respondent:</b> No provision.</p>	<p>"whether the ward has planned for surrogate health care and financial decision making, such as an advance health care directive, a power of attorney, a trust, or a jointly held account;"</p>	<p>"Appointment of a conservator or other protective order may not be denied solely on the basis that the person for whom the conservatorship or other protective order is sought has a valid power of attorney in effect."</p>
<p><b>Venue:</b> Where the respondent resides or is present. If in an institution, where the institution is.</p>	<p>Not reviewed by committee.</p>	<p>Where respondent resides. If not a resident, where the respondent has property.</p>

Comparison of Guardianship and Conservatorship Laws

Guardian Current	Guardian Proposed	Conservator Current
<p><b>Appointment of a Lawyer:</b> "... unless the allegedly incapacitated person has counsel of the person's own choice, [the court] shall appoint an attorney to represent the person in the proceeding the cost of which shall be paid by the person alleged to be incapacitated, unless the court determines that the petition is without merit, in which case the attorney fees and court costs shall be paid by the person filing the petition."</p>	<p>"Unless the respondent has counsel of the respondent's choice, the court shall appoint an attorney from the roster established by the Supreme Court."                      " represent the respondent independently and zealously."</p>	<p>"Unless the person to be protected has counsel of his own choice, the court may appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem."</p>
<p><b>Examination:</b> "The person alleged to be incapacitated may be examined by a physician appointed by the court who shall submit a report in writing to the court...."</p>	<p>No significant change</p>	<p>"If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician designated by the court, preferably a physician who is not connected with any institution in which the person is a patient or is detained."</p>

Comparison of Guardianship and Conservatorship Laws

Guardian Current	Guardian Proposed	Conservator Current
<p><b>Visitor:</b> “The person alleged to be incapacitated may be ... interviewed by a visitor sent by the court. The visitor also may interview the person seeking appointment as guardian, visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that the person will be detained or reside if the requested appointment is made, and submit a report in writing to the court.”</p> <p>“A visitor is, with respect to guardianship proceedings, a person who is trained in law, nursing, or social work and is an officer, employee, or special appointee of the court with no personal interest in the proceedings.”</p>	<p>No significant change</p>	<p>“The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the court.”</p>
<p><b>Emergency Guardian</b></p>	<p>Emergency Guardian, Substitute Guardian, Successor or Co-guardian</p>	<p>No provision</p>
<p><b>Evidentiary standard:</b> clear and convincing evidence.</p>	<p>No change.</p>	<p>No provision</p>
<p><b>Mediation:</b> Not part of mandatory mediation program. Rule 4-510.</p>	<p>Implement mandatory mediation.</p>	<p>Not part of mandatory mediation program. Rule 4-510.</p>
<p><b>Volunteer Monitoring Program:</b> No provision.</p>	<p>Implement volunteer monitoring program.</p>	<p>No provision.</p>
<p><b>Appointment:</b> By will, writing or court order</p>	<p>No significant change</p>	<p>Appointment: by court order</p>

Comparison of Guardianship and Conservatorship Laws

Guardian Current	Guardian Proposed	Conservator Current
<p><b>Planning.</b> No provision</p>	<p>“The guardian shall, to the extent reasonable, involve the ward in developing the guardianship plan to outline the strategies that will be used to implement the court order. Even if legal consent is not possible, the opinions of the ward should be sought.”</p>	<p>“the conservator and the court should take into account any known estate plan of the protected person, including his will, any revocable trust of which he is settlor, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated.”</p>
<p><b>Authority of the Court:</b> To appoint guardian.</p>	<p>No significant change in the appointment itself, but much more emphasis on the limited authority of the guardian.</p>	<p>Appoint conservator or enter other protective orders. (See below)</p>
<p><b>75-5-408. Permissible court orders.</b></p> <p>(1) The court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons:</p> <p>(a) While a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice to others, the court has power to preserve and apply the property of the person to be protected as may be required for his benefit or the benefit of his dependents.</p> <p>(b) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and affairs of the minor which are or might be necessary for the best interests of the minor, his family, and the members of his household.</p> <p>(c) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has, for the benefit of the person and members of his household, all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will. These powers include, but are not limited to the power to make gifts, to convey or release his contingent and expectant interests in property including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety, to exercise or release his powers as trustee, personal representative, custodian for minors,</p>		

Comparison of Guardianship and Conservatorship Laws

Guardian Current	Guardian Proposed	Conservator Current
<p>conservator, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life, to exercise options of the disabled person to purchase securities or other property, to exercise his rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise his right to an elective share in the estate of his deceased spouse, and to renounce any interest by testate or intestate succession or by inter vivos transfer.</p> <p>(d) The court may exercise, or direct the exercise of, its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding 20% of any year's income of the estate, or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is in the best interests of the protected person, and that he either is incapable of consenting or has consented to the proposed exercise of power.</p> <p>(2) An order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists has no effect on the capacity of the protected person.</p> <p><b>75-5-409. Protective arrangements and single transactions authorized.</b></p> <p>(1) If it is established in a proper proceeding that a basis exists as described in Section 75-5-401 for affecting the property and affairs of a person, the court, without appointing a conservator, may authorize, direct, or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to, payment, delivery, deposit, or retention of funds or property, sale, mortgage, lease, or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust.</p> <p>(2) When it has been established in a proper proceeding that a basis exists as described in Section 75-5-401 for affecting the property and affairs of a person, the court, without appointing a conservator, may authorize, direct, or ratify any contract, trust, or other transaction relating to the protected person's financial affairs or involving his estate if the court determines that the transaction is in the best interests of the protected person.</p> <p>(3) Before approving a protective arrangement or other transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection of a conservator. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters done pursuant to the order of appointment.</p>		