

# Agenda

## Ad Hoc Committee on Probate Law and Procedure

August 15, 2008  
12:00 to 2:00 p.m.

Administrative Office of the Courts  
Scott M. Matheson Courthouse  
450 South State Street  
Executive Dining Room

Approval of minutes	Tab 1	Judge George Harmond
Conservatorships	Tab 2	Becky Allred Tom Christensen

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

### Meeting Schedule

Meeting	
September 19, 2008	Forms & Information
October 17, 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

June 20, 2008 - 12:00p.m.

#### ATTENDEES

Kerry Chlarson  
Mary Jane Ciccarello  
Judge George Harmond  
Justice Richard Howe  
Marianne O'Brien  
Kathy Thyfault

#### EXCUSED

Kent Alderman  
Judge Reese Hanson  
Maureen Henry  
Steve Mikita  
Julie Rigby  
Judge Gary Stott

#### STAFF

Diana Pollock  
Tim Shea

### I. WELCOME AND APPROVAL OF MINUTES

Judge Harmond welcomed the committee members to the meeting. Mary Jane Ciccarello made a motion to accept the minutes of the May 16, 2008 meeting. Kerry Chlarson seconded the motion. The motion carried unanimously.

### II. EMERGENCY APPOINTMENTS

Tim Shea stated that he modeled the proposed emergency appointment statute after a temporary restraining order in a civil case. If an emergency appointment is requested, a petition for a regular appointment and a motion to appoint on an emergency basis need to be filed. The committee discussed the following issues on the proposed emergency appointment statute.

- The court may appoint an emergency guardian for a period not to exceed 60 days.
- The court may remove an emergency guardian at any time.
- Emergency appointments are automatically terminated after 60 days.
- The existing problem of people asking for emergency appointments without an underlying petition for guardianship.
- The court may dispense with notice and the hearing on the emergency appointment if it finds that the respondent will be substantially harmed before a hearing can be held. But the hearing must be held as soon as possible thereafter.
- The signing judge will require some type of medical documentation before an order is entered.

- The guardian's authority is limited to what the judge directs in the order.
- The need for immediate attention for freezing bank accounts.

After discussion the committee agreed to leave the language as Tim Shea drafted and to include the language of addressing the emergency role. Under the new model the emergency order itself needs to be more specific.

### **Temporary Substitute Appointment**

This situation occurs when the guardian has already been appointed and is unable to do the work for some reason. Under this process the court can appoint someone to take the guardian's place on a temporary basis. The duration of the appointment is for 180 days and requires a hearing. The committee's discussion:

- Before the 180 days ends, the judge needs to decide whether to make the temporary appointment permanent or appoint someone else.
- Unless otherwise ordered by the court, a temporary substitute guardian has the same authority and duties in the previous order of appointment.
- Since incapacity has already been decided, the only issue is the propriety of the appointment.

The committee agreed with the temporary substitute appointment provisions.

### **Successor or additional guardian or conservator**

Tim Shea stated that this draft is based on the 1997 Uniform Act. Basically, the court is permitted to appoint more than one guardian. A co-guardian or a successor guardian can come into their authority based on identified conditions without a new process. The co-guardian or successor guardian would require new guardianship letters, but could get them without a new hearing. The committee agreed with the proposed language that Mr. Shea drafted.

### **Proceedings after Appointment**

These proceedings are on behalf of the ward or someone interested in the ward's welfare after an appointment has been made. These provisions would not be in the guardianship or conservatorship sections, but in a section that applies to both. The topics are quite varied and include asking for an increase or decrease in the bond, removal and appointment of a successor, directions from the court, resignation, termination, etc.

## **III. BACKGROUND CHECKS OF PROFESSIONAL GUARDIANS**

Mary Jane Ciccarello distributed information of what other states are doing to regulate guardians. Ms. Ciccarello stated that Alaska and Washington are the most regulated states. Basically there are two categories. First, there is an entity regulating professional guardians. Second, the court is requiring disclosure of arrests, convictions and the like by private guardians.

- To be certified by a national guardianship organization requires a disclosure statement of the professional guardian that is notarized.
- DOPL requires a background check.
- The committee favors some type of regulation of the professional guardians.
- It is strongly recommend that the courts do not take on this obligation.
- Responsibility should be with DOPL to regulate the profession.
- Disclosure could be a required by the court.
- Person applying to be a professional would pay for the background check.
- Try to avoid additional expenses for family guardians.
- Let the judge weigh how important a person's disclosure is.
- Recommend that discussions with DOPL take place.

Tim Shea will draft text for the committee to review.

#### **IV. CONSERVATORSHIPS**

Tim Shea indicated that the committee had developed some substantial changes in the area of guardianships, but had not yet addresses conservatorships. He asked the committee whether there was anything that we had already done that should not apply to conservators. Committee discussion:

- Should the proposed ward be incapacitated in order to have a conservator?
- The petitioner often is appointed as guardian and conservator.
- Maintain the separation of the roles while urging people to pay attention that the roles are different.
- Should the committee's role be limited to guardianships?
- The suggestion that guardian/conservator be treated as one.
- Under unlimited guardianship, the guardian still would not have the authority of a conservator.
- Concern about the confusion that exists in the current system.
- The current Probate Code, which was adopted in 1975, distinguishes between a guardian and a conservator. Before that the offices were more similar.
- It is difficult for clerks to distinguish between a guardian and a conservator.
- The necessity for a conservator when there are a lot of assets.

The committee will address this issue at its next meeting and invite others who have more experience with conservatorships.

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:** August 6, 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
<b>Planning.</b> No provision	“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.”	“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.”
<b>Authority of the Court:</b> To appoint guardian.	No significant change in the appointment itself, but much more emphasis on the limited authority of the guardian.	Appoint conservator or enter other protective orders. (See below)

**75-5-408. Permissible court orders.**

(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:

(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.

(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.

(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

## Comparison of Guardianship and Conservatorship Laws

tenancy by the entirety, to exercise or release his powers as trustee, personal representative, custodian for minors, 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.

(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.

(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.

### **75-5-409. Protective arrangements and single transactions authorized.**

(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.

(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.

(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.