

Agenda

Ad Hoc Committee on Probate Law and Procedure

October 17, 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
Draft Report	Tab 2	Tim Shea

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

Meeting Schedule

Meeting	
November 14, 2008	Report
December 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

September 19, 2008 - 12:00p.m.

ATTENDEES

Kent Alderman
Kerry Chlarson
Mary Jane Ciccarello
Judge George Harmond
Maureen Henry
Justice Richard Howe
Marianne O'Brien
Julie Rigby
Kathy Thyfault

EXCUSED

Judge Reese Hanson
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. Mary Jane Ciccarello made a motion to approve the minutes of the August 15, 2008 meeting. Kathy Thyfault seconded the motion. The motion carried unanimously.

II. FORMS

Tim Shea stated that since proposed legislation and rules are not in place, the forms were difficult to draft. He stated that the three forms provided to the committee are: a petition to appoint a guardian and/or conservator, a petition to appoint a temporary guardian and/or conservator, and the draft guardianship plan.

Petitioner to appoint a guardian or conservator

- A single form be used for the appointment of both fiduciary offices.
- Legal services uses separate forms.
- Confusion would occur if one form is used instead of a separate form for the guardianship and for the conservatorship.
- Pro se persons will file both forms if separate forms are used.
- The approach of having a guardianship form, conservatorship form and one form

that is combined.

- Pro se litigants frequently request to be both a guardian and a conservator.
- Make more visual cues on the form.

After more discussion the committee agreed that it would be best to use three separate forms, one for the appointment of a guardian, one for appointment of a conservator, and a third form to appoint as both. This will provide internal consistency.

Guardian's Authority

Tim Shea stated that the committee concluded that the order itself should specify the guardian's authority consists of. There are at least three statutes that govern the conservator's authority. Mr. Shea asked the committee how it wanted to portray the authority of the conservator.

- A simple statement that a conservator has been appointed over the protected person's property.
- It would be beneficial if the guardian is directed to request what authority is needed.
- A clear statement that the conservator does not have ownership rights to the protected person's property,
- The need for the code to reflect areas where special authority is needed.
- Have the order recorded at the Recorder's Office.
- Have general categories of authority so the guardian/conservator knows what to expect regarding the protected person's personal property.
- Using a form for only pro se litigants.

Guardianship Plan

Tim Shea stated the committee wanted to focus on limited guardianships. Mr. Shea asked the committee for direction of incorporating other options to the guardianship plan. The committee discussion:

- Should there be a form that orders that the alternative solutions be put into place.
- The guardian should have only the authority necessary to address the protected person's functional limitations.
- There should not be a conservatorship and a trust at the same time.
- No active power of attorney and a conservatorship at the same time.
- There is an alternative to a conservatorship which is a power of attorney, however, there is nothing in the law that requires a third-party to recognize the power of attorney.
- Identify in the petition why the alternatives are inadequate to serve the person's needs.
- Statute does not allow for the recovery of attorney fees.
- Incorporate specific language into the guardianship statute allowing a petitioner to

recover attorneys fees if the petition was brought in good faith and for the benefit of the protected person.

- Will not make deadline for this legislative session. Looking toward the 2010 for any possible legislation.

Petition to Appoint a Temporary Guardian/Conservator

Committee Discussion:

- Typically there is an emergency situation with a need to get into court immediately to protect the protected person or their assets.
- Once the emergency petition is filed there is a followup of a permanent petition.
- The petitions would not be filed simultaneously.
- Requires special court orders that reflect special needs.
- Appointment can last for 30 days, however, the hearing is held within 5 days.

Guardianship Plan

Tim Shea stated that this form was built around the statute that this committee previously drafted as well as some of the forms of other states. The guardianship plan is a long form and Mr. Shea asked if the committee feels that anything can safely be left off the form. Committee discussion:

- An order is required for examinations and services to be carried out.
- Using checkmarks to describe the rights retained by the protected person.
- List the rights that are being retained.
- Makes the guardian more accountable.

The meeting adjourned at 2:00 p.m. The next meeting is scheduled for October 17, 2008.

Tab 2



Utah State Courts

Ad hoc Committee on Probate Law and Procedure



Final Report to the Utah Judicial Council
January 26, 2009

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.

Ad hoc Committee on Probate Law and Procedure
Final Report to the Judicial Council
January 26, 2009

Prepared by
Administrative Office of the Courts
POB 140241
450 S State St
Salt Lake City, UT 84114-0241
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January 26, 2009

The Honorable Christine M. Durham
Chief Justice, Utah Supreme Court
Presiding Officer, Utah Judicial Council
P.O. Box 140241
Salt Lake City, Utah 84114-0241

Dear Chief Justice Durham:

On behalf of the Judicial Council's ad hoc Committee on Probate Law and Procedures, I am pleased to submit this final report with recommendations.

The Judicial Council's charge to the committee was very broad, encompassing nearly any part of probate policy that we decided needs attention. We focused immediately of the laws and procedures governing the appointment of guardians and conservators in the district court. As narrowly as the committee has focused its attention, the topic is large enough and complex enough to have required all of our time. There may well be other aspects of the probate code and the needs of the elderly that merit attention, but we have no recommendations to offer.

In the area of guardianships and conservatorships, however, we offer extensive recommendations. The package combines necessary statutes and rules and nothing less than a cultural shift in the way we think of guardianships and conservatorships.

The appointment of a guardian or a conservator removes from a protected person a large part of what it means to be an adult: the ability to make decisions for oneself. The appointment often comes later in one's life, but not always. Younger adults incapacitated by accident, disease or developmental limitations also are affected. We terminate this fundamental and basic right with all the procedural rigor of processing a traffic ticket.

- The definition of incapacity is essentially the same as it was 100 years ago.
- The respondent is often represented by a lawyer recruited by the petitioner's lawyer.
- The hearing to determine whether and to what extent the respondent is incapacitated is cursory.
- There is little or no procedure to elicit and challenge evidence.
- Evidence is cursory.
- Once appointed, guardians are often given the authority of a conservator whether or not that authority is warranted by the respondent's circumstances.

- Statutes claim to prefer limited authority for guardians, but fail to describe less restrictive alternatives.
- Plenary appointments are common with little to support the need.
- There is no planning for helping protected persons to live their lives as independently as possible.
- There is no regulation of professional guardians.
- There is little education or assistance for family guardians
- There is little training for judges and clerks.

Utah is by no means unique. Quite the contrary. Most states have let this important area of the law slip.

We classify the appointment of a guardian or a conservator as probate a case, but guardianships and conservatorships have more in common with domestic cases than with the intergenerational transfer of property. They share many of the emotional and family financial issues of a divorce. The courts are defining future family relationships. We offer our recommendations with this idea ever in mind.

Originally, we had aimed for recommendations in time to present legislation to the 2009 General Session. That has not proven possible, but the delay has a beneficial side. We recommend that this report, with recommendations and draft statutes and rules, be presented to judges, lawyers, guardians, conservators, mental healthcare providers, physical healthcare providers, service providers and other stakeholders for critical analysis which can be integrated into legislation and rules for 2010.

I want to thank all of the committee members and staff for their dedicated time and attention to the grand concepts and the many, many details that make up a program of this scope. We were well served.

Finally, I want to take this opportunity to thank Judge Sheila McCleve for her work as the first chair of the committee. Circumstances meant that she was not able to remain as chair, but her initial guidance showed us the way.

Sincerely,

George M. Harmond
Committee Chair

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(1) Summary

(2) Introduction

The general state of guardianships and conservatorships may depend upon who one talks to. Although a bit dated, one court group, while recognizing that abuses occur, notes that, “the great majority of guardianships ... are initiated by people of goodwill who are in good faith seeking to assist and protect the respondent. ... Furthermore, in the great majority of guardianship proceedings, the outcome serves the best interests of the respondent and an appointed guardian acts in the respondent's best interests.”¹ Yet empirical researchers from a similar time period, while noting the benefits of guardianships, report that “guardianship ... often benefit[s] the guardian more than the ward and [can] hasten institutionalization for the protected person. ... [H]earings [are] extremely brief, [do] not rely upon medical testimony, and often [result] in plenary orders”²

The committee members’ experience supports both views. And many of the conclusions we reach are based on our observations and experience. We have no statistics to offer because, like most jurisdictions, other than the number of petitions filed, we record little in a systematic way. In how many cases is the respondent excluded from the trial? In how many cases is the respondent not represented by counsel? Not evaluated by a physician or psychiatrist? By a court visitor? In the end, we do not know. Based on our experience we know which observations in the national literature and in the committee testimony ring true.

Appointing a guardian or a conservator is one the most significant interventions by a court into a person’s life. Like a prison sentence or commitment to a mental health facility, the appointment takes from that person the freedom to decide for oneself many, and often times all, of the large and small issues we face every day. Appointing a guardian or conservator legally changes an adult into a child once more, and, as with a child, someone else decides those questions.³

Presumably, in the process for appointing a guardian or conservator, “procedural protections work to ensure that putative wards are fully informed, properly evaluated, zealously defended, that the issues are fully developed and heard, and that an intervention is finely tuned to the needs and preferences of individuals.”⁴ Yet those protections are applied inconsistently at best.

¹ National Probate Court Standards, Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships, Section 3.3 (1993). Hereafter cited as National Probate Court Standards.

² Clinical Evidence in Guardianship of Older Adults Is Inadequate: Findings From a Tri-State Study, *The Gerontologist* Vol. 47, No. 5 (2007) by Jennifer Moye, PhD, Stacey Wood, PhD, Barry Edelstein, PhD, Jorge C. Armesto, PhD, Emily H. Bower, MS, Julie A. Harrison, MA, and Erica Wood, JD. pp 604–605, citing earlier studies. Hereafter cited as “Moye.”

³ Indeed, under current Utah law, “Absent a specific limitation ..., the guardian has the same powers, rights, and duties respecting the ward that a parent has respecting the parent's unemancipated minor child....” Utah Code Section 75-5-312(2).

⁴ Charles P. Sabatino, *Competency: Refining Our Legal Fictions, Older Adults' Decision-Making and the Law* 1, 2 (Michael Smyer, K. Warner Schaie & Marshall B. Kapp eds., Springer Publ. 1996), pp 20-21.

The law requires that the respondent be represented, but the respondent's attorney is often arranged by the petitioner's attorney. The standard to declare someone incapacitated is clear and convincing evidence, but clinical evidence is modest at best. Procedures are cursory. The guardian is usually granted plenary authority over the protected person, with little or no exploration of the protected person's capabilities and in the face of laws that prefer limited authority. Annual reports by guardians and conservators have been required for many years, but only recently has the district court enforced the requirement. The court has no way to verify the truth of those reports, except by objections from the protected person's family, which might be uninterested or perhaps does not exist.

Recently press reports and official investigations in other states have revealed ruined lives and have sent fiduciaries to prison.⁵ Although Utah has so far avoided the scandalous headlines in which a fiduciary abuses, neglects or defrauds the person s/he is responsible for, there is no reason to believe that guardians and conservators in Utah are any less prone to abuse or fraud than those in other states whose malfeasance and negligence has been discovered.

Most petitions are filed in good faith to appoint a person of goodwill, who will serve in the best interests of the protected person, but we rely primarily, if not exclusively, on good faith and goodwill to achieve that result. Good intentions and lack of oversight have, over time, led to summary proceedings that presume to protect the respondent from others and from self, but that offer little real protection from the process itself or from those we put in charge of the respondent's life. And even one case in which the fiduciary takes advantage of the person s/he is supposed to take care of is one too many. Summary proceedings and trust in the capability and goodwill of guardians and conservators are easy, but they deny many respondents the independent living they may be capable of.

To be sure, there are cases in which the respondent is so clearly incapacitated that substantial medical evidence would be costly and without purpose. There are cases in which the respondent is so fully incapacitated that plenary control over that person is the most appropriate arrangement. But not in all cases. Many cases present nuances that need to be explored and capacities that need to be protected.

In Utah, as in most states and in national standards, guardianships and conservatorships are classified as probate cases, yet today they have more in common with family law cases than with probate cases. Those who need protection or help are often seniors but not always. The families involved face the same emotional and financial drain faced in divorce. Although we do not intend to reclassify an entire area of the law, we recommend significant changes to many statutes and rules with the dynamics of family relationships in mind.

This is an area that is ripe for collective action. There are roles here for all three branches of government, the Bar, the healthcare community, and even the larger public community. This is what we hope to achieve:

⁵ See e.g., stories linked at: http://www.citibay.com/cgi-bin/directory.pl?etype=odp&passurl=/Society/Issues/Violence_and_Abuse/Elder/Guardianships/.

- a deliberate inquiry into the limitations and needs of the respondent;
- a measured intervention based on those limitations and needs; and
- oversight to protect the quality of life of a respected individual.

(3) Definition of “incapacity”

(a) Inadequacy of current definition

Merely defining the term “incapacity” is a complex matter. Is it a legal standard or medical? Is it cognitive or functional? What factors are relevant? Can a person lack capacity for some purposes and have capacity for others? Yet we must agree on a definition because the appointment of a guardian or conservator⁶ rests upon the finding that a person is incapacitated.

The current statutes governing guardians and conservators were enacted in 1975 and are based on the Uniform Guardianship and Protective Proceedings Act of 1968. Medical care for and everyday functioning of people well into later life has improved a lot in 40 years, but our definition of “incapacity,” the keystone to the entire protective arch, is not that much different from the definition at the time of statehood.

Utah law defines an incapacitated person as:

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.

Utah Code Section 75-1-201(22).

Although the statute has never been amended to reflect the decision, our Supreme Court has added that the lack of understanding or capacity to make or communicate decisions (required by statute) must be so impaired that the person is unable to care for personal needs or safety to such an extent that illness or harm may occur.

We hold that ... a determination that an adult cannot make ‘responsible decisions concerning his person’ and is therefore incompetent, may be made only if the putative protected person’s decision-making process is so impaired that he is unable to care for his personal safety or unable to attend to and provide for such necessities as food, shelter, clothing, and medical care, without which physical illness or harm may occur.

In re Boyer, 636 P.2d 1085 (Utah 1981).

In other words, poor choices alone – even choices that a reasonable person would describe as irresponsible – do not make one incapacitated.

⁶ Current Utah law permits the appointment of a conservator if the respondent “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....” Utah Code Section 75-5-401(2). Except for confinement, detention and disappearance as reasons to appoint a conservator, this definition is essentially the same as incapacity for the appointment of a guardian.

The Uniform Guardianship and Protective Proceedings Act of 1997 moves away from the traditional “physical illness” and “mental illness” found in the 1968 Uniform Act to focus on the ability to receive and evaluate information or to make or communicate decisions.⁷

More recently, many states and the National Probate Court Standards move away from cognition and decision-making to focus on functional limitations: What can the respondent do and not do? In this approach, cognition and executive functioning remain important, perhaps more important than most other functioning, but, in the end, they are simply functions in which the respondent may face limitations. This approach inherently answers the question: Can a person lack capacity for some purposes and retain capacity for others? At least potentially, the answer is “yes,” depending on the nature of the functional limitations.

This approach requires a particularized inquiry into the circumstances of the respondent, which necessarily is more difficult and time-consuming. The inquiry replaces traditional subjective judgments about the reasonableness of the respondent’s behavior with a more focused decision about the respondent’s capabilities and limitations.⁸

Whether the determination of incapacity is a medical or legal decision is more easily concluded. For the court’s purposes, the decision has to be a legal decision judicially made. The decision might be heavily influenced by medical evidence and opinions, but the decision itself remains a legal consequence.

(b) Proposed definition

By evaluating our current statute and case law, the definitions in other states and those recommended in national standards, and by considering similar concepts from Utah law in other applications, we recommend legislation to adopt the following definition of incapacity for the appointment of either a guardian or a conservator:

“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.

⁷ Uniform Guardianship and Protective Proceedings Act of 1997, Section 102(5). Hereafter cited as 1997 Uniform Act.

⁸ Judicial Determination of Capacity of Older Adults in Guardianship Proceedings, American Bar Association Commission on Law and Aging – American Psychological Association (2006). Hereafter cited as Judicial Determination of Capacity.

Although not mentioned in the *Boyer* holding, we recommend adding “financial harm” to the definition of “incapacity” so that one definition can serve as the grounds for appointing either a guardian or a conservator, rather than the separate but similar definitions we have now. The grounds for appointing a conservator should continue to include confinement and disappearance, and we recommend adding appointment by voluntary request of the person to be protected, but the definition of incapacity as grounds to appoint a conservator should be the same for both offices.

(c) Factors

We propose several factors that the judge might consider when determining the respondent's capacity. Most will be familiar to those experienced in guardianships and conservatorships.

- (1) whether the ward's condition, limitations and level of functioning leave the ward at risk of:
 - (a) his or her property being dissipated;
 - (b) being unable to provide for his or her support;
 - (c) being financially exploited;
 - (d) being abused or neglected, including self abuse; or
 - (e) having his or her rights violated;
- (2) whether the proposed ward has a physical or mental illness, disability, condition, or syndrome and the prognosis;
- (3) whether the proposed ward is able to evaluate the consequences of alternative decisions;
- (4) whether the proposed ward can manage the activities of daily living through training, education, support services, mental and physical health care, medication, therapy, assistants, assistive devices, or other means that the proposed ward will accept;
- (5) the nature and extent of the demands placed on the proposed ward by the need for care;
- (6) the nature and extent of the demands placed on the proposed ward by his or her property;
- (7) the consistency of the respondent's behavior with his or her long-standing values, preferences and patterns of behavior, and
- (8) other relevant factors.

We want to focus on one factor in particular, the respondent's values, preferences and patterns of behavior, with two brief quotes from the benchbook *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings* by the ABA.

Capacity reflects the consistency of choices with the individual's life patterns, expressed values, and preferences. Choices that are linked with lifetime values are rational for an individual even if outside the norm.”⁹

Each of the above factors must be weighed in view of the individual's history of choices and expressed values and preferences. Do not mistake eccentricity for diminished capacity. Actions that may appear to stem from

⁹ Judicial Determination of Capacity, p 5.

cognitive problems may in fact be rational if based on lifetime beliefs or values. Long-held choices must be respected, yet weighed in view of new medical information that could increase risk, such as a diagnosis of dementia.¹⁰

(4) Evidence of incapacity

(a) Inadequacy of current evidence

On what basis should the court decide whether a person is incapacitated? Although the statute requires only that the judge be “satisfied”¹¹ that the respondent is incapacitated, the actual standard – clear and convincing evidence – is well settled. This is the law from the Utah Supreme Court¹², and it is in keeping with the 1997 Uniform Guardianship and Protective Proceedings Act.¹³

Yet from the experience of committee members, it often does not require very much evidence to satisfy that high standard. In an empirical study of guardianship cases in Colorado, Massachusetts, and Pennsylvania,¹⁴ researchers found:

- Written evaluations were filed in all but one case in Massachusetts and Colorado, and in 75% of the cases in Pennsylvania.
- Evaluations were submitted by physicians in 98% of the Massachusetts cases and in 88% of the Pennsylvania cases. In Colorado, clinical reports were submitted by physicians (57%), psychologists (27%), other professionals (9%), or a multidisciplinary team (6%) consistent with the 1997 Uniform Act.
- The average length of clinical reports in Colorado as 781 words, 244 words in Pennsylvania and 83 words in Massachusetts.
- 75% of the Massachusetts reports were hand written, and 65% of these had at least some portion that was illegible. In Pennsylvania and Colorado, reports were almost always typed.

That 83 words, some of which are illegible, might be offered as clear and convincing evidence is beyond belief.

(b) Proposal

The Wingspan Conference recommends that “the pre-hearing process include a separate court investigator or visitor, who must identify the respondent’s wants, needs, and values.”¹⁵ Utah law provides that the respondent may be examined by a court-appointed physician – basically a court-appointed, independent expert – but doing so is not required. And the court may appoint a visitor to interview the respondent, – possibly providing more independent evidence – but again there is no requirement to do so, unless the petitioner proposes that the respondent be excluded from the hearing. By

¹⁰ Judicial Determination of Capacity. p 12.

¹¹ Utah Code Section 75-5-304(1).

¹² *In re Boyer*, 636 P.2d 1085 (Utah 1981).

¹³ 1997 Uniform Act, Sections 311 and 401.

¹⁴ Moyer, p 608.

¹⁵ Wingspan - The Second National Guardianship Conference, Recommendations, Recommendation 30, 31 *Stetson L. Rev.* 595, 601 (2002). Hereafter cited as Wingspan Conference.

omitting this step, we believe that court denies itself critical information with which to assess the respondent's functional abilities and limitations, values, and history, all of which affect the fiduciary's appointment and authority.

A judge should never rely exclusively on an evaluation secured by the petitioner. "A clinical evaluation secured by the petitioner is for the purpose of supporting the petition and may lack attention to the individual's areas of strength, a prognosis for improvement, or important situational factors. An independent assessment can flesh out skeletal or purely one-sided information."¹⁶

The American Bar Association Commission on Law and Aging, in conjunction with the American Psychological Association and the National College of Probate Judges, has prepared a template for a clinical evaluation of the respondent.¹⁷ We have studied it and expanded upon it with suggestions from other sources. It is extensive. Parts of it may not be relevant in some cases, and we recommend that those be excised. But we recommend its consideration in every case. An evaluation by a multidisciplinary team, as in Colorado, may be beyond the means of nearly all families, but we recommend at least the perspective of a court visitor in addition to that of the clinician. Evaluation by a medical professional will probably occur in a clinical setting, but evaluation by the court visitor should, whenever possible, be in the respondent's usual environment and with all due consideration for his or her privacy and dignity.¹⁸

Although Utah Rule of Civil Procedure 35 governs the examination of a party when the party's "mental or physical condition ... is in controversy," we recommend that a statute or special rule continue to govern the respondent's examination in guardianship and conservatorship cases. Rule 35 seems written for personal injury cases and contains provisions inappropriate to these circumstances.

Evidence from family, friends, colleagues, religious ministers, care providers and others will provide the judge with information about who this respondent is, and will enable the judge to decide, not just the respondent's capacity, but also the details of the guardianship plan. A fuller picture of the respondent – gained through more complete evidence – is desperately needed.

(5) Representation

Under Utah law, the court must appoint a lawyer to represent a respondent in a petition to appoint a guardian¹⁹ and may do so in a conservatorship proceeding²⁰ unless the respondent has a lawyer of his or her own choice. Given the importance of the proceedings, it is critical that the respondent have a lawyer.

¹⁶ Judicial Determination of Capacity, p 8.

¹⁷ Judicial Determination of Capacity, pp 25-32.

¹⁸ Guardianship, An Agenda for Reform: Recommendations of the National Guardianship Symposium and Policy of the American Bar Association. Recommendation III-B. 13 Mental & Physical Disability L. Rep. 271, 289 (1989). Hereafter cited as the Wingspread Conference.

¹⁹ Utah Code Section 75-5-303(2).

²⁰ Utah Code Section 75-5-407(1).

(a) Current availability of lawyers

Legal Aid Society of Salt Lake and Utah Legal Services are the primary free legal service providers in Utah. Legal Aid Society of Salt Lake is limited to Salt Lake County. Utah Legal Services represents clients throughout the state. Both represent clients in a variety of cases for which the client must income-qualify.

With intermittent grant funding, the Legal Aid Society of Salt Lake represents for free the respondent in a guardianship petition in Salt Lake County if the respondent meets the income guidelines. There is no age restriction.

Utah Legal Services, by contract with many of the counties under the Older Americans Act,²¹ represents for free the respondent in a guardianship petition if the respondent is 60 or older and if there is sufficient funding through the local Area Agency on Aging. There is no income-qualification under the Older Americans Act, but resources are limited, so the local Area Agencies on Aging find legitimate ways to prioritize services. If there is not sufficient funding through the local Area Agency on Aging, Utah Legal Services recruits a lawyer to represent the respondent for free. If the respondent is under 60, Utah Legal Services recruits a lawyer to represent the respondent for free, but the respondent must meet the ULS income guidelines.

Sometimes a respondent will have a lawyer who has represented him or her in another matter. The respondent – or perhaps the petitioner on the respondent’s behalf – will seek representation by that lawyer. Sometimes that lawyer may be the “family” lawyer, whose interests may be divided between the respondent and the family members who are trying to do their best by the respondent.

Many respondents simply will not be served by the conditional and informal arrangements for free legal representation, yet they cannot afford to hire a lawyer. In these circumstances the petitioner’s lawyer might recruit a lawyer to represent the respondent.

Regardless who represents the respondent, the question “Who pays?” is equally critical. Utah law provides that if the petition is “without merit,” the petitioner pays court costs and the respondent’s lawyer. Otherwise, the respondent must pay for his or her representation, but the respondent often cannot afford an attorney even though s/he may not qualify for one of the free Utah programs.

Finally, how qualified is the lawyer? Lawyers from Legal Aid Society of Salt Lake and Utah Legal Services are highly qualified and overworked. Their pro bono recruitment efforts usually produce a lawyer qualified for the case, which may run from well qualified in a complex case to modestly qualified in simpler, uncontested cases. In the experience of committee members, however, and from testimony by lawyers experienced in this area, there are many cases in which the respondent’s lawyer represents the respondent in little more than name.

²¹ Utah Legal Services is not the exclusive provider. Some counties contract with individual lawyers.

(b) Proposal

The Wingspread Conference recommends that “Courts should help develop an ongoing system that will ensure effective legal representation of respondents.”²² Utah has long mandated that the respondent be represented, at least in guardianship proceedings.²³ We recommend an ambitious program to give real effect to that policy: to ensure that respondents who are caught between the inability to qualify for free services and the inability to pay for retained services, are represented by qualified attorneys who are at least modestly paid for their work.

(i) Conservatorships

We begin by recommending legislation to require representation for the respondent in petitions to appoint a conservator as well as in petitions to appoint a guardian. Utah law currently requires representation in the latter case and permits it in the former case. The reason for the distinction usually involves the explanation that a conservator controls only the respondent’s money, while a guardian controls the respondent’s person. But in our society, a person who loses the right to decide how to invest and spend money and how to manage property has lost just as much as the person who loses the right to vote or to make healthcare decisions. Representation in conservatorships is just as necessary as in guardianships. Mandatory representation in both types of appointments is recommended by the National Probate Court Standards.²⁴

(ii) Appointment

The Wingspread Conference recommends that “training should be ... required for attorneys who wish to be appointed as counsel in guardianship cases....”²⁵ To better ensure the qualifications of the lawyer representing the respondent, we recommend that, unless the respondent has the lawyer of his or her own choosing, the district court appoint a lawyer from a roster of lawyers maintained by the Utah State Bar under the authority of the Supreme Court. There should be minimum requirements for training, observation, mentoring and continuing education to qualify for the roster. We recommend an appropriation to pay for some of the appointments, but all appointments would be from the roster, unless the respondent has retained his or her own lawyer.

The appointment would be, essentially, a rotation: When a petition for the appointment of a guardian or a conservator is filed, the clerk would offer the appointment to the first lawyer in order on the roster willing to accept assignments in that county. The lawyer would review the case for conflicts of interest and other factors that might impede the lawyer from independent and zealous representation of the respondent. If the lawyer declines the appointment, the clerk would offer the appointment to the next lawyer on the roster. Upon accepting the appointment, the judge would enter an order appointing the lawyer, and the clerk would move the lawyer’s name to the bottom of the roster.

²² Wingspread Conference. Recommendation IV-D.2. 13 Mental & Physical Disability L. Rep. 271, 295 (1989).

²³ Utah Code Section 75-5-303(2).

²⁴ National Probate Court Standards. Standards 3.3.5 and 3.4.5.

²⁵ Wingspread Conference. Recommendation II-D(2). 13 Mental & Physical Disability L. Rep. 271, 286 (1989).

(iii) Roster

The executive director of the Utah State Bar would maintain and publish a roster of lawyers qualified to represent respondents in guardianship and conservatorship cases. A lawyer could be added to the list in the order in which s/he certifies to meeting the minimum requirements. To qualify for the roster, a lawyer would have to:

- acquire at least four hours of MCLE or four hours of accredited law school education in the law and procedures of guardianship and conservatorships;
- observe a mentor representing at least one respondent, which may be satisfied under Rule 14-807, Law student assistance;
- serve as co-counsel with a mentor representing at least one respondent, which may be satisfied under Rule 14-807, Law student assistance;
- serve as lead counsel with a mentor representing at least one respondent;
- be recommended by one's mentors;
- agree to represent indigent respondents for attorney fees, costs and extraordinary expenses approved by the court under statute; and
- agree to represent respondents who are not indigent based on the person's ability to pay.

To be retained on the roster the lawyer would biannually certify to have:

- acquired at least two hours of MCLE in the law and procedures of guardianship and conservatorships; and
- represented at least two indigent respondents.

Minimum education requirements would be part of and not in addition to existing mandatory continuing legal education requirements. If there are not at least two indigent respondents to be represented, that requirement would be waived. The executive director should be able to waive the initial or continuing requirements that show competence if the lawyer demonstrates by education and experience proficiency in the law and procedures of guardianship and conservatorship proceedings.

(iv) Money

The Second Annual Wingspan Conference recommends that: "innovative and creative ways be developed by which funding sources are categorically directed to guardianship."²⁶ Finding the money to pay lawyers willing to take assignments is the most difficult part of this program. We propose a general fund appropriation, but there may be funds available through *and Justice for All*, the Utah Bar Foundation and other sources.

The needs of the most indigent are being met – as well as they can be met – through Legal Aid Society of Salt Lake and Utah Legal Services. We mean not to interfere with those services. Utah Legal Services can serve clients whose income is below 200% of the federal poverty guideline, so we start our program where they leave off.

We recommend that a lawyer appointed from the roster be paid \$50 per hour if the respondent's income is between 200% and 300% of the of the federal poverty

²⁶ Wingspan Conference. Recommendation 7, 31 Stetson L. Rev. 595, 596 (2002).

guidelines or the respondent does not have sufficient income, assets, credit, or other means to pay the expenses of legal services without depriving the respondent or the respondent's family of food, shelter, clothing, and other necessities. In future years, the \$50 per hour would be adjusted for inflation. Respondents who do not meet this test would pay for representation from their estates, based on the ability to pay.

(v) Role of respondent's lawyer

Currently, Utah law distinguishes between the role of the respondent's lawyer in guardianship and conservatorship cases. If the petition is to appoint a guardian, the lawyer has the traditional duty to "represent" the respondent.²⁷ If the petition is to appoint a conservator, the lawyer "has the powers and duties of a guardian ad litem."²⁸ Under the 1997 Uniform Act, the court would appoint a lawyer to "represent" the respondent.²⁹ The National Probate Court Standards recommend that the role of counsel is to advocate for his or her client.³⁰ The Wingspread Conference³¹ and the Wingspan Conference³² recommend zealous advocacy by the respondent's lawyer.

We concur that the lawyer's role is to represent the respondent (not the respondent's best interests) independently and zealously, just as in any other attorney-client relationship. Rule of Professional Conduct 1.14 already advises the lawyer on representing a person of diminished capacity,³³ and that rule has already been revised, in keeping with the ABA Ethics 2000 Commission and the recommendations of the Wingspan Conference³⁴ to allow the lawyer flexibility to take protective action. The Probate Code should not interfere with that relationship.

(6) Court process

(a) Mediation

Mediation would seem to be particularly suitable for adult guardianship cases for a number of reasons. These cases usually 1) involve ongoing family relationships and the inevitably-attendant emotional issues; 2) include sensitive information that the participants would prefer to keep private; 3) sometimes require flexible and creative resolutions; and 4) often involve parties who cannot afford protracted litigation. Yet the use of mediation in adult guardianship cases raises a host of questions. ... An adult guardianship case, by its very nature, centers on an individual whose capacity is in question. Guardianship adjudications are designed to offer maximum protection to that individual because he or she may not be capable of protecting himself or herself. Mediation, on the other hand, is

²⁷ Utah Code Section 75-5-303(2).

²⁸ Utah Code Section 75-5-407(2).

²⁹ 1997 Uniform Act, Section 406

³⁰ National Probate Court Standards. Standards 3.3.5 and 3.4.5.

³¹ Wingspread Conference. Recommendation II-C. 13 Mental & Physical Disability L. Rep. 271, 285 (1989)

³² Wingspan Conference. Recommendation 28. 31 Stetson L. Rev. 595, 601 (2002).

³³ Rule of Professional Conduct 1.14. See also RPC 1.6, also amended as part of the Ethics 2000 project to allow disclosure of some information.

³⁴ Wingspan Conference. Recommendation 59. 31 Stetson L. Rev. 595, 607 (2002).

grounded in the principle of self-determination and presumes that the parties are capable of participating in the process and bargaining for their own interests. Can these two concepts be reconciled?

Is the Use of Mediation Appropriate in Adult Guardianship Cases? Mary F. Radford, 31 Stetson L. Rev. 611, 639-640 (2002), hereafter cited as "Radford."

Although mediation of guardianship and conservatorship proceedings is not without its critics,³⁵ many organizations and individuals recommend that mediation be an integrated part of those cases,³⁶ and we concur.

Professor Radford concludes, after a thorough analysis from which we draw liberally, that mediation is appropriate in guardianship and conservatorship cases, but that these cases present several issues that must be carefully considered by the mediator and the judge.

(i) Capacity of respondent to mediate

The ADA Mediation Guidelines recommend special factors for the mediator to consider when mediating with a person of potentially diminished capacity:

1. The mediator should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options and make and keep an agreement.
2. If a party appears to have diminished capacity or if a party's capacity to mediate is unclear, the ... mediator should determine whether a disability is interfering with the capacity to mediate and whether an accommodation will enable the party to participate effectively.
3. The ... mediator should also determine whether the party can mediate with support.

ADA Mediation Guidelines, Guideline I.D.³⁷

Even if the respondent lacks capacity to participate, the ADA Guidelines permit mediation if s/he is present and a surrogate represents the respondent's interests, values and preferences and makes decisions for the respondent.³⁸

[The Center for Social Gerontology's] Adult Guardianship Mediation Manual also offers mediators a set of guidelines for determining whether

³⁵ See e.g., Winsor C. Schmidt, Jr., What is Known and not Known about the State of the Guardianship and Public Guardianship System Thirteen Years After the Wingspread National Guardianship Symposium. 31 Stetson L. Rev. 1027, 1032-1033 (2002).

³⁶ See e.g., National Probate Court Standards, Standard 2.5.1. Wingspan Conference. Recommendation 24, 31 Stetson L. Rev. 595, 600 (2002) The Center for Social Gerontology, <http://www.tcsq.org/>. Professor Mary F. Radford, 31 Stetson L. Rev. 611, 685 (2002).

³⁷ <http://www.cojcr.org/ada.html>

³⁸ ADA Mediation Guidelines, Guideline I.D.4.

the adult has capacity to participate in the mediation. These guidelines appear in the form of eight questions:

- 1) Can the respondent understand what is being discussed?
- 2) Does he or she understand who the parties are?
- 3) Can the respondent understand the role of the mediator?
- 4) Can the respondent listen to and comprehend the story of the other party?
- 5) Can he or she generate options for a solution?
- 6) Can he or she assess options?
- 7) Is the respondent expressing a consistent opinion?
- 8) Can he or she make and keep an agreement?

Radford, 31 Stetson L. Rev. 611, 650 (2002), citing The Center for Social Gerontology's Adult Guardianship Mediation Manual.

(ii) Power imbalance among the parties

The mediator must remain alert to power imbalances among the parties and take appropriate measures to neutralize them, such as:

- ensuring that the Respondent is adequately represented;
- structuring presentations so that the Respondent is allowed to speak first;
- ensuring the neutrality of the mediation site;
- encouraging experts to convey information in an understandable manner; and
- intervening to clear up confusion and assuage the Respondent's fears.³⁹

The more subtle obstacle to self-determination by an adult ... is the tendency of family members, attorneys, judges, and perhaps even mediators to want to structure a framework that is protective of the adult but that may not necessarily protect the adult's fundamental right to autonomy. ... The mediator, as guardian of the principle of self-determination, must remain alert to the distinct possibility that the other, "saner," parties to the mediation are asserting their own values rather than reflecting the values of the adult.

Radford, 31 Stetson L. Rev. 611, 653-654 (2002).

(iii) Mediator training

The Wingspan Conference recommends that: "standards and training for mediators be developed in conjunction with the Alternative Dispute Resolution community to address mediation in guardianship related matters."⁴⁰ We concur.

Mediation of guardianships and conservatorships requires training and experience that the Utah community may not yet have. Because mediation of guardianship and conservatorship proceedings does not have a history in Utah, because the only specialized training of court-annexed ADR providers focuses on family law disputes,⁴¹ and because of the special risks of mediating a guardianship case, we encourage the

³⁹ Radford, 31 Stetson L. Rev. 611, 652 (2002).

⁴⁰ Wingspan Conference. Recommendation 22. 31 Stetson L. Rev. 595, 599 (2002).

⁴¹ CJA 4-510(3)(C).

mediation community to develop training classes and materials along the lines recommended by the Wingspread Conference:

- (a) the rights and procedures applicable in guardianship proceedings;
- (b) the aging process and disability conditions, and the myths and stereotypes concerning older and disabled persons;
- (c) the skills required to effectively communicate with disabled and elderly persons;
- (d) the applicable medical and mental health terminology and the possible effects of various medications on the respondent; and
- (e) services and programs available in the community for elderly and/or disabled persons.⁴²

The Center for Social Gerontology also offers a substantial curriculum for mediation in guardianship proceedings.⁴³

(b) Probate court or probate judge

The Wingspan Conference recommends judicial specialization in guardianships,⁴⁴ however, we do not. We recommend extensive judicial education and training, but we do not recommend forming a probate department of the district court or appointing a specialized probate judge. Training for all will have to serve the objectives of specialization by a few.

Although the clerks' office in some districts has a recognizable probate department, the district court has favored the general assignment of cases among its judges for many years. The same factors that make specialization in probate attractive – small caseload, specialized procedures, and expansive geography – also work against specialization. There might be sufficient caseload in probate cases generally to merit a full-time judge in the Third Judicial District, but not in guardianship and conservatorship cases alone, and not outside of the Third District. At some point, there may be sufficient caseload to merit an arrangement similar to the district court's "tax court," a handful of judges from around the state, who are assigned the regular variety of cases from their home district but who are assigned probate cases from all of the districts when a case is contested.

(c) Access to records

During our study, the Judicial Council asked for our recommendations on public access to guardianship and conservatorship records. We recommended that, except for the appointment order and letters, which must be public, guardianship and conservatorship records be classified as "private": available to the court and to the parties, but not to the public. Rule 4-202.02 has since been amended accordingly.

Our research showed that, of the states that make an express classification, about half allow public access and half do not.

⁴² Wingspread Conference. Recommendation II-D. 13 Mental & Physical Disability L. Rep. 271, 286 (1989).

⁴³ <http://www.tcsg.org/mediation/manual.htm>.

⁴⁴ Wingspan Conference. Recommendation 56. 31 Stetson L. Rev. 595, 606 (2002).

Public	Private
Arizona	Alaska
Arkansas	California
Connecticut	Colorado
Illinois	Delaware
Indiana	Florida
Iowa	Georgia
Kansas	Idaho
Louisiana	Kentucky
Nebraska	New Mexico
Nevada	South Dakota
Oregon	Hawaii - Guardian
Washington	
Wyoming	
Hawaii - Conservator	

As we noted in our earlier recommendation: guardianship and conservatorship records and hearings historically have been public not because of any deliberate decision, but because no one seems to have asked whether they should be private. Hearings should remain public. Public scrutiny controls abuse and assures people that the authority granted by the court is appropriate. Public records serve this important goal just as much as public hearings, but court records contain significant medical information, financial information, living situation, and personal identifying information about the respondent. The respondent, almost by definition, is vulnerable to being victimized and the court records provide the information with which to do so. The combination of public hearings and private records, while not common, has precedent in juvenile court cases and adoption cases.

There are records that can safely remain public. The appointment order and letters have been mentioned. These are necessarily public because they need to be shared on a regular basis with people not associated with the case; sometimes even recorded as part of public land records. The existence of the case (case name and number) and the register of actions or docket should also be public. These latter two pieces of information were swept in with our earlier recommendation because of the district court case management system’s inability to differentiate them. But there is no privacy or security interest to be protected, and the Administrative Office of the Courts is working to sequester the documents filed in a guardianship or conservatorship case while allowing public access to the record of the document being filed.

(7) Fiduciary authority

(a) Less restrictive alternatives to guardianship or conservatorship

Currently, in order to appoint a guardian with plenary authority, the court must make a finding that nothing less is “adequate.”⁴⁵ We believe that the petition should review the alternatives to appointing a guardian or conservator and explain why none are appropriate.⁴⁶ The hearing should include evidence to support that conclusion.

⁴⁵ Utah Code Section 75-5-304(2).

⁴⁶ Wingspan Conference. Recommendation 20. 31 Stetson L. Rev. 595, 598 (2002). Wingspread Conference. Recommendation I-A. 13 Mental & Physical Disability L. Rep. 271, 277 (1989).

Less restrictive alternatives may go unexplored simply because of unfamiliarity, so we describe some here. The following options are some alternatives to guardianship or conservatorship (There may be others.) that may meet the respondent's needs.⁴⁷ All require the respondent's cooperation. Some require the respondent's capacity.

(i) Alternatives for financial decision-making

Representative payee. Several federal agencies, such as the Social Security Administration, can appoint a person to receive benefits on behalf of a beneficiary who is unable to administer his or her finances. A representative payee maintains control over the benefits, signs all checks drawn on the benefits, and spends the benefit money to meet the needs of the beneficiary. A person applying to an agency to be a representative payee does not first need to be appointed as a guardian or conservator.

Trust. Trusts can be useful planning tools for incapacity because they can be established and controlled by a competent person and continue if that person later becomes incapacitated. The trustee holds legal title to the property transferred to the trust and has the duty to use the property as provided in the trust agreement which can be for the benefit of the trustor during his or her lifetime. Trusts are regulated by statute and should be drafted by a lawyer.

Power of attorney. Power of attorney is a document in which the respondent authorizes an agent to act on his or her behalf. The power of attorney can be for a specified time or until the respondent cancels it. The power of attorney can grant a specific authority or grant more general authority to act in financial transactions. Some common powers of attorney:

- Open, maintain or close bank accounts or brokerage accounts
- Sell, convey, lease or maintain real estate
- Access to safe deposit boxes and their contents
- Make financial investments
- Borrow money, mortgage property, or renew or extend debts
- Prepare and file federal and state income tax returns
- Vote at corporate meetings
- Purchase insurance for the principal's benefit
- Initiate, defend, prosecute, or settle any lawsuit
- Start or carry on business
- Employ professional and business assistances of all kinds, including lawyers, accountants, real estate agents, etc
- Apply for benefits and participate in governmental programs
- Transfer to a trustee any and all property
- Disclaim part or all of an inheritance

Joint bank account. In a joint bank account a trusted friend or family member co-owns the account with the respondent. Both have ownership of and access to the account, so great caution should be taken.

⁴⁷ Borrowed liberally from *Alternatives to Guardianship and Conservatorship for Adults in Iowa*, The Iowa Department of Elder Affairs and the Iowa Governor's Developmental Disabilities Council, pp 6-13 (2001).

Automatic banking. A person can often retain control of his or her own affairs with the help of automatic deposits and automatic bill payments.

Trusted help. The respondent may be able to manage his or her own financial affairs simply with help, either by a family member or trusted friend or by a professional. Such a person could help organize a budget, write checks for the respondent's signature, assist with related paperwork, and propose and explain investments. Be watchful for undue influence by the person providing help.

(ii) Alternatives for healthcare decision-making

Power of attorney. Power of attorney can also be used for healthcare decisions. Power of attorney is a document in which the respondent authorizes an agent to make healthcare decisions whenever the respondent cannot. This agent is required to make healthcare decisions according to directions provided by the respondent.

Advance healthcare directive. Advance directives are instructions the respondent gives to healthcare providers and family to make sure his or her wishes regarding healthcare are followed in case s/he is no longer able to communicate.

(iii) Crisis intervention

Mediation, counseling, and respite support services. Counseling is available for both caregiver and respondent if the respondent does not lack capacity, but is unwilling to agree to reasonable requests. A mediator may be able to help reach a compromise. Respite care provides temporary relief to the caregiver if caregiver or respondent are aged 60 or older. The respite may be brief, 2-3 hours, or longer than 24 hours, and the care may take place at the individual's residence or elsewhere.

(iv) Organizations willing to help

Area Agencies on Aging administer programs for those aged 60 and over such as:

- Access to other services: transportation, outreach, and information and referral;
- Community services: congregate meals, legal services, case management, and continuing education;
- In-home services: respite care, home health, homemaker, home-delivered meals and chore maintenance; and
- Services to residents of care-providing facilities.

Community based services. There are many free and low-cost services offered by government agencies, religious organizations and others for which the respondent may qualify, such as, home nursing, home health aides, homemakers, home delivered meals, mental health services, and transportation.

(b) Fiduciary's limited authority

If the respondent is incapacitated and a guardian is needed, plenary authority, except when the respondent is completely incapacitated, is universally condemned.⁴⁸

⁴⁸ Wingspread Conference. Recommendations III-D and IV-B. 13 Mental & Physical Disability L. Rep. 271, 290 and 292 (1989). Wingspan Conference. Recommendations 38 and 39. 31 Stetson L. Rev. 595,

Although plenary appointments are relatively common under our current statutes, even current law directs the judge to “prefer” limited authority to plenary appointments.⁴⁹ Unfortunately, after that brief admonishment, the statute does nothing to support the result, other than require a finding that nothing else will do.

We believe that the “petition and order should include detailed statements of the respondent's functional capabilities and limitations”.⁵⁰ The hearing should include evidence of the same. The order should be tailored to the respondent’s particular limitations. In the statutes we have proposed, rather than presuming full authority and requiring an express limitation of it, as the Code does now,⁵¹ the authority of the guardian would be presumed limited to the authority expressly stated in the order. Only by listing all available authority would the court be able to make a plenary appointment, which should require findings supported by clear and convincing evidence that such an appointment is necessary.⁵²

There is no simple formula that will help judges make the determination. The following broad classification could serve as an initial schema:

- If minimal or no incapacities, petition not granted, use less restrictive alternative.
- If severely diminished capacities in all areas, or if less restrictive interventions have failed, use plenary guardianship.
- If mixed strengths and weaknesses, use limited guardianship.

The cases in which there are “mixed areas” of strengths and weaknesses present the greatest challenge – and the greatest opportunity – for the “judge as craftsman” to tailor a limited order to the specific needs and abilities of the individual.

Judicial Determination of Capacity, p 13.

(i) Guardian or Conservator?

In determining the appropriate authority, the judge should decide whether the respondent’s limitations require a guardian, a conservator or both. And this ultimate decision should be reflected in the petition that starts the case. Practice over the years has degenerated to the point that many, probably most, petitioners request appointment to both offices, when one or the other might do. Petitioners, who know only the conventional wisdom that a conservator is responsible for the respondent’s estate and a guardian is responsible for the respondent’s care and well-being, may not realize the significant additional fiscal responsibility that comes with being a conservator.

602-603 (2002). National Probate Court Standards, Standard 3.3.10. 1997 Uniform Act, Section 314. Judicial Determination of Capacity, p 2.

⁴⁹ Utah Code Section 75-5-304(2).

⁵⁰ Wingspread Conference. Recommendation IV-B. 13 Mental & Physical Disability L. Rep. 271, 293 (1989).

⁵¹ Utah Code Section 75-5-312(2).

⁵² Wingspan Conference. Recommendation 39. 31 Stetson L. Rev. 595, 603 (2002).

Currently, guardians have some modest authority over the respondent's estate.⁵³ We propose delineating the guardian's authority for many everyday property transactions, reserved to a conservator if one is appointed, that may reduce the need to appoint a separate conservator or to appoint one fiduciary to both offices.

Only if the petitioner requests authority beyond these transactions and the judge agrees that it is needed should a conservator be appointed. Under current law, a guardian may receive the respondent's money and property and has a duty to "conserve any excess for the ward's needs,"⁵⁴ a relatively simple standard of care. A conservator, on the other hand, must meet the much higher standards of a trustee,⁵⁵ exercising reasonable care, skill, and caution as would a prudent investor⁵⁶ and making reasonable efforts to verify facts⁵⁷ while investing and reinvesting the respondent's estate.⁵⁸ Many professional guardians and probably nearly all family guardians do not have that acumen, do not need that authority, and would do well to leave the responsibility to a professional conservator.

(ii) Rights retained by the respondent – Restrictions on the fiduciary's authority

The respondent should retain all rights, power, authority and discretion not expressly granted to the guardian by statute or court order.

The right of the respondent to vote in governmental elections is particularly difficult. The right cannot be assigned to the guardian in any event, but when is it proper to deny that right to the respondent? We propose the standard recommended by the ABA. The respondent retains the right to vote in governmental elections unless "the court finds [by clear and convincing evidence] that the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process."⁵⁹ It would be helpful if further statutory and practical changes were implemented to accommodate voting by respondents determined to be incapacitated, but that is beyond the scope of this report.

The guardian should not be able to:

- consent to commitment of the respondent to a mental retardation facility (The guardian should petition the court for an order under with Title 62A, Chapter 5, Part 3, Admission to Mental Retardation Facility.);
- consent to commitment of the respondent to a mental health care institution (The guardian should petition the court for an order in accordance with Title 62A, Chapter 15, Part 6, Utah State Hospital and Other Mental Health Facilities.);

⁵³ Utah Code Section 75-5-312(2)(b) (commence protective proceedings); (2)(d)(i) (initiate proceedings to compel support); (2)(d)(ii) ((receive money and property deliverable to the respondent).

⁵⁴ Utah Code Section 75-5-312(2)(d)(ii).

⁵⁵ Utah Code Section 75-5-417(1); Utah Code Section 75-5-424(1).

⁵⁶ Utah Code Section 75-7-902(1).

⁵⁷ Utah Code Section 75-7-902(4).

⁵⁸ Utah Code Section 75-5-424(2).

⁵⁹ Resolution of the ABA House of Delegates approved on August 13, 2007.

- consent to sterilization of the respondent; (The guardian should petition the court for an order in accordance with Title 62A, Chapter 6, Sterilization of Handicapped Person.); or
- consent to termination of the parental rights in the respondent or of the respondent's parental rights in another.

Unless permitted by the court, the guardian should not be able to:

- consent to the admission of the respondent to a psychiatric hospital or other mental health care facility;
- consent to participation in medical research, electroconvulsive therapy or other shock treatment, experimental treatment, forced medication with psychotropic drugs, abortion, psychosurgery, a procedure that restricts the respondent's rights, or to be a living organ donor;
- consent to termination of life-sustaining treatment if the respondent has never had health care decision making capacity;
- consent to name change, adoption, marriage, annulment or divorce of the respondent;
- prosecute, defend and settle legal actions, including administrative proceedings, on behalf of the respondent;
- establish or move the respondent's dwelling place outside of Utah; or
- restrict the respondent's physical liberty, communications or social activities more than reasonably necessary to protect the respondent or others from substantial harm.

(iii) Maximizing respondent's independence – Decision-making standard

"The court's order should require the guardian to attempt to maximize self-reliance, autonomy and independence...."⁶⁰ Reacquiring capacity is legally and practically possible, and the guardian should take reasonable steps to that end.

Regardless whether the respondent might reacquire capacity, maximizing independence includes applying the "substitute judgment" standard when making decisions on the respondent's behalf. When the guardian or conservator uses the substitute judgment standard s/he makes the decision that the respondent would have made when competent. The fiduciary therefore has a duty to learn the respondent's values, preferences and patterns of behavior that form the basis of what respondent would have done. Substitute judgment is the decision-making standard used in all circumstances except those that permit the "best interest" standard to be used.

The fiduciary may use the best interest decision-making standard when:

- (a) following the respondent's wishes would cause him or her substantial harm;
- (b) the guardian or conservator cannot determine the respondent's wishes; or
- (c) the respondent has never had capacity.

⁶⁰ Wingspread Conference. Recommendation IV-B. 13 Mental & Physical Disability L. Rep. 271, 293 (1989).

When the guardian or conservator uses the best interest standard, s/he makes the decision that is the least intrusive, least restrictive, and most normalizing course of action to accommodate the respondent's particular functional limitations.

(iv) Respondent's values, preferences and patterns

The respondent's values, preferences and patterns of behavior should play a big role in shaping the outcome of a petition to appoint a guardian or conservator. Not only are they important in determining capacity, as discussed in Section (3)(c), but also in determining who the guardian should be, the guardian's authority, and even some of the guardian's decisions, such as medical and financial decisions and living arrangements.⁶¹ If the court and the fiduciary are to give any realistic meaning to the standard of "substituted judgment," it is critical to learn what those values, preferences and patterns are. The respondent may have something to say. The clinician and court visitor should include the respondent's values, preferences and patterns of behavior as part of their investigation. Family, friends, colleagues, religious ministers, care providers and others also may have useful evidence.

(8) Emergency appointments

Current Utah law permits the emergency appointment of a temporary guardian,⁶² but there is no similar provision for a temporary conservator. Emergency appointments are sometimes necessary, but our current statute provides less protection to the respondent than the Rules of Civil Procedure provide to a defendant for a temporary restraining order.⁶³ The 1997 Uniform Act addresses these shortcomings and we have integrated many of its features into our proposed legislation. We have also integrated the features of a temporary restraining order and preliminary injunction, procedures lawyers and judges are familiar with.

The authorities differ on whether a regular petition should be filed with the emergency petition. Standard 3.3.6(a)(2) of the National Probate Court Standards recommends it. The 1997 Uniform Act Section 312 recommends against it. The Wingspan Conference also seems to recommend that a regular petition be required.⁶⁴ The commentary to the 1997 Uniform Act argues that requiring a petition "lends an air of inevitability that a permanent guardian should be appointed;" that respondent's need for a guardian might be temporary and his or her long-term needs might be met by other mechanisms.

Our current Utah statute is silent on the question, and usually courts do not require a regular petition. But that model permits the court to take drastic action limiting the independence and autonomy of the respondent based on a finding that doing so is for the respondent's own good (best interest) and that following the regular process will

⁶¹ Judicial Determination of Capacity, p 5.

⁶² Utah Code Section 75-5-310.

⁶³ Utah Rule of Civil Procedure 65A. Injunctions. Our current statute regulating emergency petitions does not require appointment of counsel for the respondent, even though counsel is required for regular petitions.

⁶⁴ Wingspan Conference. Recommendation 34. 31 Stetson L. Rev. 595, 602 (2002). Although not stating directly that a regular petition should be required, the Conference recommends that the emergency appointment require "a hearing on the permanent guardianship as promptly as possible...."

likely cause respondent substantial harm. There does not need to be even a claim that the respondent is incapacitated. This is very much like approval of a “single transaction” in protective proceedings, but even that requires a showing of the underlying basis to support appointment of a conservator or entry of a protective order. We agree with the recommendations of the National Probate Court Standards. Just as with a temporary restraining order or preliminary injunction in a civil case, there needs to be an underlying claim or cause of action on which to base temporary relief. A regular petition should be required.

Our proposal requires a hearing on the emergency petition and notice to the respondent unless the respondent would be substantially harmed before a hearing could be held. In the later case, the judge may consider evidence of the emergency *ex parte*. The guardian’s authority would be limited to what is justified by the emergency and expressly stated in the order. A hearing on the emergency appointment must be held within 5 days after the appointment and notice of the appointment and hearing given within 2 days. An emergency order without hearing and notice would expire after 5 days. An emergency order with hearing and notice would expire after 60 days.⁶⁵

(9) Monitoring guardians and conservators

(a) Planning

Taking responsibility for an adult life is no easy task. We recommend that guardians and conservators develop a plan for how they will implement the authority given them and that the plan be filed with the court.

(b) Annual reports

The Judicial Council and the district courts have already taken the important step of monitoring and enforcing the annual reporting requirements for guardians and conservators, and the administrative office of the courts has developed forms and an interactive web interview to guide the fiduciaries through that process. We recommend that the district court continue these essential efforts.

(c) Volunteer court visitors

Annual reporting about the respondent’s well-being and estate are a necessary first step to protect the respondent’s personal and financial health and safety. But unless someone reviews those reports and follows up as necessary, they are of little value. The current Utah law and the 1997 Uniform Act rely on objections by those family members who are required to be served with a copy of the reports. If anyone objects, the court will conduct proceedings to decide the competing claims. If no one objects, the court is left on its own, which usually means the report will be approved.

Giving those interested in the respondent standing to object is a necessary second step, but it is inadequate. Mistreatment of the respondent or misappropriation of money,

⁶⁵ Sixty days conforms to the 1997 Uniform Act, Section 312, but it is twice as long as current Utah law. We believe that by imposing a more rigorous process on the emergency appointment, it is safe to extend the time in which to conduct the medical and social evaluations and prepare evidence for the regular hearing.

whether by intent or negligence, may occur without it being obvious in the reports. Those who are interested in the ward may themselves participate to harm or defraud the ward. Perhaps the respondent is without family. We recommend, therefore, that the court select reports to be reviewed for errors or fraud and to follow up based on the results. We recommend that the court appoint visitors periodically to interview respondents, fiduciaries and others after the appointment.

Other jurisdictions have successfully established volunteer programs to monitor appointments more closely.⁶⁶ The model is very similar to the Court Appointed Special Advocate (CASA) program in the juvenile court, which has been so successful at helping children whose parents are accused of abuse. The courts would hire a coordinator whose job is to recruit and train volunteers to perform the duties of a court visitor. The results can be invaluable to the court.

The model came to light as we investigated methods of monitoring guardians and conservators after appointment, but court visitors should be used in the initial investigation of incapacity as well. An organized volunteer program such as this offers the best hope of also serving that need. The courts can create a volunteer program only over time, but eventually, in a fully developed volunteer program, a court visitor might:

- Before appointment
 - Interview the respondent and proposed fiduciary
 - Interview family members and others as appropriate
 - Visit the respondent's current and proposed residences
 - Report to the court
- After appointment
 - Review inventory and annual reports of guardians and conservators
 - Interview the respondent, fiduciary, family members and others as appropriate
 - Report to the court

The role of the coordinator is to build and support the program.

- 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.
- Supervise volunteers and recognize volunteers
- Reimburse expenses
- Troubleshoot problems
- Develop checklists, forms, & other aids
- Record and report outcomes

⁶⁶ Volunteer Guardianship Monitoring Programs: A Win-Win Solution, Ellen M. Klem, American Bar Association Commission on Law and Aging (2007); Guarding the Guardians: Promising Practices for Court Monitoring, Naomi Karp and Erica Wood, AARP Public Policy Institute (2007); Guardianship Monitoring: A Demographic Imperative, Hon. Steve M. King, <http://www.ncpj.org/guardianship%20monitoring.htm>.

No legislation is needed for a volunteer program, although it may be helpful. We recommend that the Judicial Council seek an appropriation – and legislation as may be helpful – to hire a volunteer coordinator to build and support a volunteer court visitor program.

(d) Regulating guardians and conservators – Background checks.

(i) Professional conservators

By a series of statutes, only a handful of financial institutions under permit from the Commissioner of Financial Institutions may be appointed as professional conservators.⁶⁷ Professional conservators, therefore, are already highly regulated and nothing further should be needed.

(ii) Professional guardians

Professional guardians are regulated by virtue of their credentials in other regulated professions, but they are not regulated as guardians, and they should be. Like most states, Utah lists the priority of a person or institution to be appointed guardian. Last on that list is “a specialized care professional.”⁶⁸ A specialized care professional is defined as 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.

Utah Code Section 75-5-311(1)(a).

⁶⁷ “Trust business” means ... a business in which one acts in any agency or fiduciary capacity, including that of ... conservator ...” Utah Code Section 7-5-1(1)(b). “Only a trust company may engage in the trust business in this state.” Utah Code Section 7-5-1(2). “Trust company” means an institution authorized to engage in the trust business under this chapter. Only the following may be a trust company....” Utah Code Section 7-5-1(1)(d) (naming four types of depository institutions and any corporation continuously engaged in trust business since 1981). “No trust company shall accept any appointment to act in any agency or fiduciary capacity, such as ... conservator... under order or judgment of any court ... unless and until it has obtained from the commissioner a permit to act under this chapter.” Utah Code Section 7-5-2(1).

Under special circumstances (administration of the estate is supervised by the court and no trust company is willing to act as conservator after notice of the proceedings is given to every trust company doing business in Utah) the court may appoint a certified public accountant (or other listed financial professional) as conservator. Utah Code Section 7-5-1(1)(c)(viii).

⁶⁸ Utah Code Section 75-5-311(4)(g).

So, Utah law leaves designation as a professional guardian to (1) unnamed organizations with unknown standards; (2) licensure or registration with DOPL as a health care provider, which includes unnamed professions; and (3) the judge on a case-by-case basis.

One “nationally recognized guardianship accrediting organization” is the National Guardianship Association. 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.”

There is only one organization in Utah recognized by the National Guardianship Association.

The health care providers listed in the Code as potential professional guardians are not exclusive.⁶⁹ A quick review of the DOPL website shows any number of licensed professions that might be considered health care providers:

- Acupuncture
- Athletic Trainer
- Audiology
- Certified Dietitian
- Certified Medication Aide
- Certified Nurse Midwifery
- Chiropractic
- Dentistry
- Direct-Entry Midwifery
- Genetic Counseling
- Health Facility Administration
- Hearing Instrument
- Marriage and Family Therapy
- Massage Therapy
- Nursing
- Occupational Therapy

⁶⁹ Utah Code Section 75-5-311(1)(a)(ii).

- Optometry
- Osteopathy
- Pharmacy
- Physical Therapy
- Physician and Surgeon
- Physician Assistant
- Podiatry
- Professional Counseling
- Psychology
- Radiology
- Recreation Therapy
- Respiratory Care
- Speech Language Pathology
- Substance Abuse Counseling

All are valuable professions, and many might assist the respondent with his or her incapacities, but none are qualified professional guardians merely because of their other licensure, including those in the more traditional health care professions.

We recommend that the Administrative Office of the Courts begin discussions with the Division of Occupational and Professional Licensing and professional guardians in Utah to draft legislation according to the DOPL model to regulate the professional guardian industry as it does other professions. We recommend that only a guardian licensed by DOPL be permitted to be appointed guardian as a “specialized care professional.”

(iii) Background checks for private fiduciaries

A background check of a family member nominated as guardian and conservator might reveal circumstances that show the appointment of someone else would be in the respondent’s best interest. In juvenile court cases involving the placement of an abused minor, there is an extensive investigation of the proposed guardian, including even a parent.⁷⁰ We recommend that before a person is appointed guardian or conservator, s/he be required to disclose arrests and convictions that may affect the court’s decision. We recommend no automatic disqualifications, but it is important that the judge know the criminal history of the respondent’s fiduciary.

(10) Conservators

Some states have abandoned the distinctions between a guardian and conservator. If the respondent is incapacitated, the court appoints one or more fiduciaries and grants authority, which may be authority traditionally held by a guardian, authority traditionally held by a conservator, or some combination of the two. We do not recommend going so far.

However, we recommend combining the laws common to both offices in order to isolate and emphasize the laws that create differences. Many of the standards for both

⁷⁰ Utah Code Section 78A-6-307.

officers are or should be the same. Many of the procedures are or should be the same. Many of the policies are or should be the same.

But there are important differences.

- The law should continue to permit protective orders short of appointing a conservator.
- The reasons for a conservator or protective order should continue to include confinement, detention and disappearance. And to those we should add voluntary request by the person to be protected.
- The reasons for a conservator or protective order should continue to include because funds are needed for the support, care, and welfare of a person entitled to be supported by the respondent.⁷¹
- If the reason for a conservator or protective order is respondent's confinement, detention, disappearance or voluntary request, there should be no need for an evaluation or a finding of incapacity.
- The authority of a conservator provided by statute is extremely detailed, listing almost 50 permitted acts.⁷² So, unlike a guardian's authority, which should be specified in the appointment order, the statutes should continue to identify the conservator's authority which flows to the conservator by reason of being appointed as such.

(11) Training for judges, lawyers, court personnel and volunteers

Although they can be improved, we have found that the Utah statutes currently provide reasonable due process protections.⁷³ What seems to be lacking is the sense that this matters. Perhaps the law itself too easily permits its avoidance. Perhaps courts are pressed by contested cases and pay less attention to these in which the parties seem to be in agreement. Perhaps it is a well-meaning but misplaced notion of doing what is thought to be in the respondent's best interest. Whatever the reason, too many short cuts are being taken.

Education programs would seem to be the proverbial "no brainer." They are recommended by just about every authority that has considered guardianship and conservatorship policies. And, for judicial training at least, the work is already done. The American Bar Association Commission on Law and Aging in conjunction with the American Psychological Association and the National College of Probate Judges has prepared a manual entitled *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings*. It serves as a wonderful benchbook, and the Administrative Office of the Courts has already included it on the court's website among the benchbooks available to district court judges.⁷⁴ But it is of little value unless it is used. We recommend it to the Judicial Institute as an outline on which to build a curriculum for district court conferences.

⁷¹ Utah Code Section 75-5-401(2)(a)

⁷² Utah Code Sections 75-5-408 and 424.

⁷³ Appointment of counsel, medical examination, court visitor, presence at hearing, limits on emergency appointments, and others.

⁷⁴ http://www.utcourts.gov/intranet/dist/docs/guardianship_proceedings.pdf

The Utah State Bar's Committee on Law and Aging and Estate Planning Section sponsor CLE programs in the areas of guardianship and conservatorship, and we recommend they continue that important effort focusing on the recommendations in this report.

We recommend that the Judicial Institute develop training programs for clerks and other court personnel on the new concepts, laws and procedures of guardianships and conservatorships and on the special importance of cases in which the court shares responsibility for the care and well being of a person with diminished capacity.

We recommend that the Volunteer Coordinator work with the Judicial Institute to develop training programs for people who volunteer as court visitors:

- How to draw out evidence of the respondent's capabilities and limitations.
- How to draw out evidence of the respondent's values, preferences and patterns of behavior.
- How to evaluate the respondent's circumstances during a guardianship or conservatorship.
- How to evaluate the guardianship or conservatorship plan and annual reports.
- And other matters on which the court visitor acts as the judge's surrogate.

(12) Outreach and assistance for the public

We urge the lawyer who represents the fiduciary to advise his or her client of a fiduciary's responsibilities and good practice standards.⁷⁵ Sometimes the fiduciary does not have a lawyer, but often the petitioner, who is more probably represented, will be the fiduciary. A lawyer's representation of the petitioner may end with the appointment, but the lawyer's counseling on the fiduciary's continuing responsibilities is probably the single best opportunity to impress upon the guardian or conservator that they are responsible for someone else's life and the law imposes many requirements.

The Wingspan Conference recommends that "all guardians receive training and technical assistance in carrying out their duties."⁷⁶ We recommend that the Committee on Resources for Self-represented Parties work with the Committee on Law and Aging of the Utah State Bar to develop web-based information and resources about guardianships, conservatorships, and less restrictive alternatives. The manual entitled *Basic Guidelines for Court-Appointed Guardians and Conservators*, developed by the AOC and the Bar committee is a start, but more thorough information is needed.

The Committee developed forms for an extensive clinical and social evaluation, which we recommend as part of our effort to improve the evidence on which decisions can be made. Additional forms and information need to be developed. They should be based on the new concepts, statutes and rules that have been recommended but not yet adopted. We again recommend that the Committee on Resources for Self-represented Parties work with the Committee on Law and Aging to continue this important work. We suggest to them that the following forms be developed for the court's website:

⁷⁵ Wingspan Conference. Recommendation 66. 31 Stetson L. Rev. 595, 608 (2002).

⁷⁶ Wingspan Conference. Recommendation 9. 31 Stetson L. Rev. 595, 597 (2002).

- Petition to Appoint a Guardian (Conservator) for an Incapacitated Person
- Estimated Estate Value Worksheet
- Notice of Petition and Hearing
- Proof of Service
- Motion for Order to Evaluate Respondent
- Order to Evaluate Respondent
- Report on Clinical Evaluation of Respondent
- Motion for Appointment of Court Visitor
- Order to Appoint Court Visitor
- Report on Social Evaluation of Respondent
- Findings of Fact and Conclusions of Law
- Order Directing Services for Respondent
- Order Appointing a Guardian (Conservator) for an Incapacitated Person
- Acceptance of Appointment
- Letters of Guardianship (Conservatorship)
- Guardianship (Conservatorship) Plan

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To review the Committee's briefing materials and minutes of discussions, go to:

<http://www.utcourts.gov/committees/adhocprobate/>

(14) Statutes

(15) Rules

(16) Forms