

MINUTES
Ad Hoc Committee on Probate Law and Procedure
Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114-0241
May 21, 2007 - 12:00 p.m.

MEMBERS PRESENT

Kent Alderman
Kerry Chlarson
Mary Jane Ciccarello
Reese Hansen
Judge George Harmond
Maureen Henry
Richard Howe
Judge Sheila McCleve, Presiding
Steve Mikita
Julie Rigby
Judge Gary Stott
Kathy Thyfault

EXCUSED

Reese Hansen

STAFF

Diana Pollock
Tim Shea

I. WELCOME AND APPROVAL OF MINUTES

Judge Sheila McCleve welcomed the committee members to the meeting. Judge Harmond made a motion to approve the minutes of the April 20, 2007 meeting. The motion was seconded and passed unanimously.

II. REVIEW AND PRIORITIZE TOPICS

Tim Shea expressed the need for the committee to prioritize the different issues. Judge McCleve stated that this could lead to more investigation of the individual issues by committee members.

Judge Harmond shared two observations. First, the committee has focused on guardianship and conservatorship almost exclusively. Judge Harmond would like to focus more on educating the Bar and judges as to the standards that need to be applied when determining whether someone is incapacitated. Second, identifying medical testimony about incapacity.

Kent Alderman noted that the question of incapacity comes up daily and his experience is that the law has one view of incapacity and the medical profession has a different view. Mr. Alderman stated that the ABA recently published a manual about cases dealing with incapacity, which could be helpful to the committee.

Mary Jane Ciccarello stated that she does not disagree with the education of the different

groups, however, Ms. Ciccarello believes there is a real need to review the statute, which could require changes. She said the Utah definition of incapacity is outdated. States are moving to a functional definition. Steve Mikita stated concern that the committee not attempt to do a full scale overhaul of the statutes but to pinpoint, in a short time, things that will improve the standards of review and the procedural requirements. Mr. Mikita stated he is in favor of finding the best definition of incapacity.

Maureen Henry agreed, stating that she recently finished a paper for a medical journal on assessing capacity in elderly patients. Ms. Henry stated she found there is no consensus on the medical standard of care. There are challenging issues on the medical side that need to be recognized.

Kerry Chlarson stated that he sees a lack of appropriate representation for putative wards, and feels that the matter should be a priority. Kent Alderman stated that the practice is for the petitioner to identify an attorney to represent the ward, which can result in a conflict of interest. The Code states that the court will appoint a lawyer to represent the ward.

Tim Shea stated that there seems to be a consensus to researching appropriate amendments to the Code itself. Mr. Shea asked the committee if the core issue is the definition of incapacity and the necessary medical testimony. Steve Mikita stated that the legal definition of incapacity should be established and the medical profession should follow that definition. Mary Jane Ciccarello stated that a guardianship plan should meet the needs of the individual ward. A legal definition should be arrived at and better medical information would follow. Mr. Mikita stated the court needs to understand in what areas the putative ward is functional and dis-functional in order to appoint a limited guardian.

Tim Shea asked the committee how it wanted to pursue this topic. Steve Mikita stated that an up- to- date definition of incapacity would be helpful. Mr. Mikita would also like to review other states' definitions of incapacity. Maureen Henry stated that the committee could look to other countries for definitions. Mary Jane Ciccarello stated that Wisconsin and Maryland recently did a study of their guardianships. Perhaps this committee could review their studies. Ms. Ciccarello also suggested that the committee look at the recommendations made by Wingspan regarding guardianship. Ms. Ciccarello will obtain the Wingspan information for the committee.

Judge Stott stated that the National College of Probate Judges have a library of resources that may be helpful. Their organization helps states in making changes. Judge Stott will obtain a contact person from the College for this committee to work with. Kent Alderman stated that the AARP and the ABA are good sources of materials and he will provide copies of the reports and the practitioner's guide.

Tim Shea stated that, when the Policy and Planning Committee studied the post-appointment reporting requirements of guardians, they found a number of procedural conflicts

and questions in the Code. It was noted that Senator Hillyard is a member of the Commission on Uniform Laws, which is drafting a proposed uniform law on guardians and conservators. Mary Jane Ciccarello will talk with Senator Hillyard and find out where the Commission is on this topic.

Judge Harmond noted the need for user-friendly forms. Judge Harmond asked whether subcommittees should be formed. Steve Mikita stated that he is in favor of forming subcommittees.

Kent Alderman expressed the need for a full-time probate judge. Tim Shea stated that the model for district court judges is that they are generalists and can be assigned any type of case. A couple of possibilities for achieving expertise are using the tax court model and using court commissioners. Mr. Shea stated that this does not require legislation. Judge Stott stated that there are very few states that have specialist probate judges. Mary Jane Ciccarello stated that perhaps a court commissioner could hear both commitment and guardianship issues.

Judge McCleve suggested forming subcommittees and asked for volunteers. The committee agreed that:

- Kerry Chlarson will chair the Representation Subcommittee.
- Judge Harmond will contact the colleges regarding incapacity.
- Mary Jane Ciccarello, Maureen Henry and Steve Mikita will research the definition of incapacity and due process issues.
- Judge Harmond, Kathy Thyfault and Julie Rigby will research forms and public service.

III. MAKING THINGS HAPPEN

Tim Shea listed the different ways to operationalize the committee's work.

- Amending statutes. The Judicial Council reviews proposed legislation in August.
- Amending court rules. There are two rule making bodies, the Supreme Court and the Judicial Council. There are two rule-making cycles per year, with rules becoming effective in April and November. A rule change can be expedited if there is a need.
- Education: Simply making people aware of policies and procedures is an effective tool. The judiciary has two major conferences for district court judges and one major conference and several classes for clerks. The Bar has three major

conferences and classes throughout the year.

- Set policy within the statutes and rules. The law may establish discretion that could be exercised through the Council or Board of District Court Judges. Trial Court executives and clerks of courts can establish uniform operating guidelines.
- Budget requests. A budget request might accompany or be independent of legislation.

IV. MONITORING AND ENFORCING REPORTING REQUIREMENTS OF GUARDIANS AND CONSERVATORS

Tim Shea said that the Policy and Planning Committee had issued its report to the Judicial Council recommending ways to improve monitoring and enforcing the reporting requirements of guardians and conservators. There is a major rule change out for public comment. Mr. Shea stated that Utah is not enforcing reporting requirements. Mr. Shea stated that the Policy and Planning Committee's objective was to give the judge some assurance that the guardian's report is correct. The report will be served on interested people, which is the normal process, the Policy and Planning Committee recommended that the court audit select, high risk reports. The Policy and Planning Committee recommends recruiting volunteers among lawyers and CPAs. Mr. Shea said that this concept could extend to volunteer visitors to investigate the ward's conditions. Mr. Shea asked the committee for ideas on recruiting people.

Maureen Henry suggested HIPPO, AARP, the Utah Food Bank and the Statewide Volunteer Organization. Committee members also suggested law, social work and accounting students at the universities, senior lawyers, the Estate Planning Section, and the CPA association. Mary Jane Ciccarello noted that there are no resources to train volunteers. The network will need support and training. The committee suggested identifying "triggers" that would suggest further review of a report.

V. OTHER BUSINESS

There being no further business the committee adjourned at 1:50 p.m. The next meeting is scheduled for June 15, 2007 at noon.