

**MINUTES**  
**Ad Hoc Committee on Probate Law and Procedure**  
Administrative Office of the Courts  
450 South State Street  
Salt Lake City, Utah 84114-0241  
June 15, 2007 - 12:00 p.m.

**ATTENDEES**

Kent Alderman  
Kerry Chlarson  
Richard Howe  
Judge Sheila McCleve, Presiding  
Steve Mikita  
Julie Rigby  
Kathy Thyfault

**EXCUSED**

Mary Jane Ciccarello  
Reese Hansen  
Judge George Harmond  
Maureen Henry  
Judge Gary Stott

**STAFF**

Diana Pollock  
Tim Shea

**I. WELCOME AND APPROVAL OF MINUTES**

Judge McCleve welcomed the committee members to the meeting. With one correction the minutes of the May 21, 2007 meeting were approved. Judge McCleve noted that there would not be a committee meeting in July.

Tim Shea noted that discussions from the last committee meeting included the work of the Commission on Uniform Laws. Mr. Shea stated that the commission is working in the guardianship area, however, it is a jurisdictional statute only. The process for the appointment and responsibilities of the guardian will not be affected by the new uniform law.

**II. REPRESENTATION OF PERSON IN NEED OF PROTECTION**

Kerry Chlarson reported that he researched the ways other states have handled similar representation issues. The results of that research included:

- Providing a regulated list of attorneys.
- Providing an informal list.
- Public defender method - consists of contracts and agreements.

Mr. Chlarson stated it is this committee's task to see that the wards receive proper

representation. After much discussion, some of the committee's suggestions included:

- Using Utah law school students.
- Setting up a clinic to allow the law students to interact with clients.
- Utilize other disability law centers.
- Public defender model - public appropriation by the Legislature.
- Pro bono attorney list.
- Representation divided between wards whose estates can pay for counsel and wards who are not able to pay.

Tim Shea stated that Steve Mikita's approach of categorizing may be beneficial. Mr. Shea stated that to recommend a public defender model to the Legislature would require an appropriation of funds for lawyers who bid on the contract for representation of indigent wards. Mr. Shea suggested that perhaps with the regulated list model, there could be a requirement that lawyers who want to be on the list take a set number of pro bono cases.

Tim Shea questioned whether the Office of Public Guardian would be a better place for the responsibility of the public defender model. Steve Mikita stated that he was in favor that it being handled in individual districts.

Kathy Thyfault reported that judges in the Second Judicial District would like a pool of lawyers who are familiar with the procedures for representing wards. The judges would also like the doctors to be involved by submitting an affidavit stating the manner and degree to which the ward is incapacitated. The judges would like an attorney to be appointed before the hearing so that everyone involved with the ward has an opportunity to object or contest to who is appointed.

After more discussion the committee expressed the following concerns and suggestions:

- If stricter guidelines are required for guardianship that it would put more of a burden on the ward.
- Due process rights of the ward are not protected.
- Ability of attorneys representing wards to evaluate capacity.
- The line between plenary and limited guardianship.
- The lawyer needs to thoroughly interview the ward and medical staff and research records.
- Prepare a certified or regulated list with minimum qualifications approved by the court.
- Requirement of a minimum number of pro bono hours to be on the list.
- The court would make the appointment from the list.
- If the estate is indigent, the service and representation would be funded by the state. If the estate is not indigent, it would be funded by the estate. If the estate is somewhere in the middle, tap into the pro bono.
- If the estate desires to hire their own attorney, have a process whereby the judge can evaluate the attorney.

- Can the Disability Law Center provide training to ensure competency on the part of counsel?
- Renew certification every 2 to 3 years.
- If there is appointment from the list, there needs to be a process by which the court can appoint from off the list.
- Sworn affidavit from the attorney that they have the qualifications to represent the ward.
- Improve the quality of medical testimony or affidavits.

Tim Shea stated that the qualifications of the lawyer could be regulated by a rule of the Judicial Council or the Supreme Court. Mr. Shea noted that being on the list would be an assurance to the court that the attorney qualifies to represent the ward. Mr. Shea noted that in order to obtain funding a statute is needed. Tim Shea will return to the next meeting with a draft statute for the committee's review.

### **III. DEFINITION OF INCAPACITY**

There was not sufficient time for the definition of the incapacity issue. However, Steve Mikita gave a brief definition of incapacity that is in Utah Probate Code § 75-1-202(22). Mr. Mikita stated that the Office of Public Guardians' definition of incapacity leans towards the national trend of what a person can and cannot do. The issue was tabled until the next committee meeting.

The meeting adjourned at 2:10 p.m.