

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 21, 2007 - 12:00 p.m.

PRESENT

Kerry Chlarson
Mary Jane Ciccarello
Judge George Harmond
Reese Hansen
Maureen Henry
Richard Howe
Judge Sheila McCleve, Presiding
Steve Mikita
Julie Rigby

EXCUSED

Kent Alderman
Judge Gary Stott

I. WELCOME AND APPROVAL OF MINUTES

Judge McCleve welcomed the committee members to the meeting, noting that the next committee meeting will be October 19, 2007 at 12:00 p.m. Steve Mikita made a motion to approve the minutes of the August 17, 2007 meeting. Mary Jane Ciccarello seconded the motion. The motion carried unanimously.

II. DEFINITION OF INCAPACITY

Judge McCleve noted that a subcommittee consisting of Kent Alderman, Mary Jane Ciccarello, Maureen Henry and Steve Mikita met to study the definition of "incapacity." Mr. Mikita stated that incapacity is a legal status, not a medical disability, and is measured by functional limitations. Mr. Mikita reported that the subcommittee arrived at a definition of "incapacity" to mean a judicial determination that an adult lacks the ability to:

- receive and evaluate information
- make and communicate decisions
- provide for necessities such as food, shelter, etc.
- carry out the activities of daily living, or
- manage his or her property.

The committee discussed several factors the judge can use when making a finding of incapacity, when deciding whether to appoint a guardian, and deciding the guardian's authority. Some committee discussion:

- This requires the judge to decide what is appropriate to help this person.
- Practitioners, judges and family members have struggled with the ambiguity of

- definitions of guardianship and the guardian's responsibilities.
- Focus on the functional limitations of the ward.
- Make a clear distinction from medically incapacitated.
- In the factors section, the judge "should" consider the factors rather than "may" consider.
- The "risk" language should parallel Vulnerable Adult Abuse Act.
- Differentiate the factors for determining whether the ward is incapacitated from the factors for determining whether the guardianship should be put into place and the authority of the guardian.

After more discussion Mary Jane Ciccarello stated that the subcommittee did not look at statutes, such as California's, where a state did not define incapacity. Ms. Ciccarello suggested the committee research this issue more. Some discussion of the committee:

- It is essential to have the ward determined to be incapacitated.
- If there is no finding of incapacity, how does the judge determine the need and level of protection?
- The statute should put significant weight on the limitations of the guardian's authority.
- Without a threshold finding of incapacity might the ward's rights be taken away when not necessary?
- With the new statute, the judge will have factors to consider for deciding whether to appoint a guardian.
- If there is an issue that cannot be resolved, have the parties present more evidence.

Kerry Chlarson made a motion to take this issue back to the subcommittee for further study of other states. Mary Jane Ciccarello seconded the motion. The motion carried unanimously.

III. REPRESENTATION OF PUTATIVE WARD

Kerry Chlarson reviewed the changes that Tim Shea made in the proposed language and is pleased with them. Mr. Chlarson stated that he is in favor of allowing others to give feedback to the committee. Mr. Chlarson proposed to invite the Legal Aid Society and others to a future meeting to offer an analysis of the proposal. The main issues of the model are:

- Money - Dan Becker recommended that if a sound public policy is identified, to go ahead and pursue it.
- Have Legal Services and the Legal Aid Society review.
- How will the model affect the existing system?
- Concern with ongoing obligation for the attorney to file, inventory, annual reports, etc.
- If the ward's condition improves, the ward needs representation to terminate the guardianship.

- Prohibit transfer of assets to establish eligibility for the appointment of counsel.
- 24 Hours of CLE may be excessive. Mr. Chlarson will come back with a recommendation for minimum CLE.

Tim Shea will invite those with an interest to the next meeting to see how representation is currently occurring.

IV. DEVELOPING A GUARDIANSHIP MODEL

Tim Shea stated that some members on the subcommittee studying the definition of incapacity expressed difficulty with the definition when the committee had not developed an overall model for guardianships. The approach taken so far is to develop the individual issues that have been identified. Judge McCleve asked whether the committee wanted to explore and construct a model for guardianship. Some of the issues discussed:

- Definition of incapacity is part of the big picture.
- Commission on Aging concerned with reconciling and having the guardianship and the commitment statutes work together better.
- The Commission on Aging and this committee should work together, and the Commission on Aging is the agency to deal with issues outside the courts.

Maureen Henry will take the liaison role of working with the Commission.

V. ADJOURN

The meeting adjourned at 2:00 p.m.