

MINUTES
Ad Hoc Committee on Probate Law and Procedure
Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114-0241
October 19, 2007 - 12:00 p.m.

ATTENDEES

Kent Alderman
Kerry Chlarson
Mary Jane Ciccarello
Judge George Harmond
Maureen Henry
Richard Howe
Judge Sheila McCleve, Presiding
Steve Mikita
Kathy Thyfault

EXCUSED

Reese Hansen
Julie Rigby
Gary Stott

GUESTS:

Ann Milne, Utah Legal Services
David Sloan,

STAFF

Diana Pollock
Tim Shea

I. WELCOME AND APPROVAL OF MINUTES

Judge McCleve welcomed the committee members to the meeting. Judge McCleve welcomed guests Ann Milne and David Sloan. Kent Alderman noted one correction in the September minutes. With that correction, Maureen Henry moved to approve the minutes. Kerry Chlarson seconded the motion. The motion carried unanimously.

II. REPRESENTATION OF PROPOSED WARD

David Sloan reported that the Estate Planning Section supports the direction that the committee is going, including the roster of attorneys for appointment of counsel.

Anne Milne questioned the scope of the problem and asked if the problem exists in the area of the indigent ward requiring representation or is it across the board including wards who are not indigent.

Ms. Milne explained the workings of Utah Legal Services:

- Focus on federal funding for people who are below 125% of poverty.
- A few contracts for people above age 60 regardless of income.
- Success with pro bono coordination.
- Utah Legal Services include assets when qualifying clients. Sometimes, older

- people's income is limited, but they have assets.
- Utah Legal Services pays attorneys around the state \$50/hour to provide representation to clients who qualify for Utah Legal Services.

Ms. Milne asked questions about the committee's proposal:

- Does the roster apply only to indigent cases or all cases?
- Does the attorney have to agree to pro bono to be included on the roster?
- Two years admission seems excessive.
- Can a standard rate target the cases that are the most difficult?
- Can the mentor charge, and if so whom?

Some of the points in the committee's discussion were:

- The proposal requires the court to appoint counsel from the roster in all cases, unless the ward has his or her own attorney.
- There is no mechanism for finding which attorney has the experience required for the ward.
- If a certain income level is met in the pro bono cases there would be a rate determined by the court to be paid by the state or by the estate.
- Individuals above that income level would have to pay market rates.
- Interest was expressed in the gap between estates large enough to pay reasonable rates for a lawyer and indigent people who are served by Utah Legal Services' lawyers.
- The gap was identified as people under 60 who are not indigent.
- The current proposal is to pay appointed counsel from a state fund if the ward's income is below 150% of poverty and does not have sufficient assets.
- Above 150% of poverty but below 250% of poverty, the lawyers would charge the estate based on the ability to pay, but no more than a defined maximum.
- The market rate of lawyers will be difficult to calculate.
- Use local lawyers on the roster and spread the burden out among the Bar.
- Clerks cannot give referrals to particular attorneys, so having the list solves the problem.
- The requirement of 4 hours initial training and 2 hours of continuing education every 2 years to be on the roster.

Mr. Shea will prepare another draft based on the comments. There will be further comments at the next meeting.

III. DEFINITION OF INCAPACITY

The subcommittee met and recommends not adopting the California approach and to continue to use the word "incapacitated." There was still concern about whether the phrase "even with assistance" should be included. Some of the points in the discussion were:

- Concern expressed about weakening the requirement that a person be incapacitated before a guardian can be appointed.
- The need for a threshold test.
- “Substantial risk” is a phrase not used in Boyer.
- Focus on the ward’s functional limitations.
- Whether a person is at risk of harm may depend on whether the person takes their medication.
- Include in the order or plan the ups and downs of the wards in treatment for mental illness who do not take their medication.
- Limited guardianship where the guardian is authorized to make decisions only until the person is on an even road.

Maureen Henry expressed concern that the current statute is vague in terms of mental health issues. Ms. Henry feels that the guardianship statute cannot be looked at without looking at the mental health commitment statute to make them work better together.

Judge Harmond stated that an order to consult with a physician could be done under the guardianship statute if the attorneys involved are willing to be flexible. Judge Harmond stated that the proposed statute gives the judge authority to order mental health treatment. The proposed statute gives the judges sufficient direction.

The committee decided that Mr. Shea will prepare another draft based on the discussion.

IV. DUTIES AND LIMITED AUTHORITY OF A GUARDIAN

Tim Shea stated that committee members have been objecting to the common use of plenary guardianships which in turn is influencing some of the discussion on other topics. It is Mr. Shea’s observation that, as the statute is currently written, it prefers a limited guardianship, but there is nothing to support the judges and lawyers in creating a limited guardianship. Mr. Shea asked the committee how it wanted to design guidance for the judges and lawyers to develop limited guardianships.

There was a brief discussion, but, because of the time, this issue was tabled until the next meeting.

The meeting adjourned at 2:00 p.m. with the next meeting scheduled November 16, 2007.

