

MINUTES
Ad Hoc Committee on Probate Law and Procedure
Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114-0241
November 16, 2007 - 12:00 p.m.

ATTENDEES

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

EXCUSED

Reese Hansen
Maureen Henry
Gary Stott

GUESTS:

Elizabeth Conley
Joanna Sagers

STAFF

Marianne O'Brien
Diana Pollock
Tim Shea

I. WELCOME AND APPROVAL OF MINUTES

Judge McCleve welcomed the committee members to the meeting. Judge McCleve welcomed guests Elizabeth Conley and Joanna Sagers. Kathy Thyfault and Steve Mikita noted two corrections in the October minutes. With those corrections Kent Alderman moved to approve the minutes. The motion was seconded. The motion carried unanimously.

II. REPRESENTATION OF PROPOSED WARD

Joanna Sagers stated that the people coming into the Legal Society of Salt Lake who file guardianships pro se, do not understand that the proposed ward needs an attorney. Ms. Sagers feels this committee is headed in the right direction and that a roster of attorneys will be helpful.

Elizabeth Conley expressed the questions and concerns of the Committee on Law and Aging:

- Is the petitioner able to select someone from the roster of attorneys?
- Could a conflict of interest exist?
- Is there background available for the new legislation or is it a means for an indigent or near indigent proposed ward to receive representation?

- If a pro bono case becomes difficult what additional resources are available?
- Should there be a fixed rate for indigent cases?
- Who determines the level of education and experience to be on the roster?
- What is the anticipated number of pro bono clients?
- There should be safeguards to prevent aggressive attorneys from exploiting the estate.
- Will attorneys on the roster be losing money with these cases?
- What is the incentive to be on the roster?
- Who will administer and maintain the roster?

Some of the committee members responded to Ms. Conley's concerns:

Kerry Chlarson stated that it is his experience that a conflict of interest does not exist, however, he is finding that the references or referrals are not always done by an experienced attorney especially in pro bono cases. Mr. Chlarson stated that the work done on behalf of the ward is not always what it should be.

Tim Shea stated that the purpose for legislation is to get away from the need for a petitioner's attorney to try to recruit a representative for the proposed ward. The court would make that appointment as part of the initiation of the case.

Tim Shea stated that the pro bono requirement is for the attorney to accept two cases every two years. If a proposed ward qualifies as indigent, the proposal is that the state would pay the proposed ward's attorney at the rate of \$50.00. The appointment would come from the list in all cases. Those wards who have estates would pay market rates. If the ward is indigent, the state would pay the attorney the defined rate.

Tim Shea stated that in the current draft, the roster would be maintained by the Bar with express minimum qualifications to be on the roster. The roster would be publically available, but the actual selection of the ward's lawyer would come from the court. In regards to the question of whether the petitioner could select the ward's attorney, Mr. Shea stated that this was previously discussed, and it was decided not to go that direction. If the ward has chosen his or her own attorney, which does not happen very often, that would be honored.

Committee discussion included:

- Have a set rate for select services but allow a motion to award more in difficult cases.
- Attorneys would come up in rotation with some mechanism for a lawyer to decline because of a conflict of interest or scheduling problem.
- A proposed ward needs a lawyer for protection against family members who may not have the ward's best interest at heart.
- Roster will assure judges of the level of competency of the lawyers.
- Minimum requirements will protect against well-meaning lawyers who do not understand the responsibilities of representing a proposed ward.
- What happens if the legislation passes without funding?

- Raise the awareness of both the profession and the bar and train both practitioners and the judiciary.
- Mechanism for the judge to use when appointing the lawyer.

III. DEFINITION OF INCAPACITY

Mr. Shea discussed Maureen Henry's observations on the definition of incapacity. Mr. Shea suggested addressing the amendments first rather than the underlying legislation. Steve Mikita circulated a memo explaining why the more cognitive definition of incapacity should not be used.

The committee discussed the factors the judge should consider when appointing a guardian.

- Differentiate between the capacity for financial decisions but not health care decisions.
- Maintain the blend of cognitive and functional considerations.
- Current draft allows the distinction between the capacity to appoint a health care agent and the capacity to make a health care decision.
- The current statute provides that the decision of the health care agent supercedes that of the guardian, unless the court determines otherwise.

The committee decided not to adopt the proposed changes.

The committee adjourned at 2:00 p.m.