

## MINUTES

### Ad Hoc Committee on Probate Law and Procedure

Administrative Office of the Courts

450 South State Street

Salt Lake City, Utah 84114-0241

January 18, 2008 - 12:00p.m.

#### ATTENDEES

Mary Jane Ciccarello  
Judge George Harmond  
Maureen Henry  
Richard Howe  
Julie Rigby  
Kathy Tryfault

#### EXCUSED

Kent Alderman  
Kerry Chlarson  
Steve Mikita  
Judge Gary Stott

#### STAFF

Marianne O'Brien  
Diana Pollock  
Tim Shea

### I. WELCOME AND APPROVAL OF MINUTES

Judge Harmond welcomed the committee members to the meeting. Judge McCleve asked to be relieved of her committee assignments, and Judge Harmond will serve as the new committee chair. Julie Rigby made a motion to accept the minutes of the November 16, 2007 committee meeting. Kathy Tryfault seconded the motion. The motion carried unanimously.

### II. POWERS OF GUARDIAN

Tim Shea stated that his approach in drafting this statute is that the statute would give the guardian duties. However, the statute itself does not give the guardian any authority. The authority would come from the order of court.

Mr. Shea provided in the draft that the guardian would not be able to revoke a power of attorney or advance health care directive. Mr. Shea asked for comments to the draft.

- The new Health Care Directive law makes it clear that a guardian does not trump an agent, "unless ordered by the court."
- In the Health Care Directive law, unless the principal denies authority to an agent, the agent has the ability to make end of life decisions for the ward.
- If a health care agent is not appointed, then the guardian should have similar authority as a health care agent.
- There was concern with making the decision for the ward to be committed. Currently, if there is a guardian, mental health facilities will accept their consent

to admission.

Tim Shea will research and integrate the Advance Health Care Directive statute into the proposed draft to ensure that the same model applies to both statutes.

### Voting.

- If the ward is incapable of voting, the court may order that the ward may not vote. The court may not grant authority to the guardian to vote in behalf of the ward.
- What is the standard by which the court will make the determination that the ward is not capable of voting? Mr. Shea will integrate the ABA standard into the draft.

### Mental Health.

- The mental health community understands the commitment process that has been in place for a long time. Many providers view it as the only way to provide mental health treatment for someone who disagrees with their care.
- If the guardian can consent to mental health treatment against a person's wishes, it would require reeducating providers. Providers have been trained that the only way to keep someone against their will is the commitment process.
- The guardian must understand that having the ability to consent to treatment does not give the authority to order treatment.
- A guardian cannot prevent commitment of a ward if the provider seeks it and it is ordered by the court.
- Commitment requires that the person be a danger to self or others.
- Commitment and admission to a mental health facility are different processes.
- Under the Advance Health Care Directive statute, the agent can consent on behalf of the principal to admission and recommended treatment if the principal agrees. The agent cannot consent to commitment. However, a mental health care agent can consent to commitment for up to 17 days if authorized to do so in the declaration document.
- The requirements of commitment have been established so that people are not committed against their will. The guardian does not have the authority to consent to commitment, but must go through the involuntary commitment process.

### Authority for the estate.

Mr. Shea proposed some basic financial authority that a guardian could exercise without being appointed as a conservator. Mr. Shea asked what is routine that would not require the expertise or authority of a conservator?

- Is there a point where an estate is so extensive that there should be a conservator?
- The guardian can hire an investment counselor without being a conservator.
- Real-property transactions should require that the guardian be appointed as conservator. Especially for the ward's home.
- The guardian can open a bank account for routine transactions.

- Should the guardian be able to prosecute, defend and settle legal actions? Or should this be authority for a conservator?

#### Restrictions on the guardian's authority.

- The guardian would not be permitted to consent to termination of parental rights.
- The guardian should follow the process for a court order for sterilization.
- Be explicit regarding consent to be a living donor of body organs.
- Require court approval for the guardian to purchase the ward's property.
- Unless permitted by order, the guardian may not give gifts on the ward's behalf.

#### Guardian's duties

- File a guardianship plan with the court .
- File a status report and, if responsible for the ward's estate, a financial report.
- Exercise guardian's authority.
- The term "best interest" is a different standard from "substituted judgment."
- At termination of the guardianship, deliver any of the ward's estate in the guardian's possession "as directed by the court."

### **III. OPEN OR CLOSED RECORDS**

Tim Shea stated there is concern that when the courts move to electronic filing, the internet becomes the court's filing cabinet. Very sensitive information would be on the public internet. If the records are defined as private, the parties would still be able to view the record, but the public would not. The Policy & Planning Committee has recommended that the annual reports of guardians and conservators be private and has deferred to this committee the question of whether the balance of the records should be private. Mr. Shea noted that the definition of private has been amended to include an "interested person" under the Probate Code.

After discussion, the committee concluded that the records contain very sensitive information on the status of the ward's estate, the ward's incapacity, and how to contact the wards. Wards are, by definition, incapacitated and especially at risk of being victimized. It is important that the appointment process be open to public scrutiny, but open hearings should achieve that objective. The committee recommended that records in guardianship and conservatorship cases be classified as private. Mr. Shea recommended that the appropriate rule change be effective as soon as possible. Judge Harmond will report this recommendation to the Judicial Council at their next meeting.

The meeting adjourned at 2:05 p.m.