

## MINUTES

### Ad Hoc Committee on Probate Law and Procedure

Administrative Office of the Courts  
450 South State Street  
Salt Lake City, Utah 84114-0241  
December 19, 2008 - 12:00p.m.

#### ATTENDEES

Kent Alderman  
Kerry Chlarson  
Mary Jane Cicarello  
Judge George Harmond  
Maureen Henry  
Justice Richard Howe  
Julie Rigby

#### EXCUSED

Judge Hansen  
Steve Mikita  
Judge Gary Stott  
Kathy Thyfault

#### STAFF

Marianne O'Brien  
Diana Pollock  
Tim Shea

### I. WELCOME AND APPROVAL OF MINUTES

Judge Harmond welcomed the committee members to the meeting. Mary Jane Cicarello made a motion to accept the minutes of the November, 2008 meeting. Kent Alderman seconded the motion. The motion carried unanimously.

### II. DRAFT REPORT

Tim Shea stated that the plan is to deliver the report to the Judicial Council on January 26, 2009. Committee members are welcome to attend.

Tim Shea anticipates that the Judicial Council will accept the report, but that decisions on the statutes and rules will be deferred to the legislative and rulemaking procedures. Mr. Shea stated that over the course of the next several months the report will be taken to various groups, and their input also will be considered. The target for legislation is the 2010 general session.

Mary Jane Cicarello sent Tim Shea several proposed changes to the report and Mr. Shea has incorporated them. Mr. Shea reported that any requests for appropriations will not be approved, so these items have been noted in the report, but not included in the implementing legislation. If the opportunity arises to put money back into the legislation, then it will be pursued. Ms. Cicarello suggested adding a recommendation that the Utah Access to Justice Council and the Bar organize and train pro bono attorneys.

Mr. Shea included a paragraph in the report recommending data gathering as part of case processing, including how many times monitoring finds evidence of abuse, neglect, or other inappropriate conduct.

Maureen Henry suggested including the point that physicians often disagree about a person's capacity. Ms. Henry will send the research to Mr. Shea.

## **Statutes**

### **“Petition” or “motion.”**

The committee asked Mr. Shea to include language in the statute that states petitions are a request for a court order in an uncontested proceeding. While a motion is a request for a court order in a contested proceeding. Mr. Shea will try to differentiate “motions” from “petitions” in the statutes and rules.

### **Residents of the Developmental Center.**

Mr. Shea stated that the existing statute results not in an expedited process but in a guardian with limited authority. The statute governing the expedited process uses different language than the regular statutes, but it describes the same rights and procedures. Mr. Shea asked whether we need this section since, under our proposal, all appointments will be limited to the face of the order. Ms. Ciccarello observed that the process for appointing a guardian for a resident of the Developmental Center should be a full process, because the guardian is more involved with the ward than the statute reflects. Mr. Alderman noted that the proposed emergency process should permit a quick appointment if one is needed. The committee asked Mr. Shea to contact the Fourth District Court and Steve Mikita to see how frequently the current statute is being used.

## **Borrowing**

Tim Shea reported that he had misinterpreted the Uniform Act at the last meeting. The Uniform Act probably intends to permit the conservator to borrow money on behalf of the estate rather than from the estate. The committee agreed that borrowing on behalf of the estate is the correct interpretation and that words to that effect should be added to the statute. After discussion, the committee decided that the conservator should not need special court approval to exercise this authority.

## **Definitions**

Kent Alderman suggested adding financial harm as within the scope of an emergency. Mr. Shea will make that change.

## **Letters of Office**

Kent Alderman stated that the draft statute mentions only the acceptance of office and bond as being conditions for issuing letters. The statute does not mention the test required for letters to be issued. Mr. Shea suggested striking the “Upon filing” clause and say only that “the court shall issue appropriate letters.” The rule and other statutes will regulate what conditions have to be met.

## **Rules**

Tim Shea stated the Bar rule would establish the roster and the minimum requirements for a lawyer to represent a respondent in a guardianship or conservatorship case. He said that the rule regulating the appointment process could be placed in the “attorney” section of the Rules of Civil Procedure or in the proposed “probate” section. Kerry Chlarson made the suggestion to put it in the “probate” section because of its limited application.

Mr. Shea stated that the proposed Rules of Civil Procedure would implement the procedural parts of the Uniform Act. He noted that in Utah the Supreme Court has the authority to adopt rules of procedure. Mr. Shea took the procedural provisions from the Uniform Act and developed them as a series of rules for the Supreme Court to consider.

Mary Jane Ciccarello observed that in the draft of Rule 150, the petition does not track the findings for the cause of action. Mr. Shea proposed that he return to the statute and take the elements from the cause of action and insert them into the requirements for the petition. Beyond what is minimally sufficient to state a case, the petition can serve to pass information to the court, the respondent and interested persons.

## **School guardianships.**

Mr. Shea included a lot of information regarding school guardianships in the petition because they are so highly specialized. The Department of Education’s concern seems to be that someone will attempt to avoid out-of-state tuition. The committee decided to eliminate this cumbersome process and rely on the traditional guardianship principles. School boards have a way to determine whether to charge non-resident tuition under current law.

## **Petition to appoint a conservator.**

Mr. Shea stated that the rule regulating the petition to appoint a conservator is more extensive than for a guardian because there is one set of requirements for a minor respondent and another set for an adult respondent.

## **Service in a protective proceeding.**

Mary Jane Ciccarello suggested striking the language “at least one adult nearest in kinship to the respondent.” Ms. Ciccarello said that if you are at that point, the person who has principle care of the respondent is probably sufficient.

Mr. Shea explained his approach in drafting the service rules. There is little uniformity in the Uniform Act regulating who to serve. Interested persons are to be served and that is a case-by-case determination. Mr. Shea has tried to identify a more uniform set of people to be served. He has described these in a hierarchical fashion, so that if someone higher up the line is identified and served, those farther down the line do not need to be served unless they request it. He observed that this would be the service list for all pleadings from the petition to the annual reports.

The committee agreed that a uniform approach made it simpler for everyone to decide who to serve. After discussion, the committee concluded that serving someone higher up the line should not cut off the others. All of the people listed should be served. The committee also decided to use the language from the Advanced Healthcare Directive Act to serve a person who has shown particular care or concern for the respondent.

#### **Manner of service.**

Tim Shea stated that a petition and notice of hearing must be served personally on the respondent or protected person in accordance with Rule 4 at least 14 days before the hearing. Personal service does not mean only personal delivery, but can include leaving the petition and notice with a person of suitable age and discretion residing in the respondent’s home. Once the respondent is found to be incapacitated, Rule 4 contains special service requirements. People other than the respondent would be served under Rule 5, which includes service by mail. The rule will require serving the petition itself and notice of the hearing.

#### **Next meeting**

The committee decided to meet again in January to discuss the further changes made in the report. This will delay the report to the Council until February 23.

The committee adjourned at 3:00 p.m.

