



Utah State Courts

Ad hoc Committee on Probate Law and Procedures

Report to the Judicial Council
February 23, 2009

Ad hoc Committee on Probate Law and Procedures

- **George Harmond**, Seventh District Court, Chair
- **Kent Alderman**, Attorney at Law
- **Kerry Charlson**, Disability Law Center
- **Mary Jane Ciccarello**, Self Help Center Attorney
- **Reese Hansen**, J. Reuben Clark Law School
- **Maureen Henry**, Commission on Aging
- **Richard Howe**, Public Representative
- **Stephen Mikita**, Assistant Attorney General
- **Julie Rigby**, Third District Court Clerk
- **Gary Stott**, Fourth District Court
- **Kathy Thyfault**, Second District Court Clerk
- **Tim Shea**, Committee Staff



Utah State Courts

Committee Final Report

www.utcourts.gov

Click on “Report on Guardianships and Conservatorships”

Charge to the Committee

- Probate Law and Procedures
- Appointment of Guardians and Conservators
- Other issues will have to be left to another committee

Summary of the Problem

- Antiquated concept of incapacity
 - Legal definition
 - How we approach incapacity
- Plenary authority not supported by evidence
- Too many corners being cut
 - Insufficient representation
 - Insufficient evidence
 - Cursory hearings
 - Inadequate monitoring

Definition of Incapacity

“Incapacity” means a judicial determination that an adult’s ability, even with assistance, to

- (a) receive and evaluate information,
- (b) make and communicate decisions,
- (c) provide for necessities such as food, shelter, clothing, health care or safety,
- (d) carry out the activities of daily living, or
- (e) manage his or her property

is so impaired that illness or physical or financial harm may occur. Incapacity is a judicial decision, not a medical decision, and is measured by functional limitations.

How We Approach Incapacity

- “Do not mistake eccentricity for diminished capacity. Actions that may appear to stem from cognitive problems may in fact be rational if based on lifetime beliefs or values.”
 - Judicial Determination of Capacity of Older Adults in Guardianship Proceedings, American Bar Association Commission on Law and Aging – American Psychological Association (2006).
- “The more subtle obstacle to self-determination by an adult ... is the tendency of family members, attorneys, judges, and perhaps even mediators to want to structure a framework that is protective of the adult but that may not necessarily protect the adult's fundamental right to autonomy.”
 - Radford, 31 Stetson L. Rev. 611, 653-654 (2002).

Representation

- Appoint a lawyer in conservatorships as well as guardianships
- Appoint from a roster of qualified lawyers maintained by the Bar
- Access to Justice Council and the Bar organize and support such a roster
- Independent and zealous representation, not the role of a *guardian ad litem*
- Permit court or conservator to pay the petitioner's lawyer if the petition results in a beneficial order

Evidence of Incapacity

- A fuller picture of the respondent – gained through more complete evidence – is desperately needed.
- Clear and convincing evidence
- Evaluation by court appointed physician
- Evaluation by court visitor
- Evidence from family, friends, colleagues, religious ministers, care providers and others
- Consistency of behavior with long-standing values, preferences and patterns of behavior

Hearings

- “Once the paperwork is in order, ‘hearings’ average seconds, not minutes.”
 - Deseret News, November 24, 2008
- Respondent must be present unless excused
- Appoint an interpreter as in a commitment proceeding
- Meet the respondent’s needs

Mediation

- Encourage mediation community to develop education programs
 - rights and procedures in guardianship and conservatorship proceedings
 - aging process and disability conditions and the myths and stereotypes concerning older and disabled persons
 - skills required to communicate with older and disabled persons
 - medical and mental health terminology and the possible effects of various medications
 - services and programs available in the community for older and disabled persons
- Expand 3rd District pilot program to other districts

Probate Commissioner

- Consider appointing a commissioner instead of a judge when caseload justifies an increase
- Third District
- Combine with Domestic Commissioner in Districts 2 and 4, possibly 5

Fiduciary Authority

- Plenary authority common, but not supported
- Limit authority to the respondents needs
- Modest authority in the guardian for respondent's property
- Conservator's authority only if needed
- Respondent retains all rights and authority not delegated by the order
- Right to vote
- "Substituted judgment" decisionmaking standard
- "Best interest" decisionmaking standard

Monitoring Appointments

- Management plan
- Annual report
- Volunteer visitor
 - Volunteer coordinator

Miscellaneous

- Emergency appointments
- School guardianships
- Regulating professional guardians
- Training (judges, clerks, lawyers, fiduciaries)
- Outreach
- Information gathering



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Questions?
Comments?
Reservations?