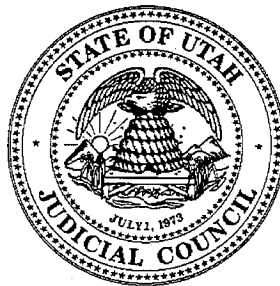




Utah State Courts

Ad hoc Committee on Probate Law and Procedure

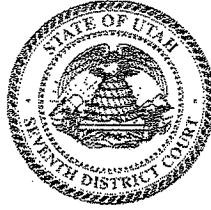


Final Report to the Utah Judicial Council
February 23, 2009

**The mission of the Utah judiciary is to provide the people an open, fair, efficient,
and independent system for the advancement of justice under the law.**

Ad hoc Committee on Probate Law and Procedure
Final Report to the Judicial Council
February 23, 2009

Prepared by
Administrative Office of the Courts
POB 140241
450 S State St
Salt Lake City, UT 84114-0241
www.utcourts.gov



Seventh District Court

George M. Harmond, Jr.
District Judge

February 23, 2009

Douglas B. Thomas
District Judge

The Honorable Christine M. Durham
Chief Justice, Utah Supreme Court
Presiding Officer, Utah Judicial Council
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Dear Chief Justice Durham:

On behalf of the Judicial Council's ad hoc Committee on Probate Law and Procedure, I am pleased to submit this final report with recommendations.

The Judicial Council's charge to the committee was very broad, encompassing nearly any part of probate policy that we decided needs attention. We focused immediately on protective proceedings in the district court. Yet, as narrowly as we have focused our attention, the topic is complex enough to have required all of our time. So the work on the probate code and the needs of the elderly remains unfinished.

We offer extensive recommendations in the area of guardianships and conservatorships. This package combines necessary changes to statutes and rules, improved forms and education, and nothing less than a cultural shift in the way we think of guardianships and conservatorships.

The appointment of a guardian or a conservator removes from a person a large part of what it means to be an adult: the ability to make decisions for oneself. The appointment often comes later in one's life, but not always. Younger adults incapacitated by accident, disease or developmental limitations also are affected. We terminate this fundamental and basic right with all the procedural rigor of processing a traffic ticket.

- The definition of incapacity is essentially the same as it was 100 years ago.
- The respondent is sometimes not represented.
- The respondent is sometimes represented by a lawyer recruited by the petitioner's lawyer.
- The respondent's lawyer sometimes acts as *guardian ad litem* rather than advocate.
- There is little or no procedure to elicit and challenge evidence.
- The evidence itself is cursory.
- Once appointed, guardians are often given the authority of a conservator whether or not that authority is warranted by the respondent's circumstances.
- Statutes claim to prefer limited authority for guardians and conservators, but fail to describe less restrictive alternatives.

- Plenary appointments are common with little evidence to support the need.
- There is no planning to help the respondent live life as independently as possible.
- There is no regulation of professional guardians.
- There is little education or assistance for family guardians.
- There is little training for judges and clerks.

The *Deseret News* recently reported that when it “went to court to watch guardianship proceedings, it was startling how quickly someone could be stripped of all decisionmaking rights. Once the paperwork is in order, ‘hearings’ average seconds, not minutes.”

Utah is not unique. Quite the contrary. Most states have let slip this important area of the law.

We classify guardianships and conservatorships as probate cases, but they have more in common with family law cases than with the intergenerational transfer of property. They share many of the emotional and financial issues of a divorce. The court defines future family relationships. We offer our recommendations with this idea in mind.

Our recommendations retain the basic concept of the Uniform Guardianship and Protective Proceedings Act to avoid contested litigation whenever possible. But uncontested does not mean automatic. We recommend a much more fully developed process to better protect the respondent and to present better evidence on which to make a measured intervention.

We have three recommendations that require public money:

- attorney fees and expenses of indigent respondents;
- interpreting guardianship and conservatorship proceedings and translating forms and materials for non-English speaking respondents; and
- a coordinator to recruit and train volunteers to serve as court visitors.

We recognize that the significant decline in state revenue means there will be no general fund appropriation for programs such as these. Nevertheless, we make the recommendations hoping that funding may someday be available. In the meantime, we recommend that the courts and the Bar pursue funds that might be available through *and Justice for All*, the Utah Bar Foundation, grants, and other sources. And we recommend that the Utah Access to Justice Council and the Utah State Bar organize and support a panel of trained, pro bono attorneys.

Beyond these funds, we recognize that our recommendations require a particularized inquiry into the respondent’s circumstances. The inquiry replaces traditional subjective judgments about the reasonableness of the respondent’s behavior with a more focused decision about the respondent’s capabilities and limitations. And all of that translates into more time.

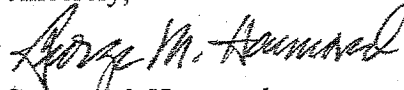
We recommend that this report be presented to judges, lawyers, guardians, conservators, health care providers, service providers and other stakeholders for critical analysis which can be integrated into legislation and rules for 2010.

The Honorable Christine M. Durham
February 23, 2009
Page Three

I want to thank the committee members and staff for their dedicated time and attention to the grand concepts and the many, many details of a program of this scope. We were well served.

Finally, I want to thank Judge Sheila McCleve for her work as the first chair of the committee. Circumstances meant that she was not able to remain as chair, but her initial guidance showed us the way.

Sincerely,

A handwritten signature in cursive script that reads "George M. Harmond". The signature is written in dark ink and is positioned above the printed name.

George M. Harmond
Committee Chair

(2) Summary of recommendations

- Modernize the definition of incapacity to focus on functional limitations. Require proof of incapacity (among other grounds) to appoint a conservator or a guardian.
- Enforce the requirement to prove incapacity by clear and convincing evidence.
- Consider in every case ordering that the respondent be evaluated by a physician or psychiatrist and by a court visitor. Adopt uniform forms on which to report the results of a clinical and social evaluation.
- Appoint a lawyer to represent the respondent in conservatorship cases, as is now done in guardianship cases.
- Require the respondent's lawyer to be from a roster of qualified lawyers maintained by the Utah State Bar. Establish minimum qualifications for the roster. Appropriate funds to pay the respondent's lawyer if the respondent cannot afford a lawyer and does not qualify for existing programs.
- Respondent's lawyer should be an independent and zealous advocate, rather than a *guardian ad litem*.
- If the court determines that a petition resulted in an order beneficial to the respondent, and if funds are available in the estate, permit the court or conservator to pay the reasonable and necessary expenses, costs and attorney fees from the estate.
- Require the respondent to attend all hearings unless the respondent waives that right or unless the court finds that attending the hearing would harm the respondent. Take steps to accommodate the special needs of respondents at court hearings.
- Appoint a certified court interpreter if the respondent does not understand English.
- Refer protective proceedings to mediation. The mediation community should develop training for mediating protective proceedings, including especially the skills and accommodations necessary when mediating with a person of potentially diminished capacity.
- Consider appointing a commissioner to hear probate matters, including guardianship and conservatorship cases, in districts with sufficient caseload.
- With a few exceptions, classify guardianship and conservatorship records as private.
- Require the petitioner to show that alternatives less restrictive than appointing a fiduciary have failed or that they would not be effective. Presume, rather than favor, limited guardianships. Adopt laws, procedures and forms that make limited guardianships a realistic option.
- Require the fiduciary to use the "substituted judgment" standard for decisionmaking on behalf of the respondent except in those limited circumstances in which the "best interest" standard may be used.

- Adopt special procedures for temporary emergency appointments.
- Eliminate “school guardianships.”
- Permit a person to nominate, rather than appoint, a guardian for self, a child or a spouse, and to petition to confirm the nomination during one’s lifetime.
- Require the fiduciary to write a management plan and file it with the court.
- Appoint a coordinator to develop a program of volunteer court visitors.
- Regulate the profession of guardian through the Division of Occupational and Professional Licensing. Require private guardians and conservators to disclose any criminal convictions that have not been expunged.
- Develop training for lawyers, judges and court staff. Develop outreach and assistance to guardians, conservators, respondents and the public.
- Unify the laws regulating guardians and conservators except where there is sound policy to differentiate them.

(3) Introduction

The general state of guardianships and conservatorships may depend upon whom one talks to. Although a bit dated, one court group, while recognizing that abuses occur, notes that, “the great majority of guardianships ... are initiated by people of goodwill who are in good faith seeking to assist and protect the respondent. ... Furthermore, in the great majority of guardianship proceedings, the outcome serves the best interests of the respondent and an appointed guardian acts in the respondent’s best interests.”¹ On

Appointing a guardian or conservator legally changes an adult into a child once more, and, as with a child, someone else decides those questions.

the other side of the coin, empirical researchers from a similar time period, while noting the benefits of guardianships, report that “guardianship ... often benefit[s] the guardian more than the ward and [can] hasten institutionalization for the protected person. ... [H]earings [are] extremely brief, [do] not rely upon medical testimony, and often [result] in plenary orders”²

The committee members’ experience supports both views. Many of the conclusions we reach are based on our observations and experience. We have no statistics to offer because, like most jurisdictions, other than the number of petitions filed, we record little in a systematic way. In how many cases is the respondent excused from the trial? In how many cases is the respondent not represented by counsel? Not evaluated by a physician or psychiatrist? By a court visitor? In the end, we do not know. Based on our

¹ National Probate Court Standards, Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships, Section 3.3 (1993). Hereafter cited as National Probate Court Standards.

² Clinical Evidence in Guardianship of Older Adults Is Inadequate: Findings From a Tri-State Study, *The Gerontologist* Vol. 47, No. 5 (2007) by Jennifer Moye, PhD, Stacey Wood, PhD, Barry Edelstein, PhD, Jorge C. Armesto, PhD, Emily H. Bower, MS, Julie A. Harrison, MA, and Erica Wood, JD. pp 604–605, citing earlier studies. Hereafter cited as “Moye.”

experience we know which observations in the national literature and in the committee testimony ring true.

Appointing a guardian or a conservator is one the most significant interventions by a court into a person's life. Like a prison sentence or commitment to a mental health facility, the appointment takes from that person the freedom to decide for oneself many, and often times all, of the large and small issues we face every day. Appointing a guardian or conservator legally changes an adult into a child once more, and, as with a child, someone else decides those questions.³

Ideally, "procedural protections work to ensure that putative wards are fully informed, properly evaluated, zealously defended, that the issues are fully developed and heard, and that an intervention is finely tuned to the needs and preferences of individuals."⁴ Yet those protections are applied inconsistently at best.

The law requires that the respondent be represented, but that does not always happen. If the respondent is represented, the attorney might have been recruited by the petitioner's attorney. Or might fulfill the role of a *guardian ad litem* rather than advocate. The standard to declare someone incapacitated is clear and convincing evidence, but clinical evidence is usually modest. Procedures are cursory. The *Deseret News* reports that "'hearings' average seconds, not minutes."⁵

The guardian is usually granted plenary authority over the respondent with little or no exploration of the respondent's capabilities and in the face of laws that prefer limited authority. Annual reports by guardians and conservators have been required for many years, but only recently has the district court enforced the requirement. The court has

This is what we hope to achieve:

- ♦ a deliberate inquiry into the limitations and needs of the respondent;
- ♦ a measured intervention based on those limitations and needs; and
- ♦ oversight to protect the quality of life of a respected individual.

no way to verify the truth of those reports, except by objections from the respondent's family, which might be uninterested or perhaps does not exist.

Press reports and official investigations in other states have revealed ruined lives and have sent fiduciaries to prison.⁶ Although Utah has so far avoided the scandalous headlines in which a fiduciary abuses, neglects or defrauds the person s/he is responsible for, there is no reason

to believe that guardians and conservators in Utah are any less prone to abuse or fraud than those in other states whose malfeasance and negligence have been discovered.

³ Indeed, under current Utah law, "Absent a specific limitation ..., the guardian has the same powers, rights, and duties respecting the ward that a parent has respecting the parent's unemancipated minor child..." Utah Code Section 75-5-312(2).

⁴ Charles P. Sabatino, *Competency: Refining Our Legal Fictions, Older Adults' Decision making and the Law* 1, 2 (Michael Smyer, K. Warner Schaie & Marshall B. Kapp eds., Springer Publg. 1996), pp 20-21.

⁵ <http://deseretnews.com/article/1,5143,705265008,00.html?pg=2> *Deseret News*, November 24, 2008. Who should make choices for the elderly? By Elaine Jarvik and Lois M. Collins.

⁶ See e.g., stories linked at: [http://www.citibay.com/cgi-bin/directory.pl?etype=odp&passurl=/Society/Issues/Violence and Abuse/Elder/Guardianships/](http://www.citibay.com/cgi-bin/directory.pl?etype=odp&passurl=/Society/Issues/Violence%20and%20Abuse/Elder/Guardianships/).

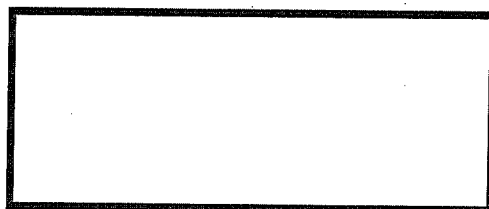
Most petitions are filed in good faith to appoint a person of goodwill who will serve in the best interests of the protected person, but we rely primarily on good faith and goodwill to achieve that result. Good intentions and lack of oversight have, over time, led to summary proceedings that presume to protect the respondent from others and from self, but that offer little real protection from the process itself or from those we put in charge of the respondent's life. And even one case in which the fiduciary takes advantage of the person s/he is supposed to take care of is one too many. Summary proceedings and trust in the capability and goodwill of guardians and conservators are easy, but they deny many respondents the level of independence they may be capable of.

To be sure, there are cases in which the respondent is so clearly incapacitated that substantial medical evidence would be costly and without purpose. There are cases in which the respondent is so fully incapacitated that plenary control over that person is the most appropriate arrangement. But not in all cases. Many cases present nuances that need to be explored and capacities that need to be protected.

In Utah, as in most states and in national standards, guardianships and conservatorships are classified as probate cases, yet today they have more in common with family law than with probate law. Those who need protection or help are often seniors but not always. The family faces the same emotional and financial drain faced in divorce. Although we do not intend to reclassify an entire area of the law, we recommend significant changes to many statutes and rules with the dynamics of family relationships in mind.

This is an area that is ripe for collective action. There are roles here for all three branches of government, the Bar, the health care community, and even the larger public community. This is what we hope to achieve:

- a deliberate inquiry into the limitations and needs of the respondent;
- a measured intervention based on those limitations and needs; and
- oversight to protect the quality of life of a respected individual.



Guardianships about 1500 years ago:

The relation of guardian and ward, or, in the Roman words, of *tutor* and *pupil*, which covers so many titles of the Institutes and Pandects, is of a very simple and uniform nature. The person and property of an orphan must always be trusted to the custody of some discreet friend. If the deceased father had not signified his choice, the *agnates*, or paternal kindred of the nearest degree, were compelled to act as the natural guardians: the Athenians were apprehensive of exposing the infant to the power of those most interested in his death; but an axiom of Roman jurisprudence has pronounced that the charge of tutelage should constantly attend the emolument of succession. If the choice of the father and the line of consanguinity afforded no efficient guardian, the failure was supplied by the nomination of the praetor of the city or the president of the province; but the person whom they named to this *public* office might be legally excused by insanity or blindness, by ignorance or inability, by previous enmity or adverse interest, by the number of children or guardianships with which he was already burthened, and by the immunities which were granted to the useful labors of magistrates, lawyers, physicians, and professors. Till the infant could speak and think, he was represented by the tutor, whose authority was finally determined by the age of puberty. Without his consent, no act of the pupil could bind himself to his own prejudice, though it might oblige others for his personal benefit. It is needless to observe that the tutor often gave security, and always rendered an account; and that the want of diligence or integrity exposed him to a civil and almost criminal action for the violation of his sacred trust. The age of puberty had been rashly fixed by the civilians at fourteen, but as the faculties of the mind ripen more slowly than those of the body, a *curator* was interposed to guard the fortunes of a Roman youth from his own inexperience and headstrong passions. Such a trustee had been first instituted by the praetor to save the family from the blind havoc of a prodigal or madman; and the minor was compelled by the laws to solicit the same protection to give validity to his acts till he accomplished the full period of twenty-five years. Women were condemned to the perpetual tutelage of parents, husbands, or guardians; a sex created to please and obey was never supposed to have attained the age of reason and experience. Such at least was the stern and haughty spirit of the ancient law, which had been insensibly mollified before the time of Justinian.

The Decline and Fall of the Roman Empire
Edward Gibbon
(citations omitted)

The full Report of the Ad hoc Committee on Probate Law and Procedure, including draft legislation and rules, and the opportunity comment about them are on the Web at:

<http://www.utcourts.gov/committees/adhocprobate-discussion/>