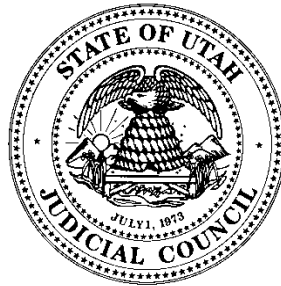




Utah State Courts

Ad hoc Committee on Probate Law and Procedure

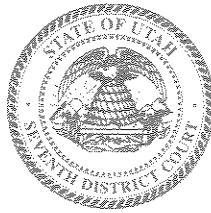


Final Report to the Utah Judicial Council
February 23, 2009

**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

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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.

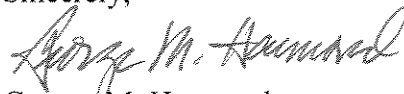
We recommend that this report be presented to judges, lawyers, guardians, conservators, health care providers, service providers and other stakeholders for critical analysis which can be integrated into legislation and rules for 2010.

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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".

George M. Harmond
Committee Chair

EXCERPT

(4) Definition of “incapacity”

(a) Inadequacy of current definition

Merely defining the term “incapacity” is a complex matter. Is it a legal standard or medical? Is it cognitive or functional? What factors are relevant? Can a person lack capacity for some purposes and have capacity for others? Yet we must agree on a definition because the appointment of a guardian or conservator⁷ rests upon the finding that a person is incapacitated.

The keystone to the entire protective arch is not that much different from the definition at the time of statehood.

⁷ Current Utah law permits the appointment of a conservator if the respondent “is unable to manage the person's property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance....” Utah Code Section 75-5-401(2). Except for confinement, detention and disappearance as reasons to appoint a conservator, this definition is essentially the same as incapacity

The current statutes governing guardians and conservators were enacted in 1975 and are based on the Uniform Guardianship and Protective Proceedings Act of 1968. Medical care for and everyday functioning of people well into later life has improved a lot in 40 years, but our definition of “incapacity,” the keystone to the entire protective arch, is not that much different from the definition at the time of statehood.

Utah law defines an incapacitated person as:

any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority, to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

Utah Code Section 75-1-201(22).

Although the statute has never been amended to reflect the decision, our Supreme Court has added that the lack of understanding or capacity to make or communicate decisions must be so impaired that the person is unable to care for personal needs or safety to such an extent that illness or harm may occur.

We hold that ... a determination that an adult cannot make ‘responsible decisions concerning his person’ and is therefore incompetent, may be made only if the putative protected person’s decisionmaking process is so impaired that he is unable to care for his personal safety or unable to attend to and provide for such necessities as food, shelter, clothing, and medical care, without which physical illness or harm may occur.

In re Boyer, 636 P.2d 1085, 1089 (Utah 1981).

In other words, poor choices alone – even choices that a reasonable person would describe as irresponsible – do not make one incapacitated.

The Uniform Guardianship and Protective Proceedings Act of 1997 moves away from the traditional “physical illness” and “mental illness” found in the 1968 Uniform Act to focus on the ability to receive and evaluate information or to make or communicate decisions.⁸

Many states and the National Probate Court Standards have moved away from cognition and decisionmaking to focus on functional limitations: What can the respondent do and not do? In this approach, cognition and executive functioning remain important, perhaps more important than most other functioning, but, in the end, they are simply functions in which the respondent may face limitations. This definition inherently answers the question: Can a person lack capacity for some purposes and retain capacity for others? At least potentially, the answer is “yes,” depending on the nature of the functional limitations.

This approach requires a particularized inquiry into the respondent’s circumstances, which necessarily is more difficult and time-consuming. The inquiry replaces traditional

for the appointment of a guardian. Later in this report, we recommend using one standard for both appointments.

⁸ Uniform Guardianship and Protective Proceedings Act of 1997, Section 102(5). Hereafter cited as 1997 Uniform Act.

subjective judgments about the reasonableness of the respondent's behavior with a more focused decision about the respondent's capabilities and limitations.⁹

Whether the determination of incapacity is a medical or legal decision is more easily concluded. Given the consequences of the decision, it has to be a legal decision judicially made. The decision might be heavily influenced by medical evidence and opinions, but the decision itself remains a legal consequence.

(b) Recommended definition

By evaluating our current statute and case law, the definitions in other states and those recommended in national standards, and by considering similar concepts from Utah law in other applications, we recommend the following definition of incapacity for the appointment of either a guardian or a conservator:

Poor choices alone – even choices that a reasonable person would describe as irresponsible – do not make one incapacitated.

Choices that are linked with lifetime values are rational for an individual even if outside the norm.

“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.

Although not mentioned in the *Boyer* holding, we recommend adding “financial harm” to the definition of “incapacity” so that one definition can serve as the grounds for appointing a guardian or a conservator, rather than the separate but similar definitions we have now. The importance of this small change can be lost in the enormity of the project. Historically, appointment of a conservator has not been a determination of the respondent’s incapacity.¹⁰ With this change, a conservator cannot be appointed unless the respondent is incapacitated.

The grounds for appointing a conservator should also include that the respondent is missing, detained, or unable to return to the United States, and the person to be protected should be able to voluntarily request the appointment. But the definition of

⁹ Judicial Determination of Capacity of Older Adults in Guardianship Proceedings, American Bar Association Commission on Law and Aging – American Psychological Association (2006). Hereafter cited as Judicial Determination of Capacity.

¹⁰ Utah Code Section 75-5-408(2); 1997 Uniform Act Section 409(d).

incapacity as grounds to appoint a guardian or conservator should be the same for both offices.

(c) Factors

We propose several factors that the judge might consider when determining the respondent's capacity. Most will be familiar to those experienced in protective proceedings.

(1) whether the respondent's condition, limitations and level of functioning leave the respondent at risk of:

- (a) his or her property being dissipated;
- (b) being unable to provide for his or her support, or for the support of individuals who are entitled to the respondent's support;
- (c) being financially exploited;
- (d) being abused or neglected, including self injurious behavior; or
- (e) having his or her rights violated;

(2) whether the respondent has a physical or mental illness, disability, condition, or syndrome and the prognosis;

(3) whether the respondent is able to evaluate the consequences of alternative decisions;

(4) whether the respondent can manage the activities of daily living through training, education, support services, mental and physical health care, medication, therapy, assistants, assistive devices, or other means that the respondent will accept;

(5) the nature and extent of the demands placed on the respondent by the need for care;

(6) the nature and extent of the demands placed on the respondent by his or her property;

(7) the consistency of the respondent's behavior with his or her long-standing values, preferences and patterns of behavior, and

(8) other relevant factors.

We want to focus on one factor in particular: the respondent's values, preferences and patterns of behavior. Although it comes late in the list, it is perhaps one of the more important factors. Two brief quotes from the benchbook *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings* by the ABA indicate why.

Capacity reflects the consistency of choices with the individual's life patterns, expressed values, and preferences. Choices that are linked with lifetime values are rational for an individual even if outside the norm."¹¹

Each of the above factors must be weighed in view of the individual's history of choices and expressed values and preferences. Do not mistake

¹¹ Judicial Determination of Capacity, p 5.

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. Long-held choices must be respected, yet weighed in view of new medical information that could increase risk, such as a diagnosis of dementia.¹²

(5) Evidence of incapacity

(a) Inadequacy of current evidence

On what basis should the court decide whether a person is incapacitated? Although the statute requires only that the judge be “satisfied”¹³ that the respondent is incapacitated, the actual standard – clear and convincing evidence – is well settled. This is the law from the Utah Supreme Court¹⁴, and it is in keeping with the 1997 Uniform Act.¹⁵

Yet from the experience of committee members, it often does not require very much evidence to satisfy that high standard. In an empirical study of guardianship cases in Colorado, Massachusetts, and Pennsylvania,¹⁶ researchers found:

The danger of relying exclusively on an evaluation arranged by the petitioner is shown by physicians’ disagreement about determining capacity.

In other words, physicians consistently diagnosed the obvious subjects at either end of the spectrum and disagreed about the subjects in the middle for whom the diagnosis was a closer question.

- Written evaluations were filed in all but one case in Massachusetts and Colorado, and in 75% of the cases in Pennsylvania.
- Evaluations were submitted by physicians in 98% of the Massachusetts cases and in 88% of the Pennsylvania cases. In Colorado, clinical reports were submitted by physicians (57%), psychologists (27%), other professionals (9%), or a multidisciplinary team (6%) consistent with the 1997 Uniform Act.
- The average length of clinical reports in Colorado as 781 words, 244 words in Pennsylvania and 83 words in Massachusetts.
- 75% of the Massachusetts reports were hand written, and 65% of these had at least some portion that was illegible. In Pennsylvania and Colorado, reports were almost always typed.

That 83 words, some of which are illegible, might be offered as clear and convincing evidence is beyond belief.

A judge should never rely exclusively on a clinical evaluation secured by the petitioner. “A clinical evaluation secured by the petitioner is for the purpose of supporting the petition and may lack attention to the individual’s areas of strength, a

¹² Judicial Determination of Capacity. p 12.

¹³ Utah Code Section 75-5-304(1).

¹⁴ *In re Boyer*, 636 P.2d 1085, 1092 (Utah 1981).

¹⁵ 1997 Uniform Act, Sections 311 and 401.

¹⁶ Moye, p 608.

prognosis for improvement, or important situational factors. An independent assessment can flesh out skeletal or purely one-sided information.”¹⁷

The danger of relying exclusively on an evaluation arranged by the petitioner is shown by physicians’ disagreement about determining capacity. In a study reported in 1997,¹⁸ “physicians experienced in competency assessment showed ... virtually unanimous judgment agreement [98%] for older normal controls but dramatically lower ... agreement [56%] for patients with mild [Alzheimer’s disease].” “Overall pairwise physician ratings showed excellent percentage judgment agreement for the control and a severely demented AD patient but lower percentage agreement for patients with mild to moderate [Alzheimer’s disease].” In other words, physicians consistently diagnosed the obvious subjects at either end of the spectrum and disagreed about the subjects in the middle for whom the diagnosis was a closer question.

(b) Recommendation

The American Bar Association Commission on Law and Aging, in conjunction with the American Psychological Association and the National College of Probate Judges, has prepared a

A fuller picture of the respondent – gained through more complete evidence – is desperately needed.

template for a clinical evaluation of the respondent.¹⁹

We have studied it and expanded upon it with suggestions from other sources. It is extensive. Parts of it may not be relevant in some cases, and we recommend that those be excised. The judge should not be required to order the respondent to submit to a clinical evaluation, but we recommend its consideration in every case.

Although Utah Rule of Civil Procedure 35 governs the examination of a party when the party’s “mental or physical condition ... is in controversy,” we recommend that a special rule govern the respondent’s examination in protective proceedings. Rule 35 was written for personal injury cases and contains provisions inappropriate to these circumstances.

The Wingspan Conference recommends that “the pre-hearing process include a separate court investigator or visitor, who must identify the respondent’s wants, needs, and values.”²⁰ The 1997 Uniform Act also recommends that a court visitor be required.²¹ Utah law provides that the court may appoint a visitor to interview the respondent, but there is no requirement to do so, unless the petitioner proposes that the respondent be excluded from the hearing. By omitting this step, the court denies itself critical independent information with which to assess the respondent’s functional abilities and limitations, values and history, all of which affect the fiduciary’s appointment and authority.

¹⁷ Judicial Determination of Capacity, p 8.

¹⁸ Journal of the American Geriatrics Society - Volume 45, Issue 4, pages 453-457 (April 1997).

¹⁹ Judicial Determination of Capacity, pp 25-32.

²⁰ Wingspan - The Second National Guardianship Conference, Recommendations, Recommendation 30, 31 Stetson L. Rev. 595, 601 (2002). Hereafter cited as Wingspan Conference.

²¹ 1997 Uniform Act Section 305.

An evaluation by a multidisciplinary team, as in Colorado, may be beyond the means of nearly all families, but we recommend at least the perspective of a court visitor in addition to that of the clinician. Evaluation by a medical professional will probably occur in a clinical setting, but evaluation by the court visitor should, whenever possible, be in the respondent's usual environment and with all due consideration for his or her privacy and dignity.²²

Evidence from family, friends, colleagues, religious ministers, care providers and others will provide the judge with information about who this respondent is, and will enable the judge to decide, not just the respondent's capacity, but also the details of the guardianship plan. A fuller picture of the respondent – gained through more complete evidence – is desperately needed.