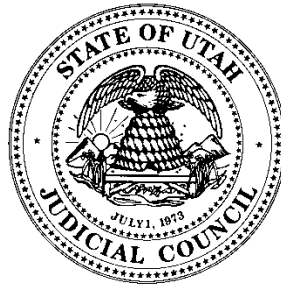




Utah State Courts

Ad hoc Committee on Probate Law and Procedure

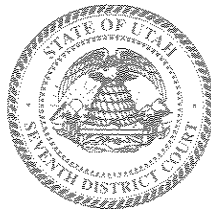


Final Report to the Utah Judicial Council
February 23, 2009

**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
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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.

The Honorable Christine M. Durham
February 23, 2009
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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