

## Presentation on Guardianship Reform Report Utah Aging Alliance, 10/13/09

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Utah State Courts Ad Hoc Committee on Probate Law and Procedure  
Final Report to the Utah Judicial Council, February 23, 2009

► For the report, power point presentation, and to **make comments**, go to:

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

### Summary of Committee 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 trainings 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.