

MINUTES
Utah Commission on Aging
October 19, 2009
12:00 – 2:00 pm

Commission Member Attendees:

Maureen Henry
Norma Matheson
Mark Supiano
Kim Soper for Diana Kirk
Shauna O’Neil
Michael Deily for David Sundwall
Rep. Steven Mascaro
Comm. William Cox
Nels Holmgren for Lisa-Michele Church
Kent Alderman
Gary Kelso
Carol Wilcox for Cherie Bruncker
Sheriff Jim Winder

Representing:

Executive Director
Honorary Chair
Higher Education
Financial Institutions
Area Agencies on Aging
Department of Health
House of Representatives
Utah Association of Counties
Department of Human Services
Legal Profession
Long-Term Care
Health Care
Public Safety

Other attendees:

Fran Wilby	Goodwill Initiatives
Hollie Carter	Nursing Student

The meeting was called to order by Norma Matheson.

1. Welcome, Approval of Minutes, and Lunch

The minutes from June 16 and August 19 were approved. Reappointment status of members is still pending. Norma asked that anyone who has not yet submitted their application do so. The proposed meeting with Governor Herbert is pending.

2. Proposed Revisions to Utah’s Guardianship Code

The Ad hoc Committee on Probate Law and Procedures has been working on legislation with the intent that it will be submitted for consideration during the next legislative session. Maureen is serving on this committee. Lyle Hillyard is sponsoring the legislation.

The final report is 150 pages, and located at [.utcourts.](#). There is a request for comments at this website. The committee is encouraging people in the community to read the report and the proposed legislation, and provide feedback to the Judicial Council so that any changes can be made before the session begins in January.

The committee decided that its focus would be on the appointment of guardians and conservators. One problem with the code was an antiquated concept of capacity, both with the legal definition and how we approach capacity. Plenary authority (a

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guardianship is awarded over the whole person, as opposed to limited authority, which is for specific aspects of control.) In the 1980s, the law was changed to state that guardianship should be limited and that plenary guardianship should be awarded only when there was sufficient evidence to support this action. However, in one study it was found that over 80% of guardianships in Utah are plenary, with no consideration for the needs of the individual, as well as inadequate representation. Monitoring of guardianships is also lacking. The current statutory definition of an "Incapacitated person" means 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. It was modified by the Supreme Court in 1980 to read "... only if the ... decisionmaking process is so impaired that he is unable to care for his personal safety or ... provide for ... necessities ... without which physical illness or harm may occur." The proposed definition reads: "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. (Boyer standard) This emphasizes that this is a judicial determination, not a medical decision. The new definition shifts away from a "status" determination to a "functional" definition of incapacity that links the inability to do something specific to being incapacitated rather than having a diagnosis that equals incapacity or incompetence. The courts are moving away from having a physician writing a letter saying a person needs a guardian to requiring evidence as well as input from the individual before making a decision.

Training will be essential with a financial cost. Lawyers will have higher standards to meet in the realm of evidence. Incapacity factors will include:

- Whether level of functioning leaves person at risk of being victimized.
- Is there an illness, disability, condition, or syndrome and what is the prognosis?
- Ability to evaluate consequences of alternative decisions.
- Ability to manage daily activities through training, education, support, health care, medication, therapy, assistants, assistive devices, etc. that person accepts.
- Nature and extent of demands on person.
- Consistency of behavior with long-standing values, preferences and patterns of behavior.

The advance directives and other legal mechanisms can be used to support the guardianship issues. Eccentricity should not be mistaken for diminished capacity. One of the most difficult and subtle obstacles is how to protect a person's rights without putting him/her in danger.

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Evidence of incapacity would include:

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

Fiduciary authority takes into account what limits should be applied, with the purpose of maintaining as many rights as possible; ie., right to vote. “Substituted judgment” and decisionmaking standard should be applied. In an emergency situation, a temporary appointment can be made possibly the same day for a five day period. The revisions to the guardianship code will hinge on due process, competent counsel, and provision of medical and functional evidence.

3. ADRC Cooperative Agreement Award

The Commission on Aging was awarded the cooperative agreement for the Aging & Disability Resource Center (ADRC). We will be working closely with AoA and CMS regarding the outcomes. Louise will be the Program Coordinator, Maureen will be the Director, and there will be a yet-to-be hired half-time AA. A Steering Committee will determine how the ADRC looks and functions. The Steering Committee will be made up of the required entities as stated in the grant application. There will be four AAA directors, three CIL directors, one designee each from HealthInsight, Aging & Adult Services (Nels Holmgren), DOH Medicaid program (Tonya Hales), DSPD, 2-1-1 (Lorna Koci), Access Utah Network (Mark Smith), and one community partner designee. There will also be a Community Advisory Council; hopefully, Commission members will agree to serve on this council.

The ADRC will serve the entire state and anyone in the state who is providing information regarding long-term care options. The main objective of the ADRC is to provide reliable, consistent, trusted information about long-term care options to individuals throughout the state. The ADRC will serve people of all income levels; this will test the theory that better choices will result in fewer people on Medicaid. The ADRC will serve aging people who meet the Older American’s Act criteria AND younger adults with disabilities. The intent of CMS and AoA is to eliminate the barriers between programs that force a person into categories. Other programs, such as the Veteran Directed Home and Community-Based Services (VDHCBS) program, are very well funded; the AAAs can apply for this funding if a state has an ADRC.

There are two non-negotiable terms of the grant: (1) have one site providing in-person counseling about long-term care options by the end of 12 months, (2) The state must have a five-year plan in place by the end of 18 months. AoA does not intend for this to be an

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on-going funding stream; the grant is for three years. \$700,000 will not go very far in the long run. The ADRC will work with 2-1-1 to make sure that it offers an appropriate level of information statewide to people in need of information about options for older and disabled adults. People will need to be able to apply for DWS Eligibility online, on the telephone, and in-person. The ADRC will be working with different agencies regarding applying for programs, accessing information, and providing benefits information. Everyone needs to be giving out the same information. The ADRC will build a database of trusted information and distribute the information statewide.

The meeting adjourned at 1:50 p.m. The next meeting is Tuesday, December 8, 2009.