The Arc Missouri

4th Annual Educational Summit

Disability and Abuse: Administering Trauma-Informed Justice in Missouri Guardianship Proceedings

by Thomas F. Coleman

September 15, 2017

Annotated Bibliography with Strategic Commentary

This bibliography is the foundation for the presentation of Thomas F. Coleman at the 4th Annual Educational Summit. In addition to analyzing the materials listed below, the following individuals in Missouri were interviewed: **Les Wagner**. Executive Director of the Missouri Association of County Developmental Disabilities Services; **Gary Schanzmeyer**, Deputy Director of the Division of Developmental Disabilities of the Missouri Department of Mental Health; and **Susan Eckles**, Managing Attorney, Missouri Protection and Advocacy Services. Written information was supplied by **Catherine Nelson Zacharias**, Legal Counsel to the Office of State Courts Administrator. **Nora J. Baladerian, Ph.D.**, Director of the Disability and Abuse Project of Spectrum Institute was also consulted.

1. Disability and Guardianship – Demographics

a. Document: *Adults in Guardianship*. According to a newspaper article published in 2015, there were 30,000 adults under an order of guardianship in Missouri at the time. These figures were supplied to the paper by the Mo-WINGS Task Force. It was not specified how many of these adults were elders with dementia, adults with intellectual and developmental disabilities, or others with cognitive impairments resulting from medical conditions or accidents. **Comment**. In response to an inquiry from Spectrum Institute on August 15, 2017, the Office of State Courts Administrator supplied a document indicating that in 2016 there were 30,912 adult guardianship cases that were active. The document also showed that 3,062 new guardianship petitions were filed that year. The AOC stated that it does not know how many of these cases involve adults with intellectual and developmental disabilities (I/DD) versus dementia or other types of cognitive disabilities. According to the AOC, guardianship cases are handled at the local level and there is no monitoring of them at

the state level. The lack of information on people with developmental disabilities in guardianships and the lack of monitoring of local processing and management of these cases should be of great concern to the I/DD community and their advocates. At the very least, there should be a Guardianship Ombudsperson in state government – in an appropriate agency of the Executive Branch – to receive and gather information about the guardianship practices of local courts and participants in these legal proceedings and to identify deficiencies in state policy. The Guardianship Ombudsperson could issue periodic reports to the Legislature and to the Judicial Branch, with recommendations for ways to improve policy as well as local practices.

b. Document: *Aging with Intellectual and Developmental Disabilities: Trends and Best Practices* (UMKC - Institute for Human Development, 2015) Using a national estimate that 1.58% of the population has an intellectual or developmental disability, this report suggests that there are 95,497 individuals with such disabilities in Missouri. This includes children as well as adults. Using national estimates that 71% of people with I/DD live with family caregivers, the report suggests that more than 67,000 people with such disabilities live with family caregivers in Missouri. **Comment**: The statistics from this report do not distinguish between children and adults. However, the most recent data from the Census Bureau shows there are 4.7 million adults in Missouri. Using the 1.58% figure in connection with the current adult population in the state, it would appear that about 73,000 adults with intellectual and developmental disabilities reside in Missouri. Since it is estimated that only 30,912 adults are in guardianships – and many if not most of them do not have I/DD – it is clear that the overwhelming majority of adults with developmental disabilities are not in guardianships. Most adults with I/DD are likely living with family caregivers in informal supported decision-making arrangements. This fact underscores the importance of supported decision-making agreements and arrangements being both safe and legal. The Division of Developmental Disabilities, The Arc of Missouri, Missouri Protection and Advocacy Services, and other organizations and agencies should sponsor and promote educational literature and events on "Safe and Legal Supported Decision-Making in Missouri." A PowerPoint presentation, video, and printed materials on that subject are available on the website of Spectrum Institute.

c. Document: *Charting the Life Course* (PowerPoint, NASDDDS 2016 Mid-Year Conference) Slide #24 of this PowerPoint estimates that of the 96,122 Missourians with developmental disabilities, some 65% are not known to the state DD system. **Comment:** It should be of great concern to those who establish public policy and those who provide services that such a high percent of people with I/DD are "off the grid" in terms of state services. Without any outside engagement or monitoring, this segment of the I/DD population is at a higher risk for abuse than those who regularly interact with state or local agencies.

d. Document: *Disability Statistics: Online Resource for U.S. Disability Statistics* (Cornell University) This website allows users to select criteria. When these criteria are selected (male or female; cognitive disability; age 18-64 + 65 and over; all races; all education levels; regardless of ethnicity; 2015) these results are shown for Missouri. There were 217,818 adults who had a cognitive disability (206,600 between the 18 and 64 plus 11,248 who were 65 over). People with cognitive disabilities are at a higher risk for abuse than the generic population. Since only 30,000 adults are in guardianships, there are more than 187,000 vulnerable adults who are not. These individuals are therefore coping with major life decisions and activities through the use of informal supported decision-making arrangements. This data underscores the need for educational outreach about the importance of *safe and legal* supported decision-making.

2. Abuse and Disability – Prevalence of Abuse

a. Document: Baladerian, Coleman, and Steam, *The First Report: Victims and Their Families Speak Out* (2012 National Survey on Abuse of People with Disabilities, Spectrum Institute, 2013) **Comment**: This report shares the findings of the largest survey on abuse of people with disabilities ever conducted in the United States. More than 7,200 people throughout the nation took the survey, including 1,364 people with disabilities and 2,249 family members of people with disabilities. Findings: More than 70% of people with disabilities said they had been victims of abuse; more than 63% of family members said their loved ones with disabilities had been abused. A large majority of victims said they had been abused on multiple occasions. Some 63% of victims with disabilities did not report the abuse to authorities. Fear, futility, and lack of information were cited as the reasons for not reporting. In a majority of cases where reports were made, nothing happened to the perpetrator. Most victims never received therapy.

b. Document: Coleman, *A Review of the Association Between Childhood Disability and Maltreatment* (Spectrum Institute, 2017) **Comment**: A new meta-study published in 2017 and reviewed by attorney Thomas F. Coleman shows that children with disabilities are abused at a higher rate than children without disabilities . . . but how much more is not clear from that meta-study. However, based on his review of an array of other academic literature, Coleman's commentary concludes: " If the estimates from the study funded by the World Health Organization are correct, and 27% of children with disabilities are victims of reported abuse, then the problem is much worse when the percent of unreported cases are considered. If nearly 40 percent of child abuse cases involving victims with disabilities are unreported, as suggested by some studies, then as many as 45% of children with disabilities may experience abuse during their childhood years. If it is true that 'most cases are not reported to anyone,' as stated in a journal article published in 2013 by the National Academy of Sciences, and if this applies to children with disabilities to the same extent as children in the general population, then a majority of children with disabilities will have experienced abuse during their childhood years. (New Directions in Child Abuse and Neglect Research, 2013)"

c. Document: DHSS, *It's a Crime: Abuse, Neglect and Financial Exploitation of Missouri's Elderly and Adults with Disabilities* (Department of Health and Senior Services, 2011) **Comment**: This report reveals that between 2007 and 2011, reports of abuse of adults with disabilities jumped 49.22 percent in Missouri. In 2011, more than 8,500 cases were reported. A significant percentage of reports identify the alleged perpetrator as a relative.

d. Document: MODDC, *It's Happening* (Missouri Developmental Disabilities Council and The Arc Missouri) **Comment**: This website is part of a public education campaign by The Arc and the Developmental Disabilities Council to make the public aware that abuse of adults with intellectual and developmental disabilities is prevalent and pervasive and often goes unreported. It explains that abuse happens in many ways, and that it needs to be identified and reported. The website describes the signs and symptoms of abuse and encourages people to report it by phone or in writing, anonymously or otherwise.

3. Abuse and Disability – Mandated Reporters

a. Document: *List of Mandated Reporters* (Updated 02/17) A document found on a webpage of the State of Missouri shows that the Revised Statutes of Missouri, Section 192.2405 make it a Class A

misdemeanor for any person practicing specified professions to fail to report suspected abuse or neglect of an eligible adult (senior or dependent adult). That duty and that penalty also apply to "any other person with the responsibility for the care of an eligible adult." **Comment:** Although the word "guardian" is not contained in the list of persons who are mandated reporters, since a guardian is an "other person with the responsibility for the care of an eligible adult" then a guardian would be a mandated reporter nonetheless. The word "guardian" should be explicitly stated in the statute.

4. Supported Decision-Making – Risk Reduction and Monitoring

a. Document: Coleman, *Supported Decision-Making: My Transformation from a Curious Skeptic to an Enthusiastic Advocate* (Spectrum Institute, 2017) This commentary discusses the path taken by attorney Thomas F. Coleman on the topic of supported decision-making (SDM) – from his caution when he was first introduced to the subject to his enthusiastic endorsement of SDM – so long as the process and the result are safe and legal. **Comment**: For a supported decision-making agreement to be legal, an adult with a developmental disability must have the ability to understand the terms of the agreement and that he or she has a choice to agree to it or not. In other words, it must be voluntary. There must be no undue influence or pressure from authority figures or others. For a supported decision-making arrangement to be safe, there must be ongoing monitoring mechanisms built into the process, to safeguard against potential abuse or exploitation by supporters or others. People in Missouri and throughout the nation are discussing SDM as a substitute for guardianship. However, the "safe and legal" aspects are all too often not included in the discussion. This commentary and a related report, and PowerPoint presentation address the important issues that need attention as SDM is being considered for individuals as an alternative to guardianship. A video of attorney Coleman's presentation on SDM at a conference sponsored by The Arc of California is also available.

5. Abuse and Guardianship – Vetting of Proposed Guardians

a. Document: Coleman, *Trauma-Informed Justice: A Necessary Paradigm Shift for the Limited Conservatorship System* (Spectrum Institute, 2017) **Comment:** Although this commentary was written with California's limited conservatorship system in mind, it applies equally to people with developmental disabilities who are respondents in adult guardianship proceedings in any state. Coleman argues that guardianship systems should use a trauma-informed approach, since the reality is that a majority of people with developmental disabilities may have been victims of abuse by the time they become adults – and the likely perpetrators are people close to them. Judges, court-appointed attorneys, and guardians ad litem, should not assume all is well. Proper vetting should be done to determine if the respondent has been a victim of abuse in the past and to determine whether the petitioner, proposed guardian, or people in their households have been or are currently perpetrators of abuse or neglect or have negligently allowed such abuse to occur or negligently failed to intervene to stop such abuse or to report it. Unfortunately, most guardianship systems barely scratch the surface in terms of vetting proposed guardians. Participants in guardianship proceedings need to be educated about the prevalence of abuse of people with disabilities and trained on how to investigate potential past abuse and reduce the risk of future abuse to guardianship respondents.

6. Missouri Rules of Professional Conduct – Duties of Attorneys

a. Document: Rule 4-1.1 Competence**.** A lawyer shall provide competent representation to a client.

Comment: Some skills, such as adequate preparation and the evaluation of evidence, are required in all legal matters. However, special skills may be required for competent representation in particular matters and therefore special training may be required to provide competent representation in those areas. Representing clients with cognitive and communication disabilities, especially in proceedings during which their capacity to make decisions is questioned and fundamental rights may be taken away, is one of those areas requiring special training. Representing a client in such a proceeding without proper training and without adequate preparation would be a violation of Rule 4-1.1. This rule applies to retained as well as court-appointed attorneys.

b. Document: Rule 4–1.4 Communication. A lawyer shall keep the client reasonably informed about the status of the matter. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation. **Comment:** Representing clients with special needs is challenging. An attorney representing a guardianship respondent should know that the client has cognitive or communication disabilities that will make it difficult for the client to understand the proceeding and to communicate with the attorney. Therefore, the attorney must immediately assess the situation and determine what ancillary supports and services may be needed to ensure effective communication between the client and the attorney as well as between the client and other participants in the case. Failure to formulate and implement such a plan would violate this rule and fail to enhance the client's chance of understanding and participating in the proceedings.

c. Document: Rule 4-6.2 Accepting Appointments. A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause. **Comment**: An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same duties pertaining to the lawyer-client relationship. Since a lawyer who is acting as guardian ad litem (GAL) does not have duties of loyalty and confidentiality, and since the role of an advocacy attorney is distinct from the role of a guardian ad litem, an attorney appointed to represent a respondent in a guardianship proceeding should make sure the court order clarifies whether the attorney is appointed as GAL and, if so, should ask the court to also appoint an advocacy attorney because serving in a dual role would pose a conflict of interest and violate the rules of professional conduct.

7. Disability and Guardianship – Position of MODDC

a. Document: *Self-Determination and Guardianship* (MODDC, 2017) The Missouri Developmental Disabilities Council position statement on guardianship acknowledges that guardianship is sometimes necessary, but should only be used when less restrictive alternatives are not feasible. Even when guardianship is ordered, the rights of the individual should be restricted to the minimum extent possible. **Comment**: It is the position of the Developmental Disabilities Council that a guardianship respondent has the right to be represented by an independent attorney. It also calls for educational and training material about alternatives to guardianship to be provided to people with disabilities, their families, and to lawyers and other professionals throughout the state.

8. Disability and Guardianship – Guardians ad Litem

a. Document: *Attorneys Address Guardian Ad Litem Standards* (The Guardian, Missouri Protection and Advocacy, 2009) This article explained that attorneys at Missouri P & A submitted

recommendations to the Missouri Supreme Court on the need for standards for guardians ad litem in adult guardianship cases. Currently there are no standards and no mandatory training for them. A GAL serves a much different role than a court-appointed advocacy attorney, generally functioning as the "eyes and ears of the court" or as a court investigator of sorts. Unfortunately, advocacy attorneys are often not appointed at all, thus making the function of the GAL even more critical. **Comment**: The article explains that "[t]he rules of a GAL and an attorney for the individual are different and must be clearly distinguished." A GAL is often called to testify as a witness. In contrast, the rules of ethics for advocacy attorneys prohibit them from testifying for or against a client due to requirements of confidentiality and loyalty. The Supreme Court has created standards for GALs for minors in family law cases, but not for GALs for adults in guardianship proceedings.

9. Disability and Guardianship – Americans with Disabilities Act

a. Document: *Coleman, ADA Title II Guidance from the U.S. Department of Justice is Instructive to Participants in the Limited Conservatorship System* (Spectrum Institute, 2017) This commentary examines a technical assistance publication issued by the DOJ on how the ADA applies to agencies and official participants in criminal justice proceedings. **Comment**: This document explains how the mandates of Title II apply to all court proceedings involving litigants with cognitive or communication disabilities, including guardianships and conservatorships. It details the obligation of courts to make modifications and provide accommodations to litigants with a *known* disability in order to give them access to justice and assist them in having meaningful participation in their cases. Such modifications and accommodations must be provided without request if the disability is known to the court and the nature of the disability precludes the litigant from asking for a modification or accommodation. In effect, this applies to virtually all guardianship respondents. The commentary also explains the need for attorneys and others involved in guardianship proceedings to facilitate effective communications with such litigants. It also highlights the need for education of participants in these proceedings about their Title II duties and the importance for training on how to fulfill them.

b. Document: *Letter dated August 16, 2010, from Assistant Attorney General Thomas E. Perez, United States Department of Justice, to the Chief Justice and State Court Administrator in all states*. The letter calls the attention of courts to their responsibility under federal law to ensure effective communications between litigants with limited English proficiency (LEP) and court-appointed or court-supervised personnel. Since the duty to ensure "effective communication" is also contained in the ADA, the letter draws an analogy between LEP duties and ADA duties. **Comment**: Title II of the ADA is similar to the LEP requirements of Title VI of the Civil Rights Act of 1964. Both require public entities to provide meaningful access to their services to those who these laws protect. Title VI protects litigants and witnesses with limited English proficiency. Title II of the ADA protects litigants whose cognitive and communication disabilities limit their ability to understand or communicate. This letter emphasizes that courts have a duty to ensure that court-appointed or court-supervised personnel are able to effectively communicate with litigants who have English language disabilities and that such litigants are able to understand the proceedings. Such personnel include defense counsel, guardians ad litem, psychologists, doctors, and others who are employed, paid, or supervised by the courts. Although this DOJ letter was issued in the context of LEP litigants, it's reasoning and explanations equally apply to litigants whose cognitive and communication disabilities impair their ability to understand guardianship proceedings or to communicate with other participants in such proceedings. The DOJ letter emphasizes that the cost of providing effective communication services should be treated as basic and essential operating

expenses, not as an ancillary cost. The letter states: "Budgeting adequate funds to ensure language access is fundamental to the business of the courts." The same can be said about ensuring meaningful participation in guardianship proceedings to litigants who have cognitive and communication disabilities. The state should take affirmative steps to ensure that these involuntary litigants have access to justice by using appropriate methods to maximize their understanding of the proceedings and their ability to communicate with personnel appointed by or supervised by the court.

c. Document: *ADA and Court Interpreters* (Missouri Courts Website) The "Rules and Resources" page of the website of the Missouri Courts has a link to a section titled "ADA and Court Interpreters." A paragraph explains that interpreters are available for people who are deaf as well as those with limited English proficiency. A link takes the reader to another page with further details. It says that the United States Department of Justice "enforces the requirements of Title II addressing programs, services and activities of state and local government." It adds that "Missouri's courts strive to make the courts' programs and services accessible to all." **Comment**: Other than mentioning sign language interpreters for the Deaf, nothing further is said on the website about the court's duties or the rights of litigants under the ADA or Section 504 of the Rehabilitation Act of 1974. No explanation was found about how the courts strive to make guardianship proceedings accessible to respondents with cognitive and communication disabilities. Other than a list of local court ADA coordinators and a notice from the Office of State Courts Administrator about its own agency obligations under the ADA with respect to people who interact with that agency, there is virtually nothing on the Missouri Courts website about the ADA – except the materials mentioned above. On July 30, 2017, an email was sent by Thomas F. Coleman to Ms. Lynette Ricks, a staff member in the Office of State Courts Administrator asking about the policies and practices of Missouri courts to make guardianship proceedings accessible to respondents with cognitive and communication disabilities. Ms. Hicks provided information on how the courts implement the ADA in judicial proceedings that involve litigants with disabilities. Unfortunately, there was no indication that the courts have any policies or programs that specifically address their duty to provide access to justice for litigants with intellectual, developmental, or cognitive disabilities. It appears that the court places the burden on litigants or their attorneys to initiate a request for accommodations. This requirement does not acknowledge the fact that many litigants with cognitive disabilities are unable to make such a request. The reply suggests that there are no formal court rules on ADA modifications or accommodations for litigants with disabilities. Although mention was made of ADA training for judges, there were no specifics given on this topic. The reply suggests that the courts do not have any ADA training requirements for court-appointed attorneys or guardians ad litem. While it is appreciated that the judiciary replied to my request for information with an email and a poster, the reply indicates that there is much work to be done in Missouri to help the judicial branch bring itself into compliance with the requirements of Title II of the ADA.

d. Document: *Disability Discrimination* (Missouri Department of Labor and Industrial Relations) A page on the website of the Department of Labor discusses the Missouri Human Rights Act and its prohibitions against disability discrimination. The page explains that the act applies to the services of state and local governments. **Comment:** The Missouri Commission on Human Rights is authorized to receive and investigate complaints of disability discrimination against employers, landlords, and service providers, including public entities that provide services. This would include state and local courts. Section 213.065 of Title XII of the Missouri Revised Statutes prohibits discrimination on the basis of disability by public accommodations. Section 213.010 specifies that a public accommodation includes "any public entity owned, operated, or managed by or on behalf

of this state or any agency or subdivision thereof, or any public corporation; or any such facility supported in whole or in part by public funds." Nothing has been found on the Internet to suggest that a complaint has ever been filed with the Commission against a court for disability discrimination in the context of a guardianship case or any other type of proceeding. The section of the Commission's website on public accommodations does not mention that courts are considered public accommodations or that litigants with disabilities can file complaints with this agency for failure to provide access to justice to people with disabilities in court proceedings.

10. Disability and Guardianship –Missouri Statutes

a. Document: Section 475.050 – *Who may be appointed guardian*. This statute specifies that the court shall nominate as a guardian: (1) someone nominated by the adult in question; (2) someone nominated by the adult in a previously executed power of attorney; (3) various close relatives listed in the statute; or (4) any other person or organization. Preference should be given to the wishes of the adult in question. **Comment**: The statute does not specify what would disqualify a person, such as a criminal conviction of a proposed guardian. It also does not state that the court should give deference to the objections of the adult in question to a proposed guardian.

b. Document: Section 475.055 – *Qualifications of guardians or conservators*. This statute specifies that *any* adult person may be appointed as a guardian so long as the person consents to the appointment. The person need not live in the state. **Comment:** The statute does not contain any disqualifying factors, such as felony convictions or sustained allegations of child abuse or elder or dependent adult abuse.

c. Document: Section 475.060 – *Application for guardianship; petition requirements*. The statute specifies that a petition for guardianship of an incapacitated adult shall state: (1) their name, age, address, and other identifying information; (2) name and address of the parents, if living; (3) name and address of spouse, living children, closest known relatives, and any adult living with the person in question. If no spouse, parent, or adult child is listed, then the names and addresses of siblings must be listed. The name and address of the person having custody of the adult must also be listed. The petition must state "the reasons why the appointment of a guardian is sought" as well as "the fact that the person for whom guardianship is sought is unable by reason of some specified physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that the person lacks capacity to meet essential requirements for food, clothing, shelter, safety, or other care such that serious physical injury, illness, or disease is likely to occur. **Comment:** Although state law does not require this, the court in Boone County requires a criminal records background check and the completion of a caregiver background screening form for each petitioner and each adult living in the home of the proposed guardian or conservator. State law should be amended to require such screening be done in cases occurring in courts throughout the state. Such screenings should also be done of adults living in the proposed residence of the ward when the ward will be placed in a residence other than that of the guardian. A follow up screening should be required annually when the guardian submits an annual report. The annual screening should include any adult who has moved into the home of the ward since the last annual review.

d. Document: Section 475.075 – *Contents of petition, service, notice, appointment of attorney*.

(1) Service on Respondent. The respondent shall be served in person with the petition, a notice of the date and time and location of the hearing, the name and address of appointed counsel,

names and addresses of witnesses who may testify in support of the petition, and a copy of respondent's rights. **Comment:** Although the court knows that the person likely has significant cognitive or communication disabilities, there is no provision that the respondent receive an ADA accommodation assessment to determine what supports or services may be needed to ensure that he or she understands the proceedings and can communicate effectively with appointed counsel and others in the case, and can have meaningful participation in the proceeding. Without such an assessment and appropriate supports and services, serving these documents on the respondent may be an empty gesture.

(2) Notice to relatives. The statute says that the petition shall include the names and addresses of parents, spouse, and adult children of the respondent and they shall be served with a copy of the petition. If there are no such persons, then at least one close relative must be served. **Comment**: Notice to all living grandparents and all known siblings should be mandatory. These persons may have important information about the respondent – information they would share with the court or appointed counsel or the GAL if they knew of the proceeding – including information that the respondent has been a victim of abuse or neglect, or reasons why the proposed guardian should not be appointed to take charge of the respondent's life. The failure of the statute to include a requirement of notice to all known adult relatives, especially grandparents and siblings, is a serious deficiency – one that increases the risk of abuse to the adult in question.

(3) Appointment of attorney. The statute says that upon the filing of a guardianship petition, the court shall immediately appoint an attorney to represent the respondent in the proceeding. The statute specifies that the attorney shall "visit his client" prior to the hearing. If the client can understand the matter in question, or can contribute to the client's interest, the attorney shall obtain from the client all possible aid. **Comment**: Since the statute calls for the appointment of an "attorney to represent the respondent" and refers to the respondent as a "client," it seems clear that the statute contemplates that a normal attorney-client relationship is established when an attorney is appointed. Thus, the rules of professional conduct mentioned above – including rules on confidentiality, loyalty, and communication – would apply. Thus, the attorney is not a guardian ad litem, but is acting or should be acting as a lawyer to advocate for and defend the rights of the client. Acting in a dual capacity as advocacy attorney and guardian ad litem would pose a conflict of interest and would constitute violations of one or more rules of professional conduct and could expose the attorney to disciplinary measures. In order to act competently, the attorney should have special training and have acquired skills in representing clients with cognitive and communication disabilities. In order to have effective communication with the client, the lawyer should have a professional assessment of the client's abilities by a qualified professional who can assess the client's capacities in several major areas of decision-making. The lawyer should also have an ADA accommodation assessment done in order to determine what supports and services may be needed for the client to have effective communication with the attorney and others in the proceeding, to understand the proceeding, and to have meaningful participation in the case. It appears that no such inquiries or assessments are done in Missouri by appointed counsel. The failure to build these rights and protections into guardianship proceedings has the effect of increasing the risk of abuse to respondents. Effective communication with an attorney could reduce such risk.

(4) Appointment of a capacity-assessment professional. The statute says that the court *may* direct the respondent to be examined by a physician, or licensed psychologist, or other appropriate professional designated by the court. The purpose of such examination is to "produce evidence which may be used to determine whether the respondent is incapacitated, disabled or partially incapacitated or disabled." **Comment**: Although the petitioner has the burden of proving incapacity by clear and convincing evidence, the statutory scheme allows for such proof to rest on lay

testimony. A professional capacity assessment is not required by Missouri state law. However, some local courts, such as the one in Boone County, require medical evidence of incapacity. Having respondents examined by a neutral and objective professional – one without a relationship with the petitioner or proposed guardian – would help to reduce the risk of abuse. Such a professional could not only receive information from the respondent that could suggest possible abuse, but could also ascertain respondent's wishes as to who should be appointed as guardian as well as who the respondent does not want appointed as guardian. Subtle cues picked up by the capacity assessment professional may suggest that a further investigation into possible abuse is warranted.

e. Document: Section 485.082. *Review of status of persons under guardianship*. The statute requires the court to inquire, at least annually, into the status of each ward and protectee under its jurisdiction. The statute lists two purposes for the inquiry: (1) to determine whether the incapacity or disability may have ceased; and (2) to determine whether the guardian is discharging his duties and responsibilities in accord with the state's guardianship laws. **Comment**: As noted below, the annual inquiry by the court appears to be wholly dependent on the court's review of an annual report by the guardian. There is no affirmative outreach by the court to the ward and no independent assessment of the living conditions and activities of the ward. No one goes to the ward's home. No one speaks with the ward. Failure to have such safeguards built into the guardianship system increases the risk of abuse to the ward.

(1) Annual report by guardian. The statute requires the guardian to file an annual report with the court concerning the personal status of the ward. In addition to contact information for the ward and guardian, and the number of contacts between them during the prior year, the report must state whether the ward has seen a physician and if so for what purpose. The guardian shall indicate any major changes in the ward that he or she has observed. The guardian also states his or her opinion about the adequacy of the level of care. **Comment**: The annual reporting requirements are inadequate. A guardian is unlikely to report information that would be adverse to the guardian. No reports from service providers must be submitted to the court. The court does not learn whether the ward has seen a psychologist or mental health professional and if so why. The court does not learn whether the ward has ever been seen by a dentist. There is no requirement for the guardian to report the names of other adults who have started living in the ward's residence since the guardianship was initiated or since the last annual report. No criminal background check is done on such adults. For all the court knows, there could be a registered sex offender living in the ward's residence. The statute is also deficient in that it does not require the annual report to be sent to known relatives, including grandparents and siblings, of the ward. The statute could be improved by requiring that such relatives receive a copy of the report, along with a notice that they may submit information to the court that is relevant to the status and well being of the ward and that such information can be submitted in the form of a letter and without the need for an attorney being involved. Furthermore, the statute should be amended to require interaction between Adult Protective Services and the court as well as between the Division of Developmental Disabilities of the Department of Mental Health and the court. These agencies should maintain a list of adults who are under an order of guardianship. If APS receives information about suspected abuse or neglect, it should notify the guardianship court. If DDD receives a special incident report about suspected misconduct of a service provider, it should notify the court. Such notifications may cause the court to conduct a status hearing as described below.

(2) Status hearing. The court can order a status hearing as a part of its annual review, or at any time on the motion of any interested person, including the ward or someone on his or her behalf, if the court receives information that the guardian is not discharging his duties properly or

is not acting in the best interest of the ward. If such a hearing is ordered, the court shall appoint an attorney for the ward.

f. Document: 475.120. *Powers and duties of guardian.* The statute requires a guardian to act in a ward's best interests. The general powers and duties of a guardian shall be to take charge of the person of the ward and to provide for the ward's care, treatment, habilitation, education, support and maintenance; and the powers and duties shall include, but not be limited to, the following: (1) Assure that the ward resides in the best and least restrictive setting reasonably available; (2) Assure that the ward receives medical care and other services that are needed; (3) Promote and protect the care, comfort, safety, health, and welfare of the ward; (4) Provide required consents on behalf of the ward. **Comment:** The statute fails to specify that a guardian is a mandated reporter of suspected abuse or neglect as defined in Section 192.2405 since a guardian is a "person with the responsibility for the care of an eligible adult." Section 475.120 should be amended to make that responsibility clear. The statute should also be amended to require guardians to use the Family Care Safety Registry or the Caregiver Background Screening service operated by the Missouri Highway Patrol to screen all adults who live in the home of the ward and all adults who provide in-home or support services to the ward. If the adult refuses to participate or if negative information is obtained from such screening, the guardian shall not allow the adult to live in the home or provide services to the ward without an order from the guardianship court allowing such activities to occur.

11. Disability and Guardianship – Due Process

a. Document: *Probate Procedures Manual of the 16th Circuit Court of Jackson County.* Section 29 of the manual explains policies and procedures that apply to adult guardianship proceedings in this court. Section 29.20.1 explains: "An adjudication of incapacity and disability results in a deprivation of an individual's civil rights. Therefore, the appointment of guardian/conservator requires full due process for the person for whom the guardian/conservator is sought, the respondent. It is a special adversary proceeding and should be approached as such despite intentions of petitioners to act in the respondent's best interest. See In re Link, 713 S.W.2d 487 (Mo. banc 1986) and Chapter 475, RSMo, generally."

b. Document: *In re Link.* In this 1986 decision, the Missouri Supreme Court ruled that respondents in adult guardianship proceedings are entitled to due process of law, including the right to counsel, since the proceedings place significant liberty interests of the respondents at risk. The court explained that "the purpose of the statutory and due process requirement of the appointment of counsel is to protect the rights and interests of the alleged incompetent. To accomplish this task it is essential that appointed counsel act as an advocate for the individual." The court added: "The right to counsel becomes a mere formality, and does not meet the constitutional and statutory guarantee absent affirmative efforts to protect the individual's fundamental rights through investigation and submission of all relevant defenses or arguments." **Comment**: In order to fulfill the duty to advocate – to investigate facts and present all relevant defenses and arguments – an appointed attorney must conduct an independent and factual analysis of: (1) whether the client lacks capacity to make decisions in each of several areas of decision making; (2) whether alternatives to guardianship have been explored and whether they are feasible; and (3) if a guardianship is appropriate, who should be appointed as guardian (considering the wishes of the client as well as all persons who may be willing to serve as guardian.). In the *Link* decision, the Supreme Court stated: "Such behavior is required by the constitution, the statute, and the Rules of Professional Conduct."

An attorney who just "goes through the motions" and does not properly vet the proposed guardian and investigate the proposed living arrangement is placing the client at risk of future abuse and is violating his or her constitutional, statutory, and professional responsibilities.

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Coleman has been practicing law for 44 years, concentrating his energy and attention on various civil rights issues and causes. Throughout those years, he has been involved in disability rights cases and projects. His advocacy has involved work with all three branches of government, at the federal, state and local levels. Much work has also been done with the media.

Coleman is editor of the website of Spectrum Institute (www.spectruminstitute.org). A description of his activities involving disability, abuse, and guardianship are found on the "what's new" page of the website of the Disability and Abuse Project. (http://disabilityandabuse.org/whats-new.htm) Coleman is the author of more than 220 reports, articles and commentaries on disability and guardianship. (http://spectruminstitute.org/library/) His resume and curriculum vitae are found at: http://tomcoleman.us/. Coleman can be contacted at: tomcoleman@spectruminstitute.org