



## *4<sup>th</sup> Annual Educational Summit*

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

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## **Facts, Findings, and Recommendations**

### **Statewide Coordination**

#### Facts:

- \* No state official in any branch of government is monitoring the operations of Missouri's guardianship system.
- \* Local courts process guardianship cases with little or no oversight or accountability.
- \* There are virtually no appeals by guardianship respondents and as a result there is seldom any corrective guidance given by appellate courts to local courts and attorneys.

#### Findings:

- \* Some form of systematic statewide oversight is needed to ensure guardianship proceedings comply with the constitutional guarantees of due process and equal protection and follow the mandates of Title II of the Americans with Disabilities Act.

#### Recommendations:

- \* The Chief Justice of Missouri should convene a Guardianship Task Force, similar to what was done in recent years in Nevada, Pennsylvania, and other states, to review the state's adult guardianship system and make recommendations to the Legislature and Judiciary on ways it can be improved so that it better complies with due process, equal protection, and the Americans with Disabilities Act.
- \* Absent such action by the Chief Justice, The Arc of Missouri should convene a Workgroup on Guardianship Reform to fulfill the same function. Representatives from the State Bar, Department

of Mental Health, Protection and Advocacy, The Arc, the Developmental Disabilities Council, MACDDS, and other organizations and agencies that advocate for or provide services to people with intellectual and developmental disabilities should be invited to participate in the workgroup.

\* The Legislature should authorize two new positions in state government to monitor and improve the operations of the state's guardianship system. A position of State Guardianship Ombudsperson should be created at an appropriate agency within the Executive Branch. In addition, a position of State Guardianship Coordinator should be created within the Office of State Courts Administrator.

## **Specific Areas of Concern**

### **1. Demographics**

#### Facts:

- \* Of the 217,818 Missouri adults with cognitive disabilities of all types, only 30,912 are in guardianships
- \* Of the 73,000 adults with intellectual and developmental disabilities, 65% of them are not known to the DD system

#### Findings:

- \* Most adults with cognitive disabilities are using various forms of supported decision-making to navigate through life.
- \* Most adults with I/DD live with family members and have no government oversight, monitoring, or formal protection.

#### Recommendations:

- \* Lawmakers, judges, and others need to focus more attention on safe and legal methods of supported decision-making.

### **2. Abuse and Disability – Prevalence of Abuse**

#### Facts:

- \* By the time someone with I/DD reaches 18, it is likely that he or she has been a victim of abuse.
- \* Most perpetrators of abuse against people with I/DD are not strangers; they are people who have close proximity to the individual, such as household members, relatives, neighbors, school or day care personnel, transportation workers, or other service providers.

#### Findings:

- \* The prevalence of abuse against persons with I/DD in Missouri is not well documented.
- \* State agencies do not identify the specific type of disability of abuse victims.
- \* The most recent abuse data is from 2011.

### Recommendations:

- \* Adult Protective Services should gather data on whether reported cases involve an alleged victim with I/DD.
- \* APS should issue an annual report on abuse victims with I/DD, including the types of abuse and the perpetrator's relationship to the victim.

## **3. Abuse and Disability – Mandated Reporters**

### Facts:

- \* It is a misdemeanor for a mandated reporter to fail to notify APS or law enforcement of suspected abuse or neglect of an eligible adult.
- \* Eligible adults include seniors and dependent adults.
- \* Dependent adults include people with significant disabilities, such as adults with I/DD.
- \* Various professionals and service providers are included in the statutory list of mandated reporters.
- \* The term “guardian” is not included in the statutory list.

### Findings:

- \* A guardian is a statutorily mandated reporter as an “other person with the responsibility for the care of an eligible adult.”

### Recommendations:

- \* The Legislature should amend the statute on mandated reporters to specifically include the term “guardian” in the list.
- \* During guardianship proceedings, proposed guardians should be required to acknowledge their obligation to report suspected abuse or neglect of the ward and that they are subject to criminal prosecution for failing to fulfill this statutory obligation.

## **4. Supported Decision-Making – Risk Reduction and Monitoring**

### Facts:

- \* Adults retain the right to make all major life decisions unless the authority to do so has been taken away by a court.
- \* Decision-making authority is transferred to another person in a guardianship proceeding.
- \* Most adults with cognitive disabilities are not in a guardianship.
- \* These adults are vulnerable to exploitation, abuse, and undue influence.

### Findings:

- \* Risks of abuse and exploitation exist in guardianships as well as supported decision-making arrangements.
- \* Supported decision-making arrangements are valuable if they are safe and legal.

\* Most people with I/DD, relatives, judges, attorneys, service providers, and advocates are not trained about safe and legal SDM.

#### Recommendations:

\* The Arc of Missouri should convene a workgroup to develop legislation to specify the requirements for safe and legal SDM agreements and arrangements, including: (1) the requirements for creating them, implementing them, and monitoring them to reduce the risk of undue influence, abuse, and exploitation, and (2) to ensure that vulnerable adults enter into them voluntarily, and (3) that there is a mechanism to trigger a termination proceeding when SDM is no longer needed or desired by the adult.

### **5. Abuse and Guardianship – Vetting of Proposed Guardians**

#### Facts:

- \* More than 3,000 new guardianship petitions are filed in Missouri each year for adults with cognitive disabilities.
- \* Family members file many of these petitions.
- \* Family members are often named as the proposed guardians.
- \* Many of the disabled adults in these cases have been or are victims of abuse and such abuse may be a recurring problem.
- \* Family members may have perpetrated such abuse or may have been negligent in allowing it to occur.

#### Findings:

- \* The legal system has a constitutional obligation to protect guardianship respondents from abuse.
- \* Many judges, attorneys, and guardians ad litem do not take seriously their duty to vet family members as proposed guardians.
- \* Many judges, attorneys, and guardians ad litem are not aware that a majority of I/DD adults may have been victims of abuse.
- \* Trauma-informed justice is not being administered in guardianship proceedings.

#### Recommendations:

- \* The Arc of Missouri should ask the Supreme Court to adopt rules requiring judges, attorneys, and guardians ad litem to receive training on disability and abuse, including the incidence of such abuse, the types of abuse, the types of perpetrators, and the need to thoroughly investigate proposed guardians and their household members to determine if they pose a risk to the proposed ward.
- \* The Arc of Missouri should ask the State Bar to convene a workgroup to develop a training program on abuse, disability, and guardianships with the goal of making such trainings mandatory for attorneys who are appointed as counsel for guardianship respondents or who are appointed as guardians ad litem in such cases.

## **6. Rules of Professional Conduct – Duties of Attorneys**

### Facts:

- \* State law requires courts to appoint an attorney to represent respondents in guardianship proceedings.
- \* Respondents are entitled to an advocacy attorney as a matter of due process of law.
- \* Despite these requirements, many court-appointed attorneys are acting as guardians ad litem rather than advocates.
- \* Rules of Professional Conduct adopted by the State Bar as approved by the Supreme Court require attorneys to acquire the skills necessary to provide competent services and to engage in effective communication with clients at every stage of legal proceedings or services.
- \* Court-appointed attorneys have the same obligations as privately retained attorneys.
- \* Court-appointed attorneys have duties to their clients under Title II of the Americans with Disabilities Act.

### Findings:

- \* The Rules of Professional Conduct do not specifically address the duties of court-appointed attorneys who represent clients with cognitive and communication disabilities in guardianship proceedings.
- \* Missouri's courts have not promulgated rules or standards for court-appointed attorneys in adult guardianship cases – either in the role of advocacy attorney or as guardian ad litem.
- \* Investigating and vetting proposed guardians and members of households in which a respondent will be placed is a critically important role for court-appointed attorneys in order to minimize the risk of abuse to their clients.
- \* Missouri does not have any system for mandatory training or educational requirements for attorneys who represent clients in guardianship cases – as advocates or as guardians ad litem – despite the need for such training as a way to ensure that such attorneys are providing services that comply with due process, the Rules of Professional Conduct, and the Americans with Disabilities Act.
- \* Without such training, guardianship respondents with cognitive and communication disabilities are placed at higher risk of abuse and neglect.
- \* The State Bar's complaint procedure is premised on assumption that a client who receives deficient legal services can identify such a deficiency and file a complaint with the association. This is a false assumption with respect to guardianship respondents with cognitive and communication disabilities whose attorneys may be negligent in the vetting of proposed guardians or proposed placements. As a result, many if not most guardianship respondents who receive deficient legal services do not have access to the complaint procedure. The denial of such access may constitute a violation of Title II of the Americans with Disabilities Act.

### Recommendations:

- \* Just as the courts have issued rules and standards for guardians ad litem in family law proceedings involving minors, they should do so for guardians ad litem in adult guardianship proceedings.
- \* In cooperation with the State Bar, the courts should promulgate minimum education and training requirements for attorneys who seek or accept appointments to represent guardianship respondents.

Specific training should be required on how to effectively interview and communicate with clients who have cognitive and communication disabilities, the constitutional rights of guardianship respondents, the viability of less restrictive alternatives to guardianship including safe and legal supported decision-making arrangements, how to investigate and vet proposed guardians in order to minimize the risk of abuse, and how to provide access to justice to disabled clients in these proceedings in accord with the requirements of the Americans with Disabilities Act.

\* The State Bar should convene a task force or work group to develop ways make its complaint procedure accessible to clients with cognitive and communication disabilities, including alternative methods to identify ineffective representation such as random audits of guardianship cases and allowing third-party standing to appeal or to complain on behalf of clients with such disabilities who may have experienced ineffective representation.

## **7. Disability and Guardianship – Position of MODDC**

### Facts:

\* The Missouri Developmental Disabilities Council has taken laudable positions on the right to counsel for guardianship respondents, the duty to explore less restrictive alternatives, and the need for education and training of lawyers and other professionals about alternates to guardianship and the rights of people with intellectual and developmental disabilities.

### Findings:

\* There is a need for the Council to advance this position statement through additional strong and persistent advocacy activities.

### Recommendations:

\* The Council should engage in surveys of attorneys who represent guardianship respondents to determine what education and training they have received on these topics.

\* The Council should survey local circuit courts to determine what education and training requirements they have for attorneys who are appointed to represent respondents in guardianship proceedings. The Council's position statement should be communicated to all local circuit courts during the process of conducting this survey.

## **8. Disability and Guardianship – Guardians ad Litem**

### Facts:

\* The Supreme Court has issued standards for guardians ad litem in family law cases involving minors but not for GALs in adult guardianship proceedings.

### Findings:

\* Missouri Protection and Advocacy submitted recommendations to the court on the need for such standards in adult guardianship cases.

## Recommendations:

\* Missouri P & A should follow up with the court by submitting another request for such standards. Other agencies and organizations should join in this renewed request, including the Developmental Disabilities Council and The Arc of Missouri. Emphasis should be placed on the need to include mandatory training on abuse and disability, including risk reduction and effective response procedures.

## **9. Disability and Guardianship – Americans with Disabilities Act**

### Facts:

- \* Title II of the Americans with Disabilities Act requires state and local government entities, including courts, to provide people with disabilities effective access to services.
- \* In terms of court proceedings, people with disabilities are entitled to have meaningful participation in their cases and courts are required to provide modifications of policies and practices to maximize the possibility of such participation.
- \* When a court is aware that a litigant has a significant disability that may impair meaningful participation in a case, and when the court knows that the individual's disability may preclude him or her from requesting an accommodation, the court has an obligation to assess the situation and provide modifications, including offering supports and services, that will enhance access to the proceedings – even without a request from the disabled litigant.
- \* Since they are appointed, supervised, and paid by the government, court-appointed attorneys are also governed by these Title II requirements.

### Findings:

- \* The Missouri courts have not adopted formal rules on the application of the ADA to guardianship proceedings and have not issued educational or guidance materials on the obligation of the courts and court-appointed attorneys to comply with the ADA in terms of clients and litigants who have significant cognitive disabilities.
- \* The poster developed by the Office of State Courts Administrator which is used by local courts says that the judicial system complies with the Americans with Disabilities Act.
- \* However, the poster indicates that the courts only provide accommodations *upon request*.
- \* The judiciary has not acknowledged its duty under Title II of the ADA to make modifications and provide accommodations, *without request*, to litigants with known cognitive and communication disabilities and whose disabilities are likely to impair meaningful participation in legal proceedings and whose disabilities preclude them from making requests for accommodations.
- \* The courts have no training requirements for attorneys who act as legal advocates or guardians ad litem for guardianship respondents and do not require attorneys to have training on effective communication with clients who have cognitive disabilities or on the requirements of the Americans with Disabilities Act as applied to guardianship proceedings.
- \* The Department of Labor and Industrial Relations has jurisdiction to enforce state law prohibiting disability discrimination by state and local government entities. This includes state and local courts.

### Recommendations:

- \* The Missouri courts should adopt formal rules on the ADA and its application to judicial

proceedings, including the need for judges and attorneys to provide accommodations to clients with cognitive and communication disabilities even without request.

\* The Missouri courts should require attorneys who seek or accept appointments in guardianship cases to receive training on how to effectively interview and communicate with clients who have cognitive and communication disabilities and how to utilize supports and services to maximize the ability of such clients to have meaningful participation in their cases. Such training should include a component on the requirements of Title II of the ADA as applied to guardianship proceedings.

\* The Arc of Missouri, with the support of other organizations and agencies such as the Developmental Disabilities Council and Protection and Advocacy, should ask the Department of Labor and Industrial Relations to convene a Task Force on Access to Justice to study the extent to which guardianship respondents receive access to justice in their cases and to recommend ways in which judges and attorneys can better comply with the letter and the spirit of the ADA and its state equivalent.

## **10. Disability and Guardianship –Missouri Statutes**

### Facts – Initial Proceedings:

\* The statute on who may be appointed a guardian does not state what would disqualify a person from such a position.

\* The statute on qualifications of guardians does not specify any disqualifying factors, such as felony convictions or sustained allegations of child abuse, elder abuse, or dependent adult abuse.

\* State law does not require a criminal background check on proposed guardians or members of households where a respondent would reside.

\* The state law requiring that a guardianship respondent be served with a petition does not include a requirement for any assessment of the respondent's ability to read or understand the petition or that the court take reasonable steps to provide ADA supports and services to maximize the possibility of the respondent understanding the contents of this document.

\* State law does not require that grandparents and siblings whose whereabouts are known be sent a copy of the petition for guardianship so that they can participate in the proceeding or provide the court or respondent's court-appointed attorney with information about the petitioner, respondent, or proposed guardian or weigh in on the need for a guardianship order.

\* The statute on appointment of counsel does not require the court-appointed attorney to conduct a disability assessment of the client in order to determine what supports and services the client may need to maximize meaningful participation in the case despite the client's disabilities.

\* The statute says that the court may appoint a capacity assessment professional to evaluate the respondent.

### Findings – Initial Proceedings:

\* Current state law is inadequate to protect the rights of respondents in initial proceedings.

\* Omissions in current state law contribute to an increased risk for abuse and neglect of guardianship respondents.

### Recommendations – Initial Proceedings:

\* State law should be amended to disqualify anyone from being a guardian who has been convicted of a felony that may increase the risk of the respondent being exposed to abuse or neglect.



- \* State law should be amended to disqualify anyone from being a guardian who has been found in an administrative investigation to have committed child abuse, elder abuse, or dependent adult abuse.
- \* State law should require that a copy of a guardianship petition be sent to grandparents and siblings of the respondent if their whereabouts are known to the petitioner or can be ascertained by the court-appointed attorney or guardian ad litem.
- \* State law should require a court-appointed attorney to immediately conduct a disability accommodation assessment of the client to determine what supports and services may be needed to increase the client's ability to understand the proceedings and to have meaningful participation in the case.
- \* Considering that encroachment on civil liberties is inherent in a guardianship proceeding, and the potential conflict of interest that petitioners have with respondents, the court should be required to appoint a capacity assessment professional in each case so that such professional can determine the client's capacity to make decisions in each of several relevant areas – residence, marriage, sex, social conducts, education, occupation, medical, financial – with or without available supports and services.

#### Facts – Annual Status Review:

- \* The statute requires the court to inquire annually about whether the guardian is performing his or her duties properly.
- \* The annual review focuses on the guardian's activities rather than the overall welfare of the ward.
- \* The court's inquiry is dependent on the guardian telling the truth in the annual report.
- \* There is ordinarily no guardian ad litem or court-appointed attorney involved in the annual review process.
- \* No one from the court or the government is required to interview the ward or to physically inspect the ward's residence during the annual review.
- \* Service providers are not required to submit a report to the court for an annual review nor are they required to be interviewed by anyone.
- \* The guardian is not required to include in an annual report the names of any new persons in the ward's household or whether such persons have any known criminal convictions.
- \* Relatives of the ward are not required to be sent a copy of an annual report by the guardian so that such relatives may submit a comment to the court on its accuracy or inaccuracy.

#### Findings – Annual Status Review

- \* The annual review process is grossly inadequate to protect the ward or to minimize his or her risk of abuse or neglect.
- \* The annual review process improperly assumes that the guardian will report adverse information to the court.
- \* The annual review process provides no method for the ward to participate in this stage of the legal proceedings and therefore is not in compliance with Title II of the ADA. The ward's disabilities preclude the ward from reaching out to the court to provide the court with information about his or her level of care. The guardian has an actual or potential conflict of interest with the ward at this stage of the legal proceedings, especially if the ward is a victim of abuse or neglect which has not otherwise come to the attention of authorities.
- \* Other states, such as California, require a court investigator to visit the home and interview the ward in person on at least a biennial basis.

### Recommendations – Annual Status Review

- \* The annual review process should require all services providers, including doctors, day care centers, educational institutions, and others involved in the life of the ward during the previous year to receive a copy of the guardian’s annual report and be informed that they may provide information they believe is relevant to the welfare of the ward.
- \* The annual review process should require that copies of the guardian’s report be sent to grandparents and siblings of the ward so that they can submit information to the court on the accuracy of the report and submit any other information relevant to the welfare of the ward.

### Facts – Screening of Service Providers

- \* Current law does not require guardians to use available procedures to screen service providers in order to minimize the risk of abuse of the ward.

### Findings – Screening of Service Providers

- \* Procedures in the Family Care Safety Registry and the Caregiver Background Screening service operated through the Highway Patrol are or should be available to guardians to screen out potentially dangerous service providers.

### Recommendations – Screening of Service Providers

- \* State law should be amended to require guardians to utilize the services of the Family Care Safety Registry and the Caregiver Background Screening service prior to using the services of a vendor or volunteer caregiver for a ward.
- \* State law should be amended to prohibit guardians from using the services of a vendor or volunteer caregiver when adverse or negative information is found in the screening process, unless the guardian receives permission from the court to do so.

## **11. Disability and Guardianship – Due Process**

### Facts:

- \* The Missouri Supreme Court has ruled that respondents in adult guardianship cases are entitled to due process of law in these proceedings.
- \* This duty includes the requirement that the court-appointed attorney investigate facts and present all relevant defenses and arguments on behalf of the client.

### Findings:

- \* 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.)

Recommendations:

\* The State Bar should develop a training program for court-appointed attorneys designed to explain what such attorneys must do in order to protect the due process rights of clients in guardianship proceedings.

\* The courts should require attorneys to attend such trainings before they are appointed in such cases and to attend refresher classes periodically on the topic of due process duties as well as access-to-justice duties of attorneys under the Americans with Disabilities Act.



Attorney Thomas F. Coleman is the Legal Director of Spectrum Institute. As such, he directs its Disability and Guardianship Project and provides advice to the Disability and Abuse Project which is directed by Dr. Nora J. Baladerian, Ph.D.

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](http://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](mailto:tomcoleman@spectruminstitute.org)

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For more detailed information, references, and resource materials,

see: Annotated Bibliography with Strategic Commentary