

Beyond Guardianship:

Toward Alternatives That
Promote Greater
Self-Determination



National Council on Disability
March 22, 2018

Federal Agency Speaks Out on the ADA, Due Process, and Right to Counsel in Guardianships

A new report by the National Council on Disability calls on the United States Department of Justice to issue guidance to state courts on their legal obligations under the Americans with Disabilities Act in guardianship cases.

The proposals are consistent with and advance similar recommendations made over the last few years by the Disability and Guardianship Project of Spectrum Institute.

For information on the Disability and Guardianship Project, go to: <http://pursuitofjusticefilm.com/>

Recommendations:

- The DOJ, in collaboration with the HHS, should issue guidance to states (specifically Adult Protective Services [APS] agencies and probate courts) on their legal obligations pursuant to the ADA. Such guidance should address NCD's position that: 1) the ADA is applicable to guardianship proceedings; 2) the need for assistance with activities of daily living or even with making decisions does not give rise to a presumption of incapacity; and 3) guardianship should be a last resort that is imposed only after less restrictive alternatives have been determined to be inappropriate or ineffective.

Recommendations:

- The Elder Abuse Prevention and Prosecution Act (P.L. 115-70) calls upon the Attorney General to publish best practices for improving guardianship proceedings and model legislation relating to guardianship proceedings for the purpose of preventing elder abuse. The Attorney General's model legislation should incorporate the UGCOPAA, including its provisions for preventing unnecessary guardianships.
- To ensure that due process requirements are met, it is especially important that alleged incapacitated individuals facing guardianship have qualified, independent legal representation that will advocate for the individual's desired outcome, especially if that person expresses a desire to avoid guardianship or objects to the proposed guardian. However, many courts lack sufficient resources to fund this type of representation and families often find that such representation is cost-prohibitive. Federal grant money should be made available to help promote the availability of counsel.
- The state court improvement program referenced throughout these recommendations should include improvements to the restoration process. DOJ should publish guidance regarding the right to restoration and best practices.

To access the NCD report online, go to:

<https://ncd.gov/newsroom/2018/federal-report-examines-guardianships>