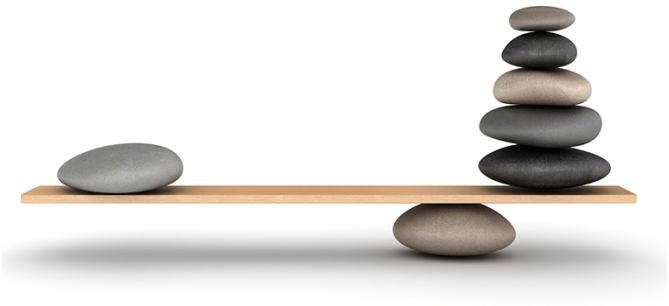
ADA Complaint to the Supreme Court of Texas

Make the Necessary Modifications in Policies and Practices to Bring the Adult Guardianship System into Harmony with the Requirements of the Americans with Disabilities Act



Administrative Docket

Filed by Spectrum Institute
pursuant to Section 35.107
of ADA Title II Regulations

April 9, 2018

www.spectruminstitute.org/Texas

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Justice

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April 9, 2018

ADMINISTRATIVE DOCKET

Supreme Court of Texas
201 W. 14th Street
Suite 104
Austin, TX 78711

Re: Complaint pursuant to ADA Title II Regulations, Section 35.107, Section 35.130, Section 35.160, Section 35.170, and Section 35.178; and Section 504 of the Rehabilitation Act of 1973

To the Court:

Spectrum Institute is a nonprofit organization advocating for equal rights and justice for people with disabilities, especially people whose cognitive and communication disabilities preclude them from advocating for themselves either individually or collectively. In recent years, we have been focusing on deficiencies in state-operated guardianship systems that are violating the rights of adults with such disabilities.

Our attention was recently drawn to the adult guardianship system in Texas – a system that operates under the administrative supervision and control of the Supreme Court of Texas as the head of the judicial department of the State of Texas. A complaint filed with this Court last month by Juliette Fairley alleged that the Bexar County Probate Court is processing guardianship cases and providing oversight and protection to wards in a manner that violates the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973.

After reviewing that complaint and supporting documents, we decided to investigate the extent to which *statewide* policies and practices in Texas may be violating these federal nondiscrimination laws. We reviewed the Texas Constitution, state statutes, rules of court, and reports that have been published documenting deficiencies in the adult guardianship system in Texas. We also searched the websites of the Texas Judicial Branch and the State Bar of Texas. We also reviewed statutes, regulations, and case law involving Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973.

Our review of these materials has caused us to conclude that the Supreme Court of Texas – a public entity within the meaning of Title II of the ADA and a recipient of federal funds under Section 504 – is allowing the adult guardianship system to operate in violation of the mandates of the ADA and Section 504. As a result, we have decided to file a complaint with this Court in order

to protect the legal rights of individuals whose rights are being violated by this system and who are unable to file such a complaint with this Court due to the nature of their cognitive and communication disabilities: (1) adults who have been adjudicated wards and whose cases are active; and (2) adults whose cases are pending but have not yet been adjudicated as wards of the state.

ALLEGATIONS:

1. The Americans with Disabilities Act is a federal law that prohibits discrimination on the basis of disability. Title II of the ADA requires state and local public entities that provide services to do so in a manner that does not cause users of their services to experience such discrimination. Section 504 of the Rehabilitation Act of 1973 – a federal law that predates the ADA – prohibits such discrimination by any public entity that receives federal funds. When used herein, the term "ADA" shall refer to obligations of a public entity under Title II as well as Section 504.

2. State and local courts are public entities within the meaning of the ADA.

3. The Supreme Court of Texas has administrative and supervisory oversight responsibilities for all courts in the state. This responsibility is fulfilled through the promulgation of court rules, the issuance of administrative directives and orders, and through research, surveys, audits, and monitoring conducted by the Office of Court Administration.

4. The Supreme Court of Texas has administrative and supervisory oversight responsibilities for the Texas State Bar and all of the attorneys in the state who are licensed by the State Bar. This responsibility is fulfilled by the promulgation of court rules, disciplinary rules of professional conduct, and administration of the disciplinary system operated by the State Bar with the direction and approval of the Supreme Court.

5. Through statutory provisions and rules of court, the State of Texas operates an adult guardianship system for the safety and protection of people with disabilities who lack the capacity to care for their own basic needs. The system is a function of the judicial department of state government and is administered by local courts, with the participation of court personnel, attorneys appointed by judges to serve as guardians ad litem and attorneys ad litem, and by professional and lay persons who are appointed by judges to act as guardians of persons adjudicated as wards of the state. As the head of the judicial branch, the Supreme Court is ultimately responsible for the manner in which the adult guardianship system functions and for the practices of judges and other participants in this system.

6. A guardianship proceeding, whether pre-adjudication or post-adjudication, is a service provided by the judicial branch. The nature of the service is the administration of justice in legal proceedings, and the protection of wards in post-adjudication active cases. Both types of services are subject to the requirements of Title II of the ADA.

7. Title II requires that guardianship respondents and wards – persons with known disabilities – receive access to justice, have effective communications with those who are delivering the services, and be given meaningful participation in all aspects and all phases of these cases.

8. Requests for accommodations, modifications, or supports and services are not required under Title II. The ADA duties of the courts, its officers and employees, and all court-appointed agents, are triggered when they become aware that a respondent or a ward has significant disabilities that may preclude them from understanding the proceeding, communicating effectively with such personnel or agents, or from having meaningful participation of these cases. Officers, employees, and agents of guardianship courts acquire such knowledge when a petition is filed seeking to place an adult in a guardianship.

9. Judges, attorneys, and others who participate in guardianship proceedings are unlikely to fulfill their duties under the ADA unless they have received education and training on what those duties are – not just for litigants who have a physical disability or who are blind or deaf, but for those who have cognitive, emotional, and other disabilities that impair their ability to understand and communicate. Our research has not discovered any trainings in Texas for judges and attorneys on these issues.

10. Judges, attorneys, and others who participate in these proceedings are unlikely to fulfill their duties under the ADA unless they receive training on how to effectively interview and communicate with people who have specific types of disabilities that impair their ability to understand and communicate. Our research has not discovered any trainings in Texas for judges and attorneys on how to maximize understanding by and how to maximize effective communication with and by people with various types of cognitive and communication disabilities.

11. The Supreme Court has mandated that attorneys and judges who participate in guardianship proceedings must receive training on the requirements of the ADA and the principles of equal access and accommodation. This mandate appears to be in furtherance of the requirements of Government Code Section 22.013 and Government Code Section 81.114. We have not found any information to suggest that these judicial and legislative mandates are being fulfilled in an effective manner. We are unaware of any procedural mechanisms created by the Supreme Court to ensure that all judges and all attorneys who participate in guardianship proceedings have complied with orders issued by Supreme Court in 2015 (Misc. Docket No. 15-9157) and in 2017 (Misc. Docket No, 17-9164).

12. In order to receive access to justice in guardianship proceedings, respondents and wards must receive due process of law despite the fact that they have significant cognitive and communication disabilities,. The process which they are due includes the appointment of an attorney ad litem. A report issued by the Office of Court Administration documents that such attorneys were not appointed in 10% of the cases reviewed by OCA. Since about 4,500 new guardianship cases are initiated each year in Texas, it may be that as many as 450 respondents were not provided with an advocacy and defense attorney. This would deprive them of access to justice as required by the ADA. They cannot have meaningful participation in these proceedings without an attorney ad litem.

13. In order to receive access to justice as required by the ADA, respondents who do receive an ad litem attorney must be provided *effective* assistance of counsel. Deficient legal services are no less a violation of the ADA than would be deficient sign language interpreter services. The types of services an ad litem attorney should perform was detailed and explained in a publication released in 2016 by the Texas Judicial Probate Academy. (The Role of the Ad Litem) In addition

to reviewing pleadings such as the petition and capacity assessment report, an attorney needs to interview the client, visit his or her place of residence, evaluate the proposed guardian, talk to the capacity assessment professional used by the petitioner, review medical and other records of the client from social service agencies and service providers, and review possible alternatives to guardianship that may be available and feasible. All of this would need to be done prior to making a decision on whether to contest the petition. Including travel time and time in court, it could easily take 15 to 20 hours for an attorney to perform such services. A report issued by the OCA indicates that some ad litem attorneys in guardianship proceedings are being paid as little as $50 per case. These attorneys must be providing less than one hour of services in such cases. There is no way that an attorney ad litem could provide effective assistance of counsel and ensure access to justice for a client with cognitive disabilities for a fee of $50 for the entire case.

14. A report issued by the OCA states that "judges interviewed commented that ad litem attorneys are often not knowledgeable or prepared for their role in guardianship cases." "Lack of preparation" was specifically cited as a problem. Reports were filed with the court by these attorneys only 50% of the time, and those that were filed were often incomplete. This OCA report is evidence that ADA violations by these attorneys (denial of access to justice for their clients) is widespread and occurs throughout the state.

15. After an order is issued adjudicating a respondent to be a ward of the state, guardians are supposed to file a variety of reports with the court. These reports are to ensure the well-being of the ward's person and the safety of the ward's estate. This reporting is to minimize the risk of abuse, neglect, or financial exploitation. The OCA reports that in the cases it reviewed, the first annual report on the well-being of the ward was only filed in 18% of the cases and the first annual accounting report was only filed in 15% of the cases. These failures are additional evidence that wards are not receiving access to justice as required by the ADA.

16. A report issued by the OCA in 2016 indicates that due to lack of resources to monitor compliance with statutory mandates, the practices in 244 counties without statutory probate courts are placing the "elderly and disabled at risk of abuse & neglect." When judges and the agents they appoint to protect wards are failing in their statutory duties to the extent that wards are placed at risk, they are not providing access to justice as required by the ADA.

17. Theoretically, a guardianship respondent has a right to complain to the State Bar that the attorney ad litem is not performing competently or not providing access to justice for the respondent. Unfortunately, due to the nature of their disabilities, guardianship respondents lack access to this complaint process. They don't know they are being shortchanged by the attorneys. They don't know they have a right to complain. They don't know how to complain. The State Bar has not taken into consideration this de facto denial of access to the complaint process for guardianship litigants with cognitive and communication disabilities. Modifications of the complaint procedure should be made to rectify this problem to the extent it is possible to do so. Mandating effective and thorough training programs on how to maximize the potential of effective communication with clients who have cognitive disabilities and how to provide effective representation in such cases is one action that could be taken. Conducting annual performance audits in a sample of guardianship cases throughout the state would be another – followed up by investigations and discipline of attorneys who perform services in a deficient manner. At present, however, the State Bar has not modified its normal complaint process in any way to accommodate

the needs of guardianship respondents. Since it has a supervisory role over the State Bar, this failure lies at the doorstep of the Supreme Court.

18. The initial findings of the Guardianship Compliance Project are dismal. The OCA reports that of 5,637 cases reviewed statewide, 32% were missing annual reports of the person, 45% were missing initial inventory reports and 46% were missing annual accounting reports. In addition to these practices being violations of state statutes, these omissions also constitute violations of the ADA. Wards are entitled to the protection that such reporting requirements provide. Due to the nature of their disabilities, wards are not able to complain about the failure of their guardian to file such reports. The lack of reporting places them at risk of abuse, neglect, and financial exploitation. Because they cannot complain, they must rely on the court to issue orders commanding the guardians to file reports when they miss the statutory deadline. A citation of contempt of court may be necessary to secure compliance. When courts allow such reporting violations to occur in such significant numbers, a large class of people are being denied access to justice. Since the courts know that the wards lack the ability to complain about reporting deficiencies, judges have a duty under the ADA to take affirmative action to ensure compliance.

19. The Supreme Court relies on others in the judicial system and legal profession to assist the Court in meeting its responsibilities under the ADA and Section 504. Among those on whom the Court relies are local judges, attorneys ad litem, guardians ad litem, court investigators, court visitors, and guardians. It appears that ADA compliance is not automatically occurring – except possibly for the easy situations of sign language interpreters or wheelchair access. The hardest cases – ADA-mandated access to justice and effective communication for guardianship respondents and wards with serious cognitive and communication disabilities – have not received proper attention in performance standards, mandatory trainings, or monitoring mechanisms. The Supreme Court may have assumed that ADA compliance is occurring in guardianship cases. It is not.

20. The severity of the problem is underscored by a review of a 2016 publication released by the Texas Judicial Probate Academy titled "The Role of the Ad Litem." Generally, the publication is very good and contains detailed information on what an ad litem attorney should do in a guardianship case. Missing however, is any information about the application of the ADA to such proceedings, the duties of the court and the ad litem attorney under the ADA, as well as a lack of references and resources on where ad litem attorneys can learn "how to" provide ADA-compliant services.

21. The Supreme Court has recently placed in the spotlight "the administration of civil and criminal justice for persons with mental illness" by acting jointly with the Court of Criminal Appeals to create a Judicial Commission on Mental Health. However, access to justice for people with cognitive disabilities in guardianship proceedings is not included in the mandate of this commission.

22. There are more than 50,000 active adult guardianship cases in Texas. Some 4,500 new guardianship petitions are filed each year in the state. Respondents and wards include people with intellectual and developmental disabilities, seniors who are in cognitive decline, and adults who experience cognitive difficulties due to injuries or medical illnesses. These people with disabilities depend on the Supreme Court of Texas to ensure they have access to justice and effective

communication in guardianship proceedings – both pretrial and post adjudication.

23. The United States Department of Justice is the federal agency charged with investigating violations of the ADA and Section 504 by state and local courts. It also has the authority to issue regulations and to issue guidance memos and technical assistance manuals to guide state courts in fulfilling their responsibilities under these federal nondiscrimination laws. Although the DOJ has not yet issued specific guidance on the application of the ADA to guardianship proceedings, it has done so with respect to criminal justice proceedings and child welfare proceedings. With the passage of S178 last year, and the issuance of a new report this year by the National Council on Disability, it is expected that a DOJ guidance memo on the ADA and guardianship proceedings may be created and released in the future. However, in the meantime, these other guidance memos can be used by the Supreme Court of Texas for information on what courts and attorneys should do to ensure access to justice for guardianship litigants with cognitive ad communication disabilities.

24. Spectrum Institute has compiled a set of exhibits which are being submitted to this Court in support of this complaint. Among the exhibits are two that may prove to be especially helpful to the Court. One is titled "ADA Title II Guidance from the United States Department of Justice is Instructive to Participants in the Texas Guardianship System." The other is titled "The ADA and Guardianship Courts: Excerpts from DOJ and HHS Joint Guidance to Courts in Child Welfare Proceedings, with Comments on Their Application to Adult Guardianship Proceedings."

25. Proactive measures taken by this Court should preclude the necessity of a complaint to the DOJ, or an investigation and enforcement action by that agency to remedy the numerous ADA violations occurring in the Texas guardianship system. However, should such federal intervention be necessary, it is clear that the DOJ would have such authority and that the doctrine of sovereign immunity would not preclude intervention by federal courts.

26. The Texas Attorney General has opined that the failure of a public entity to provide "meaningful access" to its services would be a violation of the ADA. Although the opinion was issued in connection with a legislative request regarding the obligations of an administrative agency of the executive branch, the legal reasoning in that opinion would apply equally to the state courts since they are also public entities subject to the mandates of the ADA. (Opinion No, GA-0579 issued November 8, 2007)

27. The failure of the Supreme Court of Texas to adopt policies and monitoring mechanisms to ensure that all official participants in the adult guardianship system – judges, attorneys ad litem, guardians ad litem, court investigators, guardians, and capacity assessment professionals – comply with the ADA is not harmless. Proper training in the "meaningful access to justice" and "effective communication" requirements of the ADA and how to implement those requirements in practical ways, are necessary in order to minimize the risk of abuse and neglect to adults with disabilities who are involuntarily required to participate in guardianship proceedings. Such training is also necessary for these participants to effectively explore safe and legal alternatives to guardianship. Even if the Court were to adopt such policies – a necessary first step to ADA compliance – that would not be enough. Because these litigants cannot complain about errors, abuses, or failures of performance by these participants, the Court needs to adopt and implement monitoring mechanisms to ensure or maximize ADA compliance.

28. Title II regulations make it clear that administrative complaints may be filed alleging that a "specific class of individuals has been subject to discrimination on the basis of disability by a public entity." (Section 35.170) They also make it clear that a public entity that employs 50 or more persons shall adopt grievance procedures providing for the prompt and equitable resolution of complaints alleging any action in violation of Title II of the ADA. (Section 35.107) This Court is a public entity with 50 or more employees. ADA violations by judges and lawyers are causing the two classes of people identified above to be subject to discrimination on the basis of disability.

29. Our research not identified the name and contact information of the person designated by the Supreme Court as its ADA Coordinator or to identify the procedure adopted by the Supreme Court to resolve grievances filed with the Court alleging ADA violations in the judicial branch, as required by Section 35.107 of the ADA Title II Regulations.

PRAYER FOR RELIEF:

It is requested that this Court:

A) process this complaint promptly;

B) resolve this complaint equitably in order to protect the rights of tens of thousands of residents of Texas who are under an order or involved in a guardianship proceeding or will be so involved in the future;

C) convene a Committee on Access to Justice in Guardianship Proceedings, composed of several supreme court justices, to receive public input, through written materials and testimony, on how to bring the policies and practices of the state guardianship system into compliance with the ADA; and

D) provide such other and further relief as the court deems appropriate and just in the exercise of its administrative and supervisory role over the judicial branch, the State Bar, and the attorneys and judges involved in adult guardianship proceedings.

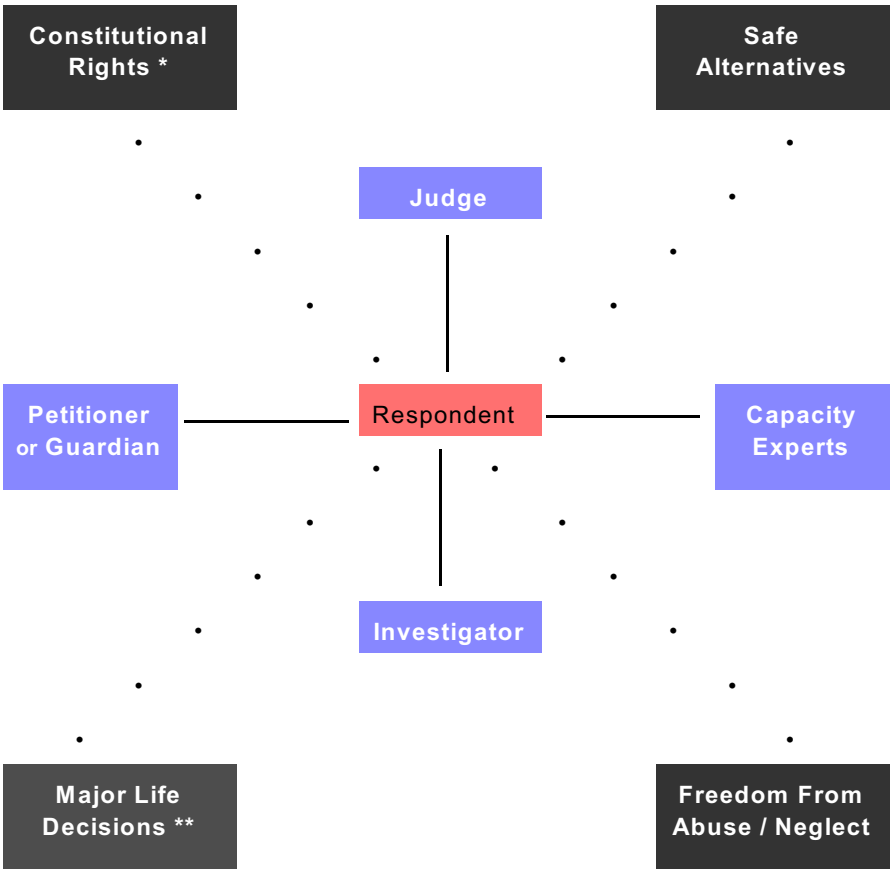
Respectfully submitted:

Thomas F. Coleman
Legal Director
Spectrum Institute

cc: Office of Court Administration
Texas Judicial Council
Texas State Bar
Texas College of Probate Judges
Texas Judicial Probate Academy
Texas Guardianship Association
The Arc of Texas
Disability Rights Texas
County Judges and Commissioners Association
United States Department of Justice (information only)

Participants and Issues in Texas Guardianship Proceedings

Appointing Competent Ad Litem Attorneys is Required by the ADA and Section 504 to Ensure that Respondents with Cognitive Disabilities Have Access to Justice



Respondents with cognitive disabilities lack the ability to represent themselves in guardianship proceedings. Appointing an attorney ad litem is a necessary accommodation under the Americans with Disabilities Act to enable a respondent to have meaningful participation in a case. Once an attorney is appointed, counsel must provide *effective* advocacy services. To ensure effective assistance of counsel, Texas courts must adopt ADA-compliant performance standards, require proper training of attorneys, and create methods to monitor their actual performance. The duty of the courts regarding appointment, training, and monitoring of attorneys ad litem stems from due process, Title II of the ADA, and Section 504 of the Rehabilitation Act of 1973.

Advocacy services of an appointed attorney include: examining capacity assessments in all areas of decision making, determining whether less restrictive and safe alternatives are viable, vetting the proposed guardian, insisting on a care plan that provides safety and reduces the risk of abuse, and making sure that the judge, petitioner, guardian ad litem (GAL), court investigator, capacity experts, and guardian follow statutory directives. A guardianship respondent is unable to perform these essential functions without an attorney.

** Constitutional rights include intimate association (sex), the right to travel, the right to marry, the right to contract, the right to vote, and freedom of choice in personal decisions. ** Major life decisions include choices regarding residence, occupation, education, medical care, social life, finances, etc.*

Thomas F. Coleman, Legal Director, Spectrum Institute

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The Supreme Court of Texas Has a Duty to Ensure ADA Compliance in Guardianship Proceedings

People with Disabilities Are Entitled to Access to Justice

By Thomas F. Coleman
April 6, 2018

A press release issued on March 12, 2018, announced that a complaint had been filed with the Supreme Court of Texas alleging that the Bexar County Probate Court "is violating the federal civil rights of the elderly who are experiencing cognitive decline, physical disability or blindness."

Citing Title II of the Americans with Disabilities Act, the press release explains that the complaint is asking the Supreme Court "to address the policies and practices of the Bexar County Court in adult guardianship proceedings." It further explains that through such proceedings "the court assumes control over the lives of older adults, allegedly on the ground that they lack the capacity to make decisions for themselves."

The complaint, filed by Juliette Fairley, gave specific examples of how various participants in her father's guardianship proceeding – including the court, the court-appointed guardian, and the attorney ad litem appointed to represent her father – all had failed to follow the mandates of the ADA to ensure effective communication to, from, and with wards and to ensure that wards have access to justice in their cases. Other cases in that court were also listed as examples of ADA violations.

Spectrum Institute obtained copies of the relevant documents from Ms. Fairley. A review of them made it clear that they were patterned after documents filed by Spectrum Institute with the Supreme Court of Missouri and with the Supreme Court of Washington.

An email from a deputy clerk of the Supreme Court to Ms. Fairley indicated that her complaint was under review by the general counsel of the Supreme Court. Spectrum Institute sent an email to the clerk, asking her to advise the general counsel that we intended to submit materials to the Court, in an amicus curiae capacity, in support of Ms. Fairley's complaint. We were advised that the general counsel would be so informed.

We have reviewed constitutional and statutory provisions of Texas law regarding the duties and authority of the Supreme Court of Texas over the judicial system, state and local courts, and attorneys who practice law in Texas. We have also reviewed statutes, legal practice materials, and judicial reports about the way in which adult guardianship cases are processed by the judicial branch. During our research, we have specifically looked for any information about whether the courts or attorneys ad litem or other court officials are complying with the requirements of the Americans with Disabilities Act.

The results of our research have caused us to change the nature of our communication to the Supreme Court. The statewide ADA violations, in both policy and practice, are so egregious and numerous, that we are filing a formal complaint with the Supreme Court instead.

The complaint is being filed on behalf of the class of guardianship litigants with disabilities whose cases are currently pending as well as those who have already been adjudicated to be wards of the state and whose cases remain active.

Due to the nature of their disabilities, these litigants lack the ability to understand their ADA rights, to know when they are being violated, or know how to complain about these violations. In order for them to be heard, they need an advocacy organization to petition the government for redress of grievances on their behalf. Spectrum Institute is assuming this role in order to ensure that these systemic and ongoing ADA violations are properly addressed.

As explained below, state and local courts are public entities with duties under Title II of the ADA. As the entity with oversight of the Judicial Branch, the Supreme Court has the responsibility to ensure that judicial proceedings in the state are ADA compliant. The Supreme Court should exercise its constitutional authority to ensure that judges and attorneys involved in guardianship proceedings are giving litigants with cognitive and communication disabilities the access to justice guaranteed to them by federal laws, including the ADA.

Hopefully, the Supreme Court will heed the call to action and will take remedial steps within a reasonable time frame. If not, a class-action complaint can be filed with the United States Department of Justice, asking that agency to conduct a formal investigation into the guardianship system in Texas – a system over which the Supreme Court of Texas has administrative and management authority.

The Supreme Court should exercise its supervisory authority over judicial proceedings and the practice of law, to make such a complaint unnecessary.

The Supreme Court has two types of general jurisdiction over the administration of justice in Texas. One is its appellate jurisdiction where the court hears appeals involving cases litigated in lower courts. It also has an administrative role where the court exercises its supervisory authority over attorneys licensed to practice law and over procedural aspects of litigation that occurs in the trial and appellate courts of the state.

Appellate Jurisdiction

The appellate jurisdiction of the Supreme Court is derived from Article V, Section 3 of the Texas Constitution.

Through the exercise of its appellate jurisdiction, the Supreme Court shapes the law in Texas by issuing rulings and writing opinions that declare whether the lower court judges committed errors or abused their discretion or not, and whether the attorneys involved in the cases committed errors or engaged in misconduct. The rulings are binding in these cases and the opinions create a body of case law that guides attorneys and judges in future cases.

Unfortunately, appeals by guardianship respondents are rare and appeals by adults with intellectual and developmental disabilities are virtually nonexistent. As a result, there has not been a growing body of case law in Texas on the procedural and substantive rights of respondents in guardianship proceedings.

Judges and attorneys are more likely to respect the rights of litigants when they know that an appeal is a distinct possibility. They are less likely to adhere to the rule of law when they think that an appeal is only a very remote prospect. People who believe they have the ultimate and final word and who lack supervision act differently than people who believe they are being watched or that they may be audited. That's human nature. The fact that guardianship respondents almost never appeal stunts the adjudicative growth of guardianship law and allows systemic flaws to go uncorrected indefinitely.

Administrative Jurisdiction

The administrative role of the Supreme Court is derived from Article V, Section 31 of the Texas Constitution, which states: "The Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts."

Government Section 74.021 states that the Supreme Court has supervisory and administrative control over the judicial branch and is responsible for the orderly administration of justice.

Section 74.024 states that the Supreme Court may adopt rules of administration setting policies and guidelines necessary or desirable for the operation and management of the court system and for the efficient administration of justice.

<u>Chief Justice</u>

Government Code Section 21.004 directs the chief justice to submit an annual report to the legislature "evaluating the accessibility of the courts to the

citizens of the state and the future directions and needs of the courts of the state."

Government Code Section 74.006 states that the chief justice shall ensure that the Supreme Court executes and implements the court's administrative responsibilities.

Government Code section 74.007 authorizes the chief justice to name and appoint members of the court to committees necessary or desirable to the efficient administration of justice.

Administrative Staff

Government Code Section 72.001 creates the office of court administration as an agency operating under the direction and supervision of the Supreme Court.

The Office of Court Administration has published reports in recent years that document serious deficiencies in the state's guardianship system. Many of these deficiencies are violations of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

A 2014 report titled "Texas Guardianship Cases: Improving Court Processes and Monitoring Practices in Texas Courts" documents that:

• ad litem attorneys were not appointed in 10% of the cases despite a statutory mandate to do so;
• in the cases in which they were appointed, ad litem attorneys only filed a report 50% of the time;
• a First Annual Report was only filed by a guardian in 28% of the cases reviewed;
• A First Annual Report of Well-being of the Ward was only filed by a guardian in 18% of the cases reviewed;
• a First Annual Accounting Report was only filed by a guardian in 15% of the cases reviewed;
• judges interviewed noted instances of the lack of preparation on the part of ad litem attorneys;
• judges commented that ad litem attorneys are often not knowledgeable or prepared for their role in guardianship cases;
• in the cases reviewed, ad litem attorneys were compensated at a rates ranging from $50 per case to $1,000 per case.

A report submitted by the OCA to the Senate State Affairs Committee in 2016 noted that due to lack of resources to monitor compliance in 244 counties without statutory probate courts, guardianship respondents and wards are at risk of abuse and neglect.

In a sample of 5,637 cases reviewed by OCA, 32% were missing annual reports of the person, 45% were missing initial inventory reports, and 47% were missing annual accounting reports.

Court Rules

Government Code Section 22.003 underscores the court's rule-making authority, stating: "The supreme court may make and enforce all necessary rules of practice and procedure, not inconsistent with law, for the government of the supreme court and all other courts of the state to expedite the dispatch of business of those courts."

To reiterate, because there are few appeals by guardianship respondents in these cases, the normal corrective appellate process is generally not operating in these proceedings. As a result, it would be highly beneficial for the Supreme Court to fulfill its duty under Section 5 by promulgating rules to establish procedural protections and to set professional standards for attorneys appointed to represent guardianship respondents, whether it is in their role as attorneys ad litem or guardians ad litem.

Guardianship Rules

Government Code Section 22.013 states that the Supreme Court shall provide a course of instruction that relates to issues that arise in guardianship cases for judges involved in those cases. It further states that the Supreme Court shall adopt rules necessary to accomplish the purposes of this section.

Subdivision (b) of this section declares that the instruction must include information about . . . the aging process and the nature of disabilities; the requirements of the Americans with Disabilities Act and related case and statutory law, rules, and compliance methods; and the principles of equal access and accommodation, among other things.

Our research has not found evidence that such a course of instruction exists or that ADA compliance practices is being taught to judges who process and adjudicate guardianship cases.

State Bar

Government Code Section 81.001 states that the state bar is a public corporation and an administrative agency of the judicial department of government. The Supreme Court exercises administrative control over the state bar.

Government Code Section 81.114 requires the state bar to provide a course of instruction for attorneys who represent parties in guardianship cases. The state bar is required to adopt rules necessary to accomplish the purposes of this section.

The course of instruction must include information about . . . the aging process and the nature of disabilities; the requirements of the Americans with Disabilities Act and related case and statutory law, rules, and compliance methods; and the principles of equal access and accommodation, among other things.

Our research has not found any evidence that such a course of instruction exists or that ADA compliance practices are being taught to guardianship attorneys. An attorney at Disability Rights Texas has informed us that the state bar is not issuing continuing legal education credits on this topic.

Estates Code Section 1054.201 requires that court-appointed attorneys in guardianship proceedings must be certified by the state bar or its designee as having successfully completed a course in guardianship law and procedure. Four hours of training is required including one hour of alternatives to guardianship and supports and services available to proposed wards. Section 1054.202 requires four hours of training every two years for the first four years, after which it is four hours of training every four years. An attorney may not be appointed by a court to serve as an attorney ad litem without the necessary certification.

Rule 1.03 of the Disciplinary Rules of Professional Conduct governs the duties a lawyer has in communications with a client. The Americans with Disabilities Act is not mentioned in the rule or in the comments to the rule.

The preamble of the Texas Rules of Disciplinary Procedure declares that the Supreme Court of Texas has the constitutional and statutory responsibility for the lawyer discipline system and has inherent power to maintain appropriate standards of professional conduct.

Professional standards require attorneys to provide effective communication and competent representation. Ethical duties of loyalty and confidentiality are mandatory.

Ad Litem Attorney

Estates Code Section 1054.001 requires the court to appoint an attorney ad litem to represent the proposed ward's interests. Section 1002.002 defines an attorney ad litem as an attorney appointed by the court to represent and advocate on behalf of a proposed ward in a guardianship proceeding. This role is separate and distinct from that of a guardian ad litem. (See Estates Code Section 1054.054)

An ad litem attorney must perform various investigative, advocacy, and defense activities as specified in Estates Code Section 1054.004.

It is the duty of an attorney ad litem to defend the rights of his involuntary client with the same vigor and astuteness as he or she would employ the defense of a client who retained the attorney. (In re Estate of Stanton, 202 S.W.3d 205, 208) Guardianship clients are entitled to effective assistance of counsel. (Ex Parte Parker, 2014, WL 31253 (Tex.App.—Amarillo *2014*, no. pet.).

A treatise on the duties of attorneys ad litem and guardians ad litem was published in 2016 by the Texas Judicial Probate Academy. (The Role of the Ad Litem)

While it is otherwise an excellent and detailed explanation of what an attorney must do to fulfill his or her duties to a guardianship client, it does have

some serious deficiencies. For example, it does not mention the due process right of the client to access to justice, or the ADA rights of the client to effective communications and meaningful participation on the case. Nor does it mention the corresponding responsibilities of the ad litem attorney in these regards.

ADA Compliance

The Americans with Disabilities Act was passed by Congress more than 25 years ago. The law's constitutionality has been upheld by the United States Supreme Court as a valid exercise of federal authority over the states.

The ADA builds upon and extends beyond the requirements of federal due process. The Due Process Clause of the Fourteenth Amendment requires state courts to protect the procedural and fundamental substantive rights of litigants in state court proceedings. The ADA goes even further than these minimum constitutional guarantees and may require extra accommodations to people with disabilities who are participants in legal proceedings.

The term "Due Process *Plus*" has been coined to describe the duties of judges and court-appointed lawyers who interact with litigants with cognitive and communication disabilities in state guardianship proceedings. (*Due Process Plus: ADA Advocacy and Training Standards for Appointed Attorneys in Adult Guardianship Proceedings – 2015*) "Due Process *Plus* is a White Paper submitted by Spectrum Institute to the U.S. Department of Justice. (http://spectruminstitute.org/white-paper/)

The Supreme Court of Texas has not spoken on the rights of guardianship respondents under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act. The court has not used its *adjudicative* authority to address this issue, probably because appeals by guardianship respondents are virtually nonexistent. Neither has the court used its *administrative* authority to address the role of the ADA in guardianship cases.

Title II of the ADA applies to services provided by public entities. The term "public entity" includes state and local courts. The service provided by the Texas courts is the administration of justice.

Under Title II, judges, attorneys ad litem, guardians ad litem, and other court-appointed or supervised participants must take affirmative steps to ensure that litigants with cognitive and communication disabilities receive access to justice in guardianship proceedings. Under the concept of "due process *plus*," extra steps (modifications of normal policies and practices) may be required to ensure effective communication between the litigant and all participants in the proceedings.

In addition to ensuring effective communication, various supports and services may be necessary to maximize the prospect that a litigant with serious disabilities has meaningful participation in all stages of the proceeding – both in and out of court. The duty to provide such supports and services does not depend on a request from a litigant with disabilities – especially when the court or court-appointed lawyers know that the nature of the disability precludes the litigant from making such a request.

The responsibility of judges to provide, and for court-appointed attorneys to seek, accommodations or modifications is *sua sponte* when it is known that a serious disability may hinder a litigant's ability to have meaningful participation in the case. It is obvious in guardianship proceedings – just by virtue of the allegations made in the petition – that the respondent has serious cognitive disabilities and may have significant communication and other disabilities as well.

The duty of a public entity to provide meaningful access to its services actually pre-dates the passage of the ADA. It is rooted in Section 504 of the Rehabilitation Act of 1973 – a federal law that did, and still does, apply to state and local government entities. Speaking of Section 504, the United States Supreme Court said: "[A]n otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the

grantee's program or benefit may have to be made." (Alexander v. Choate, 469 U.S. 287, 301 (1985))

The requirement of "meaningful access" to public services is not limited to Section 504. Many federal appellate courts have ruled that the ADA also requires public entities to provide "meaningful access" to people with disabilities so as not to deprive them of the benefits of the services provided. (Ability Center of Toledo v. City of Sandusky, 385 F.3d 901, 907 (6th Cir. 2004); Randolph v. Rogers, 170 F.3d 850 858 (8th Cir. 1999); Lee v. City of Los Angeles, 350 F.3d 668, 691 (9th Cir. 2001); Chaffen v. Kansas State Fair Board, 348 F.3d 850, 857 (10th Cir. 2003)).

A subtle clarification should be made at this point. ADA terminology makes a distinction between "accommodations" and "modifications." Under Title I of the ADA, a "reasonable accommodation" is only required by employers to avoid discrimination against employees with disabilities. Under Title II, public entities have an obligation to make "reasonable modifications" of policies and practices to ensure meaningful access to their services.

The two different terms, however, may pose a distinction without a significant difference. For all practical purposes, the two terms are essentially equivalent. (McGary v. City of Portland, 386 F.3d 1259, 1266, n.3 (9th Cir. 2004). Courts often use the terms interchangeably. (Tyler v. City of Manhattan, 118 F.3d 1400, 1407 (10th Cir. 1997)).

Another requirement of the ADA is that a public entity take appropriate steps to ensure that communications with recipients of its services are as effective as communications with others. (Robertson v. Las Animas County Sheriff's Department, 500 F.3d 1185 (10th Cir. 2007)) To fulfill this duty, an entity may need to provide auxiliary aids and services.

The duty to provide accommodations, modifications, and effective communications applies to "known" disabilities. An entity, such as a court, cannot take steps to respond to a disability it does not know about. As the court in Robertson explained: "[T]he entity must have knowledge that the individual is disabled, either because the disability is obvious or because the individual (or someone else) has informed the entity of the disability." In other words, it is the knowledge of the disability, even without a request for accommodation, that triggers the entity's obligation to take reasonable steps to compensate for the disability in order to maximize the possibility of meaningful access to the services.

In the context of guardianship proceedings, the mere filing of a petition should be sufficient to trigger a duty of the court to inquire into the types of modifications or the extent of supports and services that are necessary to give the respondent meaningful access to the legal proceedings. The same is true about the court's duty to ensure effective communications between the respondent and all court participants.

The filing of a guardianship petition is predicated on allegations that a respondent has significant cognitive or other disabilities. The mere filing of a guardianship petition, therefore, puts the court on notice that the respondent has a known disability that may require accommodations. In addition, other documents submitted with the petition would give the court and attorneys additional information as to the types of disabilities the respondent has.

A recent publication issued by the U.S. Department of Justice explains these issues in the context of criminal justice proceedings involving people with intellectual and developmental disabilities. (https://www.ada.gov/cjta.html) The principles and examples contained in this DOJ publication should be helpful to courts in Texas as to the types of actions that may be required by the ADA to ensure access to justice in adult guardianship proceedings. (http://disabilityandabuse.org/doj-guidance.pdf)

Whether the judicial branch, under the administrative supervision of the Supreme Court, is fulfilling its responsibility to ensure access to justice in guardianship proceedings should be subject to a "pass-fail" test. As things now stand, judges, court-appointed attorneys, and other court-supervised personnel would not pass an ADA compliance test if the Department of Justice were to investigate the guardianship system in Texas.

Our research indicates that Texas has no access-to-

justice performance standards for ad litem attorneys or guardians ad litem. These personnel are not receiving sufficient training on legal and medical issues involving litigants with intellectual and developmental disabilities, how to maximize effective communication, or forensic interviewing of clients in this special needs population. Despite statutory mandates, there do not appear to be educational programs on the ADA and its application to guardianship proceedings.

WINGS

The Office of Court Administration convened the first meeting of WINGS in November 2013. This Working Interdisciplinary Network of Guardianship Stakeholders worked with the Texas Judicial Council's Elders Committee in 2013 and 2014. Our research has not identified the ADA, access to justice, effective communication, or effective assistance of counsel as areas that were made a priority or even studied by WINGS.

Texas Council for Developmental Disabilities

The Texas Council for Developmental Disabilities has a webpage devoted to guardianship issues. It appears to have been published in 2013. The issues it focuses on do not include the ADA, access to justice, effective communication, or effective assistance of counsel in guardianship proceedings.

Conclusion

Pursuant to Government Code Section 74.007, the Chief Justice should convene a committee on Access to Justice in Guardianship Proceedings. Pursuant to Article 5, Section 3(b) of the Constitution, this committee of Supreme Court justices should solicit public input, including testimony from scholars, professionals, advocates, and others to determine what steps the court should take to bring the Texas guardianship system into compliance with the ADA. The committee should work in consultation with the Judicial Commission on Mental Health which was recently convened by a joint order of the Supreme Court and the Court of Criminal Appeals.

The Supreme Court of Texas has had duties under the ADA for more than 25 years, and under Section 504 for even longer. The court should exercise its administrative authority, sua sponte, to ensure that guardianship proceedings in the state comply with access-to-justice requirements of the ADA.

An ADA violation in a legal proceeding may create "structural error" that requires reversal per se. No showing of prejudice is needed because the nature of the error gives rise to a presumption of prejudice.

Some errors in civil cases are reversible per se, "primarily where the error calls into question the very fairness of the trial or hearing itself." (Biscaro v. Stern, 181 Cal.App. 4th 702 (2009)) "Wrongful denial of an [ADA] accommodation is structural error infecting a legal proceeding's reliability, which stands to reason because an accommodation's purpose is to help a party meaningfully participate in a way that enhances our confidence in a proceeding's outcome." (Id, at p. 710)

By failing to even consider ADA accommodations or modifications of normal policies and practices on their own motion at the initial stages of a guardianship proceeding, judges have been engaging in structural error in thousands of cases each year in Texas. Similarly, structural error is being committed on a regular basis by the inaction of attorneys ad litem and guardians ad litem who fail to assess the communication needs or identify the supports and services that would enhance access to justice for guardianship respondents.

The Supreme Court should, without delay, create a committee of justices to study the guardianship system with a view to enacting ADA-compliant rules for courts as well as performance standards for attorneys and guardians ad litem in guardianship proceedings. Standards also should be developed for training programs for judges, attorneys, and guardians ad litem. The ADA requires as much. ◊◊◊

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ADA Title II Guidance from the United States Department of Justice is Instructive to Participants in the Texas Guardianship System

by Thomas F. Coleman
April 6, 2018

Title II of the Americans with Disabilities Act prohibits public entities from discriminating on the basis of disability against recipients of the services of such entities. Title II applies to state and local government entities, including state and local courts. The service that courts provide is the administration of justice. Title II requires public entities to modify policies and practices, when appropriate, to provide necessary accommodations to people with disabilities to ensure they have meaningful access to the services of such entities.

The United States Department of Justice posted a Technical Assistance Publication on its website on January 11, 2017, to provide guidance to criminal justice agencies on how to comply with Title II of the ADA in the delivery of services. (https://www.ada.gov/cjta.html) Much of what is said in that publication is relevant to the administration of justice by courts and ancillary personnel (court investigators, court-appointed attorneys, and guardians ad litem) in adult guardianship proceedings. As a result, I am providing some excerpts from that publication here, with comments on how they are relevant to the need for compliance with the ADA in the administration of justice, and provision of legal services, in guardianship proceedings in Texas.

Application of Title II to Public Entities

Quote: "Title II of the Americans with Disabilities Act (ADA) protects individuals with mental health disabilities and intellectual and developmental disabilities (I/DD) from discrimination within the criminal justice system. Pursuant to the ADA, state and local government criminal justice entities—including police, courts, prosecutors, public defense attorneys, jails, juvenile justice, and corrections agencies—must ensure that people with mental health disabilities or I/DD are treated equally in the criminal justice system."

Comment: Replace "criminal justice system" with "adult guardianship system" and change "public defense attorneys" to "attorneys ad litem" and the relevance of this mandate to judges, attorneys, and other participants in the adult guardianship system is clear.

General Requirements

Quote: "Title II of the ADA provides that no qualified individual with a disability shall, because of that disability, be excluded from participation in, denied the benefits of, or subjected to discrimination in the services, programs, and activities of all state or local government entities, including law enforcement, corrections, and justice system entities. Such services, programs, and activities include: Interviewing and questioning witnesses, victims, or parties, negotiating pleas, assessing individuals for diversion programs, conducting arraignment, setting bail or conditions of release, taking testimony, sentencing, providing notices of rights, determining whether to revoke probation or parole, or making service referrals, whether by prosecutors and public defense attorneys, courts, juvenile justice systems, pre-trial services, or probation and parole services."

Comment: A guardianship court is a justice system entity. An attorney appointed to represent a proposed ward is the equivalent of a public defense attorney. A guardian-ad-litem (GAL) is the equivalent of a pre-trial service provider or a probation service provider. GALs and attorneys in guardianship proceedings also conduct interviews, assess individuals, and provide notices of

rights. Attorneys also negotiate dispositions. Therefore, the ADA mandates mentioned in this guidance memo are applicable to similar services in adult guardianship proceedings.

Modifications and Accommodations

Quote: "Under Title II, state and local government entities must, among other obligations . . . Make reasonable modifications in policies, practices, or procedures when necessary to avoid disability discrimination in all interactions with people with mental health disabilities or I/DD, unless the modifications would fundamentally alter the nature of the service, program, or activity. The reasonable modification obligation applies when an agency employee knows or reasonably should know that the person has a disability and needs a modification, even where the individual has not requested a modification, such as during a crisis, when a disability may interfere with a person's ability to articulate a request."

Comment: The need to make modifications of policies and practices in order to ensure meaningful participation in public services does not depend on a request from someone with a disability if a representative of a public entity knows the person has a disability and needs a modification. Judges, guardians-ad-litem, and attorneys ad litem in guardianship proceedings know, by virtue of the allegations in a petition, that the proposed ward likely has serious cognitive and/or communication disabilities that require some form of accommodation in order for the person to participate in the proceeding in a meaningful way. They therefore have a duty to conduct an assessment of the person's needs and to develop a disability accommodation plan.

Effective Communication

Quote: "Under Title II, state and local government entities must, among other obligations . . . Take appropriate steps to ensure that communication with people with disabilities is as effective as communication with people without disabilities, and provide auxiliary aids and services when necessary to afford an equal opportunity to participate in the entities' programs or activities. Even when staff take affirmative steps to ensure effective communication, not everyone will understand everything in the same way and there will necessarily be a spectrum of comprehension across the population based on many factors, including but not limited to age, education, intelligence, and the nature and severity of a disability. Public entities are not required to take any action that would result in a fundamental alteration in the nature of a service, program, or activity, or undue financial and administrative burdens."

Comment: The very nature of guardianship proceedings involves the need to assess a person's capacity to make decisions and to care for his or her own basic needs. By definition, the people who are intended to receive the benefit of judicial and legal services in these proceedings are individuals with actual or perceived cognitive and communication disabilities. Therefore, it cannot be reasonably argued that providing the necessary supports and services needed for effective communication would fundamentally alter the nature of the service, i.e., the administration of justice. Maximizing the potential for effective communication with proposed wards may be difficult, but it is essential to do so in order to interview and assess the intended beneficiaries of these judicial and legal services.

Training

Quote: "Appropriate training can prepare personnel to execute their ADA responsibilities in a manner that . . . respects the rights of individuals with disabilities; ensures effective use of criminal justice resources; and contributes to reliable investigative and judicial results."

Comment: Training of judges, guardians ad litem, and attorneys ad litem is also necessary in the guardianship system so they can execute their ADA responsibilities. The Texas Supreme Court has responsibility to ensure such training occurs.

Analysis of Policies and Practices

Quote: "Criminal justice entities have reviewed their policies, practices, procedures, and standing orders to ensure that they do not discriminate against people with mental health disabilities or I/DD. For example, entities have collected, aggregated, and analyzed data regarding individuals served by the entity and outcomes to determine whether people with disabilities are subjected to bias or other discrimination. Where potential discrimination has been found, entities have taken necessary corrective measures, such as revising policies and procedures; refining quality assurance processes; and implementing training."

Comment: In some states the judicial branch has established a statewide advisory committee to review policies and practices in guardianship or conservatorship systems. This has occurred in Pennsylvania, Nevada, Washington, and some other states. However, none of these entities has included a review of the compliance or noncompliance of the system with the ADA. The Texas Supreme Court is currently reviewing a complaint alleging that the state's guardianship system is not in compliance with the ADA. Spectrum Institute is filing a similar complaint with that court. To date, the court has not adopted a formal action plan to assess and address ADA compliance by the guardianship system the court oversees and administers.

Observations and Conclusions

A search of the website of the U.S. Department of Justice for information or publications on the ADA and guardianship or conservatorship proceedings yields no results. The DOJ has not yet issued any guidance memos or technical assistance manuals specifically on this topic.

A DOJ website search also turned up no results for complaints filed against state or local agencies that administer such proceedings. No litigation by the DOJ or settlement agreements on this topic can be found on its website.

I am aware of one formal investigation which was opened by the DOJ and which is pending. It was filed against the Los Angeles Superior Court by my own organization – Spectrum Institute – for ADA violations involving the voting rights of people with developmental disabilities in limited conservatorship proceedings.

I am also aware of a second complaint against the Los Angeles Superior Court – also filed by Spectrum Institute – for ADA violations due to deficient legal services by court-appointed attorneys in limited conservatorship proceedings. The complaint names the court as the source of the problem since it is the court that appoints the attorneys and mandates their training. It also highlights the lack of quality assurance controls by the local entity that funds these legal services, and the lack of standards by the state entity that promulgates rules for legal proceedings.

That complaint was filed in June 2015 and has been pending with the DOJ for 33 months now. The DOJ has placed considerable resources into the investigation of this complaint. However, there has been no indication yet as to what responsive action it may take.

The application of the ADA to adult guardianships is a topic that is getting more attention. A new documentary film – *Pursuit of Justice* – focuses on the need for nationwide reforms so that people with cognitive and communication disabilities receive access to justice in these proceedings. (www.pursuitofjusticefilm.com)

Until there is action taken by the DOJ – in the form of investigations, settlements, litigation, and guidance memos, – the Supreme Court of Texas and participants in the Texas guardianship system may find instruction in other relevant publications and materials. This is one of them. ◊◊◊

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Trauma-Informed Justice: A Necessary Paradigm Shift for the Texas Adult Guardianship System

by Thomas C. Coleman
April 6, 2018

"Trauma-informed justice" is a relatively new concept in the law. It has been discussed and applied in the context of criminal, family, and juvenile courts. Not so with respect to the administration of justice in probate courts.

Many mental health and substance abuse professionals have used a trauma-informed approach for some time now in counseling and therapy programs. It is in this context that much has been written on the subject.

"A *trauma-informed approach* refers to how a program, agency, organization, or community thinks about and responds to those who have experienced or may be at risk for experiencing trauma; it refers to a change in the organizational culture. In this approach, all components of the organization incorporate a thorough understanding of the prevalence and impact of trauma, the role that trauma plays, and the complex and varied paths in which people recover and heal from trauma." (Substance Abuse and Mental Health Services Administration, "Trauma Definition: Part Two: A Trauma Informed Approach.")

Three elements occur in a trauma-informed approach: (1) realizing the prevalence of trauma in the population being served; (2) recognizing how trauma affects this population; and (3) responding by putting this knowledge into practice in the delivery of services. (SAMHSA, supra.)

A system that is trauma informed must realize the widespread impact of trauma, recognize the signs and symptoms of trauma, and fully integrate knowledge about trauma into policies, procedures, and practices.

The first step in delivering trauma-informed justice in the Texas adult guardianship system is for the participants – judges, attorneys, investigators, case workers, and capacity assessment professionals – to acknowledge that the majority of guardianship respondents and wards may very well be trauma victims or survivors.

All in the Family

• The majority of guardianship cases involve people with intellectual and developmental disabilities.

• The vast majority (85%) of guardians are family members.

– OCA Report
November 2014

As difficult as it may be to make this mental and emotional shift, participants also need to be aware that the trauma to these victims was likely caused by those who are close to them – members of their households, caregivers, or service providers.

Data from the Office of Court Administration shows that a majority of respondents in adult guardianship proceedings are people with intellectual and developmental disabilities – a large percentage of whom have just transitioned to adulthood. The overwhelming majority of guardians are parents and relatives. Thus, for most adults who are involuntarily drawn into guardianship proceedings, the process and end result are "all in the family." This, unfortunately, gives rise to a host of unwarranted assumptions – assumptions which feed into the assembly line manner in which guardianship cases are processed in many parts of the state.

From the way it appears the Texas adult guardianship system currently operates, there seems to be an assumption by participants that all is well, that respondents have a normal life, and that proposed

guardians have been doing a good job of caring for their children or relatives. Research shows that such assumptions are not warranted.

The most recent report on abuse of people with disabilities was published by our own Disability and Abuse Project in 2013. (Website, Victims and Their Families Speak Out: A Report on the 2012 National Survey on Abuse of People with Disabilities.) More than 7,200 people throughout the nation responded to this survey, including thousands of people with disabilities and their families.

Over 70 percent of people with disabilities reported that they had been victims of abuse. More than 63 percent of family members said their loved one with a disability had been an abuse victim. Focusing exclusively on those with developmental disabilities, 62.5 percent of this group said they had experienced abuse of one type or another.

Of the various types of abuse, victims with disabilities reported verbal-emotional abuse (87.2%), physical abuse (50.6%), sexual abuse (41.6%), neglect (37.3%), and financial abuse (31.5%).

Risk of Abuse

Some 244 counties without statutory probate courts lack resources to monitor guardianships, thus placing seniors and people with disabilities at risk of abuse and neglect.

– OCA Report
September 2016

Although this was not a random sample of the nation, the results of the survey certainly should be enough to cause concern within any system that is supposed to protect people with developmental disabilities. The probate court is such a system.

Dr. Nora J. Baladerian, Executive Director of the Disability and Abuse Project, was not surprised by the results of our national survey. She is a recognized expert on abuse and disability and lectures on the subject at professional conferences throughout the nation. She trains law enforcement personnel, psychologists, social workers, and service providers.

Dr. Baladerian cites retrospective studies that summarize the accounts of adults about their experiences of abuse as children. These studies show that one in four women, and one in six men, report that they were victims of sexual abuse as a child. (Centers for Disease Control and Prevention, 2006)

In another study of adults retrospectively reporting adverse childhood experiences, 25.9 percent of respondents reported verbal abuse as children, 14.8 percent reported physical abuse, and 12.2 percent reported sexual abuse. (Center for Disease Control and Prevention, 2009)

The findings of these studies are for the generic population. But what are the rates of abuse for people with developmental disabilities?

A recent review of studies published in professional journals indicates that children with disabilities are victims of abuse and neglect during their childhood years at a higher rate than children in the general population. (A Review of the Association Between childhood Disability and Maltreatment, 2017)

The review cited above explains that some studies show that 27% of children with disabilities have been victims of abuse that was reported to authorities. But most abuse goes unreported. This leads to a conclusion that a majority of children with disabilities may experience abuse during their childhood years.

The data on perpetrators is also very instructive. Perpetrators of abuse are generally not strangers. Most often, they are people close to the victim. In the generic population, more than 80 percent of child abusers were reported to be parents. (Office for Victims of Crime, United States Department of Justice, 2009) According to Dr. Baladerian, victims with developmental disabilities are most likely to be abused by parents, household members, caregivers, or service providers.

This data alone should cause a paradigm shift in the

adult guardianship system, which currently seems to assume that respondents, as a class, are being treated well at home, and that proposed guardians, as a class, are treating their children or dependent relatives well. Those assumptions are based on wishful thinking, not statistical probabilities.

I am not suggesting that judges, attorneys, and investigators should automatically view each parent or relative who wants to be a guardian as a likely abuser. But I am suggesting that the system should interact with a prospective guardian in a procedural context of *caution* and *verification*.

When we add the perpetrator statistics to our new understanding of child abuse dynamics, we should be stopped in our tracks. As a class, on the whole, and statistically speaking, a significant percentage of would-be guardians may have perpetrated abuse against the people whose life they are seeking to control in adulthood. If not perpetrators themselves, they may have failed to protect the respondent from abuse. Although this information is hard to digest, it requires a paradigm shift in the way the Texas adult guardianship system system currently operates.

Questions begin to arise as to what changes should occur in policies and practices as a result of the paradigm shift from assuming that probably all is well to assuming that all may not be well. What should judges, attorneys, investigators, and service providers do differently with this newly acquired information about the likelihood that guardianship respondents may be abuse victims?

A trauma-informed approach to the administration of justice in probate courts would require a complete review of all policies and practices, from top to bottom, from start to finish, in the adult guardianship system – for the purposes of reducing risk of and improving response to abuse.

Ineffective Assistance

The judges interviewed said that ad litem attorneys are often not knowledgeable or prepared for their role in guardianship cases.

Some attorneys received as little as $50 per case in fees.

– OCA Report
November 2014

Adopting ADA-compliant performance standards for ad litem attorneys – with proper training and effective monitoring – would be a good start. Properly trained, motivated, and compensated attorneys would help reduce the risk of abuse, and would help ensure that all other participants in the guardianship system are doing their jobs.

Only a system in denial could expect these attorneys to be the front line of defense against the appointment of potentially dangerous guardians, and yet not train them with the special skills needed to interview people with cognitive and communication disabilities. Only such a system would fail to emphasize the importance of talking personally and privately with all close relatives in order to find any dissenting views in the family about how wonderful the proposed guardian is.

A trauma-informed adult guardianship system would require court-appointed attorneys to acquire interviewing skills appropriate to the task, to interview respondents in a private setting away from their parents or caregivers, to review all school and medical records, to talk to neighbors, and to run a criminal background check on everyone who lives in the household.

If those who operate the training programs of the State Bar were trauma-informed educators, they would act differently when they select topics and speakers for training programs for ad litem attorneys.

Trauma-informed training coordinators would provide more seminars because of the need to include much more information than is currently transmitted during the few training programs that are offered now. They would include speakers on the dynamics of each type of disability and how to interview people who have each type of disability. Seminars would include a presentation on the prevalence of abuse against people with develop-

mental disabilities and who the likely perpetrators are. They would also include requirements of the Americans with Disabilities Act and what the courts and attorneys must do to accommodate the special needs of clients with disabilities.

Ad litem attorneys would be informed at these mandatory seminars that most cases of child abuse or dependent adult abuse are not reported. In many cases, the victim is too embarrassed, or too afraid of consequences, or thinks they will not be believed – or simply lacks the communication skills necessary to make a report.

The fact that no report has been made to Child Protective Services or Adult Protective Services does not mean that abuse has not occurred. Such knowledge would inform the actions of the attorneys, prompting them to do more thorough investigations and not to be distracted by smooth-talking and friendly-appearing proposed guardians. A trauma-informed training session would advise court-appointed attorneys not to be fooled by pleasant appearances. Too much is at stake.

Many other changes in the guardianship system would be required if the probate court were to shift paradigms – from the current model that assumes benevolence to one that is trauma informed. A trauma-informed justice system would operate with more caution and scrutiny. Thousands of seniors and people with developmental disabilities would then receive a greater degree of protection from the probate courts. Since "protection" is the service that guardianship courts are providing, the ADA requires that people with disabilities have meaningful access to this service. That is currently not occurring.

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Mandatory Training on Disability and Abuse

* Children with disabilities are victims of abuse and neglect during their childhood years at a higher rate than children in the general population.

* Studies show that 27% of children with disabilities have been victims of reported abuse. But studies also show that most abuse goes unreported. This leads to a conclusion that a majority of children with disabilities experience abuse during their childhood.

* Perpetrators of abuse are generally not strangers. Most often, they are people close to the victim, such as parents, relatives, household members, and service providers.

* This data alone should cause a paradigm shift in the adult guardianship system, which currently seems to assume that respondents, as a class, are being treated well at home, and that proposed guardians, as a class, are treating their children well.

* Gov. Code Sec. 22.013 (education for guardianship judges) and Sec. 81.114 (education of guardianship attorneys) should be amended to include mandatory training on abuse of people with disabilities, including risk reduction and effective response.

* The Supreme Court should amend its order on mandatory education for guardianship judges (Misc. Docket No. 17-9164) to include training on abuse of people with disabilities, including risk reduction and effective response.

ADA COMPLAINT

Supreme Court of Texas

Table of Exhibits

Exhibits Available Online:
www.spectruminstitute.org/Texas