# WASHINGTON WINGS AND MANDATORY COUNSEL

## Omissions from the Report of the Subcommittee on Attorney Representation

A DISSENT
by Tina Baldwin
Subcommittee Member

The Working Interdisciplinary Network of Guardianship Stakeholders (WINGS) of Washington State created a subcommittee to study whether changes should be made to current laws regarding the appointment of counsel for respondents in adult guardianship cases.

A draft of a subcommittee report has been circulated to its members for review. I am a member of the subcommittee and have been advocating for mandatory appointment of counsel for all guardianship respondents as a matter of federal due process and as a requisite under the access-to-justice- requirements of the federal Americans with Disabilities Act. As federal laws, the Supremacy Clause of the United States Constitution gives these legal protections priority over state laws to the contrary.

I have reviewed the draft of the subcommittee and, as it is currently written, cannot endorse it. Important information has been omitted from the report. Unless this information is included, I respectfully dissent from the report.

**Three Options Presented**

There are three options presented by the subcommittee's report: (1) maintain the status quo of appointing an attorney for some respondents and not for others, leaving this critical decision to be decided on a case by case basis without strict guidelines; (2) mandate the appointment of an attorney for all respondents, both in initial and post-adjudication proceedings; and (3) make appointment of counsel the default position, allowing for a judge to accept a waiver of counsel as unnecessary under procedures and criteria that have not been identified in the report.

I shall refer to these options as: (1) status quo; (2) mandatory counsel; and (3) optional waiver. Important information has been omitted from the discussion of all three of these options. As a result, the report is incomplete and misleading.

The Long Range Planning Committee should send the report back to the subcommittee for revision or it should consider this dissent along with the subcommittee report and adopt Option 2.

**Option 1: Status Quo**

The discussion of Option 1 does not adequately acknowledge the serious cognitive and communication disabilities that most guardianship respondents experience. It does not disclose that the large majority of petitions are granted – a fact that underscores the lack of capacity of the vast majority of respondents to make significant decisions. Understanding the need for an attorney, the value of representation, and the loss of rights associated with an adjudication of guardianship are matters that are beyond the comprehension of most respondents. Therefore, their theoretical right to request an attorney, is an illusion not supported by the reality of the situation.

The discussion of this option does not disclose that in a large percentage of cases, perhaps a majority, attorneys are not appointed to represent respondents. Thus, most respondents do not have anyone to advocate for or defend the retention of their existing rights. Guardians Ad Litem do not serve this function. This raises serious equal protection problems as some respondents receive legal representation by an advocate while others do not, often depending on budgetary considerations that may vary from county to county and judicial practices that may vary from judge to judge.

**Option 2: Mandatory Counsel**

The report states that the subcommittee has determined that 20 states require the appointment of counsel for all guardianship respondents. It should state that <u>some</u> members of the subcommittee have reached that conclusion. My research has found otherwise.

Spectrum Institute, an nonprofit education and advocacy organization that has been studying state guardianship systems for several years, has concluded that 30 states mandate the appointment of counsel for guardianship respondents. A study by the American Bar Association suggests that the number may be higher. The Jenny Hatch Project, an advocacy organization focused on supported decision making and guardianship reform, says that 38 states have mandatory counsel. The National Coalition for a Civil Right to Counsel reports that 41 states fall into the mandatory counsel category. The National Probate Court Standards does not give a specific number but states that "more than 25 states" require the appointment of counsel.

Considering the research of this wide range of organizations and publications, the subcommittee report should delete the number 20 and replace it with a statement that "while the exact number of mandatory counsel states is open to question, most research indicates that a <u>majority of states</u> require the appointment of counsel for guardianship respondents."

The report names a few national organizations that support the mandatory appointment of counsel: The Arc of the United States, TASH, Spectrum Institute, and the American Association on Intellectual and Developmental Disabilities. The list should be amended to include the National Coalition for the Civil Right to Counsel.

The report should also mention that Wingspread, a national symposium for guardianship reform convened in 1988, recommended mandatory appointment of counsel as a matter of basic due process.

Wingspread rejected a minority position to the contrary.

Furthermore, the subcommittee does not call attention to two recent government reports from other states that have recommended the mandatory appointment of counsel. The Elder Justice Task Force, a commission convened by the Pennsylvania Supreme Court, issued a report in 2014 that firmly calls for the appointment of counsel in all guardianship cases. A similar commission convened by the Nevada Supreme Court issued a report in September 2016 which reached a similar conclusion.

I am unaware of any recent study commission that has considered, and rejected, a position that counsel should be appointed for guardianship respondents in all cases. I am also unaware of any disability rights advocacy organization that has considered the issue and rejected mandatory counsel as a protection for guardianship respondents.

**Option 3: Optional Waiver**

The inclusion of the idea of waiver of counsel appears to be an attempt to forge a compromise between those who favor mandatory counsel and those who favor the status quo. The concept has not been vetted or properly researched. The discussion of this issue is incomplete. When omitted information is added to the discussion, Option 3 is premised on inconsistent and contradictory concepts.

The mere filing of a petition calls into serious question the capacity of a respondent to understand and to make informed decisions on important matters. This includes finances or contractual matters as well as medical decisions. Capacity to marry or consent to sexual relations are also called into question. Once such questions have been raised, and if the petition cites facts to support these allegations, it would be difficult for anyone to seriously consider that a person lacking such capacities would have the capacity to waive the right to counsel.

I think a review of guardianship cases over the past few years would likely reveal that the vast majority of petitions are granted. This supplies evidence that the lack of capacity of most respondents is not a matter of speculation based on allegations in a petition, but as a class of individuals, most respondents do in fact lack capacity to make important decisions. Waiving (rejecting) the appointment of counsel is a major decision – one that can have significant and detrimental ramifications to a respondent since the loss of substantial rights is at stake.

The discussion of Option 3 does not address the legal and constitutional requirements of a waiver of the right to counsel. Once the right is given – which it would be under Option 3 when a petition is filed – federal due process requirements come into play. A litigant who has a statutory right to counsel can only waive that right if the waiver is voluntary and if it is knowing and intelligent. It must be an informed decision, no different than "informed consent" for a medical decision.

Informed consent that is knowing and intelligent requires an evidentiary showing, in open court, that the respondent was advised of the right to counsel and understood the role of an attorney and the value of an attorney in a guardianship proceeding. The respondent must be advised that, without an

attorney, he or she would have to represent himself or herself – including investigating the case, presenting evidence favorable to the retention of existing rights, and challenging evidence of the petitioner that supports the loss of existing rights. The respondent must also be advised of the rights that he or she currently has and might lose. The respondent must also be advised that a Guardian Ad Litem is not a substitute for counsel, has no duty of confidentiality or loyalty to the client, and is not bound to advocate for the stated wishes of the respondent.

In addition to proof that such advisements were made – by a person who does not exert undue influence of the respondent (who may be a "people pleaser") – there must be evidence that the respondent understood the advisements and made an informed decision to proceed without an attorney.

Because of the nature of the disabilities of most guardianship respondents, it should be clear that very few, if any, respondents would have the legal capacity to waive the right to counsel.

I cannot support Option 3 as it is factually unsound and legally superficial. Furthermore, waiver is also a topic being reviewed by the Standards and Practices Committee. The Long Range Planning Committee should reject Option 3 out of hand as the concept of waiver is not ready for consideration by the Steering Committee.

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I may be contacted at: christina.ann.baldwin@gmail.com

WASHINGTON COURTS

ADMINISTRATIVE OFFICE OF THE COURTS

**Callie T. Dietz**
State Court Administrator

WINGS
Working Interdisciplinary Networks of Guardianship Stakeholders

April 30, 2015

Dear Christina Baldwin,

The Washington State Supreme Court is the recipient of a grant to develop a Working Interdisciplinary Network of Guardianship Stakeholders (WINGS). The Court is enthusiastic about the prospect of working with you and others to improve Washington's current approach to adult guardianship and less restrictive decision-making options. To help the Court achieve this goal, you are invited to serve as an advisor to WINGS on the effect of decision support, including guardianship, on the family of a person under guardianship. To serve as a WINGS advisor you should be available to participate in two one-hour conference calls and two all-day in-person meetings between May 1, 2015 and March 31, 2016.

If you agree to serve as an advisor, please send a brief e-mail acceptance by May 7, 2015 and include your preferred contact information. I'm enthusiastic about the future we will create together!

Sincerely,

Shirley Bondon, Coordinator
Washington's Working Interdisciplinary Network of Guardianship Stakeholders (WINGS)

**STATE OF WASHINGTON**
1206 QUINCE ST SE ● P.O. Box 41170 ● Olympia, WA 98504-1170
360-753-3365 ● 360-586-8869 Fax ● www.courts.wa.gov