



The Judicial Branch Has a Duty to Appoint, Train, and Supervise Attorneys to Effectively Represent Respondents in Guardianship Cases

A Special Report to the Washington Supreme Court

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Factual Findings

◆ Demographics

There are currently more than 20,000 adults under an order of guardianship in Washington state. Hundreds of new petitions for guardianship are filed each year.

While most of the persons under guardianship are seniors, a significant percent of guardianship respondents are adults with intellectual and developmental disabilities. Another segment of the guardianship population are adults with cognitive impairments due to accident or illness.

◆ Guardianship Proceedings

A guardianship proceeding is initiated with the filing of a petition. Some petitions are filed by relatives of the respondent, while others are filed by a public agency such as the Department of Social and Health Services.

A guardian ad litem is appointed by the court in each case. The role of the guardian ad litem (GAL) is to investigate the basis of the petition, the qualifications of the proposed guardian, and to determine what is in the best interests of the respondent. The GAL does not advocate for the respondent. The GAL makes recommendations to the court about

whether to grant the petition and, if so, who should be appointed to serve as guardian and what terms and conditions to attach to the guardianship. The services of the GAL are paid for from the assets of the respondent or, if unable to pay, from public funds.

◆ Court-Appointed Attorneys

A state statute (RCW 11.88.045) provides that respondents have a right to an attorney during all stages of a guardianship proceeding. If an attorney appears in the proceeding, the attorney must petition to have the court appoint him or her to represent the respondent. If the respondent cannot afford an attorney, the court shall appoint an attorney to represent the respondent and the attorney is paid with public funds. The court must approve the fees of all attorneys.

Most respondents are not represented by counsel in guardianship proceedings. The practice of the courts seems to be that if the GAL does not recommend an attorney then the court does not appoint an attorney. In effect, the courts are implying a waiver of counsel when respondents do not request an attorney.

Because of the nature of their disabilities, most guardianship respondents would not understand the right to counsel, the role of counsel, the value of being represented by counsel, or the disadvantages of not having counsel. They are often not able to request counsel, and in most cases would not be able to knowingly and voluntarily waive the right to counsel.

◆ Qualifications

It appears that the only qualification required by statute or court rule for an attorney to be appointed to represent a guardianship respondent is a license to practice law in Washington.

◆ Performance Standards

While Washington has performance standards for guardians and guardians ad litem, there do not appear to be specific standards for attorneys appointed to represent guardianship respondents.

◆ Training

Training programs have not been identified for attorneys who represent guardianship respondents. There are special training programs for lay guardians, certified professional guardians, and guardians ad litem. Not so for court-appointed attorneys.

◆ Monitoring

The performance of attorneys is normally monitored by their clients. If a client feels his or her attorney is not performing adequately, the client can lodge an objection, file a motion, or initiate an appeal to seek relief. The client may also file a complaint against the attorney with the state bar association. A civil lawsuit may also be filed for legal malpractice. Due to their cognitive and communication disabilities, guardianship respondents are not able to access these remedies.

The courts and the state bar association know that, because of their disabilities, guardianship respondents are not able to identify deficient performance by their attorneys, or to file judicial appeals or administrative complaints about ineffective assistance of counsel. Despite this knowledge, these public entities have not engaged in modifications or accommodations to ensure effective monitoring of court-appointed attorneys through other methods.

◆ Selection of Attorneys

There is no uniform method of selecting attorneys to represent guardianship respondents under state law. The method varies from county to county. In some locations, the petitioner or the GAL play a role in selecting an attorney for the respondent.

◆ Payment of Attorneys

The method and amount of paying attorneys who represent guardianship respondents varies by county and depends on whether a client has assets. Attorneys representing clients with assets are paid more than those representing indigents. The amount of public funds paid to attorneys for indigents varies from county to county.

Counties pay for these legal services without regard to the quality of the services rendered. Counties do not have any quality assurance mechanisms in place nor do they require the courts to do so as a condition of the county paying for these legal services. County governments appear to be indifferent as to whether guardianship respondents receive adequate legal services.

Legal Findings

◆ Due Process of Law

Since guardianship proceedings jeopardize significant liberty interests, and since guardianship respondents have considerable cognitive and communication disabilities, the Judicial Branch has a duty to provide an attorney to these involuntary litigants as a matter of due process of law under the state and federal constitutions.

◆ Americans with Disabilities Act

Washington courts are public entities within the meaning of Title II of the Americans with Disabilities Act. When courts know that litigants have cognitive and communication disabilities that impair their ability to understand and participate in legal proceedings, they have an affirmative duty to modify policies and provide accommodations to ensure these involuntary litigants have access to justice. Fulfilling this duty requires the appointment of attorneys to provide advocacy services for guardianship respondents in all proceedings that involve significant liberty interests. It also requires taking steps to ensure that such attorneys are providing effective advocacy services. This includes requiring such attorneys to be properly trained, adopting performance standards, and implementing effective monitoring mechanisms to ensure that such training and performance actually occur.

◆ Section 504 of the Rehabilitation Act

State courts and county governments are public entities that receive federal funding for various activities and programs. As a result, they are obligated under Section 504 of the Rehabilitation Act of 1973 to ensure that litigants with cognitive and

communication disabilities receive access to justice. Fulfilling this duty requires courts to adopt the same policies and engage in the same practices as are required by the Americans with Disabilities Act. As the funding source for legal services, county governments have a duty to ensure that legal services meet ADA standards.

◆ Washington Law Against Discrimination

Courts are public accommodations within the meaning of the Washington Law Against Discrimination. This statute prohibits discrimination on the basis of disability against persons who use the services of state courts. Guardianship respondents with cognitive and communication disabilities are a protected class under this statute. To fulfill their duties under the WLAD, courts must appoint attorneys to represent guardianship respondents. They must also take the same steps to that are required to comply with the Americans with Disabilities Act.

◆ Privileges and Immunities

Guardianship respondents in one county are entitled to the same privileges as are respondents in all counties. This includes the appointment of an attorney and effective legal advocacy services. Funding, training, performance, and monitoring of court-appointed attorneys must be essentially similar in all counties in order to ensure that guardianship respondents receive equal protection of the law regardless of the geographic location of the court where their legal proceedings occur.

Recommendations

◆ Appointment of Attorneys

To comply with RCW 11.88.045 and other state and federal laws, courts should appoint an attorney to represent guardianship respondents in all cases. The only exception would be those rare cases in which a respondent gives a knowing, intelligent, and voluntary waiver of counsel on the record. Attorneys should be routinely appointed in all initial proceedings, as well as post-adjudication proceedings in which a modification is being sought that would affect the liberty interests of the respondent.

◆ Performance Standards

In order to ensure that court-appointed attorneys provide effective advocacy services to guardianship respondents, the Judicial Branch has a responsibility to adopt performance standards that meet the requirements of due process, the ADA, Section 504, the WLAD, and state laws establishing procedures for guardianship cases.

◆ Training Programs

In order to ensure that court appointed attorneys provide effective advocacy services, the Judicial Branch has a responsibility to require attorneys to attend certified training programs to ensure they provide services that comply with the requirements of due process, the ADA, Section 504, the WLAD, and state laws establishing procedures for guardianship cases. Training programs should be periodically monitored by the Judicial Branch to ensure they comply with these requirements.

◆ Monitoring Activities

The Judicial Branch should modify existing monitoring mechanisms – appeals and administrative complaints – to maximize the potential for guardianship respondents to have meaningful access to these procedures. Knowing that access by people with cognitive and communication disabilities may not be feasible, modifications should be made to provide for monitoring the quality of legal services by other methods. Periodic auditing of a sample of guardianship cases annually in each county would help identify deficient performance. This informa-

tion could be used for discipline of attorneys as well as for the improvement of training programs.

◆ Funding Sources

Public entities that provide funding for legal services in guardianship cases should take some responsibility for assuring the quality of the services they are funding. Through contracts or other methods, county governments should require the courts who receive or distribute the funds, and the attorneys who are paid with the funds, to provide access to justice for guardianship respondents. Entities that fund a legal services program can delegate the monitoring of such services, but they cannot avoid responsibility for ensuring that such services are compliant with the ADA and Section 504. Counties, therefore, may contract with a bar association to audit the quality of legal services, but doing so would not absolve them of their ADA and 504 responsibilities as the funding source.

About Spectrum Institute

Spectrum Institute is a 501c3 nonprofit organization that engages in research, education, and advocacy involving the rights of people with intellectual and developmental disabilities. The mission of the Disability and Abuse Project is to reduce the risk of abuse, to promote healing for victims, and to seek justice for those who have been victimized. The mission of the Disability and Guardianship Project is to ensure that people with developmental disabilities have access to justice in guardianship proceedings, and that less restrictive alternatives are used when feasible.



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