Disability and Guardianship Project

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March 16, 2016

Chief Justice and Associate Justices
Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: *Supplement to* Request for Modifications (Per ADA and Section 504)
Transmittal of Report and Exhibits

To the Court:

The Disability and Guardianship Project of Spectrum Institute sent a letter to this court, dated January 15, 2016, requesting that appropriate modifications be made to ensure access to justice for guardianship respondents, especially access to effective advocacy services. A letter amending the request was sent to the court on February 11, 2016.

By this letter we are sending supplemental materials for the court to consider in meeting its obligations under Title II of the Americans with Disabilities Act to ensure access to effective advocacy services for guardianship respondents – involuntary litigants who, by definition, may have cognitive disabilities that impair their ability to make decisions. The supplemental materials include a report titled *The Justice Gap* and a set of reference materials. The report is also being given to the chairs and members of the House Judiciary Committee and Senate Law and Justice Committee.

Data supplied by the Department of Social and Health Services confirms that approximately 20,000 adults in Washington are living under an order of guardianship. More than 8,600 of these individuals are adults with developmental disabilities. From time to time, requests to modify the terms of a guardianship or to terminate a guardianship are made by a party to an open case. RCW 11.88.045 says that the right to counsel applies at all stages of a guardianship proceeding. Most wards – persons who have been found to lack capacity to make important decisions – would not have access to justice in such modification proceedings without representation by an appointed attorney.

In addition to these existing guardianships, hundreds of new guardianship petitions are filed each year in Washington. The mere filing of such a petition puts the court on notice that the respondent may have significant cognitive and communication disabilities. Most respondents would lack access to justice in these initial guardianship proceedings without the appointment of an advocacy attorney.

Available information shows that the vast majority of respondents never receive an appointed attorney. The failure of the courts to appoint counsel for these litigants is contrary to both RCW 11.88.045 and the Americans with Disabilities Act. This pattern and practice needs to be corrected.

The appointment of a guardian ad litem (GAL) is not a substitute for an advocacy attorney. A GAL is essentially a court investigator who recommends to the court what the GAL believes is in the best interest of the respondent. By statute, a GAL may not function as an advocate. By statute, an appointed attorney must function as an advocate. An advocacy attorney is bound by ethical

obligations of loyalty and confidentiality to the client while a GAL has a duty of loyalty to the court.

With an advocacy attorney, a guardianship respondent is represented by someone who is required to provide *effective* assistance. That duty is fulfilled by: reviewing the allegations and evidence of the petitioner for legal sufficiency; scrutinizing the credentials of the capacity evaluator, the method of the evaluation, and the basis for expert opinions; investigating less restrictive and safe alternatives that may be viable; vetting the suitability of the proposed guardian; interviewing family, friends, and neighbors to determine if there is evidence to support the denial of the petition, appointment of a different guardian, and if there is any evidence of abuse or exploitation of the respondent. Without appointment of counsel, these essential advocacy services are absent. Most importantly, an advocacy attorney ensures that all participants to the proceeding – petitioner, capacity evaluator, GAL, and judge – perform their functions as required by law. These participants cannot evaluate their their own performance since self monitoring would involve an inherent conflict of interest.

Despite the fact that an advocacy attorney engages in vital functions not performed by others in the proceeding, and despite the inability of guardianship respondents to represent themselves due to their cognitive and communication disabilities, research indicates that most guardianship respondents do not receive an appointed attorney. The failure to provide counsel to respondents not only violates RCW 11.88.045, but it constitutes a violation of the Washington Law Against Discrimination, Title II of the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973.

Characterizing the appointment of an attorney as an "accommodation" necessary to give *meaningful* access to justice to litigants with cognitive disabilities is not a novel concept. General Rule 33 acknowledges this principle. The problem with GR 33, however, is that it places the burden on litigants with disabilities to request an accommodation. This is contrary to the ADA which dispenses with the need for a request when a public entity knows that a person has a disability that requires an accommodation, and that the nature of the disability precludes or impairs his or her ability to make a request. Under those conditions, a public entity has an affirmative duty to provide an appropriate accommodation on its own initiative. GR 33 should be modified so that judges and attorneys know that guardianship respondents are entitled to accommodations even without making a request.

A court does not fulfill its Title II duties merely by appointing attorneys for litigants with cognitive disabilities. Steps must be taken to ensure that such attorneys provide *effective* advocacy services. That requires the court to establish qualifications, mandate attendance at proper training programs, adopt performance standards, and equally importantly, implement effective monitoring mechanisms in order to verify that legal services that are actually performed in fact meet the requisite standards.

In Oregon, the Supreme Court has advised us that it has asked relevant judicial committees and state agencies to review the important issues we brought to its attention. In California, the Judicial Council has authorized a two-year project to review our proposals for the purpose of developing new court rules on qualifications, training, and performance standards for conservatorship attorneys. We encourage this court to take similar remedial actions to address the issues raised in *The Justice Gap.*

Respectfully submitted:

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