



Disability and Guardianship Project

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March 14, 2016

Honorable Gary Herbert
Governor of Utah
P.O. Box 142220
Salt Lake City, UT 84114-2220

Re: HB 101 Increases the Risk of Abuse to People with Developmental Disabilities;
HB 101 Violates the Americans with Disabilities Act and Due Process of Law

Dear Governor Herbert:

Signing HB 101 will increase the risk of abuse to guardianship respondents. It will also violate due process of law and take Utah out of compliance with the Americans with Disabilities Act.

Risk of Abuse. Research shows that by the time a person with a developmental disability reaches the age of 18, he or she has probably been a victim of abuse. People with such disabilities are 3 to 4 times more likely to be a victim of abuse than someone in the generic population. Research also shows that the most likely perpetrators of such abuse are not strangers but instead are people close to the victim – parents, household members, school personnel, or service providers. (“Abuse of People with Disabilities: Victims and Their Families Speak Out,” *A Report on the 2012 National Survey on Abuse of People with Disabilities*. <http://disabilityandabuse.org/survey/>) Therefore, even when the petitioner in a guardianship case is a parent, the petitioner and proposed guardian need to be screened carefully. That is one of the tasks that should be done by an appointed attorney.

Federal Law. Guardianship respondents are involuntary litigants who generally cannot represent or defend themselves or their rights. Because of cognitive and communication disabilities, they lack the capacity to retain counsel, to waive the right to counsel, to waive an evidentiary hearing, or to stipulate to the entry of judgment. If they do have the capacity to make these decisions, then they probably don’t need a guardian. If they don’t have the capacity to make these decisions, then they lack the capacity to have meaningful participation in the proceedings without an attorney.

An order granting a guardianship takes away fundamental constitutional rights and statutory privileges guaranteed to all adults. When a petition is filed, the respondent has a right of privacy, freedom of association, and freedom of movement. The respondent’s sexual civil liberties are protected by the constitution as is his or her right to marry. The rights to contract and possess property are protected too. These rights are placed in jeopardy by the mere filing of a guardianship petition. The fact that a petitioner is a parent does not diminish the restrictive impact that a guardianship order will have on the authority of a respondent to make his or her own decisions.

A guardianship respondent is entitled to due process of law – both substantive due process (freedom from arbitrary decisions affecting liberty interests) and procedural due process (fundamental fairness during the proceedings). Appointment of counsel is required to protect the due process rights of guardianship respondents. Without counsel, respondents do not have access to justice.

In addition to infringing federal due process rights, HB 101 violates the Americans with Disabilities Act. Utah courts are public entities within the meaning of Title II of the ADA. As such, they must provide litigants with disabilities access to justice. To comply with their duties under Title II, the courts have a duty to appoint counsel to represent guardianship respondents. Without appointed counsel, these respondents will not have meaningful participation in their cases. They cannot advocate for or defend themselves without counsel.

Under existing state law, Utah courts must appoint counsel for guardianship respondents. State law currently conforms to the requirements of federal due process and Title II of the ADA. HB 101, if enacted into law, gives the court discretion not to appoint counsel for guardianship respondents when the petitioner is a parent. These respondents are entitled to due process and access to justice as guaranteed by the ADA. There is no exception in federal law for proceedings involving the parent of a litigant. If a court were to dispense with the need for counsel, citing HB 101 as authority, the court would be violating federal law. (This is explained in detail in a White Paper we filed recently with the United States Department of Justice titled “Due Process Plus.” It is available online at: <http://spectruminstitute.org/white-paper/>)

Despite the benevolent motives of a parent-petitioner, there are significant issues to be addressed in *any* guardianship proceeding: (1) is there a less restrictive alternative to guardianship; (2) should decision-making authority be retained by the respondent in some areas such as social, sexual, educational, vocational, or other areas; (3) is the medical or psychological capacity assessment valid; (4) is the respondent a victim of abuse (perhaps by someone in his or her household) and has the parent been neglectful in failing to protect the respondent from such abuse; (5) is there a more appropriate person to be appointed as guardian; (6) should the terms of the guardianship be limited so as to respect the rights of the respondent to make some decisions; etc.

If HB 101 is enacted, we can envision a complaint being filed with the United States Department of Justice alleging that the enactment of this law violates Title II of the ADA and Section 504 of the Rehabilitation Act of 1973. Section 504 is implicated because the court system in Utah receives federal funding for some of its programs or services. The prospect of such a complaint is not remote. Complaints about court-appointed attorneys have been filed by Spectrum Institute with the DOJ against the State of California and are currently under review. (www.spectruminstitute.org/doj)

There was a time when the failure to appoint attorneys for guardianship respondents went unnoticed or unchallenged. That era of passivity is over. The failure of the courts in Washington State to appoint counsel for *all* guardianship respondents is the subject of a report that is being filed this week. (www.spectruminstitute.org/gap) – this web link will be activated on March 16) There, the violations of federal law are caused by the courts, not the legislature. Here, in contrast, the violations of federal law will be the result of judicial action that has received direct legislative approval.

We encourage you to use your authority as Governor to prevent this deliberate violation of federal law from occurring and to send the matter back to the Legislature for further review.

Respectfully submitted:



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Enclosures: Sitting Ducks Essay
The Justice Gap brochure
DOJ White Paper brochure