Disability and Guardianship Project

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Chief Justice and Associate Justices
South Dakota Supreme Court
500 E. Capital Avenue
Pierre, SD 57501

Re: Request for Modifications (Per ADA and Section 504)
Access to Effective Advocacy Services in Guardianship Proceedings

To the Court:

The Disability and Guardianship Project of Spectrum Institute submits this request to the South Dakota Supreme Court in its administrative role as a "public entity" responsible for ensuring that the judicial branch provides access to justice to people with disabilities in legal proceedings conducted in South Dakota.

This request for modification of policies and practices is made pursuant to Title II of the Americans with Disabilities Act. Because the judicial branch of South Dakota receives federal funding, the request is also being made pursuant to Section 504 of the Rehabilitation Act of 1973.

The request is made on behalf of two classes of individuals who have not received or will not receive access to justice in guardianship proceedings. The first class includes adults with intellectual and developmental disabilities who are currently under an order of guardianship due to a finding of incapacity to make decisions in one or more major life activities. The second class includes adults with such disabilities who are currently involved in such a proceeding as a respondent or who will be so involved in the future.

Due to cognitive and communication disabilities, these classes of individuals are not able to make a request for modification of policies and procedures on their own behalf. However, a request for modification is not required when a public entity is aware that persons who use its services have a disability, that the disability impairs them from having meaningful participation in such services, and that the nature of the disability precludes or impairs their ability to request modifications or accommodations that would allow them to have meaningful access to such services. Even though a request is not necessary, this request is being made to alert the court to its sua sponte duties.

The general nature of the services that are the focus of this request involves access to justice in guardianship proceedings. Due to cognitive and communication disabilities, adults who have such conditions are not able to participate in such proceedings in a meaningful way – to defend their existing rights and to advocate for their retention – without an appropriate accommodation. One way the judicial branch can provide such accommodation is by appointing an attorney to represent a guardianship respondent. An appointed attorney – if he or she provides effective assistance to the respondent – is an important method of ensuring that such respondents have access to justice.

Unfortunately, South Dakota does not require appointment of counsel in all guardianship cases.

Because important liberty interests are at stake in these proceedings – the right to make decisions regarding residence, education, health care, sexual relations, social contacts, and marriage are in jeopardy – the appointment of counsel is required by due process and federal statutes (Title II of the ADA and Section 504). State law must conform to and abide by these federal mandates.

Once counsel is appointed – whether due to statutory or constitutional requirements – due process requires that counsel must provide *effective* assistance. Otherwise, the right to counsel would be an illusory protection. Even privately retained counsel is required to provide effective assistance.

The judicial branch provides a variety of procedural methods to ensure that the right to effective assistance of counsel is being enforced, including procedural methods for clients to complain when counsel is violating professional standards or ethical requirements. Such methods include: (1) a motion for new appointed counsel (known as a "Marsden motion" in California); (2) an appeal; (3) a petition for writ of habeas corpus; and (4) an administrative complaint with the state bar.

These procedures either alone or collectively work well for litigants who do not have cognitive or communication disabilities. It is not uncommon for them to be used by adults in cases involving criminal law, family law, civil law, and probate law. Such procedures are also used by teenagers involved in juvenile delinquency cases. Courts in South Dakota regularly hear and adjudicate complaints of ineffective assistance of counsel in hearings on motions, writ proceedings, and appeals. The State Bar of South Dakota often hears and decides administrative complaints regarding ineffective assistance, regardless of whether counsel was appointed by the court or privately retained.

Unfortunately, these procedures are not accessible to respondents in guardianship proceedings due to their cognitive and communication disabilities. Adults with intellectual and developmental disabilities are generally not able to understand the constitutional and statutory protections available to them to defend their existing rights and to advocate for their retention. They do not know when their attorneys are not providing the advocacy services to which they are entitled and which are essential to having access to justice. As a result, they are generally not able to complain through the normal procedures established by the state and administered by the judicial branch – motions, writ petitions, and appeals. They are also not able to file administrative complaints with the State Bar.

An investigation by the Supreme Court would confirm that such motions, writ petitions, and appeals by guardianship respondents are virtually nonexistent. An investigation by the State Bar would also confirm that administrative complaints by such respondents are rare, if they ever occur at all.

Although it was stated in a different procedural context, the Eleventh Circuit Court of Appeals recently observed: "it seems fanciful to expect intellectually disabled persons to bring petitions for habeas corpus. We agree with one of our sister Circuits that '[n]o matter how elaborate and accurate the habeas corpus proceedings available under [state law] may be once undertaken, their protection is illusory when a large segment of the protected class i.e., ["gravely disabled" persons committed to mental institutions] cannot realistically be expected to set the proceedings into motion in the first place." (JR v. Hansen, 803 F.3d 1315, 1326 (11th Cir. 2015)).

A state Court of Appeal in California recognized that respondents in conservatorship cases, due to their disabilities, would be denied access to justice if procedural rules require them to raise the issue of ineffective assistance of counsel on their own.

"[T]he parties agree Michelle is incompetent and unable to personally exercise her right to request new appointed counsel. That inability, however, does not mean Michelle is any less entitled to effective representation or any less entitled to request new appointed counsel if the representation she is receiving is ineffective. '[I]ncompetence does not cause the loss of a fundamental right from which the incompetent person can still benefit.' (Citation omitted)" (Michelle K. v. Superior Court, 221 Cal.App.4th 409 (2013))

The Supreme Court of South Dakota and the State Bar of South Dakota have probably not been aware of the dilemma faced by guardianship respondents with respect to the lack of access to justice associated with the outright denial of counsel or the ineffective assistance of counsel; a procedure exists but they can't access it due to their cognitive and communication disabilities. That lack of awareness is being corrected by this letter, the references cited in it, and the enclosed White Paper.

The issue is not academic. Abuses in guardianship proceedings have been the impetus for reform efforts in states throughout the nation. National conferences have been held. Reports have been written. New WINGS agencies have been created in many states (Working Inter-disciplinary Networks of Guardianship Stakeholders). Although these conferences, reports, and agencies have acknowledged the need for systemic reforms, their focus has not yet included the issue of the right to appointed counsel and to effective assistance of counsel. That too will soon be changing.

The Disability and Guardianship Project is the leading advocacy organization in the nation on these issues. We have conducted several investigations in California and currently have a complaint against various public entities pending with the United States Department of Justice. We have submitted proposals to the Judicial Council of California and to the Los Angeles Superior Court. These efforts are based on a documented pattern and practice of ineffective assistance of court-appointed attorneys in limited conservatorship proceedings in California.

We do not file complaints without offering potential solutions. Our reports are numerous and they always contain specific recommendations for improvement. While they have involved all aspects of guardianship or conservatorship proceedings, they are heavily focused on the right to effective assistance of counsel. If court-appointed attorneys were to consistently advocate in a competent manner, the other systemic problems associated with these proceedings would be cleared up through motions, writs, and appeals. Unfortunately, in California there are no motions, writs, and appeals involving the rights of people with intellectual and developmental disabilities in such proceedings. In all likelihood an investigation by the Supreme Court of South Dakota would show that the same is true in South Dakota. The lack of such motions, writs, and appeals – and the lack of complaints to the State Bar of South Dakota – would confirm our premise that guardianship litigants are not receiving access to justice because they can't use existing remedial procedures.

It is the responsibility of the Supreme Court to implement modifications of normal procedures to ensure that these involuntary litigants have access to effective advocacy services and there are methods to identify deficiencies when they occur and to remedy them. To the extent that the Supreme Court of South Dakota oversees or gives approval to rules of professional conduct adopted by the State Bar or reviews discipline when it is meted out by the State Bar, it is also the duty of the court to ensure access to justice through these rules and administrative proceedings.

We realize that this is a difficult situation for the Supreme Court and the State Bar. Existing policies and procedures are based on an assumption that disgruntled litigants are able to identify deficiencies in attorney performance and complain about them through motions, writ petitions, appeals, or

administrative complaints. Courts generally think about disability modifications and accommodations in terms of physical access (e.g. structural modifications) or communication adaptations (e.g., sign language interpreters). Literature about accommodations for litigants with intellectual and developmental disabilities is sparse. Except for publications of Spectrum Institute, literature about the ADA and access to advocacy in guardianship cases is virtually nonexistent.

This issue is only now beginning to receive public attention and official recognition. The Daily Journal – California's leading legal newspaper – published several articles and commentaries on the ADA and the right to effective advocacy last year. The Judicial Council of California is considering proposals, submitted last year, for training and performance standards for court-appointed attorneys in limited conservatorship proceedings. The California Supreme Court received a letter similar to this one a few months ago. A complaint against state and local judicial branch agencies in California is currently pending with the U.S. Department of Justice. (http://www.spectruminstitute.org/doj/) Advocacy efforts are gaining momentum and the issue is ready for recognition and remedial action.

Several issues need to be addressed by the Supreme Court in connection with this request for modification of policies and practices to provide guardianship respondents access to justice, especially access to effective advocacy. There is the issue of having an attorney appointed to represent them in the first place. Then there is the secondary issue of having effective advocacy. Finally, there is the issue of not being able to complain when they are denied appointed counsel or not being able to complain about ineffective assistance when they do have privately retained counsel.

The Supreme Court could convene an Advisory Committee on Access to Effective Advocacy to investigate why South Dakota is among the minority of states where appointed counsel is not mandatory in guardianship cases. The committee could also study the adequacy of existing training programs, rules of professional conduct, and ethical standards for attorneys who represent guardianship respondents, and recommend new training and performance standards for these cases.

The issue of cost is noteworthy but not controlling. For example, the Supreme Court would not allow cost considerations to interfere with its duty under Title II of the ADA if the issues were sign language interpreters for litigants who are Deaf or structural modifications for litigants who use wheelchairs. Likewise, the cost of appointing counsel for guardianship litigants with cognitive and communication disabilities would not justify the court's failure to provide these litigants access to effective advocacy services as required by due process, the ADA, and Section 504. Appointment of counsel is mandatory in all civil commitment proceedings. Since significant liberty infringements occur in guardianship cases, appointment of counsel should be mandatory in these proceedings too.

The court could ask the State Bar to conduct an audit of a significant sample of adult guardianship cases to determine, from a review of court records and attorney case files, whether clients are receiving due process and ADA-compliant legal advocacy services. An audit of performance in Los Angeles revealed a pattern of inadequate advocacy services by court-appointed attorneys in limited conservatorship cases. (http://disabilityandabuse.org/daily-journal.pdf) The same may be true in South Dakota in those cases where the respondent is fortunate enough to even have an attorney.

Something needs to be done. The right to counsel, and the right to effective assistance of counsel for litigants with intellectual and developmental disabilities, are issues that have been neglected for too long. With thousands of such cases processed through South Dakota courts for decades – without any attention being given to these issues – one wonders how many more years or decades

will pass until the issues get the attention they deserve. If normal procedures remain, without appropriate modifications, the issues may continue to be unresolved indefinitely.

We trust that the Supreme Court, now that these problems have been brought to its attention, will fulfill its responsibilities under Title II of the Americans with Disabilities Act and take appropriate action to ensure that guardianship respondents with intellectual and developmental disabilities receive access to justice in these cases – both through the appointment of counsel in *all* cases and through the adoption of ADA-compliant training and performance standards for such attorneys.

To assist the Supreme Court in addressing these issues, we have included a White Paper titled "Due Process *Plus*: ADA Advocacy and Training Standards for Appointed Attorneys in Adult Guardianship Cases." (Available online at: http://www.spectruminstitute.org/white-paper/). It discusses the need for access to effective advocacy and offers specific methods to achieve that goal. We also direct the court's attention to our website: http://spectruminstitute.org/guardianship/ where more information is available on our "what's new" page and our "publications" page.

To summarize, in order to bring the State of South Dakota into conformity with the requirements of the ADA and Section 504, this court should: (1) adopt a rule mandating the appointment of counsel for respondents in all guardianship cases; (2) adopt training and performance standards for such attorneys – standards that are ADA compliant; (3) adopt a system to monitor the quality of trainings and the performance of such attorneys; and (4) modify existing remedial procedures for ineffective assistance of counsel to adjust for the fact that they are generally inaccessible to litigants with cognitive and communication disabilities. Relaxed rules on standing should be considered.

Whatever steps the Supreme Court or the State Bar may take to investigate these problems, we hope that they will involve disability rights and disability services organizations in South Dakota. The collaborative approach used in the WINGS agencies is preferable to an approach that is strictly "in house" and that is conducted without public participation.

We welcome a response from the court and are eager to be of assistance as the court takes steps to address the issues affecting these two classes of involuntary litigants who are unable, without appropriate modifications, to participate in guardianship proceedings or to access existing remedial procedures. Access to effective advocacy services is an issue that needs the court's attention.

Respectfully submitted:

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Enclosures: (1) White Paper brochure; (2) "Sitting Ducks: 20 States Violate Federal Law by Not Appointing Attorneys for Guardianship Respondents," and (3) information about projects approved by the Judicial Council of California reviewing our proposed training and advocacy standards.

cc: Thomas C. Barnett, Jr., Executive Director, State Bar of South Dakota