



Disability and Guardianship Project

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February 4, 2016

Ben Orzeske, Chief Counsel
Katie Robinson, Legislative Program Director
Uniform Law Commission
Chicago, Illinois

Re: ADA and the Right to Counsel in Adult Guardianship Proceedings

Dear Mr. Orzeske and Ms. Robinson:

We request that the Uniform Law Commission update the comment to Section 5-305 of the Uniform Probate Code (UPC) pertaining to the appointment of a lawyer to represent the respondent in an adult guardianship proceeding. The comment should be expanded to explain that mandatory appointment of counsel may be required as a matter of federal due process. Mention should also be made that courts may have a duty to appoint counsel for guardianship respondents pursuant to their duty under Title II of the Americans with Disabilities Act to ensure that litigants with cognitive and communication disabilities have access to justice. The same request applies to the parallel Uniform Guardianship and Protected Persons Proceedings Act.

Section 5-305 of the UPC has two alternatives on this issue. In Alternative A, appointment of counsel is discretionary unless the respondent requests an attorney. In Alternative B, appointment of counsel is mandatory in all cases. Some 30 states provide for mandatory counsel while the other 20 either put the burden on the respondent to request counsel or leave the issue to the discretion of the court.

Under the Supremacy Clause of the United States Constitution, these uniform laws must comply with federal civil rights protections. The comment should explain that the failure to appoint counsel may violate the Due Process Clause of the Fourteenth Amendment. It should also mention that the Americans with Disabilities Act requires state and local courts to provide litigants access to justice. Without an attorney to defend and advocate, guardianship respondents are not able to participate in the proceedings in a meaningful manner. The 20 states that do not provide for mandatory counsel in these cases may be exposed to liability under the ADA and Section 504 of the Rehabilitation Act of 1973. (<http://spectruminstitute.org/doj/>)

Documents on our website provide a thorough analysis of these issues. We recently submitted a White Paper to the United States Department of Justice explaining how the ADA requires not only the appointment of counsel but the adoption of training and performance standards. (<http://spectruminstitute.org/white-paper/>) Our Access to Advocacy Outreach Project is contacting supreme courts and bar associations in all 50 states asking them to address these issues. (<http://spectruminstitute.org/outreach/>) Other materials are available on the “publications” and “what’s new” pages of our website. (<http://spectruminstitute.org/guardianship/>)

We welcome an ongoing conversation with the Commission’s staff on these important issues.

Respectfully submitted:

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