Current Law Mandates the Appointment of Counsel: Courts in Washington Just Need to Implement It

By Thomas F. Coleman

RCW 11.88.045

Legal counsel and jury trial—Proof—Medical report—Examinations—Waiver.

(1)(a) Alleged incapacitated individuals shall have the right to be represented by willing counsel of their choosing at any stage in guardianship proceedings. The court shall provide counsel to represent any alleged incapacitated person at public expense when either: (i) The individual is unable to afford counsel, or (ii) the expense of counsel would result in substantial hardship to the individual, or (iii) the individual does not have practical access to funds with which to pay counsel. If the individual can afford counsel but lacks practical access to funds, the court shall provide counsel and may impose a reimbursement requirement as part of a final order. When, in the opinion of the court, the rights and interests of an alleged or adjudicated incapacitated person cannot otherwise be adequately protected and represented, the court on its own motion shall appoint an attorney at any time to represent such person.

Through the enactment of RCW 11.88.045, the Legislature has already established a policy requiring the appointment of counsel for guardianship respondents. To the extent there may be any ambiguity in the statute, or potential conflict with constitutional or statutory protections afforded by federal law, courts should interpret the statute so as to harmonize it with the superior protections of federal due process or the Americans with Disabilities Act.

The first sentence of the statute merely recognizes a longstanding and well-known legal principle that litigants have a right to be represented in court proceedings, whether criminal or civil, by counsel of their choice. This is a matter of fundamental fairness and, as such, is protected by the Due Process Clause of the Fourteenth Amendment.

The problem with the first sentence of the statute is practical, not theoretical. A guardianship respondent, because of cognitive disabilities, probably does not know that he or she has the right to an attorney, or understand the role of an attorney, or realize how an attorney would help protect his or her rights from improper infringement. A respondent, due to physical, cognitive, or communication disabilities, would most likely lack the ability to search for an attorney or to handle the financial matters associated with retaining one.

Furthermore, most attorneys would be reluctant to be retained by a guardianship respondent whose capacity to contract is questionable. Doing so could result in complaints of undue influence by relatives, the initiation of disciplinary proceedings with the state bar, or the expenditure of hours of labor only to have to refund the retainer monies if a contractual capacity challenge were successful.

These obstacles to a respondent's ability to retain counsel are most pronounced for those with intellectual and developmental disabilities.

The Legislature's policy declaration that a guardianship respondent has the right to be represented by counsel of his or her choice looks good on paper but, in practical reality, is unlikely to be available to the overwhelming majority of guardianship respondents – especially seniors with dementia or adults of any age with intellectual and developmental disabilities.

It is likely that a review of court records would confirm the experience of judges and attorneys who participate in guardianship proceedings: hardly any guardianship respondents retain a private attorney to represent them in court.

Moving beyond the first sentence of the statute, an analysis of the rest of the section focuses on whether

counsel should be appointed for those who don't retain an attorney on their own – in other words, for the overwhelming majority of guardianship respondents. When practical reality is considered, and the mandates of due process and the ADA are factored into the analysis, the policy and practice should require the mandatory appointment of counsel for *all* guardianship respondents. Affirming the right to counsel should not be confused with who should pay for the services of appointed counsel. That is a separate consideration.

This part of the statute focuses on two types of respondents: (1) those who can afford counsel but are unable to access funds in a timely manner; and (2) those who are unable to afford counsel.

For those who can afford counsel but lack the practical means to hire one, the statute says "the court shall provide counsel." The term "shall" is mandatory. In those cases, reimbursement for counsel's services shall occur at the end of the case pursuant to a court order. As for those who can't afford counsel, the law says the court "shall provide counsel" to represent them at public expense.

To recap the matter, the statute as a whole contemplates three types of guardianship respondents: (1) those who can and do retain private counsel; (2) those without funds to retain counsel, in which case the court shall appoint counsel at public expense; and (3) those who have funds but cannot access them in a timely manner, in which case the court shall appoint counsel and determine the source of payment at the end of the proceedings.

Under this statutory scheme, virtually all guardianship respondents should be represented by counsel – except in those rare cases where a respondent has the capacity to contract, has access to necessary funds, and voluntarily waives their right to counsel. Those cases would be few and far between.

Having done this statutory analysis, the question arises as to why most guardianship respondents are not represented by counsel. If courts were following the statutory mandates, virtually all guardianship respondents would have an attorney to advocate for them and to ensure their statutory and constitutional rights are protected throughout the proceedings.

The apparent answer to this question seems to rest on the fact that the guardianship system does not have anyone with a duty to monitor the courts and to insist that they follow the statute and appoint counsel as required by law. The Legislature has acknowledged that appointment of counsel is essential for respondents to have access to justice. The policy of the statute is consistent with federal due process and access-to-justice requirements of the ADA and Section 504 of the Rehabilitation Act. It is judicial practices, not legislative policy, that conflicts with federal mandates.

Two corrective actions are necessary: (1) courts should properly implement the law; and (2) a monitoring mechanism should be created to ensure this occurs. Such measures would protect the due process rights of guardianship respondents and enable courts to comply with their ADA duty to provide access to justice for all such litigants.

These actions are unlikely to occur without political advocacy, legislative oversight, and judicial accountability. The status quo doesn't budge easily.

Disability Rights Washington and the State Council on Developmental Disabilities should be asking some tough questions. Appropriate committees of the Legislature should exercise their oversight responsibilities. The Washington Supreme Court should investigate whether RCW 11.88.045 is being faithfully executed by the judicial branch.

Legislative notes to RCW 11.88.045 indicate that it became effective in 1990. Questions arise as to whether judges ever implemented the law as written. If so, when did they stop doing so? Who decided that not all guardianship respondents needed to have an attorney? When? Why? With the rights of thousands of vulnerable adults being affected, surely someone will seek answers to these questions.

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