

Mandatory Attorneys for Guardianship Respondents: A Historical Moment in the Disability Rights Movement

by Thomas F. Coleman

All 50 states have guardianship proceedings in which, for benevolent reasons, petitioners seek a court order appointing them to make major life decisions for the respondents in such cases. The filing of a petition triggers a series of events that can, and usually does, result in the respondent losing fundamental liberties, including the right to make decisions regarding medical care, finances, marriage, residence, education, sexual relationships, and their social life. A court order granting a guardianship petition restricts a respondent's constitutional rights, including First Amendment rights of freedom of speech and association and Fourteenth Amendment rights of liberty and privacy.

All participants in guardianship cases fully understand the proceedings and are able to communicate and articulate their positions to the court – all, that is, except the respondents who have serious cognitive and communication disabilities. Petitioners can, and often do, hire attorneys to represent them. A guardian ad litem, who is often an attorney, is appointed to assist the court in evaluating the case. Unless an attorney is appointed by the court, a respondent is left to fend for himself or herself through a maze of procedural rules and to sift through a pile of complicated documents. Because of his or her disability, a respondent is obviously at a serious disadvantage.

To overcome this imbalance, and to ensure that a respondent receives due process of law and access to justice, 30 states require that counsel be appointed to represent respondents in all guardianship cases. Washington is in the minority of states that do not require counsel in these cases.

The Disability and Guardianship Project of Spectrum Institute has a mission to promote the right to counsel for all guardianship respondents regardless of where they may live. The appointment of counsel is required by federal law and therefore should not depend on the state in which a guardianship petition is filed. The Fourteenth Amendment to the United States Constitution entitles a guardianship respondent to due process of law. The appointment of counsel is a matter of fundamental fairness when an involuntary litigant with cognitive and communication disabilities is required to participate in legal proceedings that may result in the loss of fundamental liberties.

The Americans with Disabilities Act also comes into play when someone with a serious disability is served with a guardianship petition. Title II of the ADA requires a public entity to take affirmative steps, even without a request, to ensure that someone with known cognitive and communication disabilities receives meaningful access to its services. State and local courts are bound by this Title II mandate. The service provided by a court is the administration of justice. That is a process, not merely a result. The process must be fundamentally fair. The service recipient – in this situation the guardianship respondent – must be afforded an opportunity to have meaningful participation in a guardianship case.

Appointment of counsel, if properly trained and obligated to follow enforceable performance standards, satisfies the requirements of federal due process and of the ADA. Without appointed counsel, a guardianship respondent doesn't have a chance to participate in the case in a meaningful way. Meaningful participation would involve understanding the allegations in the petition, being able to challenge those allegations, analyzing the sufficiency of the evidence supporting the petition, investigating issues of capacity and lesser restrictive alternatives, and developing evidence and finding witnesses to support the retention of some or all of the respondent's rights. Because of the nature of their disabilities, guardianship respondents can't perform those functions without counsel.

Putting the burden on a guardianship respondent to hire his or her own attorney is reminiscent of the proverbial “let them eat cake” remark about people who lack nourishment. Whether for financial, practical, or legal reasons, guardianship respondents are unable to retain counsel – either for a fee or pro bono. Most of them receive financial aid and lack the funds necessary to hire an attorney. They are also unable to go through the process of finding and retaining counsel. They may not understand that they have the right to an attorney or the role of an attorney. They may not be able to make the phone calls and office appointments needed to do so. Most importantly, most attorneys would not be willing to represent them – out of fear of reprisals to them for signing a retainer agreement with someone who allegedly lacks the capacity to contract. Therefore, a guardianship respondent generally will not be represented by an attorney unless one is appointed by the court.

Family members are not a substitute for a trained attorney, especially if one or more of them is the petitioner or is seeking to be appointed as the guardian. A lay person cannot represent someone in court. That would be practicing law without a license. Even if the family member were a licensed attorney, if he or she is the petitioner or wants to be the guardian, there would be a conflict of interest. So, as well meaning as family members may be, they are not a substitute for a court-appointed attorney – someone with legal training and without a conflict of interest.

A guardian ad litem is also not a substitute for an appointed attorney. The role of a GAL is not to defend the rights of the respondent or to advocate for what the respondent wants. Unlike a court-appointed attorney, a GAL does not have a duty of loyalty or an ethical obligation of confidentiality. The GAL must be loyal to the court and fulfill the legally mandated function of being an objective investigator who will render an opinion about what is in the “best interests” of the respondent. Due process entitles guardianship respondents to an advocate whose undivided loyalty is to them and in whom they can confide. A GAL plays an important role in guardianship proceedings, but one that is not the legal or functional equivalent of a competent attorney acting as a diligent and conscientious advocate for someone whose basic rights are in jeopardy.

Many national organizations have taken positions favoring the mandatory appointed of counsel for guardianship respondents. Court rulings say that mandatory counsel is required as a matter of federal constitutional and statutory requirements when fundamental liberties are at stake.

The issue of whether Washington should require counsel to be appointed in guardianship cases is being considered by the WINGS agency in that state (Working Interdisciplinary Network of Guardianship Respondents). WINGS is an advisory body to the Washington Supreme Court. It advises the court in its management capacity, not its adjudicative capacity. In its management capacity, the court has an institutional concern associated with the cost of appointing counsel. WINGS should not involve itself in this issue. Cost is not relevant when it comes to protecting the due process rights of involuntary litigants who are vulnerable and unable to defend themselves.

One question faced by members of WINGS Washington is how do they want to be remembered as the story about the expansion of the rights of people with disabilities is being written. Did members of WINGS vote to recommend that Washington move into the majority of states that protect the due process and ADA rights of guardianship respondents, or did they vote to maintain the status quo favoring efficiency and cost management? Make no doubt about it – history is being made here.

Thomas F. Coleman is the legal director of Spectrum Institute. Its Disability and Guardianship Project is promoting access to justice for guardianship respondents. This essay was written as part of its Access to Advocacy Outreach Project. (www.spectruminstitute.org/outreach) The Disability and Guardianship Project is represented by Christina Baldwin in Washington State. She is a member of WINGS Washington.