**Disability and Guardianship Project**

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January 15, 2016

Chief Justice and
Associate Justices
Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

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

To the Court:

The Disability and Guardianship Project of Spectrum Institute submits this request to the Supreme Court of Washington 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 Washington. A copy of this request is therefore being sent to the court's ADA coordinator.

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 Washington receives federal funding for one or more of its functions, 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 involve access to justice in guardianship proceedings. Due to cognitive and communication disabilities, adults who have such conditions are not able to participate in these proceedings in a meaningful way – to defend their

existing rights and to advocate for the retention of such rights – without an appropriate accommodation. One way the judicial branch provides such accommodation is by appointing an attorney to represent a respondent in such proceedings. A court-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.

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 mandates under the ADA and Section 504. Appointment of counsel may also be required by state law.

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.

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 court-appointed counsel is violating professional standards or ethical requirements. Such methods include: (1) a motion for new 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 Washington regularly hear and adjudicate complaints of ineffective assistance of counsel in hearings on motions, writ proceedings, and appeals. The Washington State Bar Association often hears and decides administrative complaints regarding ineffective assistance.

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 Washington and the Washington State Bar Association have probably not been aware of the dilemma faced by guardianship respondents with respect to the lack of access to justice associated with the issue of effective 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 effective assistance of counsel. That too will soon be changing.

The Disability and Guardianship Project is the leading advocacy organization in the nation on this issue. 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 and concrete recommendations for improvement. While they have involved virtually 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 Washington would show that the same is true in Washington. The lack of such motions, writs, and appeals – and the lack of complaints to the Washington State Bar Association – would confirm our premise that guardianship litigants are not receiving access to justice because they can't use existing remedial procedures. In this case, the specific problem is lack of access to effective advocacy, and lack of institutional procedures to reduce the likelihood of ineffective assistance or to address the problem when it does occur.

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 and there are methods to identify deficiencies when they occur and to remedy them. To the extent that the Supreme Court of Washington oversees or gives approval to rules of professional conduct adopted by the Washington State Bar Association 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 effective advocacy for guardianship respondents 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 two 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 actions can be taken by the Supreme Court to address this request for modification of policies and practices to provide guardianship respondents access to justice in these proceedings, especially access to effective advocacy. Because of the inherent problem that such litigants are not able to identify ineffective advocacy or complain about it, most of the modifications may have to be pro-active and prophylactic. Nonetheless, whether reactive or preventive, action is needed.

The Supreme Court could convene a Task Force on Access to Effective Advocacy to investigate the adequacy of existing training programs, rules of professional conduct, and ethical standards for court-appointed attorneys who represent guardianship respondents. The task force could investigate the problem and advise the court on whether it should promulgate new training and performance standards for these cases. The court could also ask the State Bar to conduct an audit of a significant sample of such cases to determine, from a review of court records and attorney case files, whether clients are receiving due process and ADA-compliant legal advocacy. An audit of attorney performance in Los Angeles County revealed an embarrassing pattern and practice of inadequate advocacy services by court-appointed attorneys representing respondents in limited conservatorship cases. (http://disabilityandabuse.org/daily-journal.pdf) The same may be true in Washington.

Something needs to be done. The issue of ineffective assistance of counsel for litigants with intellectual and developmental disabilities has been avoided or neglected for too long. With thousands, or even tens of thousands of such cases processed through the courts of Washington for decades – without any attention being given to this issue – one wonders how many more years, or even decades, will pass until the issue gets the attention it deserves. If normal procedures remain,

without appropriate modifications, the issue may continue to be unresolved indefinitely.

We trust that the Supreme Court, now that the problem has 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 – especially access to effective advocacy services.

To assist the Supreme Court in addressing this issue, 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.

Whatever steps the Supreme Court or the State Bar may take to investigate this problem, we hope that they will involve disability rights and disability services organizations in Washington. 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. Where they do exist, WINGS projects should add this issue their agenda since this is a core problem affecting access to justice.

We welcome a response from the Washington Supreme 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 and accommodations, to participate in existing remedial procedures. Access to effective advocacy services is an issue that needs the court's attention.

Respectfully submitted:

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p.s. We have included an article about a related access-to-justice issue that should be addressed by this court as an administrative matter – the failure of the state to require appointment of counsel in all adult guardianship cases. ("Sitting Ducks: 20 States Violate Federal Law by Not Appointing Attorneys for Guardianship Respondents") Also included is a page of information about projects approved by the Judicial Council of California to review our proposed training and advocacy standards for court-appointed attorneys with a view toward adopting new rules on this topic.

cc: Ms. Paula Littlewood
Executive Director
Washington State Bar Association

Ms. Shirley Bondon
Court Program Accessibility Manager
Washington Courts