The Perils of Judicial Control of Guardianship Legal Services

By Thomas F. Coleman

Nearly four decades ago, the Missouri Supreme Court recognized the serious deprivation of liberty posed by a guardianship proceeding. Despite the potential encroachment on fundamental constitutional rights, the court noted that guardianship cases were being processed in "an atmosphere of procedural informality." In re Link, 713 S.W.2d 487 (Mo. 1986) A recent review of hundreds of dockets in several circuit courts throughout Missouri suggests that such informality persists today. Expediency and cost control seem to be predominant considerations in these cases.

Guardianship petitions target adults with actual or perceived mental or developmental disabilities and seek to transfer control over their lives from the individuals themselves to a court-appointed guardian. If a petition is granted, the individual may lose the right to make decisions regarding residence, finances, medical care, marriage, and other important aspects of life. Because such liberty interests are at stake, judges must appoint an attorney to represent a respondent if they do not have a privately-retained attorney. Due process requires that appointed counsel must provide their client with competent and effective legal services. Because these clients have actual or perceived cognitive or communication disabilities, the Americans with Disabilities Act requires counsel to use reasonable measures to ensure that clients have effective communication and meaningful participation in legal proceedings, whether inside or outside of a courtroom.

Guardianship respondents have a right to demand a jury trial or to have a court trial to contest the petition. Their attorneys and the court are supposed to seriously explore less restrictive alternatives, such as enforcing previously executed powers of attorney or developing new supported decision-making arrangements. Rights should be retained unless there is clear and convincing evidence that doing so would endanger the respondent. Guardianship should be a last resort.

Guardianship legal defense is a specialty. Representing clients with mental or communication disabilities is much different than representing non-disabled individuals. These cases require evaluations by medical and psychiatric professionals and should involve working with social workers. Counsel should throughly investigate the allegations by petitioners and develop evidence supporting less restrictive alternatives. A thorough legal defense is critical, considering that once a person is ordered into a guardianship it is likely they will never get out of it. Once an order is granted, counsel is discharged and the client is on their own – trapped in a guardianship for years or even decades. They must live under the control of a guardian, often a stranger, and there is no regular monitoring of the situation by a third party. The guardian files an annual report, but it is not served on the adult or on relatives. Once an order is granted, the adult is not treated as a party to the proceeding. Technically they are, but in reality they become invisible to the court.

Because guardianships essentially operate on "auto pilot" once an order is granted, and since respondents have no effective way of participating in the proceedings because their attorney has been discharged, it is essential that the pre-adjudication phase of the proceedings be handled carefully and that legal defense services be competent and thorough. A recent review of hundreds of dockets in 10 county courts in various parts of the state suggests that guardianship respondents are not receiving the quality of legal defense services required by due process and mandated by federal disability nondiscrimination laws.

There are no jury trials. Contested court trials are rare. Dismissals are not common. In about 95% of the cases, defense attorneys consent to an order of guardianship. The client's rights are surrendered. Attorneys are unlikely to seriously explore less restrictive alternatives due to time and cost considerations. Perhaps there are other subtle considerations that influence defense attorneys not to seek the appointment of experts to challenge a petitioner's allegations of incapacity or to seek appointment of a social worker to explore community services and the viability of supported decision-making arrangements. Such legal services take time and cost money – commodities the courts seem to perceive as lacking.

Judges in Missouri essentially run legal services programs in their guardianship courts. They decide what qualifications, if any, attorneys must possess in order to be placed on a panel from which appointments to individual cases are made. Our inquiry suggests that the only qualification to be appointed to these cases is a license to practice law. Judges decide what type of continuing education attorneys must receive to stay on a appointment panel. Our research indicates there are no MCLE training requirements for court-appointed attorneys who represent clients in guardianship proceedings.

Then there is the process of appointing attorneys to individual cases. More than 3,000 appointments are made in new cases each year in Missouri. There should be no place for cronyism or favoritism in the appointment process. All qualified attorneys should be entitled to be on a panel. Appointment to individual cases should be done by lottery or in rotation. Our research shows that the appointment process is not done in a fair manner.

In Jackson County, one attorney is appointed to *all* guardianship cases in the Kansas City branch. He receives about 400 appointments annually involving adult guardianship. That is in addition to the mental health cases he receives. He is a one-man show, performing all services in these cases without the help of an investigator, social worker, or support staff. The attorney has been the sole defense attorney in these cases ever since he left the employ of the court several yeas ago.

In contrast, in nine other counties we examined, the court has a panel from which it makes appointments to these cases. The number of attorneys on a panel varies by county. Our estimates: Jackson County (4); St. Louis County (18); Cole County (7); Franklin County (14); Boone County (6); Clay County (8); Greene County (14); Buchanan County (26); Jasper County (7); Platte County (13).

Whether it is favoritism or some other factor at play, our research shows that there is not an equal distribution of appointments of cases to attorneys on these panels. Some attorneys receive many more appointments than others. In some courts, one attorney may receive 8 to 10 times the number of appointments that other panel attorneys receive.

Then there is the issue of compensation. The judges are controlling the hourly rate and number of hours an attorney will be compensated for. By setting a low hourly rate and expecting few billable hours, judges are implicitly dissuading attorneys from providing thorough legal services. In some courts, the hourly rate for appointed attorneys is $100. That alone could influence the amount of time an attorney would spend on a case. In many cases, attorneys are awarded a total fee of $300 or less. Fees above $500 are unusual.

No special qualifications, training requirements, or performance standards. Favoritism in appointments. Low hourly rates. Keeping hours to a minimum. These factors may be contributing to the denial of due process in guardianship cases. They also raise concerns about judicial ethics. Judges should be deciding cases, not running legal services programs – especially when the programs do not have any performance standards or quality assurance controls to monitor for deficient services.

Contrast this with a legal services program in Nevada. The Legal Aid Center of Southern Nevada is a nonprofit organization with a Guardianship Advocacy Program. It represents all guardianship respondents in Clark County if they do not have private counsel. Legal services are free to the clients. Taxpayers do not fund the program. There is a staff of well-trained attorneys who are on salary. They have performance standards. The program tracks outcomes. They are able to secure dismissals of about 25% of new petitions due to less restrictive alternatives. About 25% of their annual caseload involves successful petitions for restoration of rights. Supervisors do performance audits of a percent of cases and each attorney has an annual review. There is no pressure, explicit or implicit, for these attorneys to cut corners. And for icing on the cake, judges love this program. They can spend their time deciding cases without the distraction of running a legal services program.

Appointments to cases, hourly rates, number of hours, and wondering if respondents are receiving effective assistance of counsel are issues the Nevada judges no longer have to deal with. This model for guardianship legal defense services should be seriously explored in Missouri. Another benefit of the Nevada model is that the attorneys represent the clients for the life of the case. The law office sends a lay advocate to visit each client twice a year. If there is a problem, the law firm brings it to the court's attention. Unlike in Missouri, clients in Nevada are not abandoned by their attorneys once a guardianship order is entered. Missouri's post-adjudication process raises serious ADA concerns for the 30,000 adults with active cases. (A reminder: the ADA duties of courts for known disabilities are sua sponte and do not require requests.) ◊◊◊

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