Disability and Guardianship Project

555 S. Sunrise Way, Suite 205, Palm Springs, CA 92264
(818) 230-5156 • www.spectruminstitute.org

April 19, 2019

Governor Jay Inslee
P.O. Box 40002
Olympia, WA 98504-0002

Re: Support the rights of seniors and people with disabilities (Veto SB 5604)

Dear Governor Inslee:

Advocates in Washington State have been doing what advocates across the nation have been doing for many years – seeking reforms in guardianship laws so that the rights of seniors and people with disabilities are respected and protected.

The Uniform Law Commission put together a so-called "model guardianship code" that purports to improve state guardianship systems around the nation. It has some good provisions, but it has many that are harmful. While using this code as a starting point for discussion may be appropriate, it should be just that – a starting point. Adopting the code as a package in Washington, or anywhere else, is not appropriate. Sure, it may satisfy the academics and bureaucrats who created the "model code" but the residents of Washington deserve to have a guardianship system that has each and every provision tailored to the needs of seniors and people with disabilities in Washington.

Unfortunately, proponents of SB 5604 have been trying to push this Uniform Code through the Legislature with as few changes as possible. They want Washington law to mirror the guardianship laws in every state. This is not a progressive approach to reform, nor one that respects the needs and rights of seniors and people with disabilities in Washington.

Some of the provisions of SB 5604 dilute existing rights. That is not acceptable. I am enclosing a few reviews of this bill that point out some of its major flaws. Advocates from around the nation are watching to see what you do when this bill finds its way to your desk. They want to know whether you will protect the rights of these vulnerable populations or whether you will side with the bureaucrats, money interests, and professionals who feed off of the guardianship system and want "reforms" that increase their power over the lives and estates of thousands of seniors and others.

You should veto this bill and send the Legislature a veto message informing them that you support reform, but it must be done right. The rights of seniors and people with disabilities need to be expanded, not diluted. A significant network of advocates throughout the nation are waiting to see what you do – hoping that you will be prove to be a leader who is deserving of national admiration.

Respectfully yours,

Thomas F. Coleman
Legal Director, Spectrum Institute
tomcoleman@spectruminstitute.org

Governor Jay Inslee Should Veto Washington State's ALARMING Proposed Adult Guardianship Legislation-SB5604

Advocates and community leaders who are working for meaningful guardianship reform should beware of SB 5604 – a bill that is tantamount to a wolf in sheep's clothing. Proponents claim that it is an improvement over current law. In reality, if Governor Jay Inslee signs this measure into law he will be responsible for diminishing the rights of seniors and people with disabilities in Washington State.

Advocates for seniors and people with disabilities in other states should watch closely what Governor Inslee does with this bill. A veto will signal that he sides with these vulnerable populations and that he will stand up to special interests who, for personal gain, seek to diminish their rights. If he signs it, this will send a signal that Inslee is clearly not ready to be President of the United States – a position that affects seniors and people with disabilities throughout the nation in many significant ways.

Tom Coleman of Spectrum Institute contacted me on this bill. What is occurring in the 2019 legislative session demonstrates exactly how the predatory legal community has driven guardianship law to insure they best serve themselves in this process.

This bill passed the Senate and is headed in the coming days to the Senate floor for a final vote.

We must be vigilant to objecting to this outrageous revision of current Washington State adult guardianship statutes. We have mountains of material evidence to refute the claims of predatory attorneys and guardianship insiders intent on expanding their powers at the expense of vulnerable adults, their families, and their estates. Vulnerable adults are routinely being isolated and financially exploited by guardians and attorneys for petitioners and others who claim to be protecting them.

SB5604/(HB1259) Issues

- Independent legal representation of a proposed ward IS NOT required. Current law does require the appointment of counsel although this mandate is often ignored by courts in various areas of the state.

- The superior court judges association has opposed the bill because it dilutes existing rights. We must all keep in mind that most judges, especially superior court judges, are committed to "good" law. Them weighing in against this bill is encouraging and should be leveraged.

- Adopts much of the 2017 ULC UGCOPAA which gives the rulings of the weakest local court greater national control of a ward during interstate asset and ward transfers. It also gives guardians more power to withhold services and sustenance (euthanasia) in disregard of legitimately executed healthcare advance directives.

- Reduces obligations of the court to recognize third party monitoring of guardians.

- Violates federal civil rights and ADA laws which apply to state courts and guardianship proceedings. Every proposed ward has a right to counsel as a necessary ADA accommodation – preferably one of their own choosing, but if they can't retain counsel then to have an appointed lawyer who will zealously advocate for their rights in these proceedings.

https://app.leg.wa.gov/billsummary?BillNumber=5604&Year=2019&initiative

The two greatest reforms achieved in 2017 in Nevada were free independently (non judicial) appointed counsel and a statewide guardianship compliance and investigation board. Nevada currently has the best guardianship reforms of any state in the nation, although there are still improvements to be implemented. Washington continues to live in the dark ages by comparison to Nevada in its commitment to insure integrity in the guardianship process and in protect vulnerable adults and their estates.

Rick Black
Executive Director-CEAR
https://www.cearjustice.org
https://www.facebook.com/CEARRICK
(804) 564-5330

Washington State Law and Proposed Bill (SB 5604) Violate the Americans with Disabilities Act

Who is fighting for the right to counsel for seniors and people with disabilities whose fundamental liberties are threatened in guardianship proceedings? Where does Disability Rights Washington stand on this? What is the ACLU of Washington doing? What about other disability rights groups such as People First, or the State Council on Developmental Disabilities, or The Arc of Washington? This is shameful and needs to be corrected.

Under current law in Washington State, the court is supposed to appoint counsel for a respondent in an adult guardianship proceeding if they are unable to afford counsel or otherwise lack access to counsel. RCW 11.88.045 states: "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."

Despite this apparent mandate in current law, reviews of court records in various regions of the state show that counsel has not been appointed to represent respondents in many cases. Spectrum Institute filed an ADA complaint with the Washington Supreme Court in November 2017 alleging that the failure to appoint counsel for respondents in adult guardianship proceedings violates this federal civil rights law – a law that applies to state courts and to guardianship proceedings. Without the assistance of counsel, respondents who have actual or alleged significant cognitive disabilities, will not have effective communication or meaningful participation in these proceeding as required by the ADA. The complaint is still under review by the Supreme Court. (http://disabilityandabuse.org/washington-chief-justice.pdf) (http://disabilityandabuse.org/washington-chief-justice-letter.pdf)

The issue of the right to counsel in guardianship proceedings has been taken up by the Washington State Legislature this session.

House Bill 1259 was introduced by Representative Jinkins and others on January 17, 2019. It had a provision to REQUIRE the appointment of counsel in all cases. The would have brought Washington State Law into compliance with the ADA on this issue. After a hearing on January 19, 2018 in the House Civil Rights and Judiciary Committee, the bill was dropped. The provision on appointment of counsel read: "**Sec. 507.** APPOINTMENT AND ROLE OF ATTORNEY. (1) Unless the respondent in a proceeding under this article is represented by an

attorney, the court shall appoint an attorney to represent the respondent, regardless of the respondent's ability to pay."

A new bill (SB 5604)was introduced into the Senate on January 24, 2019. It dilutes the right to counsel for guardianship respondents, making the appointment of counsel discretionary and not mandatory. It has passed the Senate and sailed through House committees. It is ready for a final vote in the House. If this enacted as currently worded – as it appears will happen – Washington State law will remain in violation of the ADA. The relevant portion of the second amended bill appears below.

SECOND SUBSTITUTE SENATE BILL 5604
State of Washington 66th Legislature 2019 Regular Session By
Senate Ways & Means (originally sponsored by Senators Pedersen, Padden, Conway, Kuderer, Keiser, Salomon, Bailey, and Dhingra; by request of Uniform Law Commission)

AN ACT Relating to the uniform guardianship, conservatorship, and other protective arrangements act

NEW SECTION. "**Sec. 507.** APPOINTMENT AND ROLE OF ATTORNEY. (1) Unless the respondent in a proceeding under this article is represented by an attorney, **the court is <u>not required</u>**, but may appoint an attorney to represent the respondent, regardless of the respondent's ability to pay." (emphasis added)

Please share this information with anyone in Washington who cares about the rights of seniors and people with disabilities. Now is the time to speak up and demand that the bill be amended to require the appointment of counsel.

For more information about the ADA complaint filed by Spectrum Institute, see:
http://spectruminstitute.org/Washington/

AN ANALYSIS BY SPECTRUM INSTITUTE OF WASHINGTON SUBSTITUTE SECOND AMENDED STATE SENATE BILL 5604 (April 19, 2019)

Washington State is poised to pass SB 5604 (the second substitute bill) this month. This bill is Washington's version of the Uniform Guardianship and Conservatorship and Other Protective Proceedings Act (UGCOPP), which was written by the Uniform Law Commission. Washington State has made some changes to the UGCOPPA, so this law is not identical to the Model Act.

This new law, which will go into effect on January 1, 2021, will rewrite Washington's guardianship laws. Substantially all of the Revised Code of Washington at Title 11.88 and Title 11.92 (adult guardianships), as well as Title 26.10, (guardianships for minors) will be replaced.

CHANGES TO EXISTING GUARDIANSHIP LAW FOR ADULTS

1. EMERGENCY GUARDIANSHIPS ARE AUTHORIZED

The new guardianship law will permit the filing of emergency petitions for guardianship. (Page 53 of SSB 5604, at lines 18-25) Under existing law, there are no emergency guardianship petitions.

According to an investigative report done by the Los Angeles Times in 2005, (www.latimes.com/local/la-me-conserve13nov13-story.html) "Professional conservators take over with jarring speed. In many courtrooms, they get emergency appointments on the day they ask for them, based on short forms in which they swear that prospective clients cannot care for themselves.

These hasty hearings are meant for cases in which elderly people are in imminent danger. But professional conservators have made them the norm, The Times found. More than half of their Southern California cases began this way."

The same thing could easily occur in Washington State.

2. THE RIGHT TO A JURY TRIAL ON ISSUES OF INCAPACITY IS DIMINISHED

A respondent may demand a jury trial in a proceeding under this chapter on the issue whether a basis exists for appointment of a guardian or conservator. (Page 7, lines 28-30 of SSB 5604)

11.88.045 (3) is as follows: The alleged incapacitated person is further entitled to testify and present evidence and, upon request, entitled to a jury trial on the issues of his or her alleged incapacity. The standard of proof to be applied in a contested case, whether before a jury or the court, shall be that of clear, cogent, and convincing evidence.

Therefore, the new law is more restrictive than the current law.

3. THERE IS AN EXPANSION OF THE AUTHORITY OF CONSERVATORS UNDER THE NEW LAW WHERE A MARRIED PERSON HAS A GUARDIAN OR CONSERVATOR.

SSB 5604 appears to provide conservators with the right to control community property in derogation of current state law. (See RCW 26.16.030, either spouse has the right to manage or control community property.)

4. THERE APPEARS TO BE AN EXPANSION OF DECISION-MAKING BY A GUARDIAN FOR A PERSON UNDER GUARDIANSHIP

The authority of guardians to make medical and personal decisions for persons under guardianship are significantly expanded under the new law.

5. EXISTING LAWS AND STANDARDS OF PRACTICE FOR CERTIFIED PROFESSIONAL GUARDIANS

Currently, under the Standards of Practice for Certified Professional Guardians at 403, the standard is:

The civil rights and civil liberties of the incapacitated person shall be protected. The independence and self-reliance of the incapacitated person shall be maximized to the greatest extent consistent with their [sic] protection and safety. The guardian shall protect the personal and economic interests of the incapacitated person and foster growth, independence, and self-reliance.

NEW LAW

POWERS OF GUARDIAN FOR ADULT. (1) Except as limited by court order, a guardian for an adult may:

(a) Apply for and receive funds and benefits for the support of the adult, unless a conservator is appointed for the adult and the application or receipt is within the powers of the conservator;

(b) Unless inconsistent with a court order, establish the adult's35place of dwelling;

(c) Consent to health or other care, treatment, or service for the adult; (Section 315 of SSB 5604, page 56, lines 30-38)

6. THE "BEST INTERESTS" STANDARD IS USED THROUGHOUT THE NEW LEGISLATION

Courts are directed to use the "best interests" test throughout the legislation, rather than to determine the wishes and desires of the person under guardianship. Historically, Washington State courts have examined the personal history and preferences of incapacitated persons and deferred to the right of the person, even though the person wishes to make a decision that might not be in his or her best interests.

Forty years of Washington State guardianship case law is now in question. It appears that the new law will change the standard set forth in *Raven v. DSHS* from a person-centered, autonomous decision-making to an objective, "best interests" standard.

7. GUARDIANS OR CONSERVATORS WILL BE PERMITTED TO CANCEL OR REWRITE THE WILLS AND ESTATE PLANNING DOCUMENTS OF THE PERSON UNDER GUARDIANSHIP WITH PERMISSION OF THE COURT.

[With court authority], the conservator may "Make, modify, amend, or revoke the will of the individual subject to conservatorship in compliance with chapter 11.12 RCW." (Section 414 (i) page 83. lines 38-39)

Under current law, guardians are not permitted to make, modify. Amend or revoke wills of incapacitated persons.

8. EXISTING LAW

Requires an examination by a physician, nurse practitioner, PA or psychologist before the appointment of a guardian.

NEW LAW:

No examination is required

9. RELIGIOUS BELIEFS AND PRACTICES ARE NOT ADDRESSED IN SSB 5604 AND APPARENTLY, THE GUARDIAN OR CONSEVATOR NEED NOT RECOGNIZE THE REGLIOUS BELIEFS OR PRACTICES OF THE PERSON UNDER GUARDIANSHIP

10. THE CONCURENT AUTHORITY OF THE CERTIFIED PROFESSIONAL GUARDIANSHIP BOARD IS DIMINISHED BY THE NEW LEGISLATION.

Under existing rules and regulations, the Certified Professional Guardianship Board has concurrent authority with the courts that appoint guardians. It appears that under the new law, the Board's authority will be severely restricted and if the CPG Board determines that a certified professional guardian has violated the standards of practice, the Board will only be permitted to act as directed by the courts that appointed the guardian or conservator. (Page 131, lines 23-34, Section 701 (b))

NEW LAW

The language of SSB 5604 is as follows:

(b) If the certified professional guardianship board determines the grievance is complete, states facts that allege a violation of the standards of practice, and relates to the conduct of a professional guardian and/or conservator, the certified professional guardianship board must forward that grievance within ten days to the superior court for that guardianship or conservatorship and to the professional guardian and/or conservator. The court must review the matter as set forth in section 128 of this act, and must direct the clerk of the court to send a copy of the order entered under this section to the certified professional guardianship board. The certified professional guardianship board must act consistently with any finding of fact issued in that order. (Page 131, lines 23-34, Section 701 (b))