

March 9, 2016

To the Members of the Interim Committee on Children, Families, Health and Human Services:

The following is a list of concerns about Montana's guardianship and conservatorship laws. They have been collected from our experience with clients, information from Montana judges and input from disability advocates from throughout the country. This is probably not an exhaustive list, but it includes many of the more serious issues with the Montana statutory law.

The law does NOT provide:

1. Automatic triggers for reexamination of the guardianship or conservatorship if certain issues arise, such as when a guardian consistently fails to provide an annual report, files inadequate reports, or when there is an allegation of abuse or neglect.
2. A requirement that all conservators have a bond. Guardianships are typically used to cover situations where the ward has limited income and financial resources. Conservators are usually appointed when there are substantial funds to manage. Given this, conservators should be required to have a bond in every case.
3. A guarantee of appointment of counsel if the ward is indigent. The current statute provides that the judge may appoint counsel if it is in the "interest of justice." Mont. Code Ann. § 72-5-315 (2). Given that these proceedings are some of the most restrictive of a person's constitutional rights, all indigent people must be appointed counsel.
4. A requirement of a full fact finding for each infringement of rights. For example, the ward may not be capable of making financial decisions, but can still make decisions about where they want to live, who they want to spend time with or exercise the right to vote.
If the court does not find sufficient facts for each infringement of rights in a full guardianship, the guardianship should be limited to those areas only.
5. A requirement that anyone seeking full guardianship demonstrate that it is necessary by clear and convincing evidence, as opposed to a preponderance of evidence. Clear and convincing evidence is a higher civil standard which is closer to a criminal standard and used for situations where constitutional rights are implicated, such as involuntary psychiatric civil commitments.
6. A requirement that anyone seeking guardianship provide a statement of the alternative means tried with the person including powers of attorney, social security benefits payee,

joint accounts, advance directives, trusts, etc., what has been considered or implemented and why those things are inadequate.

7. A requirement that a court granting a full guardianship find by clear and convincing evidence that other alternatives to full guardianship, including a limited guardianship, have been fully explored and are inadequate.
8. A requirement of mandatory standards of practice for guardians/conservators.
9. A requirement of education and training for guardians/conservators.
10. Background checks for guardians/conservators.
11. A means by which a ward can complain or raise concerns regarding the guardian or guardianship relationship to the court, including living arrangements, visitation, retaliation by the guardian, conflicts of interest between the guardian and service providers, or violations of the ward's rights.
12. Appointment of counsel for an indigent ward who is challenging a guardian or conservator for cause or because the ward no longer needs a guardian or conservator.

Although there is a provision for appointment of counsel for "in the interest of justice" for the initial guardianship proceeding, there is no such provision when a guardian or conservator has already been appointed and the ward (or others) believe he or she is either doing a poor job or the ward believes he or she no longer needs a guardian/conservator. Indigent wards need to have access to have counsel to regain their rights in these situations or to have an appropriate guardian to replace the current one.

13. Court oversight aside from the filing of annual reports, which most district court judges do not have the staff time or resources to adequately review and analyze.

Our law provides for a visitor to be appointed to assess the potential ward and potential guardian and give a report to the court. Some jurisdictions keep the visitor involved to review the annual reports that are submitted and, if necessary, investigate what is occurring with the ward. That could be a solution in Montana.

14. A requirement that the ward and any interested person receive the annual reports that the guardians/conservators submit to the court.
15. A requirement that the guardian give preference to the housing, health care and other important choices of the ward.
16. Alternatives to guardianship like supported decision making, which is a process of supporting and accommodating an adult with a disability to enable the adult to make life decisions. Supported decision making is gaining popularity and being discussed by the Uniform Law Commission in drafting the new uniform guardianship law, and was incorporated into Texas statute in 2015. *See Tex. Est. Code 1357.002 - 1357.003.*

Sincerely,

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