

April 23, 2019

Mr. Jason McGill
Senior Advisor on Health Policy
Office of the Governor
Olympia, Washington

Mr. McGill:

I am writing to you to inform you about my opposition to SSB 5604. ***I am hoping that the Governor will veto this legislation*** and I will explain why in the following paragraphs.

I am an elder law attorney in Spokane and I have been in practice for thirty-five years. My husband and I are authors of seven volumes of *Washington Practice*, which is a series of books on Washington State law for attorneys. We are authors of four volumes of *Methods of Practice*, two volumes on elder law and one volume on Washington probate and practice. These books are published by Thomson Reuters WestLaw, the largest publisher of legal books in the nation. I have participated in many guardianship cases (I estimate about 100) and I have served as a guardian for approximately eight individuals in Spokane County. I have represented petitioners in guardianship cases, I have been a guardian ad litem, and I have represented alleged incapacitated persons who opposed having a guardian. I have lectured on guardianship laws at various continuing legal education programs over the years.

Guardianship is an extremely intrusive method of taking control of the life of a person who is alleged to be incapacitated. U.S. Representative Claude Pepper famously said of guardianships, "The typical [person subject to guardianship] has fewer rights than the typical convicted felon... It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty."

I have been following SSB 5604, the Uniform Guardianship and Conservatorship and Other Protective Proceedings Act (UGCOPPA), since its introduction at the beginning of the current legislative session. This bill will repeal most of the current guardianship law for adults (RCW 11.88 and RCW 11.92) and will replace existing law with a uniform law that will increase the power and authority of guardians, while, at the same time, reduce the rights and protections for the elderly, the disabled and the mentally ill who are under guardianship.

I am alarmed by the significant changes in the law that will diminish the constitutional rights of persons under guardianship. For at least forty years the Washington courts have interpreted the guardianship laws in such a way as to allow individuals who are under guardianship to make serious decisions that impact their health care, based on their own individual religious preferences and beliefs, as well as their personal philosophical and personal preferences. The courts have repeatedly held that persons who have guardians still have the right, if they are able to do so, to make decisions

about their own health care. This will no longer be true because the new law, as I read it, requires judges to act in the "best interests" of the incapacitated person. This is an objective standard, based on what a "reasonable person" would do under the same circumstances.

After having read **every word** of the senate bill (which is approximately 130 pages in length) it seems clear that the new law will no longer allow incapacitated persons to make their own health care choices and the guardian will apparently make those decisions based on the "best interests" test. Religious practices and preferences are not mentioned any place in SSB 5604 that I can find, and this raises very serious constitutional issues. It appears that if this legislation goes into effect, an incapacitated person's past preferences may be completely disregarded by guardians and the courts.

I am alarmed by the utilitarian approach that this bill takes. It is clear that a one-size-fits-all approach has been adopted in order to expedite guardianship cases to the detriment of individual rights.

Of particular concern to me is the fact that there is no right of a person who is alleged to be incapacitated to be represented by an attorney. The initial legislation contained a provision for an attorney to represent every person for whom a guardianship petition was filed, but this was apparently changed because of cost estimates. I find this alarming because in a guardianship case, every constitutional right a person has can be removed from a person who is found to be incapacitated, including the right to vote, the right to marry, and the right to decide where a person will live. And these are only a few of the rights that a person can lose when a guardian is appointed.

Another significant concern I have is that the new law will permit the appointment of an emergency guardian without notice to the person who is alleged to be incapacitated. Currently, there is no provision for the appointment of an emergency guardian in our state. In California, however, where guardians can be appointed on an emergency basis, over half of the petitions for guardianship are filed based upon an alleged emergency.

One other very serious issue is the way in which the legislation will remove authority from the Certified Professional Guardianship Board. Under existing law and rules, the Certified Professional Guardianship Board has concurrent authority with the courts that appoint and oversee professional guardians. The new law, however, will remove a very serious check-and-balance for persons who have professional guardians and for friends and family members of persons who have guardians. Again, this decreases the rights and protections for the elderly, the disabled, and the mentally ill who have guardians.

While Washington guardianship laws may need to be revised in order to improve the system under which guardianship cases are handled, this hastily passed bill is not an improvement, but a major step backward. Only one other state, Maine, has passed the Uniform Guardianship and Conservatorship and Other Protective Proceedings Act (UGCOPPA) and not enough time has elapsed to study how the implementation of this act is working in that state.

This bill came out of nowhere, and without notice to the major groups that will be impacted. I was blindsided by this legislation, as were others who have significant experience in guardianship cases. If there was such a tremendous need to repeal Washington State statutes, then why was there no advance notice given to the groups that could have studied the proposed law and offered suggestions and comments? Clearly, this bill was in the works for many months before the legislative session began.

And because the legislature has taken the position that it is not governed by the Public Records Act, RCW 42.56, there is no way to find out who was acting behind the scenes to push this bill through.

The Superior Court Judges Association (SCJA) spoke in opposition to the bill, and they proposed some revisions. I also submitted some revisions, but it became clear that this bill was being driven through the legislative process at an amazing speed and with almost no resistance from legislators. I do not believe that most legislators took the time to read and analyze the bill because it is quite long and very difficult to read and understand. Even with thirty-five years of experience in guardianship law, I found the bill to be complex and confusing.

I understand that several groups, including Disability Rights Washington and the Washington State Long Term Care Ombudsman's program did not take any position on the legislation because they were not given enough time to read and study it.

If Washington State guardianship laws are to be revised, then I am absolutely convinced that it is essential to provide advance notice of any proposed changes to those groups who are most familiar with the laws and the current problems.

I hope that Governor Inslee **will veto this bill** and make it clear that the rights of the elderly, the disabled and the mentally ill in Washington State are more important than forcing through a bill that will decrease the constitutional protections for these protected classes of individuals. This bill as presently written clearly demonstrates that the rights of the state are more important than the rights of the individuals who are to be declared to be legally incapacitated.

Please feel free to contact me if you have any questions or if you require additional information.

Cheryl C. Mitchell
Attorney at Law
Mitchell Law Office
24 W. Augusta Ave.
Spokane, WA 99205

Phone (509) 327-5181
email: MiLawOff@aol.com