

Time For Change

A Call to Reform the District of Columbia's Guardianship System

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- Legal Counsel for the Elderly
- Legal Aid Society of the District of Columbia
- P.E.E.R.S. Coalition
- Project Action!
- The Public Defender Service for the District of Columbia

ABOUT ULS

Since 1996, University Legal Services, Inc. (ULS), a private, non-profit legal services agency, has been the federally mandated protection and advocacy (P&A) program for individuals with disabilities in the District of Columbia. Congress vested the P&A's with the authority and responsibility to investigate allegations of abuse and neglect of individuals with disabilities. In addition, ULS provides legal advocacy to protect the civil rights of D.C. residents with disabilities.

ULS staff directly serves hundreds of individuals with disabilities annually, with thousands more benefiting from the results of investigations, institutional reform litigation, outreach, education, and group advocacy efforts. ULS addresses a diverse range of client issues; including abuse and neglect, community integration, accessible housing, financial exploitation, access to health care services, discharge planning, special education, and the improper use of seclusion, restraint, and medication.

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EXECUTIVE SUMMARY

Under guardianship, which has been characterized as a “civil death,” individuals lose the rights many of us take for granted, such as control over personal health care decisions, living arrangements, and finances.¹ The District of Columbia’s guardianship system is in dire need of reform.² Flawed and dated judicial and institutional practices lead to needless restriction of the freedom of District residents, particularly those with disabilities. This paper is intended to prompt discussion and action among advocates, attorneys, service providers, and the judicial, executive, and legislative branches of government. We offer the following concrete suggestions to serve as a blueprint for meaningful reform:

- **Provide Notice of Guardianship Hearings in Clear, Non-Technical, and Readily Understandable Language.**
- **Use Probate Court’s Mediation Program to Limit and Prevent Unnecessary Guardianships**
- **Improve the Standard of Practice for Court-Appointed Counsel.**
- **Ensure Individuals Alleged to be Incapacitated are Present and Participate in Intervention Proceedings.**
- **Adopt a Petition Form that Requires More Specific Information and Encourages Alternatives to Full Guardianship.**
- **Mandate Periodic Judicial Review of Guardianships.**

¹ Michael Perlin, “*Striking for the Guardians and Protectors of the Mind*”: *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 Penn St. L. Rev. 1159 (2013).

² The Washington Post released an in depth investigative report in several articles detailing abuses in the guardianship system in 2003. See, e.g., Lena Sun and Carol Leonnig, *Guardians Decry New D.C. Rules; Probate Reforms Called Deterrent*, Wash. Post, August 2, 2003, at B04.

- **Create a More Accessible System for Individuals with Guardians to Challenge Guardianship.**
- **Create a Statutory Exception that would Allow a Student's Parent to Continue to Make Education-Related Decisions on the Student's Behalf After the Student Turns 18 Without Needing to Become the Student's Guardian.**
- **Ensure regular training of Probate Judges and Attorneys by People with Disabilities and their Families.**

INTRODUCTION

Guardianship is the government's highly restrictive means of protecting an individual with diminished decision-making capacity. Across the country and internationally, jurisdictions are reforming guardianship practices in favor of a system that allows for the maximum possible autonomy for individuals with diminished capacity. Unfortunately, the District's guardianship system lags behind other reform efforts, placing individuals under guardianship at risk of abuse and neglect, and often unnecessarily restricting their freedom.

Our communications with individuals with guardians have focused primarily on individuals with mental illness and intellectual/developmental disabilities. However, we recognize the need for coalition building among various groups affected by the guardianship system, including: elders, individuals with intellectual disabilities, traumatic brain injury, substance addiction, and terminal illness.

As D.C.'s federally mandated protection and advocacy program for individuals with disabilities, ULS meets every year with thousands of District residents. Our observations of the negative effects of guardianship include: individuals languishing in nursing facilities and at St. Elizabeths Hospital because their guardians will not allow them to return to the community;³ the D.C. Department of Behavioral Health pushing for guardianship when an individual refuses to go to a nursing home or assisted living facility; and individuals under guardianship feeling isolated and helpless. These feelings

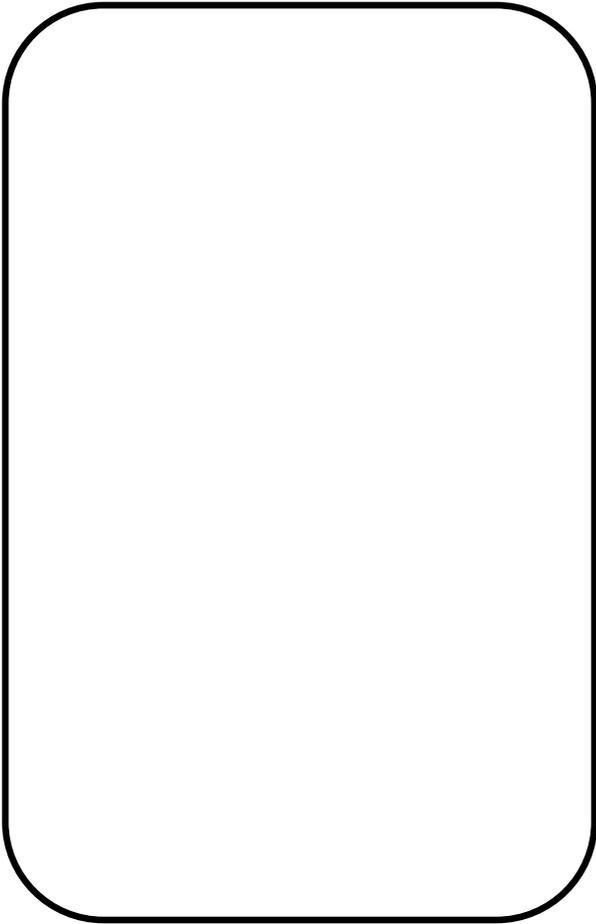
³ St. Elizabeths Hospital is the District's public psychiatric facility.

often intensify the mental health or social issues that led to the appointment of a guardian.⁴

Firsthand accounts of individuals under guardianship have influenced every aspect of this paper. ULS represents clients seeking to challenge restrictive guardianships and meets many more individuals under guardianship through our outreach efforts. Also, we have interviewed guardians, legal advocates, service providers, court employees, and policymakers; observed Probate Court hearings; researched best practices in other jurisdictions and scholarly literature; and participated in symposiums and conferences.

A note on language

“Ward” is a very common term for a person under guardianship. In line with “person first” language guidelines, we prefer and encourage the use of “person under guardianship.”



⁴ See Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. Colo. L Rev. 157, 168-169 (2010).

SUMMARY OF RECOMMENDATIONS/SOLUTIONS

A legal guardianship should be a last resort and only impose the minimum necessary restrictions on an individual's autonomy. Often, the issues guardianship is meant to address could be resolved with a more limited guardianship or alternative, such as supported decision-making, a power of attorney, family engagement and involvement, and/or better mental health services. In the District, however, guardianships are rarely limited in scope and duration.

The Guardianship Act should be amended to ensure the Petitioner and Court carefully consider whether any alternatives to guardianship are available or whether a limited guardianship is sufficient. The District's statute is based on the Uniform Guardianship and Protective Proceedings Act (UGPPA) of 1982, which was groundbreaking for its focus on limited guardianship and autonomy. The UGPPA was updated in 1997, and added language stating that guardianship should be a "last resort," limited guardianships are preferred over general guardianships, and whenever possible, a guardian should consult with the person under guardianship in making decisions. D.C. has not adopted the updated version.⁵

For every challenge we have identified in D.C.'s guardianship system that contributes to creating overly restrictive guardianships, we propose a practical solution. We view our recommendations as a starting point. Many of

⁵ We encourage adoption of the updated UGPPA, but make recommendations for additional changes to D.C.'s statute.

them adopt best practices from other states. Some focus on statutory reform while others would require practice and cultural changes from the probate bar.

GUARDIANSHIP: THE JUDICIAL PROCESS

When a Court finds that an individual lacks capacity to make decisions, it may transfer the individual's right to make some or all of his or her personal decisions to a guardian. An inherent tension exists between the state's interest in protecting an individual and the individual's right to autonomy:

Guardianship implicates the difficult question of when--and if--it is appropriate for the State to remove an individual's legal right to make decisions "for his or her own good." It pits the individual's rights of autonomy, self-determination, and self-definition against the state's interest in protecting individuals from personal and financial harm when they are found to have a diminished capability to make decisions and manage their own affairs.⁶

At any time, any person may file a petition for appointment of a guardian in the Probate Division of the District of Columbia Superior Court.⁷ Once the Petitioner files, the Court schedules a hearing on the issue of the individual's incapacity.⁸

Before the hearing, notice is provided to the individual alleged to be incapacitated and to other designated parties, and the Court appoints an attorney to represent the individual, if he or she does not have counsel.⁹ A qualified individual trained in the diagnosis, care, or treatment of the cause(s)

⁶ Leslie Salzman, *Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?*, 4 St. Louis U.J. Health and Law Pol'y 279 (2011).

⁷ D.C. Code § 21-2041; See CHALLENGES AND SOLUTIONS section for a discussion of the content of Probate Court's petition.

⁸ D.C. Code § 21-2041(d).

⁹ Id.

of the individual's alleged incapacity, known as an "examiner," submits a report to the Court assessing the individual's capacity. A court-appointed professional, called a "visitor," may visit and interview the individual alleged to be incapacitated.¹⁰ A Court may also appoint a guardian ad litem (GAL) to assist the individual alleged to be incapacitated if the Court determines that the individual is incapable of discerning his or her own interests. The GAL can also determine the individual's interests if the individual cannot make a decision because he or she is unconscious or otherwise lacks decision-making capacity.¹¹

Next, the Court holds a hearing. The Court may appoint a guardian if it finds, by clear and convincing evidence, that the individual is incapacitated and a guardianship is "necessary as a means of providing continuing care and supervision" for the "incapacitated" individual.¹² The terms of the guardianship should be the least restrictive possible in duration and scope.¹³

In the District, generally, guardianship is a permanent legal relationship. The individual under guardianship or any interested person may petition (or the Court may rule *sua sponte*) to remove a guardian.¹⁴ One may also petition

¹⁰ As with the appointment of the examiner, the Court may waive the visitor's appointment. *Id.*

¹¹ D.C. Code § 21-2033(a).

¹² D.C. Code § 21-2044(b); see D.C. Code § 21-2003 for standard of proof.

¹³ D.C. Code § 21-2044(a). The Court can limit the duration and scope by appointing a temporary guardian, which includes an emergency guardian for up to twenty-one days, a health care guardian to provide substituted consent for up to ninety days, or a provisional guardian for no more than six months. D.C. Code § 21-2046.

¹⁴ Reasons for removing a guardian include: "Failure to discharge his or her duties, including failure to conform as closely as possible to a standard of substituted judgment or, if the individual under guardianship's wishes are unknown and remain unknown after reasonable

or informally request an order terminating the guardianship because the person for whom guardianship was sought is no longer incapacitated.¹⁵

LEGAL DUTIES OF A GUARDIAN

The guardian is responsible for the “care, custody, and control” of the person under guardianship.¹⁶ A guardian is required to:

(I)nclude the ward in the decision-making process to the maximum extent of the ward’s ability; and encourage the ward to act on his or her own behalf whenever he or she is able to do so, and to develop or regain capacity to make decisions in those areas in which he or she is in need of decision-making assistance, to the maximum extent possible.¹⁷

In the District, guardians are required to practice substituted decision-making, meaning the guardian should substitute his or her judgment as closely as possible in alignment with the wishes of the person under guardianship. If the guardian is not able to discern these wishes, the guardian must make decisions in the individual’s best interests.¹⁸ A guardian should not be confused with a conservator, who is appointed as trustee of all property of a “protected individual.”¹⁹ Conservators generally are appointed when an individual has significant financial assets that require managing; they do not

efforts to discern them, to make a decision on the basis of the individual’s best interests; Abuse of power; Failure to comply with a court order; Failure to educate or provide for the individual as liberally as the ward’s financial situation permits, if education and financial management fall within the scope of the guardianship; Interference with the individual’s progress or participation in programs in the community; Any other good cause.” D.C. Code § 21-2049(a)(3).

¹⁵ The individual under guardianship who is seeking termination is entitled to the same rights and procedures as in the original proceedings for appointment of a guardian. D.C. Code § 21-2049(b).

¹⁶ D.C. Code § 21-2047.

¹⁷ D.C. Code § 21-2047(a)(7)-(8).

¹⁸ D.C. Code § 21-2047(a)(6).

¹⁹ D.C. Code § 21-2066(a).

make health care, financial, or other kinds of decisions that guardians make for the individuals under their authority.

CHALLENGES AND SOLUTIONS

Challenge: Guardianships are often Unnecessary or Overly Restrictive in Scope and Duration.

The Court should only appoint a full, plenary guardianship when it finds that more limited forms of guardianship would not suffice to provide care and supervision for an individual with limited capacity.²⁰ In fact, even if an individual becomes incapable of making his or her own decisions, the law provides for a statutorily defined substitute decision-maker to make health care decisions on behalf of the individual, and explicitly affirms “the right of all competent adults to control decisions relating to their own health care and to have their rights and intentions in health care matters respected and implemented by others if they become incapable of making or communicating decisions for themselves.”²¹

The current system provides no safeguards for ensuring that the Petitioner or Court will consider whether alternative means would suffice to address the concerns that led to the petition for guardianship.²² And even though the law requires that the Court appoint a guardianship that is the least possible restrictive to the incapacitated individual in duration and scope,” the Court rarely assigns guardians with limited powers.²³ The District’s

²⁰ See D.C. Code § 21-2044(a)-(b).

²¹ D.C. Code § 21-2201.

²² Appendix I of this paper discusses widely used and accepted alternatives to guardianship, including substitute health care decision-makers, powers of attorney, and the Social Security Administration’s Representative Payee program.

²³ D.C. Code § 21-2044(a). See also Unif. Guardianship & Prot. Proceedings Act, § 304(b)(8), expressing a strong preference for limited guardianships, requiring a petition to state the

guardianship system, as is still the norm nationally, favors general guardianships.²⁴

The least restrictive and most preferable alternative to guardianship is “supported decision-making.” This relatively new and innovative concept recognizes that most individuals create their own informal networks of decision-making support by consulting with spouses, family members, friends, and/or service providers.²⁵ Supported decision-making expands on the intuitive concept that an individual has a right to choose when and how he or she wants support, and who will provide that support. It is gaining acceptance as preferable to the traditional guardianship model, in which a guardian has the authority to substitute decision-making for the individual under guardianship. For a more in depth discussion of supported decision-making, see Appendix II.

Consider the following example in which an individual had a supported decision-making network, but was appointed a guardian.²⁶ ULS’ client, Mr. Smith (name has been changed to preserve anonymity), was diagnosed with a

reasons why a limited guardianship would be inappropriate if an unlimited guardianship is requested.

²⁴ Teaster et al., *Wards of the State: A National Study of Public Guardianship*, American Bar Association Commission on Law and Aging at 8–9 (2005), available at <http://apps.americanbar.org/aging/publications/docs/wardofstatefinal.pdf>.

²⁵ Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 No. 2 Hum. Rts. Brief at 10 (Winter 2012).

²⁶ The Texas Protection and Advocacy Program, Disability Rights Texas, recently represented an individual in a case to terminate guardianship who had the benefit of an extensive supported decision-making network. For a discussion of the case and supported decision-making in action, see Robin Thorner, *Challenging Guardianship and Pressing for Supported Decision-Making for Individuals with Disabilities*, Clearinghouse Rev. (November-December 2013), available at <http://povertylaw.org/communication/advocacy-stories>.

terminal illness. Mr. Smith resided at St. Elizabeths hospital, a psychiatric facility, for more than thirty years. In an effort to protect Mr. Smith's wishes should he lose capacity to make decisions, ULS assisted him in creating a health care power of attorney assigning decision-making authority to his sister. Unfortunately, the illness progressed quickly and Mr. Smith suffered extensive memory loss. The physician who evaluated Mr. Smith for treatment felt that Mr. Smith could not consent to treatment. The doctor was not comfortable consulting with Mr. Smith's sister, who lives out of state. At that point, St. Elizabeths petitioned for a temporary guardian to assist Mr. Smith in determining whether or not he wanted to proceed with medical treatment.

Mr. Smith felt lonely, depressed, and frightened. Originally he wanted his sister to be his guardian, but both she and he agreed that she might not be available to make an immediate decision. Mr. Smith believed that the only option to obtain assistance in making decisions was to consent to the appointment of a guardian.

Under the current system, a temporary guardian was the only obvious answer to ensure someone would make decisions for Mr. Smith if he could not make them himself. Yet Mr. Smith had a support network in place that could have worked with him to decide whether or not he wanted to go ahead with treatment. His sister was available by phone, his mental health attorney had known him for years and had a very close relationship with him, and he had a treatment team of psychiatrists, psychologists, social workers, nurses, and other hospital staff. All of these individuals could have assisted Mr. Smith in making a decision about treatment, and returned to the physician with an answer.

At least two state courts have already recognized supported decision-making as an alternative to guardianship:

- A New York judge terminated a guardianship because the individual alleged to be incapacitated demonstrated that over several years she had developed a strong supported decision-making network. In the Matter of the Guardianship of Dameris L., 956 N.Y.S.2d 848, 855 (N.Y. Sur. Ct. 2012).
- A Virginia judge appointed a limited guardian for one year, with “the ultimate goal of transitioning to the supported decision-making model” and the respondent will be able to assist and work with staff...who will be providing the supportive decision-making skills that will allow her to succeed and adapt successfully.” Ross v. Hatch, Case No. CWF: 120000426-P03, Final Order, at 5-6, (Newport News Cir. Ct., Va., Aug. 2, 2013), *available at* http://jennyhatchjusticeproject.org/docs/justice_for_jenny_trial/jhjp_trial_final_order.pdf.

Instead, a judge granted a temporary guardian legal authority to make decisions on behalf of Mr. Smith. In an effort to protect Mr. Smith’s decision-

making autonomy as much as possible, ULS advocated for Mr. Smith's sister to continue to play a role in the decision-making process. ULS provided Mr. Smith's court-appointed counsel with a copy of the power of attorney and urged counsel to bring up Mr. Smith's wishes in court. During the hearing both counsel and the petitioning attorney for the government informed the judge that Mr. Smith had assigned health care power of attorney to his sister. Yet when Mr. Smith's mental health attorney asked the judge to instruct the guardian to consult with the sister in the guardianship order, the judge and guardian summarily denied the request. Ultimately, the guardian, who had only known Mr. Smith for a few days, was granted sole legal authority to assist him in making decisions.

The following solutions seek to incorporate supported decision-making and other alternatives to guardianship into law and judicial practice.

Solution: Using Probate Court's Mediation Program to Limit and Prevent Unnecessary Guardianships.

The Probate Division offers an Elder Mediation Program for individuals fifty years of age or older, but only after the Court makes a finding of incapacity.²⁷ D.C. Council should amend the law to make the Probate Division's mediation program available to parties *before* a guardian is appointed. Mediation provides a "unique opportunity for families and others concerned about the welfare of an incapacitated adult to discuss and resolve issues . . . [including] whether a particular person should or should not be

²⁷ On at least one occasion an advocate has been able to access the program pre-appointment, but this is not the norm.

appointed a guardian or conservator, [and] whether limitations should be placed on the fiduciary's powers. . . ." ²⁸ Mediation could provide an opportunity for the parties to discuss the allegations in the petition; to determine whether a guardianship is necessary or if the parties would consent to other options; and/or a chance for the parties to develop the terms of a limited guardianship or a supported decision-making agreement.

Solution: Instituting a Petition Form that Requires More Specific Information and Encourages Limited Guardianship.

Individuals often file for guardianship because they are not aware of other options. Currently, when someone goes to Probate Court to apply for guardianship, he or she is simply handed the petition form. Additional information would identify less restrictive forms of intervention.

The petition is the first step in the appointment process and the Court's introduction to the case. Completing a petition should demand the time and consideration worthy of the very serious deprivation of civil rights that it proposes. The Probate Court should provide the Petitioner with information about alternatives to guardianship prior to the filing of the petition. ²⁹

The statute currently requires that the petition include the name, address, and interest of the Petitioner; the name, age, residence, and address

²⁸ The Elder Mediation Program Handbook, April 2013 (distributed by the Office of the Registrar of Wills, Probate Division).

²⁹ Alternatives to guardianship are described in detail in Appendix I. See, e.g., Mich. Comp. Laws Ann. § 700.5303(2), "the Court shall provide the person intending to file the petition with written information that sets forth alternatives to appointment of a full guardian, including, but not limited to, a limited guardian, conservator, patient advocate designation, do-not-resuscitate declaration, or durable power of attorney with or without limitations on purpose, authority, or time period, and an explanation of each alternative."

of the individual for whom a guardian is sought; and reasons for which guardianship is sought with particularity so as to enable the Court to determine what class of examiner and visitor should examine the person alleged to be incapacitated.³⁰ Despite the statute's preference for "particularity," the petition form merely requires that the Petitioner check off a series of boxes related to capacity and the guardian's powers.³¹

In contrast, Rhode Island's form, Petition for Limited Guardianship or Guardianship, requires the Petitioner to provide comprehensive reasons for filing the petition.³² Even the petition's title promotes limited guardianships. Rhode Island's petition requires the Petitioner to explain what kinds of services the subject needs in specific categories such as health, financial, and residential matters. The Petitioner must indicate which less restrictive alternatives to guardianship have been considered and why those alternatives will not meet the needs of the subject.³³

In Michigan, the Petitioner is required to provide specific facts about the allegedly incapacitated individual's condition and *specific examples* of the individual's recent conduct that necessitate the appointment of a guardian.³⁴

³⁰ D.C. Code § 21-2041(b).

³¹ See D.C. Probate Court's Petition for Guardianship, available at <http://www.dccourts.gov/internet/documents>.

³² Available at <http://sos.ri.gov/documents/probate/PC2.3.pdf>.

³³ The UGPPA also encourages the use of alternatives to guardianship. For example, the Court must make a finding that the subject's needs cannot be met by less restrictive means prior to appointing a guardian. Unif. Guardianship & Prot. Proceedings Act, Prefatory Note.

³⁴ Mich. Comp. Laws Ann. § 700.5303(1).

A proposed Petition Form is attached that incorporates our recommendations.³⁵ The goal of this form is to preference limited guardianship and to require the Petitioner to support the requested restrictions on an individual's autonomy.

Solution: Establishing Statutory Guidelines for Clinical Evaluations.

The District must adopt a uniform clinical assessment tool to guide the Court in crafting limited guardianships. "The need for clinical evaluations in guardianship proceedings is paramount, as they provide a key objective and scientific component of the data needed by the Court to make an appropriate determination of the need for capacity."³⁶ An effective evaluation guides the Court in ordering guardianship tailored to the specific needs of the person under guardianship.³⁷ Most jurisdictions, including the District of Columbia, require some kind of clinical evaluation in a guardianship proceeding. However, the majority of state statutes, including D.C's, do not provide specific guidance regarding the content of the evaluation.³⁸

In the District, instead of a guided clinical analysis, a Court-appointed examiner, defined as an individual qualified in the care, treatment, or diagnosis of the causes and conditions giving rise to the alleged incapacity,

³⁵ See Appendix III.

³⁶ Michael Mayhew, *Survey of State Guardianship Laws: Statutory Provisions for Clinical Evaluations*, BIFOCAL, Vol. 27, No. 1 Oct. 2005, at 13.

³⁷ *Id.*

³⁸ *Id.* The UGPPA may provide some guidance; the Act requires that evaluations include a "description of the cognitive and functional limitations, an evaluation of the medical condition, identification of strengths and abilities, a prognosis and any recommendations for care," including "the educational potential, adaptive behavior, and social skills" of the subject. Unif. Guardianship & Protective Proc. Act 1997 § 306.

completes a clinical examination.³⁹ There is no prescribed format for the evaluation, or mandated assessments, and the Court can waive the examiner's appointment if a satisfactory evaluation was submitted in writing to the Court.⁴⁰ District law also directs the Court to consider any current social, psychological, medical, or other evaluation used for diagnostic purposes or in the development of a current plan of treatment or any plan of treatment.⁴¹

The District should adopt a form akin to Rhode Island's Decision-Making Assessment Tool (DMAT). The DMAT requires the evaluation to focus on the relevant question – whether the individual has the capacity to make decisions.⁴² In the event the Court finds it necessary to appoint a guardian, the Rhode Island model ensures that the clinical evaluation is used as a guide for creating a limited guardianship, because the Court has information regarding the relative strengths and weaknesses of the individual's various decision-making domains. The DMAT poses several questions about the individual's physical and psychological status, and then requires an assessment regarding the individual's decision-making abilities in financial, health care, relationships, and residential matters, and whether the individual needs a limited or full substitute decision-maker in any of those categories.

When the Petitioner is a hospital, nursing home, or government agency with access to medical professionals, the Petitioner often submits the

³⁹ D.C. Code § 21-2011(7).

⁴⁰ D.C. Code § 21-2041(d).

⁴¹ D.C. Code § 21-2041(g).

⁴² Rhode Island's DMAT form is *available at* <http://sos.ri.gov/documents/probate/PC2.4.pdf>.

examiner's report rather than requesting a Court-appointed examiner to evaluate the individual alleged to be incapacitated. In the interest of providing an unbiased clinical opinion, the law should prohibit an examiner's report that is written by an employee, contractor, or affiliate of the Petitioner.

Challenge: Lack of a Robust Judicial Process.

The judicial process to determine whether an individual requires a guardian, depriving him or her of fundamental civil liberties, should merit a robust fact-finding process and a reasonable mechanism for individuals who have been appointed guardians to challenge findings. Yet ULS has received numerous complaints, from individuals with guardians and legal advocates, that fact-findings are perfunctory. There are statutory safeguards in place to ensure an individual alleged to be incapacitated is afforded his full due process rights; the evidentiary standard for finding an individual lacks capacity and requires a guardian for his or her own protection and safety is clear and convincing, and the individual alleged to be incapacitated has a right to articulate his or her position.⁴³ Despite these procedural protections, proceedings to appoint a guardian tend to be brief. The individual alleged to be incapacitated rarely has the opportunity for meaningful participation.

⁴³ The Court must make a decision to appoint a guardian on sound evidentiary foundation, not speculations and accusations. In re Penning, 930 A.2d 144, 154 (D.C. 2007)(remanding a case when trial court removed individual under guardianship's choice for conservator without appointing an examiner or visitor or considering any actual evidence); Incapacity for purposes of the Guardianship Act does not equate to inability to participate meaningfully at a hearing. In re Orshansky, 804 A.2d 1077, 1093, 1097 (D.C. 2002).

Solution: Provide Notice of Guardianship Hearings in Clear, Non-Technical, and Readily Understandable Language.

After a petition is filed, notice is provided to the subject of the guardianship proceeding. The current notice form is confusing and full of legal jargon. For example, under the section "Your Hearing Rights," the first listed right is "to have your partial or total incapacity proved by clear and convincing evidence...." Presumably this means, "You have the right to a hearing in which the Petitioner has the burden of proving your partial or total incapacity by the legal standard of clear and convincing evidence." If an individual does not understand the content of the notice, he or she may not realize that his or her capacity has been challenged and the importance of participating in a hearing.

In order to participate meaningfully in the proceedings, an individual at risk for guardianship must first understand the purpose of the hearing. Therefore, the statute should require a notice form with clear language that informs the individual that he or she is the subject of a guardianship proceeding. ULS has simplified the content of the current version and changed the font and spacing to create a form that individuals with a wide range of intellectual capabilities and educational backgrounds can read and understand.⁴⁴ We encourage City Council to codify a notice form, much like a sample "Durable Power of Attorney" form has been codified in D.C. Code § 21-2207.

⁴⁴ See Appendix IV.

Solution: Improve the Standard of Practice for Court Appointed Counsel.

In February 2013, ULS hosted a meeting for legal advocates from the local legal services community, including Bread for the City, Legal Aid Society of the District of Columbia, Legal Counsel for the Elderly, Quality Trust for Individuals with Disabilities, Public Defender Service for the District of Columbia, and American University Washington College of Law's Disability Rights Law Clinic. Advocates unanimously identified the quality of legal representation for individuals alleged to be incapacitated or under guardianship in a post-petition proceeding as a serious problem in the Probate Court system. Attorneys regularly observe Court-appointed counsel hollowly representing his or her clients' interests; counsel merely articulating the client's expressed interests while implicitly informing the Court with tone and language that counsel believes the client needs a guardian.⁴⁵ Court-appointed counsel may even believe it is his or her role to persuade his or her client that he or she needs a guardian. On one occasion, counsel expressed this viewpoint to ULS, despite his client's clear capability to make decisions, assign a power of attorney for health care decisions, and articulate his desire to remain independent.

⁴⁵ The Maryland Court of Appeals aptly summarized the crucial rule of counsel for the individual alleged to be incapacitated: "In guardianship proceedings, effective representation by counsel ensures that the proper procedures are followed by the Court, that the guardianship is imposed only if the Petitioner proves by "clear and convincing evidence" that such a measure is necessary and there is no reasonable alternative, that the guardianship remains no more restrictive than is warranted" In Re Sonny E. Lee, 132 Md. App. 696, 719 (Md. Ct. App. 2000).

Counsel is the primary means for giving a voice to an individual who has been alleged incapacitated in a judicial proceeding that will determine whether or not to deprive the individual of his or her fundamental civil liberties. Prior to a judicial finding, an individual has only been alleged to be incapacitated. Individuals who are the subjects of guardianship proceedings should be represented by attorneys who have not already decided that the individual needs a guardian simply because he or she is the subject of the proceeding. Even if an individual has diminished capacity, his or her attorney has a professional duty to maintain a typical client-lawyer relationship.⁴⁶ Disability or diminished capacity is not an excuse for counsel to act as a surrogate decision-maker for the client.⁴⁷

The following examples of ineffective assistance of Court-appointed counsel are based on the experiences of our clients and the clients of other legal advocates:

- Counsel's only meeting with her client lasted for ten minutes on the morning of the hearing to appoint a guardian. The individual resided in a nursing facility and could not leave without assistance. The attorney informed her client that appearing at the hearing was impossible due to the client's medical needs. The attorney did not ask the Court to provide reasonable accommodations, advocate for rescheduling the hearing until the client could appear, or investigate how to arrange for transportation.

⁴⁶ D.C. Rules of Prof'l Conduct R. 1.14(a) (2007). See also, Dari Pogach, *The Conflict between Advocacy and "Best Interests" for Individuals in Psychiatric Institutions*, 46 Clearinghouse Rev. 25 (May-June 2012) for a discussion of ULS' person centered approach to representing individuals with diminished capacity.

⁴⁷ D.C. Rules of Prof'l Conduct R. 1.14, cmt. 2 (2007).

- Counsel petitioned the Court to appoint a guardian ad litem, alleging she could not determine the client's legitimate interests.⁴⁸ In her petition, the attorney described her client's complaints about lack of services as "ranting and raving." Using such a pejorative description may be counter to counsel's ethical responsibility to refrain from prejudicing a client.⁴⁹ This strong language and negative descriptions could influence the Court's decision to appoint a guardian. In this case, the Court appointed the individual's daughter as guardian, despite the fact that the individual had not spoken to her daughter in years and reported an acrimonious relationship.
- Counsel, without reviewing an examiner's report, made the determination that his client was incapacitated and *recommended* appointment of a guardian in a pleading submitted prior to the first hearing. A guardian was appointed at the first hearing.⁵⁰

In the District and many other jurisdictions, minimal statutory requirements defining the role of counsel leave attorneys to choose between substituting judgment on behalf of their client, or arguing zealously against guardianship and trying to limit the guardian's powers as much as possible.⁵¹ The District's statutory language is somewhat ambiguous. Counsel is required to zealously represent an individual's "legitimate interests." The statute defines the minimum level of zealous representation as:

(1) Personal interviews with the subject of the intervention proceeding; (2) Explaining to the subject of the intervention proceeding, in the language, mode of communication, and terms that

⁴⁸ See SCR-PD Rule 305(a)(4).

⁴⁹ D.C. Rules of Prof'l Conduct R. 1.3(b)(2)(2007).

⁵⁰ An attorney from another advocacy organization shared this example with ULS.

⁵¹ Joan O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 Stet. L. Rev. 687, 688 (2002) (arguing the attorney should advocate for their client's position, otherwise the individual has no voice in the guardianship proceeding). The zealous advocacy position has also been endorsed by the Second National Guardianship Conference, sponsored by, inter alia, the American Bar Association, A. Frank Johns and Charles Sabatino, *Introduction to Wingspan – The Second National Guardianship Conference*, 31 Stet. L. Rev. 573, 585 (2002). The recommendations are available at <http://www.azcourt.gov/Portals/83/pdf/Wrkgrp2WingspanRecommendations.pdf>.

the individual is most likely to understand, the nature and possible consequences of the proceeding, the alternatives that are available, and the rights to which the individual is entitled; and (3) Securing and presenting evidence and testimony and offering arguments to protect the rights of the subject of the guardianship or protective proceeding and further that individual's interests.⁵²

These minimal requirements may be the foundation of adequate representation, but they are not enough. To provide zealous representation, counsel must conduct thorough investigations, challenge any experts presented by the Petitioner, and retain experts if necessary.⁵³

The Vermont state legislature has amended its state guardianship statute to protect the rights of individuals alleged to be incapacitated by requiring attorneys to “endeavor to ensure:”

(1) their clients’ wishes are communicated to the court, the wishes of the respondent, including those contained in an advance directive, as to the matter before the court are presented to the court; (2) there is no less restrictive alternative to guardianship or to the matter before the court; (3) proper due process procedure is followed; (4) no substantial rights of the respondent are waived, except with the respondent's consent and the court's approval ..., (5) the petitioner proves allegations in the petition by clear and convincing evidence in an initial proceeding....⁵⁴

The following statutory amendments would raise the standard of practice for counsel:

- Adding the following language from the D.C. Rules of Professional Conduct to D.C. Code § 21-2033(b): **Counsel has a duty to**

⁵² D.C. Code § 21-2033(b). See also *In re Orshansky*, 804 A.2d 1077, 1095 (D.C. 2002) (affirming counsel’s duty to zealously represent his or her client’s legitimate interests and the importance of interviewing his or her client in order to avoid advocating for appointments the client may have opposed).

⁵³ See O’Sullivan, 31 Stet. L. Rev at 725-733 for several suggestions on how to provide zealous representation for a client in a guardianship case.

⁵⁴ Vt. Stat. Ann. tit. 14 § 3065(b); see Joseph A. Reinert, *Guardianship Reform in Vermont*, 32 Vt. B.J. 40, 42 (Summer 2006) for a discussion of legislative intent.

“pursue a matter on behalf of a client despite opposition . . . and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”⁵⁵

- Changing the language of D.C. Code § 21-2033(b) -- “legitimate interests”-- to the **“expressed interests”** of the subject.⁵⁶ This change would clarify counsel’s duty to advocate for the actual wishes of his or her client, rather than substituting what the guardian ad litem, or the counsel himself or herself, determines is in the subject’s best interest. Other jurisdictions, such as Wisconsin and Florida, require similar standards.⁵⁷

⁵⁵ D.C. Rules of Prof’l Conduct R. 1.3, cmt. 1 (2007).

⁵⁶ In July 2013, Quality Trust for Individuals with Disabilities testified before the D.C. Council regarding the need for legislative reform to preserve a person’s right to counsel in guardianship proceedings in the wake of the D.C. Court of Appeals’ In re Martel, 10 A.3d 1158 (D.C. 2010)(Table, No. 09-PR-291)(per curiam), *available at* http://jennyhatchproject.info/docs/publications/alexandra_martel.pdf, which held that this duty can be met by an attorney advocating for the person’s “best interests,” as determined by a court-appointed guardian ad litem – even if the person disagrees.⁵⁶ In other words, if the person does not want a guardian, but the guardian ad litem says a guardian is needed, that person’s own attorney can argue against the person’s wishes and say to the Court: “My client should lose.” Quality Trust advocated for changing the statutory requirement on counsel to advocate for a client’s “expressed” rather than “legitimate” interests. D.C. Code § 21-2033(b).

⁵⁷ See, e.g., Wis. Stat. Ann. § 54.42(1)(b) and Fla. Stat. § 744.102(1).

Solution: Ensure Individuals Alleged to be Incapacitated are Present and Participate in Intervention Proceedings.

Individuals alleged to be incapacitated must attend a hearing absent a showing of “good cause.”⁵⁸ Yet the current system frequently denies individuals the fundamental due process rights of appearing at a hearing which may result in the loss of civil liberties. Health concerns, the inconvenience of arranging for transportation, costs related to attending, or a host of other factors may prevent an individual from appearing.⁵⁹ With the availability of electronic communication such as phone or videophone, it is unacceptable that many individuals cannot appear at a hearing because they are hospitalized or have difficulty moving from place to place. In fact, on at least one occasion, a judge has held a hearing at a hospital so that the individual could participate.⁶⁰

The Court and Counsel should be required to demonstrate a good faith effort to facilitate his or her client’s appearance in Court. If the individual is unable to appear due to medical reasons or disability, the Court should be statutorily required to arrange for reasonable accommodations for the individual, including the opportunity to appear remotely, via videophone or other device.

⁵⁸ D.C. Code §21-2041(h).

⁵⁹ According to the Washington Post 2003 series on guardianship, roughly one in four individuals alleged to be incapacitated were present at hearings when judges evaluated their capacity in the first half of 2002. Carol D. Leonnig et al., Rights and Funds Can Evaporate Quickly; Attorneys’ Powers Thwarted in D.C. Residents Trying to Remain Independent, Wash. Post, June 16, 2003, at A1.

⁶⁰ We learned of this example from an attorney at Legal Counsel for the Elderly.

Solution: Ensure Judges and Attorneys in Probate Court Receive Regular Training by People with Disabilities and Their Families.

Not only should provisions be made to ensure that individuals at risk of guardianship participate in their own hearings, but part of the regular training for Judges, Probate staff, and the Probate Bar should include trainings designed by individuals with disabilities and their families. Individuals with disabilities, as the group most at risk for guardianship, have an important perspective to share, and should have a prominent role in training and educating professionals about the impact of guardianships on their lives. Trainings could include subjects such as alternatives to guardianship, the importance of autonomy, and what accommodations are necessary to ensure full participation in the judicial process, and other issues directly impacting the lives of those at risk for guardianship.

Solution: Recurring Judicial Evaluation of Guardianships.

Many jurisdictions require regular judicial re-evaluation of guardianships, through written motions, in Court hearings, or both.⁶¹ The District, in contrast, creates de facto life-long guardianships, only requiring that the guardian report semiannually on the status of the individual under guardianship. Mandatory judicial review with rigorous standards to determine whether an individual remains incapacitated and requires a guardian would sever unnecessary guardianships. The District has an opportunity to lead the nation in implementing a novel and innovative form of review. In most, if not all jurisdictions that require periodic review, the onus is on the Court to identify any problems with the guardianship. Only a handful of jurisdictions require the Court to consider whether the individual remains incapacitated and still requires a guardian. Furthermore, very few, if any, jurisdictions place the burden of persuasion on the original Petitioner to justify the continued guardianship.⁶²

The District's absence of statutorily required judicial review demonstrates an attitude that individuals under guardianship will not regain capacity. Guardianship can serve as a fluid mechanism for assisting individuals at certain times when they require decision-making assistance. Consider the mental

⁶¹ For a review of states' procedures see Sally Balch Hurme and The American Bar Association Commission on Law and Aging, *Monitoring Following Guardianship Proceedings* (statutory revisions as of December 31 2012)(April 2013), available at http://www.americanbar.org/content/dam/aba/administrative/law_aging/2013_04_CHARTMonitoring.authcheckdam.pdf.

⁶² District law allows for an individual to challenge guardianship, but is silent as to which party bears the burden of persuasion.

health recovery movement, which embraces as one of its main tenets “[t]he belief that recovery is real . . . that people can and do overcome the internal and external challenges, barriers, and obstacles that confront them.”⁶³

Recurring judicial evaluation of guardianships would require guardians to formally report to the Court how they fulfill their obligation to, “encourage the ward to act on his or her own behalf whenever he or she is able to do so, and to develop or regain capacity to make decisions in those areas in which he or she is in need of decision-making assistance, to the maximum extent possible.”⁶⁴

Several jurisdictions require periodic judicial re-evaluation of whether an individual has regained capacity and no longer requires a guardian. In Michigan, the Court has to re-evaluate the guardianship one year after it was ordered and a minimum of every three years thereafter.⁶⁵ Missouri law

⁶³ Substance Abuse and Mental Health Services Administration, “SAMHSA announces a working definition of ‘recovery’ from mental disorders and substance use disorders,” Dec. 21, 2011, *available at* <http://www.samhsa.gov/newsroom/advisories/1112223420.aspx>.

⁶⁴ D.C. Code § 21–2047(a)(8).

⁶⁵ Mich. Comp. Law. Ann. § 700.5309. The Court shall “appoint a person to investigate the guardianship and report to the Court. The person appointed must visit the legally incapacitated person or explain in the report why this was not practical. The “visitor,” must include in his or her report a recommendation on whether the guardianship should be modified. The visitor’s report is informally reviewed by the Court and an order entered as to whether or not the guardianship should be continued at that time without further formal proceedings. A copy of the report and order is sent to the guardian and ward. If the Court finds that further Court review on continuation of the guardianship is necessary, the Court will appoint an attorney for the legally incapacitated person.” Mich. Ct. Rules Prac., § 5408.1 (5th ed.). Missouri requires the Court to review the status of the guardianship annually to determine the individual’s state of capacity and need for a guardian. Mo. Ann. Stat. § 475.0821(1).

requires the Court to review the status of the guardianship annually to determine the individual's state of capacity and need for a guardian.⁶⁶

Solution: Create a More Accessible System for Individuals Under Guardianship to Challenge Guardianship.

While all jurisdictions allow for termination of a guardianship if the individual has regained capacity, most, including D.C., do not outline the specific procedural process or evidentiary standard involved, making it extremely difficult for a layperson to understand how to ask the Court to terminate his or her guardianship.⁶⁷ District law guarantees the right to appointed counsel, but the law does not explicitly give the individual the right to retain counsel of his or her own choosing.⁶⁸ The guardian is not explicitly obligated to assist the person under guardianship in seeking restoration. In fact, on occasion guardians have explicitly forbidden their "wards" from talking to legal advocates such as ULS and Quality Trust for Individuals with Disabilities about assisting with termination or modification of guardianship.

According to Rule 6 of the Model Code of Ethics for Guardians, the guardian has an obligation to seek termination of the guardianship when possible, and he or she "shall diligently seek out information which will provide a basis for termination . . . of the guardianship."⁶⁹ The District should adopt this standard. Furthermore, individuals under guardianship should have a

⁶⁶ Mo. Ann. Stat. § 475.0821(1). *See also*, e.g., Conn. Gen. Stat. Ann. § 45a-660(c); N.M. Stat. Ann. § 45-5-307(g).

⁶⁷ D.C. Code § 21-2049(b).

⁶⁸ D.C. Code § 21 -2049(b). *Cf.* Tex. Code Ann. § 1202.103(a), "a ward may retain an attorney for a proceeding involving the complete restoration of the ward's capacity or modification of the ward's guardianship."

statutory right to retain counsel to represent them in any post-appointment proceedings.

Challenge: Students receiving Special Education Services and their Families can be Pushed into Seeking Guardianship when Less Restrictive Alternatives would be Appropriate.

When all students turn eighteen they acquire the right to make their own decisions about their education. The rights of parents of students with disabilities under the Individuals with Disabilities Education Act (IDEA) are transferred to the student when he or she turns eighteen.⁷⁰ Most students with disabilities have the ability to make their own educational decisions at the age of eighteen, and if not, to at least identify someone that they want to make these decisions for them. A small number of students may not have the mental capacity to either make informed decisions themselves or identify an alternative decision-maker. The easiest approach in these situations, and the recommendation schools often give parents who are concerned about their child's ability to understand the individualized education plan (IEP) process, is for the child's parent to seek legal guardianship.

⁶⁹ Model Code of Ethics for Guardians Rule 6 (1988), *available at* http://www.guardianship.org/documents/Code_of_Ethics.pdf.

⁷⁰ The IDEA creates the process by which students with disabilities receive special education services in public schools. The IDEA includes many rights for parents, including the right to give or withhold consent to evaluations and special education services, as well as the right to review educational records, request an independent evaluation if they do not agree with an evaluation done by the school, and file a due process complaint if they disagree with a change that the school wants to make or refuses to make to their child's individualized education program (IEP).

However, the IDEA has considered these difficult situations and allows states to create an alternative to guardianship within the IEP process that will allow an adult student's parent, or another individual if the student's parent is not available, to continue making IEP decisions for the student after he or she turns eighteen. This alternative would allow the adult student to maintain decision-making authority in all areas other than education and would last no longer than the student's eligibility for special education services. Generally, therefore, it could be a good alternative to encouraging parents to seek guardianship, which requires lengthy and expensive court involvement and may restrict the adult student's decision-making autonomy more broadly than necessary. However, ULS is concerned that a provision in the federal law, which references the limits of state law, does not allow the District to utilize this alternative process without an amendment to the District's guardianship statute.⁷¹

Solution: Create a Statutory Exception that would Allow a Student's Parent to Continue to Make Education-Related Decisions on the Student's Behalf After the Student Turns Eighteen Without Needing to Become the Student's Guardian.

The District's current guardianship statute holds that all individuals are presumed competent to make their own decisions unless they have been

⁷¹ *"Special rule. A State must establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child's eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program."* (emphasis added). 34 CFR §300.520(b).

determined incapacitated or incompetent by a Court.⁷² The only current exception to the need for court involvement is for health care decisions.⁷³ There is no exception for educational decisions.

An exception should be added to the current guardianship statute permitting the District's State Education Agency (SEA), to create a process, consistent with the IDEA, that allows an adult student's parent, or another individual if the student's parent is not available, to continue making IEP decisions for the student after he or she turns eighteen. Such an exception should only apply if the student is unable to make his or her own educational decisions or execute an educational power of attorney to identify an alternative educational decision-maker. This process should be created through a proposed rulemaking consistent with the Administrative Procedures Act's requirements for notice and a public comment. It is imperative that any process contain robust due process protections for the student.

Conclusion

Guardianship reform is a cutting edge legal and political issue, and the District has an opportunity to be a leader in the movement, setting an example for other states and even internationally. More importantly, in amending the Guardianship Act and thereby holding guardians and court-appointed counsel accountable for performing their job duties as legally required, the District has

⁷² DC Code §21-2002(d).

⁷³ DC Code §21-2201 *et seq.*

an opportunity to restore and protect the rights of its citizens to personal liberty and autonomy.

APPENDIX I : ALTERNATIVES TO GUARDIANSHIP

Many Protection and Advocacy programs across the nation, including ULS, are committed to providing education and support for alternatives to guardianship. The following are less restrictive legal means than guardianship that support and protect the emotional, physical, and financial well being of individuals with disabilities. Our list is specific to District law, but applicable in most jurisdictions.

Power of Attorney

A power of attorney (POA) is a legal document in which one transfers the authority to transact specific business, personal, or health care matters on his or her behalf to a designated agent. The individual who assigns authority can revoke the POA at any time. For a POA for financial assistance or needs other than health care decisions, the individual assigning authority need not be declared incapacitated. For example, someone might delegate authority to a relative or friend if he or she is going to be out of the country for an extended period of time and needs a responsible party to sign contracts, manage a lease, etc. Or, the POA could become effective only in the event that the individual is incapacitated.⁷⁴ A POA for health care decisions, however, is only valid upon a finding of incapacity.⁷⁵

⁷⁴ See D.C. Code § 21-2081.

⁷⁵ See D.C. Code § 21-2205(a).

Substitute Health Care Decision-Makers

The law strives to protect the right of an incapacitated individual to control his or her own health care decisions.⁷⁶ If two professionals (one physician and one psychologist or psychiatrist) certify an individual's incapacity and the individual does not have a durable power of attorney or a court-appointed guardian, family members and friends can make health care decisions on behalf of the individual. Unless the individual has a court-appointed guardian or a power of attorney for health care, the prioritized list is as follows: (1) the individual's court-appointed intellectual disability advocate, if it is within the scope of the advocate's appointment; (2) the individual's spouse or domestic partner; (3) the individual's adult child; (4) the individual's parent; (5) the individual's adult sibling; (6) the individual's religious superior if the individual is a member of a religious order or a diocesan priest; (7) the individual's close friend; or (8) the individual's nearest living relative.⁷⁷

This decision-maker must base his or her decision on the known wishes of the individual or if the wishes are unknown and cannot be ascertained, on a good faith belief as to the best interests of the individual.⁷⁸

Representative Payee

A representative payee is a person or organization who receives Social Security benefits on behalf of an individual (beneficiary), maintains the funds in the individual's account, and uses the payments to meet the beneficiary's

⁷⁶ D.C. Code § 21-2201.

⁷⁷ D.C. Code §21-2210(a).

⁷⁸ D.C. Code §21-2210(b).

needs. A representative payee may be the least restrictive method for assisting an individual who may need assistance with money management but is capable of attending to his other needs.⁷⁹

Temporary Guardian

Temporary guardianship allows the Court to appoint a guardian for a relatively short period of time in urgent circumstances:

- (1) An emergency guardian can be appointed for up to twenty-one days when an individual alleged to be incapacitated is in a life-threatening situation or a situation involving emergency care, and there is no other person with authority to act (such as a power of attorney) who is reasonably available, mentally capable, and willing to act.
- (2) A health care guardian can be appointed for up to ninety days, and that authority can be extended another ninety days, to provide substituted consent for an individual certified as incapacitated for a health care decisions.⁸⁰

Health-Care/Psychiatric Advance Directive

An individual may prepare a written statement or document indicating what decision he would make regarding health care or mental health care; and a substitute decision-maker may rely on this document in the event that the consumer is deemed incapacitated under the Health-care Decisions Act. This statement or document may be incorporated into another document, such as a durable power of attorney designation.⁸¹

⁷⁹ For more information about Social Security's Representative Payee Program, see <http://www.ssa.gov/payee/>.

⁸⁰ See D.C. Code § 21-2046.

⁸¹ See D.C. Code § 7-622; § 21-2205; D.C. Mun. Regs. tit. 22A § 105.

Supported Decision-Making

Supported decision-making is based on the presumption that all individuals have the capacity to engage in decision making, even if they need support to do so. This principle is a major departure from the traditional guardianship model, in which a guardian has the authority to substitute decision-making for the individual under guardianship. In a supported decision-making paradigm, the ultimate decision-making authority remains with the individual. Various support networks provide assistance in making personal, financial, and legal decisions. Networks include peer support, community support and services, family and friends, and legally appointed representatives.⁸²

While most individuals informally create their own supported decision-making networks, to be a viable alternative to court-appointed guardianship, the decisions an individual makes within the supported decision-making framework must be binding on third parties.⁸³

Other countries have developed institutional models of supported decision-making, both in judicially appointed “legal mentors,” and privately reached “representation agreements.” A legal mentor serves as the individual’s agent, with the individual’s consent, in a relationship that is largely

⁸² Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 No. 2 Hum. Rts. Brief at 10 (Winter 2012).

⁸³ Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. Colo. L Rev. 157, 180 (2010).

analogous to a power of attorney. Typically the mentor is appointed in a simple court procedure with the individual's consent.⁸⁴ In a private representation agreement model an individual who might not be able to demonstrate that she has "legal capacity" in the traditional sense may enter into an agreement with an individual or support network to provide legally binding decision-making assistance.⁸⁵

As discussed in Appendix II, supported decision-making is gaining attention and support on an international scale, lauded as a departure from overly restrictive guardianship systems and a major step toward supporting autonomy for individuals with disabilities. "Supported decision-making and its recognition of universal (or near universal) capacity helps correct for the frequent underestimation of the abilities of persons with intellectual, psychosocial or other conditions affecting mental functioning. Accordingly, supported decision-making enables each individual to realize his or her fullest capabilities."⁸⁶

⁸⁴ The legal mentor acts as the individual's agent, with the consent of the individual, in an analogous legal relationship to a power of attorney. If the individual cannot demonstrate that she has legal capacity, she can enter an agreement with a support network to assist her in making or communicating legally binding decisions. *Id.*

⁸⁵ See Appendix II for a description of British Columbia's Representation Agreement Model.

⁸⁶ 81 U. Colo. L Rev. at 181.

APPENDIX II: INTERNATIONAL TRENDS IN GUARDIANSHIP: THE CONVENTION ON RIGHTS OF PEOPLE WITH DISABILITIES

The CRPD: An International Initiative in Guardianship Reform

The United States has failed to join the international trend in guardianship reform. In 2012 the United States Senate fell five votes short of ratifying the Convention on the Rights of Persons with Disabilities (CRPD), an international treaty adopted by the United Nations to promote the rights of and equality for persons with disabilities on a global scale.⁸⁷ The Senate Committee on Foreign Relations held hearings on the CRPD on November 5 and 21, 2013, and it may be considered again for ratification in the upcoming months.⁸⁸ This treaty, modeled after the Americans with Disabilities Act (ADA), provides a legislative framework to advance the principles of equality, autonomy, acceptance, and accessibility for individuals with disabilities.⁸⁹

Article 12 of the CRPD: A Movement towards Supported Decision-Making.

Of particular relevance to guardianship reform, the CRPD lays the groundwork for implementing a legally recognized supported decision-making model.⁹⁰ The Article articulates the key principle underlying the premise of

⁸⁷ U.S. International Council on Disabilities, *What is The Convention on The Rights of Persons with Disabilities?*, available at <http://www.usicd.org/index.cfm/crpd>. See also Editorial, *How to do Right by the Disabled*, N.Y. Times, Nov. 24, 2013.

⁸⁸ Live coverage of the hearings is available on the Committee's homepage, at http://www.foreign.senate.gov/hearings/index.cfm?PageNum_rs=2.

⁸⁹ U.S. International Council on Disabilities, *What is The Convention on The Rights of Persons with Disabilities?*, available at <http://www.usicd.org/index.cfm/crpd>.

⁹⁰ Michael L. Perlin, "Striking for the Guardians and Protectors of the Mind": *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 Penn. St. L. Rev. 1159, 1176-1177 (2013); Robert D. Dinerstein, *Implementing Legal Capacity Under*

supported decision-making: “Persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”⁹¹ Under the CRPD, it is the responsibility of State Parties to ensure that individuals with disabilities can fully enjoy their rights to equal legal capacity.⁹² The CRPD has revolutionized the legal status of people with disabilities, transforming them from legal subjects to legal actors with full capacity.⁹³

Benefits of U.S. Ratification of the CRPD

By requiring compliance with Article 12, ratification of the CRPD could encourage implementation of a supported decision making system.⁹⁴ In fact, the CRPD has already influenced at least one state court in its decision to terminate a guardianship because a supported decision-making system was in place: “While the CRPD does not directly affect New York’s guardianship laws, international adoption of a guarantee of legal capacity for all persons, a guarantee that includes and embraces supported decision-making, is entitled to ‘persuasive weight in interpreting our own laws...’”⁹⁵ A nation that ratifies

Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making, 19 No. 2 Hum. Rts. Brief at 9.

⁹¹ CRPD, Art. 12, paragraphs 2 and 3, available at <http://www.usicd.org/index.cfm/convention#article12>; Leslie Salzman, *Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?*, 4 St. Louis U.J. Health and Law Pol’y 279, 285 (2011).

⁹² CRPD, Art. 12 at 3, available at <http://www.usicd.org/index.cfm/convention#article12>.

⁹³ Marcia Boundy and Bob Fleischner, *Supported Decision Making Instead of Guardianship: An International Overview*, Training & Advocacy Support Center, April 2013 at 2, available at http://www.nlrc.aoa.gov/NLRC/site_utilities/Search_Result.aspx?cx=012624277387271114612:yeq_dwrqloy&cof=FORID:11&q=supported%20decisionmaking.

⁹⁴ Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the Un Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 No. 2 Hum. Rts. Brief at 8-9.

⁹⁵ In the Matter of the Guardianship of Dameris L., 956 N.Y.S.2d 848, 855 (N.Y. Sur. Ct. 2012).

the CRPD, known as a State Party, is required to adopt appropriate legislative, administrative, and other measures necessary for implementation of the rights in the Convention.⁹⁶ Thus, a State Party's continuation of plenary guardianships, without any provisions for access to decision-making support systems, would violate the CRPD.⁹⁷

Currently, the CRPD has been signed by 154 countries and ratified by 126.⁹⁸ As noted above, in December of 2012 the Treaty fell five votes short of ratification in the U.S. Senate.⁹⁹

Learning from other Countries: Canada¹⁰⁰

Canada has been a leader in implementing supported decision-making even prior to the CRPD.¹⁰¹ In 1996, the British Columbia Representation Agreement Act was enacted, implementing a method of representation agreements.¹⁰² These agreements set up a supportive relationship between the individual and a legally authorized adult, in which the individual receives assistance in making personal care, health care, and/or financial management

⁹⁶ CRPD, Art. 4(1)(a), (b).

⁹⁷ *Id.*

⁹⁸ European Union Agency for Fundamental Rights, *Has Your Country Ratified the CRPD?*, <http://fra.europa.eu/en/node/4424>.

⁹⁹ *Id.*

¹⁰⁰ Additional countries moving towards supported decision-making include: Sweden, Australia, Germany, Norway, Scotland, and Ireland. For an overview of practices in these countries, see, Supported Decision Making Instead of Guardianship: An International Overview, Marcia Boundy and Bob Fleischner, *Supported Decision Making Instead of Guardianship: An International Overview*, Training & Advocacy Support Center, April 2013 at 7-9 available at http://www.nlrc.aoa.gov/NLRC/site_utilities/Search_Result.aspx?cx=012624277387271114612:yeq_dwrqloy&cof=FORID:11&q=supported%20decisionmaking.

¹⁰¹ *Id.* at 6.

¹⁰² Representation Agreement Act, R.S.B.C., Ch. 405 (1996).

decisions.¹⁰³ The Act enforces a presumption of capability for every individual, until the contrary is proven.¹⁰⁴

¹⁰³ *Id.* at Part I(1).

¹⁰⁴ *Id.* at Part I(3).

APPENDIX III: PROPOSED PETITION FORM

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
PROBATE DIVISION**

_____ INT _____
_____ IDD _____

In re

Person Alleged to be Incapacitated

PETITION FOR LIMITED GUARDIANSHIP OR GUARDIANSHIP

1. Petitioner

a. Name:

Address:

Relationship to subject/Interest in this matter:

Individual alleged to be incapacitated

b. Name:

c. Age:

d. Address:

e. Telephone:

f. If the petition is granted and the individual cannot remain in his or her current abode, the Individual will be moved to (specify address and nature of living arrangement):

_____ Speci

fic reasons why the Individual is incapacitated (i.e., the diagnoses):

-
-
- g. Alleged incapacity:
 does does not arise from an intellectual disability
- h. A comprehensive evaluation or habilitation plan:
 does does not exist

2. Petitioner seeks _____ (limited or general) appointment of a _____ (indicate here if Petitioner seeks successor guardian) guardian of an allegedly incapacitated individual.

- a. General
 intellectual disability
 other

Reasons why limited guardianship is not appropriate:

- b. Limited
 intellectual disability
 other

Powers to be granted to the limited guardian:

3. Based upon an assessment conducted by _____(name of assessor) on _____(date of assessment) which reflects the current level of functioning of _____(respondent), it has been determined that _____(respondent), lacks decision-making ability in one or more of the following areas indicated:

Area:

Describe specific assistance needed:

health care

financial matters

residence

association

other

4. Indicate which of the following less restrictive alternatives to guardianship have been explored and deemed inappropriate as indicated:

Durable Power of Attorney for Health Care Representative Payee

Living Will Money Management

Power of Attorney Trusts

Government Benefit and Social Service Programs Housing Options

Joint Property Arrangements Other

Please describe the basis for the determination that the alternative will not meet the needs of the respondent for each alternative explored and deemed inappropriate:

5. Nominated guardian if not Petitioner:

a. Name:

b. Address:

Reasons selected:

Person nominated by the Individual to be guardian, if known to
Petitioner:

c. Name:

d. Address:

Reasons selected:

asons selected:

6. Persons to whom notice will be sent pursuant to D.C. Code §§ 21-2042 and 21-2402.08 and SCR-PD 325, including name, address, and telephone number:

a. Spouse (if none, an adult with whom the respondent resided for more than six months before the filing of this petition):

Name:

Address:

Phone:

b. Adult children (if none, parents. If none, at least one of the nearest adult relatives of the subject):

Name:

Address:

Phone:

Name:

Address:

Phone:

- c. Any person responsible for care or custody of the subject:

Name:

Address:

Phone:

- d. Counsel to the subject:

Name:

Address:

Phone:

- e. Attorney in fact nominated in durable power of attorney as guardian and/or conservator and any previously appointed guardian and/or conservator and the custodian of the subject:

Name:

Address:

Phone:

- f. All persons entitled to notice if this petition had been filed in the subject's home state:

Name:

Address:

Phone:

Signature of Petitioner

Telephone number

VERIFICATION

I, _____, being first duly sworn, on oath, depose and say that I have read the foregoing pleadings by me subscribed and that the facts therein stated are true to the best of my knowledge, information, and belief.

Signature of Petitioner

Subscribed and sworn to before me this _____ day of _____, 20____.

Notary Public/Deputy

CERTIFICATE OF SERVICE

I hereby certify that within three (3) days of the filing of the foregoing petition, a copy was served by first class mail, postage prepaid, on the following parties. (List each person by name and complete address. Attach an additional sheet of paper if necessary. An example is given.)

Jane Doe
Department of Human Services
2341 City Street, NW
Washington, DC 20000

| | |
|--|--|
| | |
| | |
| | |

Signature

Signature of Attorney

Typed Name of Attorney

Address (Actual address/not Post Office Box)

Telephone number

Unified Bar number

E-mail address (optional)

APPENDIX IV: PROPOSED NOTICE FORM

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
PROBATE DIVISION**

**NOTICE OF INITIAL HEARING PURSUANT TO SUPERIOR COURT, PROBATE
DIVISION RULE 325(B)
(to subject of proceeding only)**

To:

Address:

_____ (Name of Petitioner) has asked the Court to appoint a guardian to **make some or all of the decisions in your life.**
_____ (Name of Petitioner) wrote a petition to explain its reasons to the Court. There is a copy of the petition attached to this notice.

There is a hearing on _____, 20____ at _____ o'clock ____ m. in court room ____ in Superior Court of the District of Columbia. The Court house is on 515 5th Street, N.W., Washington, D.C. 20001.

If you do not have a lawyer, you will get one to represent you in court.

At the hearing, a guardian may be appointed to make decisions for you and/or a conservator may be appointed to handle your finances. **This may affect your right to own property, make contracts, manage and control your property, give informed consent for medical treatment, and/or decide where you will live.**

Petitioner/attorney

Address (actual address/not Post Office Box)

Telephone number

NOTE: Pursuant to Superior Court, Probate Division Rules 325(a) and 311(c)(3), this notice must be personally delivered at least 14 days before the date set for the hearing.

Copies to: Parties to the above-captioned case and persons granted permission to participate pursuant to Superior Court, Probate Division Rule 303 and persons who requested notice, pursuant to Superior Court, Probate Division Rule 304.

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
PROBATE DIVISION**

_____ INT _____
_____ IDD _____

In re:

An adult

AT THE HEARING YOU HAVE THESE RIGHTS:

1. To have a lawyer.
2. To be present at the hearing.
3. Before a guardian can be appointed, the judge has to find that there is "clear and convincing evidence" that you are incapacitated. Incapacitated means you cannot make some or all decisions.
4. To present evidence on your own behalf.
5. To cross-examine witnesses who testify against you and to cross-examine any examiner and visitor (people who evaluate and interview you).
6. To let anyone watch the hearing, or have it closed to the public.
7. The judge has to appoint someone to examine your mental health status, unless a report has already been given to the judge.

GENERAL RIGHTS

1. The following people have to be given notice of this hearing, unless they say they do not need notice:
 - A. You and, if you have one, your spouse. If you do not have a spouse, your adult children. If you do not have children, your parents. If you do not have parents, at least one of your nearest relatives.
 - B. Anyone who is already your guardian or conservator.
 - C. Your lawyer.
 - D. Anyone entitled to notice if this petition has been filed in your home state.
 - E. Anyone the Court says should have notice.

2. You cannot waive notice, which means you cannot refuse this notice.