



DISABILITY LAW CENTER

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April 8, 2018

The Honorable Matt Claman, Chair
House Judiciary Committee
Alaska State Legislature, Room 118
Juneau, Alaska 99801

RE: Letter of Support for HB 336 - An Act relating to supported decision-making agreements to provide for decision-making assistance.

Dear Representative Claman:

The Disability Law Center of Alaska thanks the House Judiciary Committee for considering HB 336, and through this letter lends support for this important legislation.

"An individual's right to make decisions about his or her life is a fundamental value in American law."¹ However, many individuals with intellectual or cognitive disabilities have been stripped of this fundamental right. Exercising its *parens patriae* authority, the State appoints a guardian for these individuals. When considering the impact of the appointment of a guardian on the life of an individual with a disability, U.S. Representative Claude Pepper observed:

The typical ward has fewer rights than the typical convicted felon—they no longer receive money or pay their bills. They cannot marry or divorce. By appointing a guardian, the court entrusts to someone else the power to choose where they live, what medical treatment they will get and, in rare cases, when they will die. 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.²

¹ The American Bar Association, Resolution 113 (2017).

RESOLVED, That the American Bar Association urges state, territorial, and tribal legislatures to amend their guardianship statutes to require that supported decision-making be identified and fully considered as a less restrictive alternative before guardianship is imposed; and urges courts to consider supported decision making as a less restrictive alternative to guardianship; and

FURTHER RESOLVED, That the American Bar Association urges state, territorial, and tribal legislatures to amend their guardianship statutes to require that decision-making supports that would meet the individual's needs be identified and fully considered in proceedings for termination of guardianship and restoration of rights; and urges all courts to consider available decision-making supports that would meet the individual's needs as grounds for termination of a guardianship and restoration of rights.

² Abuses in Guardianship of the Elderly and Infirm: A National Disgrace, H.R.641, Subcommittee on Health and Long-Term Care, House Special Committee on Aging, 100th Cong., 1st Sess. (Sept. 25, 1987) (Comm. Pub. 100-641).

Guardianship is a significant deprivation of individual rights and therefore should only be used as a last resort. Supported decision-making is a meaningful alternative. Rather than extinguishing a fundamental right, supported decision-making recognizes an individual's 'legal capacity' — the right to make decisions and have those decisions respected. "All persons with disability have the right to develop a full human life and such development cannot happen without the opportunity to exercise capacity. To deny this opportunity to any group of persons is to perpetuate exclusion and to legitimize discrimination."³

The United Nations Convention on the Rights of Persons with Disabilities further describes this right in Article 12 -- *Equal Recognition Before the Law*:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Recognizing the legal capacity of individuals with disabilities through supported decision-making is in consonance with the integration mandate of the Americans with Disabilities Act and the U.S. Supreme Court's decision in *Olmstead v. L.C.* "[B]y limiting an individual's right to make his or her own decisions, guardianship marginalizes the individual and often imposes a form of segregation that is not only bad policy, but also violates the Act's mandate to provide services in the most integrated and least restrictive manner."⁴

Supported decision-making has been formally recognized as a less restrictive alternative by the Uniform Law Commission that revised the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act⁵ in July of 2017.

³ Office of the United Nations High Commissioner for Human Rights, Legal Capacity, 20 (n.d.).

⁴ 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 University of Colorado Law Review 157 (2010).

⁵ "The Uniform Guardianship, Conservatorship, and other Protective Arrangements Act (UGCOPAA) is a comprehensive guardianship statute for the twenty-first century. It was drafted with extensive input from experienced guardianship judges and organizations that advocate for guardianship reform. UGCOPAA promotes person-centered planning to incorporate an individual's preferences and values into a guardianship order, and requires courts to order the least-restrictive means necessary for protection of persons who are unable to fully care for themselves."

<http://www.uniformlaws.org/Act.aspx?title=Guardianship,%20Conservatorship,%20and%20Other%20Protective%20Arrangements%20Act>

[T]he Act recognizes the role of, and encourages the use of, less restrictive alternatives, including supported decision-making and single-issue court orders instead of guardianship and conservatorship. To this end, the Act provides that neither guardianship nor conservatorship is appropriate where an adult's needs can be met with technological assistance or supported decision-making.

In closing, it is important to remember during deliberations on HB 336 that legal capacity – the right to make decisions – is a fundamental human right. “Whether an individual has the cognitive ability to understand and appreciate consequences of her decisions—the traditional threshold of the common law—is simply not determinative of whether she has legal capacity. Even if she does not possess those decision-making abilities, she cannot be stripped of her legal capacity.”⁶

Alaskans have a right to maximize their autonomy and independence through the use of the supports described in HB336. The Disability Law Center of Alaska fully supports HB 336 as it is consistent with the legislative, judicial and scholarly authorities cited herein.

Sincerely,

DISABILITY LAW CENTER OF ALASKA



David C. Fleurant
Executive Director

The Disability Law Center of Alaska is an independent, non-profit law firm and is the designated Protection & Advocacy system for the State of Alaska. Our mission is to vigorously enforce and advance the rights and interests of people with disabilities.

⁶ Rebekah Diller, *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 Fordham Urb. L.J. 495 (2016). Available at: <https://ir.lawnet.fordham.edu/ulj/vol43/iss3/2>