

NOTE: PROBATE LAW--A NEW GUARDIAN ANGLE: A PROPOSED CHANGE TO ARKANSAS'S PUBLIC POLICY ON GUARDIANSHIP FOR INDIVIDUALS WITH INTELLECTUAL DISABILITIES

Winter, 2020

Reporter

42 U. Ark. Little Rock L. Rev. 279 *

Length: 47843 words

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Text

[*279] I. INTRODUCTION

Consider a young man eagerly awaiting his eighteenth birthday so he can vote--a traditional American rite of passage.¹ What characteristics or conditions might prevent his participation in this general right? If he is diagnosed with an intellectual disability, would he be considered inherently incapable of meaningful participation in politics? What if he needed help managing his finances?² What if his family helped him make important decisions? Would it matter if a court authorized his parents to make decisions for him? Would a court grant such authority if the person was capable of voting?³

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Dave Hawkins, *Court Grants 25 Year Old Right to Vote*, 17 THE NAVIGATOR 1, 1 (Aug. 11, 2012), <http://pilotparents.org/wp-content/uploads/2015/01/Navigator-Fall-2012.pdf>.

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Deanna Pan, *Protecting the Voting Rights of People with Mental Disabilities*, MOTHER JONES (Nov. 5, 2012), <https://www.motherjones.com/politics/2012/11/voting-rights-mental-disabilities/>.

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See Bazelon Ctr. for Mental Health Law, Autistic Self-Advocacy Network, Nat'l Disability Rights Network, & Schulte, Roth & Zabel LLP, *Vote. It's Your Right: A Guide to the Voting Rights of People with Mental Disabilities*, 28-52 (2016),

For one young man, along with countless others, his right to vote was automatically revoked when a court appointed his parents as his legal guardians based on a mental incapacity.⁴ Though disappointed, he used the democratic process to change his state's law so that he, and others similarly situated, could petition a court to retain--or regain--the right to vote, regardless of guardianship needs.⁵ He recruited others to support his cause and successfully lobbied for the change in his state.⁶ The system that excluded his direct participation was permanently changed because of his efforts.⁷ His story is about progress, but it also raises significant questions about guardianships⁸ [*280] for people with intellectual disabilities.⁹ This man's story reveals a struggle for

<http://www.bazelon.org/wp-content/uploads/2017/01/voting-rights-guide-2016.pdf> (hereinafter Bazelon Ctr. for Mental Health Law) (outlining and comparing the right to vote for people with mental disabilities by state).

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Pan, *supra* note 2.

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Hawkins, *supra* note 1.

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Id.

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Id.

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In this note "guardian" or "guardianship" describes the court-appointed person or relationship granting authority to advocate for and make decisions on behalf of an assigned ward. A guardian is a person appointed by a court "to have the care and custody of the person or of the estate, or both, of an incapacitated person." [ARK. CODE ANN. § 28-65-101\(3\)](#) (Supp. 2017).

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An "incapacitated person" includes persons with disabilities affecting decisionmaking skills. *Id.* [§ 28-65-101\(5\)\(A\)](#). For the purposes of this note, various phrasing may be used synonymously with "individuals with intellectual disabilities" such as "individuals with developmental disabilities" or "people with disabilities." Some language may have implications beyond the scope of this analysis. Unless otherwise noted, all references to "disabilities" should be considered within a broad range of abilities and without regard to specific diagnoses.

independence.¹⁰ Individuals with intellectual disabilities experience unique challenges to their rights, often to rights unconsciously assumed by others.¹¹

Guardianship is the most restrictive form of advocacy for individuals with intellectual disabilities.¹² The implications of a guardianship are harsh and unforgiving.¹³ People with intellectual disabilities face exceptional challenges in areas of self-determination, competency, presumption of a permanent need for guardianship, and limited acceptance of alternatives to traditional guardianships.¹⁴ Policies among states are inconsistent, but typically impose broad limitations on the rights of persons subjected to a guardianship.¹⁵ Alternatives to guardianship, such as supported decision-making, are becoming more accepted.¹⁶

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See generally Pan, *supra* note 2 (noting the unique challenges to voting experienced by people with disabilities).

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Lila H. Swann, *Changing Times--Changing Minds: The Importance of Fighting for Higher Constitutional Protection for People with Intellectual Disabilities*, 12 CHARLESTON L. REV. 295, 316 (2018).

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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, 168-70 \(2010\)](#).

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See NAT'L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION, 1, 36-37 (March 22, 2018), https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf.

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Id. at 36-37. See generally STACY CLIFFORD SIMPLICAN, *THE CAPACITY CONTRACT: INTELLECTUAL DISABILITY AND THE QUESTION OF CITIZENSHIP* (U. of Minn. Press 2015), for an in-depth discussion on the historical presumptions of incapacity for people with disabilities and the continued struggle for recognition even among self-proclaimed advocates for people with disabilities.

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Sally Balch Hurme, *Current Trends in Guardianship Reform*, [7 MD. J. CONTEMP. LEGAL ISSUES 143, 144-45 \(1995-1996\)](#); see also Bazelon Center for Mental Health Law, *supra* note 3, at 28-52 (outlining and comparing the right to vote in different states).

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This note considers Arkansas's current guardianship policy and proposes changes inspired by developments in civil rights and successful reforms.¹⁷ Part II examines historical developments that shaped today's guardianship [*281] policies.¹⁸ Part III explores a recent trend toward a universal recognition of capacity.¹⁹ Part IV proposes changes to Arkansas's existing policies and legislation.²⁰ This note concludes with the assertion that Arkansas should join other states in promoting self-reliance and independence for people with varying support needs.²¹ The proposed changes emphasize a new perspective for advocates and would guide judicial processes to prevent unnecessary guardianships.

II. THE ORIGINS AND EVOLUTION OF TRADITIONAL GUARDIANSHIPS

Since its inception under English common law and its adoption in the United States, guardianships for people with intellectual disabilities have been the subject of significant reformation and debate.²² Society has

Robert Dinerstein et al., *Emerging International Trends and Practice in Guardianship Law for People with Disabilities*, [22 ILSA J. INT'L & COMP. L. 435, 437-42 \(2016\)](#).

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See discussion *infra* Parts II, IV.

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See discussion *infra* Part II.

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See discussion *infra* Part III. See generally Leslie Salzman, *Using Domestic Law to Move Toward a Recognition of Universal Legal Capacity for Persons with Disabilities*, [39 CARDOZO L. REV. 521, 532-41 \(2017\)](#) (reviewing political progress for people with intellectual disabilities and considering areas in need of more reform).

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See discussion *infra* Part IV.

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See NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 135-37 (listing less restrictive supports for people with intellectual disabilities); see also discussion *infra* Part IV.

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viewed guardianships for people with disabilities as benevolent, though skepticism emerges from time to time.²³ Fundamental principles that formed traditional guardianships, like protectionism and the "best interest" standard, still influence guardianships today.²⁴ As society develops and experiments with different forms of advocacy, less restrictive alternatives to guardianship have become more practical.²⁵

A. Historical Developments of Guardianship Policies

Modern guardianship policies originated under the English common law doctrine of *parens patriae*, which considered the government a protector for the vulnerable.²⁶ This paternalistic system was originally a public service for orphans and disabled persons.²⁷ This English concept influenced early [*282] guardianship law in the United States.²⁸ Principles like *parens patriae* are still reflected in public service programs where the government "protects"

Nicole M. Arsenault, *Start with a Presumption She Doesn't Want to Be Dead: Fatal Flaws in Guardianships of Individuals with Intellectual Disability*, [35 LAW & INEQ. 23, 26-33 \(2017\)](#).

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NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 20.

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Id. at 53-64 .

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See generally *id.* at 64 (reviewing reforms in guardianship and a shift away from surrogate decision-making as alternatives gain popularity).

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John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 WM. & MARY L. REV. 569, 575 (1972).

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Arsenault, *supra* note 22, at 26-27.

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Hal Fliegelman & Debora C. Fliegelman, *Giving Guardians the Power to Do Medicaid Planning*, [32 WAKE FOREST L. REV. 341, 344 \(1997\)](#).

vulnerable people.²⁹ The state may still directly fill the role of guardian through a governmental agency, often referred to as a public guardian.³⁰

Until recently, guardianships were always established as plenary with few limits on the powers granted.³¹ Additional forms of guardianships, like partial and limited guardianships, were developed to continue to provide support to the person but with fewer restrictions on individual rights.³² Limited guardianships gained popularity for people with intellectual disabilities; this type of guardianship purports to limit the scope of a guardian's authority by withholding all powers not explicitly granted in the court order.³³ A limited guardianship acknowledges that capacity may be specific to certain circumstances.³⁴ A limited guardianship should specifically state any authority that is granted to the guardian; powers that are not assigned to the guardian are retained by the ward.³⁵ Today, many states have a statutory preference for the use of limited, rather than plenary, guardianships.³⁶

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See Arsenault, *supra* note 22, at 27.

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Windsor C. Schmidt, *Guardianship for Vulnerable Adults in North Dakota: Recommendations Regarding unmet Needs, Statutory Efficacy, and Cost Effectiveness*, [89 N.D. L. REV. 77, 80 \(2013\)](#); see also [ARK. CODE ANN. § 28-65-702](#) (Supp. 2017) (Arkansas's statutory guidelines for public guardianship).

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Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, [31 STETSON L. REV. 735, 739 \(2002\)](#).

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Id. at 747 .

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Id. at 748-49 .

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Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, [38 MCGEORGE L. REV. 931, 947 \(2007\)](#).

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See *generally* Salzman, *supra* note 12, at 179 (considering the use of a limited guardianship to authorize at home care or housekeeping services for a woman in need of assistance).

When done correctly, limited guardianships are more burdensome for courts and petitioners.³⁷ An effective limited guardianship narrowly describes the extent of the guardianship order.³⁸ This individualization protects personal autonomy based on the person's actual abilities and needs.³⁹ Unfortunately, courts tend to err on the side of caution.⁴⁰ A court may wish to prevent future expenses incurred by parties to expand the guardian's powers or the court may view additional grants of authority as greater protection for an [*283] alleged incapacitated person.⁴¹ On the other hand, the alleged incapacitated person may have been absent from the proceedings or may not have presented opposing evidence.⁴² In practice, limited guardianships tend to bestow a broad range of powers, which contradicts its intended purpose.⁴³ When limited guardianships have the same provisions regardless of individual needs, rights are unnecessarily affected, often in the name of efficiency.⁴⁴

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NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 35-36; Salzman, *supra* note 12, at 177-78.

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Frolik, *supra* note 31, at 749.

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Id. at 748-49 .

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Id. at 748-50 .

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Salzman, *supra* note 12, at 174-75.

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Id.

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Id.; Frolik, *supra* note 31, at 743-44 (considering possible reasons why courts grant broad powers to guardians).

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NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 104.

B. Reforms Paved the Way for a Greater Change in Advocacy and Civil Rights for Individuals with Intellectual and Developmental Disabilities

Questions about the rights of people with disabilities became more prevalent as society's perception of equality became more inclusive.⁴⁵ Public attention, particularly negative attention, spurred the evolution of public policy and laid the foundation for increased political power for people with developmental disabilities.⁴⁶

1. Public Criticism Sparked Initial Guardianship Reformation

Guardianships, limited or otherwise, received criticism for implications to the constitutional rights of those subjected to them.⁴⁷ Though theoretically meant to protect, guardianships, at best, expose a person to the will of another and, at worst, revoke all vestiges of personhood.⁴⁸ Even when guardians act in good faith, their decisions leave a ward powerless and subject to the will of another person.⁴⁹ Jenny Hatch, a woman with Down's Syndrome, described her experience with guardianship as feeling unhappy, ignored, and having her rights taken away.⁵⁰

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See *id.* at 104-05 (discussing overly broad guardianship orders); see Frolik, *supra* note 31, at 749 (discussing the persistence of broad guardianship orders).

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See NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 55-64.

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Id.

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Id.

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See *id.* at 70-71 (briefly discussing exploitation and abuse by guardians); *id.* at 101-02 (calling guardianship a "double-edged sword" that seeks to protect but at the cost of fundamental rights). See also Salzman, *supra* note 12, at 168-70 (describing the isolating results of a guardianship that discourages engagement in a range of normal interactions a person encounters on a daily basis).

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Salzman, *supra* note 12, at 168-70.

Before being placed under the authority of a guardian, Jenny lived in the community and had a roommate; she was active [*284] in her church and had a job working at a local thrift shop.⁵¹ After a guardianship was established, she was removed from her home, friends, and community.⁵² She was placed in a group home and was denied meaningful participation in decisions about her own life.⁵³ Jenny's story is just one example of the drastic consequences of broad guardianship powers.

Guardianships have significant, long-term implications on individual rights.⁵⁴ A person who is subjected to a guardianship loses the right to make decisions and becomes detached from the decision-making process.⁵⁵ More troubling, a deficit in one area of life can lead to a guardianship that affects all areas.⁵⁶ A guardianship assigns many decisions about daily life to another person like housing, education, work opportunities, association with others, travel, medical treatments, and financial decisions.⁵⁷ Though limited guardianships have been widely

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Jenny Hatch, *Jenny in Her Own Words*, THE JENNY HATCH JUST. PROJECT, http://jennyhatchjusticeproject.org/jennys_words (last visited Mar. 10, 2019).

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Sean Burke, *Person-Centered Guardianship: How the Rise of Supported Decision-Making and Person-Centered Services Can Help Olmstead 's Promise Get Here Faster*, 42 WM. MITCHELL L. REV. 873, 875-76 (2016); *id.* at 886 .

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Id. at 875-76 .

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Hatch, *supra* note 50.

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See NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 36-37 (noting that guardianship rarely ends because the individual's rights are restored or reevaluated).

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Salzman, *supra* note 12, at 167-68.

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See *id.* at 158-60 (discussing a case that warranted legal intervention, in the best interest of the person, based on an inability to adequately clean, which presented a health and safety risk).

accepted and aim to preserve individual rights, their practical use does not hold up against the broad claims of promoting independence and, as a result, are inexplicably similar to a traditional plenary guardianship.⁵⁸

Though no special scrutiny is required under an equal protection analysis,⁵⁹ guardianship involves questions about due process and constitutional rights, which are afforded generous protection from arbitrary infringement.⁶⁰ [*285] Guardianship was criticized following a series of exposés detailing the denials of due process during guardianship proceedings.⁶¹ According to the article, many alleged incapacitated persons did not even attend the guardianship hearing.⁶² Congress attempted to restructure statutory guidelines to correct this blatant disregard of constitutional rights but, ultimately, the revisions minimally addressed the underlying problems of the systematic prejudices experienced by people with intellectual disabilities.⁶³ It can be difficult to confidently

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See *id.* at 167-68 (listing some, but certainly not all, of the decisions assigned to a guardian that affect a ward's daily life and noting the expansive powers a guardian holds); NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 27-30 (listing some of the rights affected by a guardianship order).

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Salzman, *supra* note 12, at 174-76 (discussing the tendency of courts to grant broad guardianship orders).

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See Swann, *supra* note 11, at 304-12 (discussing the Court's holding in [City of Cleburne v. Cleburne Living Ctr. Inc.](#), 473 U.S. 432 (1985), and the use of the rational basis standard of review for an equal protection analysis for people with intellectual disabilities and the determination that people with intellectual disabilities are not members of a suspect class, which would require a heightened scrutiny).

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See generally Salzman, *supra* note 12, at 160-70 (discussing the impact of guardianships on a ward's civil rights); Samantha Alexandra Crane, *Is Guardianship Reform Enough-Next Steps in Policy Reforms to Promote Self-Determination Among People with Disabilities*, 8 J. INT'L AGING L. & POL'Y 177, 184-86 (2015) (expanding on the civil rights implications and giving examples of constitutionally protected rights being infringed upon by guardianships).

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See NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 54-55; Fred Bayles & Scott McCartney, *Guardians of the Elderly: An Ailing System Part I: Declared 'Legally Dead' by a Troubled System*, ASSOCIATED PRESS (Sept. 19, 1987), <http://www.apnewsarchive.com/1987/Guardians-of-the-Elderly-An-Ailing-System-Part-I-Declared-Legally-Dead-by-a-Troubled-System/id-1198f64bb05d9c1ec690035983c02f9f> (critiquing the general process of obtaining guardianship).

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Bayles, *supra* note 61.

differentiate between a need for guardianship and the need for a less restrictive option, particularly concerning the viability and longevity of an alternative.⁶⁴ This gray area is especially problematic for individuals with developmental or intellectual disabilities.⁶⁵

2. *Olmstead's Implications on Guardianship Reformation*

In *Olmstead v. L.C. by Zimring*, two women with intellectual disabilities were voluntarily admitted to a state hospital for treatment.⁶⁶ They were kept in inpatient treatment even though they could have been treated in a community setting.⁶⁷ The institutionalization was, in part, due to the lack of appropriate community-based supports available.⁶⁸ The Court found that their continued institutionalization was a form of segregation.⁶⁹ This decision became a catalyst for change in the treatment and perception of individuals with intellectual disabilities.⁷⁰

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See NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 55-57.

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Salzman, *supra* note 12, at 177-78.

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See Arsenault, *supra* note 22, at 53-54.

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[*Olmstead v. L.C. by Zimring*, 527 U.S. 581, 593 \(1999\).](#)

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Id.

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[*Id.* at 594-97.](#)

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[*Id.* at 600.](#)

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See Salzman, *supra* note 12, at 192.

Concepts in *Olmstead* have been applied to guardianship standards and to assumptions about capacity.⁷¹ The Court in *Olmstead* considered the effects of segregation, like the persistence of stereotypes and the denial of basic social interactions.⁷² Similarly, guardianships deprive individuals from [*286] meaningful participation in their own lives.⁷³ Based on these social implications, some advocates expand the integration mandate beyond community services to include the decision-making process.⁷⁴ These advocates reason that if guardianship results in isolation, then guardianship is a form of segregation;⁷⁵ if guardianship is a form of social segregation, then guardianship contradicts the integration mandate.⁷⁶

3. Mental Health Implications of Guardianship and Motivations for Reform in Advocacy

Guardianship is a legal and social label indicating that a person is "incapable or unworthy of participation in civic and social activities."⁷⁷ When a guardian has the ultimate authority to make decisions, the person served is

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Id. at 193-94 .

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Leslie Salzman, *New Perspectives on Guardianship and Mental Illness: Guardianship for Persons with Mental Illness-A Legal and Appropriate Alternative?*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 279, 283-84 (2011).

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Id.

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NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 119.

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See Salzman, *supra* note 72, at 283; Crane, *supra* note 60, at 184-87.

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See generally Salzman, *supra* note 12, at 193-95 (expanding the integration mandate to guardianship); Salzman, *supra* note 72, at 283 (considering the similar effects of institutionalization and guardianship).

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unlikely to be encouraged to participate in the decision-making process--or worse, removed from the process entirely, creating an isolating and segregating effect.⁷⁸ Although limited guardianships have become widely accepted, in reality, one person is still granted legal authority to make a broad range of decisions for another person.⁷⁹

Because guardianships remove the person from the decision-making process, the person affected is unlikely to provide input and, based on assumptions of incapacity, any input is likely to be minimized.⁸⁰ When subjected to guardianship, a person may experience what has been referred to as "constructive isolation."⁸¹ This isolation occurs when a perceived incapacity affects a person's communications and social involvement.⁸² Opportunities **[*287]** to practice decision-making skills are imperative to the development of independence and self-reliance.⁸³ Research indicates that practicing autonomy and self-determination, even on a limited basis, can

Salzman, *supra* note 19, at 527.

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Salzman, *supra* note 12, at 168-70 (illustrating disengagement in different areas of life based on perceived incapacity). See generally Burke, *supra* note 51, at 875-76 (discussing the social impacts on persons subjected to guardianships).

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Salzman, *supra* note 12, at 169-70.

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See Burke, *supra* note 51, at 886-88 (citing Elspeth Slayter Recevik, *Twinkies for Breakfast: Implementing the Dignity of Risk for Adults with Intellectual Disability*, DISABILITYINFO.ORG (Feb. 12, 2014), <http://blog.disabilityinfo.org/?p=3928>) (considering an example of the tension between a well-meaning decision-maker and the person served when the parties disagree); Salzman, *supra* note 12, at 168-170 (describing the isolation that results from a guardianship).

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Salzman, *supra* note 12, at 167-70.

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Id. See also Crane, *supra* note 60, at 192-93; Dorothy Squatrito Millar, *Guardianship Alternatives: Their Use Affirms Self-Determination of Individuals with Intellectual Disabilities*, 48(3) EDUC. AND TRAINING IN AUTISM AND DEVELOPMENTAL DISABILITIES 291, 292 (2013) (discussing how a guardianship affects self-determination).

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Diane M. Browder et al., *Using a Person-Centered Approach in Community-Based Instruction for Adults with Developmental Disabilities*, 7.3 J. OF BEHAV. EDUC. 519, 521-22 (1997). See also Nina Kohn, *Supported Decision-Making: A*

cultivate decisionmaking skills and greatly impact self-confidence.⁸⁴ As a safeguard against these negative effects, a person's rights should only be restricted to the extent absolutely necessary.⁸⁵

C. Even Guardianship, as the Most Restrictive Option with Significant Impacts on Fundamental Rights, Has Gaps in Protection That Create Vulnerabilities to Abuse and Exploitation

Even with a court-appointed protector, people with disabilities are still vulnerable to exploitation and abuse. States have inconsistent expectations and policies for managing appointed guardians.⁸⁶ Despite the substantial impact on the person deemed vulnerable and incapable, guardianship has surprisingly little oversight and minimal accountability.⁸⁷

[*288] 1. *Guardianship Intends to Protect, but Has Substantial Gaps in Its Protection*

Viable Alternative to Guardianship, 117 *PENN ST. L. REV.* 1111, 1114-15, 1138-39 (2013)(discussing the impact of decreased opportunities to take part in decision-making and discussing negative impacts of surrogate decision-making); Millar, *supra* note 82, at 292 (describing a guardianship's impact on an individual's self-determination).

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Eniola Salami, *More than Meets the Eye: Relational Autonomy and Decision-Making by Adults with Developmental Disabilities*, 32 *WINDSOR Y.B. ACCESS JUST.* 91, 95-96 (2015). See also *Alternatives to Guardianship*, THE ARC OF TEXAS (2016) https://www.thearcoftexas.org/wp-content/uploads/2016/06/Alternatives_to_Guardianship_for_Families_2016-06.pdf (discussing learned decision-making through practice and guidance from supporters); Kohn, *supra* note 83, at 1114-15 (discussing the impact of decreased opportunities to practice decision-making abilities, evidence of disempowerment through surrogate decision-making, and proposing that supportive decision-making would result in greater empowerment).

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See Salzman, *supra* note 12, at 193-94.

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See, e.g., *Kuelbs v. Hill*, 2010 Ark. App. 793, 797, 379 S.W.3d 716, 721 (noting that courts are not required to analyze a guardian's suitability beyond a court's satisfaction that the person is qualified based on statutory requirements).

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Many states require guardians to file reports annually, but jurisdictions vary on their reporting requirements. See generally Judge David Hardy, *Who Is Guarding the Guardians? A Localized Call for Improved Guardianship Systems and Monitoring*, 4 *NAELA J.* 1, 14-19 (2008) (critiquing the limited oversight that exists nationwide).

If the state removes a person's right to autonomy, the state has a duty to protect that person;⁸⁸ however, most jurisdictions have no training requirement for new guardians.⁸⁹ This is particularly concerning because guardianships subject a person to complete dependency on matters ranging from housing, involuntary placement, community involvement, financial decisions, medical treatment, and association with others.⁹⁰ A guardian is not mandated to promote a ward's self-reliance or independence.⁹¹

Guardians generally must submit annual reports with updates on each ward's status and whether continued guardianship services are necessary.⁹² Many states, including Arkansas, rely on self-reporting, which provides minimal accountability.⁹³ Without meaningful accountability, the people assigned the protection of a guardianship become vulnerable to abuse and exploitation.⁹⁴ Some jurisdictions have additional requirements such

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Salzman, *supra* note 19, at 545-47.

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Hardy, *supra* note 87, at 8 (referencing a series of articles in the *Los Angeles Times* that spotlighted continued problems with the guardianship system); Bayles, *supra* note 61.

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Salzman, *supra* note 12, at 167.

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See [ARK. CODE ANN. § 28-65-322](#)(Repl. 2012) (outlining the contents of the annual report to be submitted by all guardians); Salzman, *supra* note 19, at 545.

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NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 34.

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See *generally id.*(noting general annual reporting requirements for guardians in many jurisdictions); see also [ARK. CODE ANN. § 28-65-322](#) (Repl. 2012).

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Id. at 22.

as training, licensing, additional reporting standards, and enhanced court oversight.⁹⁵ Despite the purpose of guardianship, large gaps in its protection remain.⁹⁶

2. Substantial Limitations on a Person's Rights Outweigh the Purported Protections Provided by Traditional Guardianships

Guardianship has been criticized for its significant impact on legal rights.⁹⁷ To prevent unnecessary restrictions, guardianship orders should be [*289] narrowly tailored and used only after rejecting less restrictive alternatives.⁹⁸ Critics equate a guardianship to "civil death" based on the revocation of legal rights and many personal choices.⁹⁹ Guardians' decisions involve personal issues such as housing, medical treatment, psychiatric services, and association with others.¹⁰⁰ These choices involve questions of autonomy and self-determination in all areas of a person's life.¹⁰¹

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Id. at 23 .

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See Hardy, *supra* note 87, at 7 (critiquing the limited oversight of guardians).

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See 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*, **117 PENN ST. L. REV. 1159, 1174-76 (2013)**(considering the rights described in the CRDP like the right to be free from discrimination and from institutionalization); Henry G. Watkins, *The Right to Vote of Persons Under Guardianship-Limited or Otherwise*, 44 ARIZ. ATT'Y 34, 34-35 (2007) (discussing legal implications such as disenfranchisement for people subjected to a guardianship). See generally Salzman, *supra* note 12, at 183-201 (applying concepts of segregation and discrimination to the use of guardianship).

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Jennifer J. Monthie, *The Myth of Liberty and Justice for All: Guardianship in New York State*, [80 ALBANY L. REV. 947, 951 \(2016-2017\)](#).

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Perlin, *supra* note 97, at 1166-68.

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Crane, *supra* note 60, at 184-85.

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A guardian's decision-making process is often unguided and takes on different forms using a variety of standards, such as "the best interest standard" or considering the ward's wishes.¹⁰² A decision may be based on what the guardian believes the ward would choose, if the ward was able to make an informed decision.¹⁰³ This standard is difficult to apply for someone with intellectual disabilities because the perceived incapacity is not a recent development, making it difficult to know what the person would choose.¹⁰⁴

The guardian and the person's expressed opinions may create tension when they differ.¹⁰⁵ Guardians for individuals with intellectual disabilities should not be the equivalent of parents making decisions for their children, but the legal system treats them as such.¹⁰⁶ Even decisions made in the "best interest" of the person often merely substitutes the opinion of the guardian for that of the person.¹⁰⁷ Increased difficulty arises when applying a general

Burke, *supra* note 51, at 888-89 (describing the impact of guardianship on a person's self-determination and explaining the concept of the dignity of risk).

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Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, [45 U. MICH. J.L. REFORM 739, 742-43 \(2012\)](#) (noting the lack of statutory guidance for guardians). See also Hardy, *supra* note 87, at 19-21 (recommending training, guidance, and oversight for guardians).

103

See Sally Hurme & Erica Wood, *Third National Guardianship Summit: Standards of Excellence: Introduction*, [2012 UTAH L. REV. 1157, 1170 \(2012\)](#).

104

See Burke, *supra* note 51, at 879 (discussing the problems specific to making decisions for individuals with developmental disabilities); Hurme & Wood, *supra* note 103, at 1170.

105

See generally Burke, *supra* note 51, at 886-88 (applying the principles in Recevik, *supra* note 80).

106

Bayles, *supra* note 61.

107

Frolik, *supra* note 102, at 741.

standard for decision-making for individuals with a perceived incapacitation.¹⁰⁸ Standards vary drastically in application and guidance in this area and may contain conflicting directives.¹⁰⁹

[*290] 3. *General Scope and Implications of Modern Guardianships in the United States*

Guardianships today are usually set up in a limited form, rather than plenary.¹¹⁰ Guardianship hearings rarely include a jury; a single judge makes all factual and legal conclusions.¹¹¹ The court's decision is often made using a standard that emphasizes the best interest of the person.¹¹² Even limited guardianships remove the individual from the decision-making process and do little to enhance independence of the individual.¹¹³ An alternative to guardianship must be legally recognized to be viable as a form of support for people with disabilities.¹¹⁴

108

Hurme & Wood, *supra* note 103, at 1170.

109

See Frolik & Whitton, *supra* note 102, at 742-50 (considering the lack of guidance provided to guardians and the problems with the conflicting guidance that is available).

110

Frolik, *supra* note 31, at 744-46.

111

[*Id.* at 735.](#)

112

Peter G. Guthrie, Annotation, *Priority and Preference in Appointment of Conservator or Guardian for an Incompetent*, 65 A.L.R. 3d 991, § 3 (1975, updated 2018).

113

Crane, *supra* note 60, at 191. See also Salzman, *supra* note 72, at 294-96 (considering the use of limited guardianships and overly board guardianship orders).

114

See Burke, *supra* note 51, at 877-80; Crane, *supra* note 60, 188-89.

4. *Arkansas's Current Statutes on Guardianship for Individuals with Intellectual Disabilities Lack Meaningful Protection and Do Little to Promote Independence.*

Arkansas does not have separate statutory guidelines for guardianship concerning individuals with intellectual disabilities.¹¹⁵ Arkansas's guardianship policies authorize the grant of power to the extent necessary based on the alleged incapacitated person's abilities and includes language encouraging the development of self-reliance and independence.¹¹⁶ These provisions are a good start but, practically speaking, lack meaningful guidance and fall short of empowerment.¹¹⁷ Viewing guardianship as a necessary protection leads to a loss of liberty for individuals subjected to it.¹¹⁸ The National [*291] Council on Disability (NCD) recommends guidelines on the appointment of a guardian to emphasize alternatives.¹¹⁹ The guidelines proposed by the NCD include

115

See [ARK. CODE ANN. § 28-65-210](#)(Supp. 2017) (describing for whom a guardianship may be appointed and under what circumstances); NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 171 (listing states with guardianship statutes for individuals with intellectual disabilities).

116

According to Arkansas's guardianship statute:

Guardianship for an incapacitated person shall be: (1) Used only as is necessary to promote and protect the well-being of the person and his or her property; (2) Designed to encourage the development of maximum self-reliance and independence of the person; (3) Ordered only to the extent necessitated by the person's actual mental, physical, and adoptive limitations.

[ARK. CODE ANN. § 28-65-105](#) (Repl. 2012).

117

See *generally* Salzman, *supra* note 12, at 174-78 (criticizing the minimal impact of statutory reforms).

118

NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 21. See also Kohn, *supra* note 83, at 1138-39 (considering psychological impact of guardianships).

119

NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 21. See also Crane, *supra* note 60, at 203-07 (providing examples of contradicting actions leading to legal uncertainty).

"provision[s] for preventing unnecessary guardianships," which, with the help of other reforms, would greatly impact the guardianship system.¹²⁰

Though representation is not denied, an attorney ad litem is specifically noted as unnecessary for guardianship proceedings.¹²¹ An attorney ad litem would undoubtedly benefit an alleged incapacitated person by providing an impartial perspective, particularly when guardianship determinations are left to a court to exercise discretion in the person's best interest.¹²² Although a determination of incompetency must be established by clear and convincing evidence, courts have broad authority in the admission of evidence.¹²³ Arkansas requires that guardianship be implemented only if less restrictive alternatives are not feasible, but does not give guidance for making such a determination.¹²⁴ Arkansas statutes include empowering language, but could do more to ensure that the individuals affected are actually empowered.

III. A SHIFT TOWARD UNIVERSAL CAPACITY REJECTS COMMON GUARDIANSHIPS AND ITS RESTRICTIONS

120

NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 21.

121

[ARK. CODE ANN. § 28-65-207\(c\)\(3\)](#) (Repl. 2012).

122

See generally [Bogan v. Ark. First Nat'l Bank, 249 Ark. 840, 844, 462 S.W.2d 203, 204 \(1971\)](#) (discussing the best interest standard); [McCartney v. Merchants & Planters Bank, 227 Ark. 80, 82, 296 S.W.2d 407, 408 \(1956\)](#) (appointing a bank as guardian based on the best interest of the person); [Martin v. Decker, 96 Ark. App. 45, 52-53, 237 S.W.3d 502, 507 \(2006\)](#) (reaffirming the best interest of the person standard).

123

See, e.g., [ARK. CODE ANN. § 28-65-211](#) (Repl. 2012) (defining the evidence required for determinations of incapacity and allowing the court discretion in requiring the presence of the alleged incapacitated person); *id.* [§ 28-65-213](#) (outlining some possible evaluations to use). See generally [Sanders v. Omohundro, 204 Ark. 1040, 166 S.W.2d 657 \(1942\)](#) (recognizing a presumption of insanity based on present institutionalization of the alleged incapacitated person). *But see* [Autry v. Beckham 2014 Ark. App. 692, 450 S.W. 3d 247](#) (criticizing the trial court for failing to acquire professional evaluations before the guardianship hearing).

124

[ARK. CODE ANN. § 28-65-101\(6\)](#) (Supp. 2017) (defining "least restrictive alternative"); *id.* [§ 28-65-213\(c\)\(1\)](#) (requiring the court to determine the "feasibility of less restrictive alternatives to guardianship to meet the needs of the respondent.").

Problems inherent to guardianship, such as the revocation of legal and fundamental rights, sparked international disapproval and demands for meaningful reform.¹²⁵ Over the years, innovative approaches to empowerment for people with intellectual disabilities provided renewed interest in **[*292]** current protections.¹²⁶ Approaches have been adapted to fit different models and systems in an international push toward independence.¹²⁷ These reformation efforts have been motivated by fundamental principles of empowerment and autonomy.¹²⁸

A. Popular Approaches to Supplement or Replace Traditional Guardianship for Individuals with Intellectual and Developmental Disabilities

Reformation momentum accelerated with society's changing views on civil rights for people with intellectual disabilities.¹²⁹ Society's increasing recognition of certain rights for people with disabilities demands a critical examination of current policies for guardianship.¹³⁰ These changing views inspired new alternatives to guardianships that promote independence.¹³¹ Some alternatives can promote self-determination while retaining

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Salzman, *supra* note 12, at 166-74.

126

See Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, [44 COLUM. HUMAN RIGHTS L. REV. 93, 128 \(2012\)](#) (discussing society's changing views of civil rights for people with intellectual disabilities).

127

See generally A. Frank Johns, *Person-Centered Guardianship and Supported Decision Making: An Assessment of Progress Made in Three Countries*, 9 J. INT'L AGING L. & POL'Y 1 (2016) (discussing the application of these models in Sweden, Canada, and Australia).

128

Id. at 1-3.

129

See Crane, *supra* note 60, at 178; Julia R. Nack et al., *Creating and Sustaining Interdisciplinary Guardianship*, [2012 UTAH L. REV. 1667, 1667 \(2012\)](#).

130

Ryan Kelley, Note, *Toward an Unconditional Right to Vote for Persons with Mental Disabilities: Reconciling State Law with Constitutional Guarantees*, [30 B.C. THIRD WORLD L.J. 359, 374-75 \(2010\)](#).

safeguards to prevent exploitation.¹³² Alternatives exist in familiar, legally recognized methods, like powers of attorney and special needs trusts, but are also available in less common forms, like case management and support networks.¹³³ Unfortunately, many of these legally recognized alternatives are not viable options for a person with disabilities who may be deemed incapable of appointing a representative.¹³⁴

Some alternative methods, like person-centered planning and supported decision-making, are adapted and applied in different forms.¹³⁵ Person-centered planning, a concept used by many interdisciplinary teams serving people with disabilities, emphasizes empowerment by placing the person **[*293]** served at the center of all decisions.¹³⁶ This approach asks what is "important to" the person served and what is "important for" that person.¹³⁷ It examines what is "working" versus what is "not working."¹³⁸ By asking these questions, support teams

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Burke, *supra* note 51, at 880-85.

132

[*Id.* at 883-89.](#)

133

Millar, *supra* note 82, at 297-301.

134

See Crane, *supra* note 60, at 203-04 (discussing potential uncertainty in alternatives to guardianships for individuals with intellectual disabilities).

135

See Johns, *supra* note 127, at 1547 (discussing the adaptability and variety of approaches using person-centered planning as its descriptor); Kohn, *supra* note 83, at 1121 (noting that supported decision-making has been used in many applications using the same principles and characterization).

136

Johns, *supra* note 127, at 1547-49.

137

Id. at 1550.

138

Id.

ensure the person is involved in the planning process and attempts to circumvent the tendency of advocates to gravitate toward substitute decision-making.¹³⁹ Ideally, these decisions would be made with the person, rather than for the person.¹⁴⁰

Supported decision-making, another alternative to guardianship, uses an information-sharing network that leaves the ultimate decision to the person supported.¹⁴¹ In this system, the person served is the decision-maker.¹⁴² Supporters provide neutral, factual information so the person served can make an informed decision.¹⁴³ Adaptations of the supported decision-making model take many forms.¹⁴⁴ It imitates familiar support systems that already exist in modern societies.¹⁴⁵ People, with and without disabilities, normally seek guidance from trusted family or friends to help them make decisions about many aspects of life.¹⁴⁶

139

See generally *id.* at 1549-50 (explaining the basis for person-centered planning and the importance of advocate awareness).

140

See *id.* at 1549 (stating the goal for person-centered planning is to use and acknowledge these perspectives to provide assistance).

141

See Nandini Devi, **Supported Decision-Making** and *Personal Autonomy for Persons with Intellectual Disabilities*: Article 12 of the UN Convention on the Rights of Persons with Disabilities, [41 J.L. MED. & ETHICS 792, 799 \(2013\)](#); Jasmine E. Harris, *The Role of Support in Sexual Decision-Making for People with Intellectual and Developmental Disabilities*, [77 OHIO ST. L. J. 84, 84 \(2016\)](#).

142

Kohn, *supra* note 83, at 1121.

143

Id.

144

Id.

145

Harris, *supra* note 141, at 84.

These models are growing in popularity and are often considered practical alternatives or enhancements to guardianships.¹⁴⁷ Serious reformation of the guardianship system is daunting,¹⁴⁸ but advocates propose incorporating these concepts into existing guardianship laws.¹⁴⁹ Some critics are skeptical about alternatives that remove court oversight and raise questions about [*294] the exposure to exploitation.¹⁵⁰ Opponents are also hesitant because of the limited research on the efficacy of support-based models.¹⁵¹ These critiques are addressed in greater detail in Part IV along with the application of these approaches in the United States.¹⁵²

B. International Reforms That Focus on Empowerment and Autonomy

146

Id.

147

Crane, *supra* note 60, at 179.

148

See Swann, *supra* note 11, at 318 (discussing the magnitude of constitutional reform).

149

See generally Donna S. Harkness, *Supported Decision Making: The Missing Piece in the Puzzle of Planning for Clients with Diminished Capacity*, **54 TENN. B.J. 19, 22-23 (2018)**(discussing problems with guardianship alternatives and proposing legal recognition for supported decision-making in Tennessee); Johns, *supra* note 127, at 1555-64 (proposing the incorporation of a person-centered planning into existing guardianship policies).

150

Hugo Dwyer & VOR's Committee on Guardianship Rights, *Issues to Consider Regarding Guardianship and Supported Decision-Making*, EP MAG., Dec. 2016, at 34-35, <http://www.eparent.com/money-uncategorized/issues-consider-regarding-guardianship-supported-decision-making/>.

151

Crane, *supra* note 60, at 191-93. See generally Kohn, *supra* note 83, at 1128-42 (discussing evidence for supported decision-making models).

152

See discussion *infra* Part IV.

The Convention on the Rights of Persons with Disabilities (CRPD), a treaty created by representatives from nations around the world, advocates for universal recognition of legal capacity.¹⁵³ The CRPD includes feedback to participating nations to evaluate reformations and make recommendations.¹⁵⁴ The CRPD emphasizes the importance of decision-making and promotes the use of supports based on individual abilities.¹⁵⁵ The treaty favors a supported decision-making approach; traditional substitute decisionmaking may be entirely contradictory to its principle mission.¹⁵⁶

Nations throughout the world have adopted different practices to promote independence.¹⁵⁷ A brief discussion of policies in other countries is included to provide context for the reforms in the United States.¹⁵⁸ Extreme propositions advocate for the abolition of guardianship for people with intellectual disabilities.¹⁵⁹ More

153

See *generally* Devi, *supra* note 141, at 794-97 (discussing the Convention on the Rights of Persons with Disabilities).

154

NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 60-61.

155

Devi, *supra* note 141, at 799.

156

Id. at 793 . See also G.A. Res. 61/106 Convention on the Rights of Persons with Disabilities (Jan. 24, 2007) (emphasizing equal rights for all persons).

157

See *generally* Dinerstein, *supra* note 16, 448-52 (discussing initiatives to promote autonomy occurring in different countries).

158

Id. (comparing guardianship policies of the United States and other nations).

159

Kohn, *supra* note 83, at 1124 (considering the concept of universal capacity).

conservative recommendations incorporate supported-decision or person-centered planning approaches into existing policies for individuals with intellectual disabilities.¹⁶⁰

Many countries have safeguards from the implications of traditional guardianships.¹⁶¹ New Zealand adopted a heightened threshold to rebut the [*295] presumption of competency.¹⁶² Sweden banned findings of incapacity based on intellectual disabilities and requires its guardians to work toward becoming unnecessary.¹⁶³

The Republic of Korea acknowledges both supported and substituted forms of decision-making.¹⁶⁴ The United Kingdom provides supported decision-making as a public service.¹⁶⁵ Canada recognizes different forms of representative-based supports, permitting a third party to make decisions for the principal.¹⁶⁶ These representatives must make reasonable efforts to act consistent with the wishes of the principal¹⁶⁷ and some forms require the

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[*Id. at 1124-26 .*](#)

161

See generally Dinerstein, *supra* note 16, at 448-52 (discussing the progressive trends in various countries worldwide).

162

Id. at 449-50 .

163

Id. at 448-59 .

164

Id. at 450-51 .

165

Id. Crane, supra note 60, at 198.

166

Crane, *supra* note 60, at 195; Dinerstein, *supra* note 16, at 448-59.

167

Kohn, *supra* note 83, at 1121.

principal's consent.¹⁶⁸ Australia combats reliance on the best interests approach with a guide called the "Capacity Toolkit."¹⁶⁹ This guide emphasizes the presumption of capacity and points out that abilities are situationally specific.¹⁷⁰

The underlying concepts of these approaches are like the principles in supported decision-making models.¹⁷¹ Success in these programs relies on a well-trained support network, the availability of structured supports, and universal recognition of the right to autonomy.¹⁷² Proposed changes have been criticized for their broad but unsupported claims of success.¹⁷³ Proponents point to the continued use and growing popularity of alternative approaches as evidence that these systems are not only viable but increasingly preferred.¹⁷⁴

C. The Reformation Movement in the United States

168

Crane, *supra* note 60, at 198.

169

Johns, *supra* note 127, at 20-21.

170

Id.

171

See *id.* at 11 (discussing the supported decision-making principles used in Canada).

172

See *id.* at 14-16 (considering skepticism of supported decision-making and its success in Canada to determine necessary aspects of a supported decision-making system).

173

Id.

174

Id.

The United States has begun adopting reforms that focus on empowerment.¹⁷⁵ Supported decision-making is one alternative to guardianship that is becoming more prevalent.¹⁷⁶ National attention from key cases has attracted public attention and given momentum to the guardian reformation movement.¹⁷⁷ [*296] Even private organizations, such as the American Bar Association, have embraced supported decision-making as an alternative to guardianship.¹⁷⁸

1. United States Courts Have Begun to Acknowledge the Viability of Guardianship Alternatives

Some U.S. courts have acknowledged the viability of supported decision-making systems in place of traditional guardianships.¹⁷⁹ One young woman's case drew national attention when she successfully defended her family's attempt to establish guardianship.¹⁸⁰ Though she had previously lived independently, she required additional help while recovering from a bicycle accident.¹⁸¹ She argued that her needs were temporary and that she

175

See NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 119-20 (discussing alternatives to guardianship that have attracted attention in the United States).

176

Id. at 135-37 .

177

Id. at 63-64 .

178

Dinerstein, *supra* note 16, at 456-57.

179

NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 63-64.

180

Order at 3, *Ross v. Hatch*, No. CWF120000426P-03 (Va. Cir. Ct. Aug. 2, 2013); *The Justice for Jenny Trial*, THE JENNY HATCH JUST. PROJECT, <http://jennyhatchjusticeproject.org/trial> (last visited Mar. 10, 2019).

181

NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 63-64.

had a support network that met her needs.¹⁸² The court, in its opinion, acknowledged the supported decision-making model as an appropriate, less restrictive means of protection and support.¹⁸³

Another court terminated a woman's guardianship after she developed a network based on a supported decision-making model.¹⁸⁴ The court found that a supported decision-making network was sufficient to meet her needs and warranted the termination of the existing guardianship.¹⁸⁵ These cases, and others like them, show a national shift toward acknowledging alternative forms of support for individuals with intellectual disabilities in lieu of guardianship.¹⁸⁶

[*297] 2. *State Reforms to Guardianship and Advocacy for Individuals with Intellectual and Developmental Disabilities*

182

Dinerstein, *supra* note 16, at 454.

183

Order at 5, *Ross v. Hatch*, No. CWF120000426P-03 (Va. Cir. Ct. Aug. 2, 2013); THE JENNY HATCH JUST. PROJECT, *supra* note 180. See also NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 63-64; Dinerstein, *supra* note 16, at 454 (considering examples of courts acknowledging guardianship alternatives).

184

[In re Dameris L., 956 N.Y.S.2d 848, 854-856 \(N.Y. Sup. Ct. 2012\)](#).

185

Id. See also Dinerstein, *supra* note 16, at 454 (discussing the court's reasoning and acceptance of an alternative to guardianship).

186

See, e.g., Order, *Ross v. Hatch*, No. CWF120000426P-03 (Va. Cir. Ct. Aug. 2, 2013); [In re Peery, 727 A.2d 539, 540 \(Pa. 1999\)](#) (supporting a trial court's finding that there was not a need for guardianship); [In re Michelle M., 2016 N.Y. Misc. LEXIS 2719, at *14 \(Kings Cty. Sur. Ct.\)](#) (rejecting the alleged need for plenary guardianship); NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 63-64 (noting the trend away from guardianships); *Freedom for Ryan King*, THE JENNY HATCH JUST. PROJECT (Dec. 12, 2016), <http://jennyhatchjusticeproject.org/impact-stories-ryan-king-2> (terminating a guardianship in lieu of a support network); *Cory, Pilot Project Participant*, SUPPORTED DECISION-MAKING, <http://supporteddecisions.org/cory/> (last visited Mar. 10, 2019) (denying a guardianship based on an existing support network).

Many states require using the least restrictive means of support necessary when addressing the needs of an alleged incapacitated person.¹⁸⁷ Several states have guardianship policies specifically designed for individuals with intellectual **disabilities**.¹⁸⁸ Few states have enacted statutory schemes that legally recognize **supported decision-making** models for individuals with **disabilities**.¹⁸⁹ This section reviews policies from two states¹⁹⁰ that use different approaches to guardianship and advocacy for individuals with intellectual **disabilities**.¹⁹¹

a. Texas legally recognizes **supported decision-making** agreements for individuals with intellectual **disabilities**

Texas was the first state to legally recognize supported decisionmaking agreements.¹⁹² Texas adopted this model for persons with intellectual and developmental disabilities who live in the community.¹⁹³ Texas, through

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Salzman, *supra* note 12, at 171-72.

188

NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 171 (listing Arizona, California, Connecticut, Florida, Idaho, Iowa, Kentucky, Michigan, Minnesota, New York, and South Dakota as states having guardianship statutes with specific provisions for people with developmental disabilities).

189

Harkness, *supra* note 149, at 22 (listing Texas, Delaware, and Washington, D.C. as states that legally recognize supported decision-making as an alternative to guardianship).

190

Texas and Michigan were chosen for closer evaluation based on each state's practical and unique reforms.

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See Harkness, *supra* note 151, at 22-23 (listing states that legally recognize **supported decision-making**); NAT'L COUNCIL ON **DISABILITY**, *supra* note 13, at 135-37 (discussing the acknowledgement of Supported Decision-Making by various courts).

192

Alternatives to Guardianship, THE ARC OF TEXAS (2016), https://www.thearcoftexas.org/wp-content/uploads/2016/06/Alternatives_to_Guardianship_for_Families_2016-06.pdf.

193

Dinerstein, *supra* note 16, at 455.

collaborations with advocacy groups like The Arc,¹⁹⁴ promotes the use of alternatives and strongly encourages consideration of all options based on the necessary level of support.¹⁹⁵ Texas revised statutory provisions, [*298] like the Texas Bill of Rights for Persons Under Guardianship, to create greater protections from exploitation and promote empowerment.¹⁹⁶

Texas law has safety measures to prevent unnecessary guardianships and unacceptable conduct by its guardians.¹⁹⁷ Notably, Texas requires courts to make reasonable efforts to consider the preference of the respondent in guardianship proceedings.¹⁹⁸ All guardians are required to complete state-sponsored training, which includes subjects like responsibilities of guardians, alternative services available, and the Bill of Rights for Persons Under Guardianship.¹⁹⁹

b. Michigan's inclusive policies empower people with a range of abilities and protect individual rights throughout guardianship proceedings

194

The Arc of Texas is a Texas-based group that advocates for social and legislative change for people with developmental disabilities. *Mission, History, and Achievement*, THE ARC OF TEXAS (Dec. 11, 2018, 6:50 PM), <https://www.thearcoftexas.org/who-we-are/>.

195

See THE ARC OF TEXAS, *supra* note 192 (listing alternatives such as supported decision-making, powers of attorney, representative payees, joint bank accounts, special trusts, money management programs, Medicaid services, and advanced medical directives).

196

TEX. EST. CODE ANN. § 1151.351 (West 2019) (effective June 19, 2015 to August 31, 2019).

197

See THE ARC OF TEXAS, *supra* note 192 (discussing some of the rights afforded to wards and requirements of guardians).

198

TEX. EST. CODE ANN. § 1104.002 (West 2019) (preference of incapacitated person).

199

See TEX. EST. CODE ANN. § 1104.003 (West 2019) (training required); THE ARC OF TEXAS, *supra* note 193 (citing TEX. EST. CODE ANN. § 1151.351 (2017)).

Michigan implemented several creative provisions to empower individuals with a range of capabilities.²⁰⁰ Michigan statutes prevent assumptions about the "least restrictive" means by providing additional requirements that address due process concerns.²⁰¹ For example, a court must answer questions related to capacity and each response must be supported by clear and convincing evidence.²⁰² A guardian's powers are substantially limited.²⁰³ For instance, no guardian has the power to consent to placement in an institution without a court order.²⁰⁴

[*299] Michigan affords an alleged incapacitated person the right to independent evaluations and legal representation with financial assistance available for both.²⁰⁵ Michigan's partial guardianships do not create legal implications of incapacity,²⁰⁶ must specify all granted authorities,²⁰⁷ and expire within five years.²⁰⁸ All

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Deborah A. Mattison, *Guardianship for Persons with Developmental Disabilities*, 66 MICH. B. J. 18, 21 (1987).

201

Id. at 18 .

202

See MICH. COMP. LAWS SERV. § 330.1617 (LexisNexis 2018) (outlining guardianship proceedings); *id.* § 330.1618 (requiring evaluations of capacity and describing partial and plenary guardians).

203

See generally *id.* § 330.1620 (outlining contents of guardianship order, rights retained, and finding of legal incompetence or incapacity); *id.* § 330.1623 (requirements for placement in a facility); *id.* § 330.1631 (detailing plenary and partial guardians, duties, and reports to court); *id.* § 330.1634 (requiring the court to inform a ward of the right to request a dismissal or modification of the guardianship order); MICH. COMP. LAWS SERV. § 330.1637 (LexisNexis 2018) (detailing the petition for discharge or modification order); Mattison, *supra* note 201, at 19-20 (citing [MICH. COMP. LAWS § 330.1615](#)) (affording legal counsel for respondent).

204

MICH. COMP. LAWS SERV. § 330.1623 (LexisNexis 2018) (outlining requirements for placement in a facility, inquiry into appropriateness, and residential programs). See generally Richard C. Boldt, *The "Voluntary" Inpatient Treatment of Adults Under Guardianship*, [60 VILL. L. REV. 1, 23 \(2015\)](#) (critiquing voluntary admissions of people under a guardianship to institutions).

205

See MICH. COMP. LAWS SERV. § 330.1617 (LexisNexis 2018) (outlining guardianship proceedings); Mattison, *supra* note 201, at 19-20 (citing [MICH. COMP. LAWS § 330.1615](#)) (affording legal counsel for respondents).

guardianship orders, both plenary and partial, must include a statement of duration.²⁰⁹ Michigan's guardians must submit annual reports that include a summary of services provided to the individual, guardian's visits with the ward, and all financial transactions.²¹⁰

When appointing a guardian, Michigan courts consider the respondent's preference for the person appointed.²¹¹ When a guardian is appointed, the court must attempt to inform the individual of the right to request termination or modification of the guardianship.²¹² An individual with developmental disabilities may make these requests in any form, including oral requests or informal letters.²¹³ Requests for review or termination of a guardianship are considered using the same standards and rights afforded in an initial appointment.²¹⁴

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MICH. COMP. LAWS SERV. § 330.1620 (LexisNexis 2018) (outlining the contents of a partial guardianship order, rights retained, and findings of legal incompetence or incapacity).

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Id.

208

Id. § 330.1626 (defining the term of a guardianship).

209

Id.

210

Id. § 330.1631 (defining plenary and partial guardians, duties, reports to court, and the review of reports).

211

Id. § 330.1628 (outlining qualifications for a guardian).

212

MICH. COMP. LAWS SERV. § 330.1634 (LexisNexis 2018) (requiring courts to attempt to inform a ward of right to request a guardian's dismissal or modification of a guardianship order).

213

Mattison, *supra* note 201, at 20 (citing [MICH. COMP. LAWS § 330.1637](#)) (outlining the petition for discharge or modification order and acceptable forms of communication to court).

3. Critics Question the Claims of Success and Potential for Abuse with Alternatives to Guardianship

Although the United States has begun acknowledging alternatives, guardianships remain the primary form of court-appointed and legally recognizable advocacy for individuals with intellectual disabilities.²¹⁵ Critics of guardianship alternatives are skeptical about the grand, unproven claims of [*300] success.²¹⁶ Some opponents warn that alternatives to guardianship remove the protection of court oversight and use general concepts, which disregard individual vulnerabilities.²¹⁷ Opposition typically focuses on the efficacy of these systems, the limited data supporting alternative approaches, and concerns about the risk of abuse without the protection provided by guardianships.²¹⁸

Alternative approaches to advocacy boast success primarily using anecdotal evidence.²¹⁹ Further research capturing data about abstract concepts like independence, self-reliance, and self-determination is undoubtedly needed.²²⁰ Subjective feelings are difficult to quantify and even more difficult to standardize.²²¹

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Id.

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NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 66 (noting the rate of filing for guardianship had a negligible decrease, which indicates either no change or even growth in the use of guardianships).

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See generally Dwyer, *supra* note 150, at 34-35 (expressing concerns about removing protections provided with a guardianship); Kohn, *supra* note 83, at 1128-32 (noting the limited research available for supported decision-making); Ian M. Evans, *Trying to Make Apple Pie an Independent Variable: Comment on "How Science Can Evaluate and Enhance Person-Centered Planning"*, 27 RES. AND PRAC. FOR PERSONS WITH SEVERE DISABILITIES 265, 265-67 (2002) (reviewing criticism of person-centered planning).

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Dwyer, *supra* note 150, at 34-35.

218

Kohn, *supra* note 83, at 1128-32 (discussing attacks on supported decision-making models and recommendations for more research). *See also* Dwyer, *supra* note 150, at 34-35 (criticizing alternatives claiming an increased exposure to exploitation or abuse).

219

Some criticize the universal assumption of capacity necessary to the supported decision-making model.²²² If all persons can make decisions using a support network, then those with the most severe handicaps will be expected to make a decision relying on the guidance of others.²²³ If decisions are guided by others, supported decision-making has failed.²²⁴

In response, proponents of supported decision-making emphasize the adaptability of the system to ensure people are empowered to the extent of their abilities, but not beyond them.²²⁵ There is the potential for inaccurate or substitute decision-making, which requires further research to determine how to prevent such unintended outcomes.²²⁶ Approaches incorporating person-centered [*301] planning attempt to avoid incidental surrogate

See generally NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 139-60 (considering the outcomes of various models based on the perspective of assisted persons, supporters, and professionals).

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See generally Evans, *supra* note 216, at 265-67 (discussing recent research on person-centered planning and the importance of qualitative factors).

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Id.

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Dwyer, *supra* note 150, at 35.

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Id.

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Id. See also Devi, *supra* note 141, at 796 (describing the use of the "best interest" standard in supported decision-making for people with intellectual disabilities).

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Devi, *supra* note 141, at 796 (discussing categories for the level of support needed based on a minimum threshold). See also NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 133-34 (considering supported decision-making for people with different abilities).

226

decisions by focusing on the person served.²²⁷ Both approaches have been modified in various forms to fit the specific needs of the person and overall system.²²⁸ Ultimately, any approach must be adapted to suit individual needs.²²⁹

Supporters of guardianship contend that, without court oversight and accountability, vulnerable people will be put at an increased risk of abuse and exploitation.²³⁰ Research is limited on alternative forms of support in all areas.²³¹ Similarly, though guardianships intend to protect the vulnerable from exploitation and abuse,²³² there is limited research to support the success of this claim.²³³ Regardless of the form of advocacy or support, greater oversight and accountability are necessary to prevent abuse to the people it means to protect.²³⁴

NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 132-33 (considering areas in need of further research for supported decision-based models).

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Johns, *supra* note 135, at 1549-50.

228

See *id.* at 1547 (noting the adaptability of person-centered planning approaches); Kohn, *supra* note 83, at 1121 (discussing various applications of supported decision-making models).

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See generally Devi, *supra* note 141, at 796 (categorizing the level of support provided based on individual need and ability).

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Dwyer, *supra* note 150, at 35.

231

Kohn, *supra* note 83, at 1128-32 (discussing common attacks on supported decision-making models, a brief review of research on its use, and recommendations for more research).

232

Dwyer, *supra* note 150, at 35.

233

See NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 101-02 (discussing the limited availability of information about guardianships); Hardy, *supra* note 87, at 4 (discussing the use of guardianships and its potential for abuse); *id.* at 9-10 (describing the limited data available).

IV. ARKANSAS SHOULD ADOPT NEW POLICIES TO REFLECT SOCIETAL CHANGES IN ADVOCACY AND PROTECT INDIVIDUALS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES FROM UNNECESSARY OR OVERLY BROAD GUARDIANSHIPS

Although international reform is inspiring, it is likely incompatible with Arkansas's existing guardianship systems, particularly when many of the provisions are more progressive than reforms in the United States.²³⁵ As stated in Part III, a few states made meaningful efforts to reform guardianship policies to empower individuals with intellectual disabilities;²³⁶ Arkansas [*302] has not been one of them.²³⁷ Arkansas laws are general and provide little protection for an alleged incapacitated person.²³⁸ When reforming guardianship policies, Arkansas should consider policies in other states that emphasize autonomy while ensuring individual protection.

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Hardy, *supra* note 87, at 12-15 (reviewing the policy recommendations for various systems to provide greater protections from abuse and exploitation).

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See generally Dinerstein, *supra* note 16, at 445-57 (considering the reforms in various countries, the stance of the CRPD, and the reforms that have taken place in the United States).

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NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 55-60 (reviewing guardianship reforms in the United States). See discussion *supra* Part III.

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See, e.g., [ARK. CODE ANN. § 28-65-106](#) (Supp. 2017) (noting a change in the wording used to describe a ward); *id.* [§ 28-65-203](#) (noting amendments to change specific wording and one amendment about state officials acting as a guardian). See discussion *supra* Part II.

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See, e.g., [ARK. CODE ANN. § 28-65-211](#) (Repl. 2012) (describing evidence required for the determination of incapacity without specificity to the nature or extent of the incapacity and providing the court discretion in requiring the presence of the alleged incapacitated person); *id.* [§ 28-65-210](#) (requiring the court to determine the person is "a minor or otherwise incapacitated," "a guardianship is desirable to protect the interests of the incapacitated person" and "the person to be appointed" meets the minimum qualifications); *id.* [§ 28-65-213](#) (discussing appointment of a guardian when "it is found that the respondent is substantially without capacity to care for himself or herself or his or her estate"); *id.* [§ 28-65-402](#) (allowing consideration of the restoration of capacity when "any person alleges in writing, verified by oath," that the person subjected to a guardianship is no longer incapacitated).

A. Arkansas Should Bolster Due Process Protections for Alleged Incapacitated Persons

Additional due process protections should be implemented to prevent unnecessary or overbearing guardianships. Generally, restrictions on individual liberties must be proven by clear and convincing evidence.²³⁹ Current statutes should be revised to ensure decisions on capacity are held to this standard by removing exceptions to certain protections and including obstacles to prevent arbitrary determinations of incapacity.

Arkansas requires that a person be incapacitated, that the guardianship sought is for the protection of the incapacitated person, and that the petitioner is qualified.²⁴⁰ Arkansas should adopt statutory guidelines that necessitate and identify less restrictive alternatives based on specific findings of fact.²⁴¹ Findings should identify the person's particular areas of need. When a need is identified, the court should first consider what support would adequately [*303] serve the individual.²⁴² If the person needs financial management assistance, for example, the court should identify the need and consider the least intrusive form of assistance.²⁴³ Could a financial manager or a special needs trust satisfy the need?²⁴⁴ Does the person need extensive support that can only be met by a court-

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See Monthie, *supra* note 98, at 967 (discussing the liberty interests at stake in guardianship proceedings and a standard of proof by clear and convincing evidence). Compare [ARK. CODE ANN. § 28-65-213\(b\)](#) (Repl. 2012) (stating the burden of proof must be met by clear and convincing evidence), with *id.* [§ 28-65-210](#) (requiring the court to be satisfied that the appointment of a guardianship is "desirable to protect the interests of the incapacitated person.").

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[ARK. CODE ANN. § 28-65-210](#) (Repl. 2012).

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Compare MICH. COMP. LAWS SERV. § 330.1618 (LexisNexis 2018) (prompting the court to answer questions related to capacity and actions resulting from such answers), and *id.* § 330.1617 (describing guardianship proceedings, right to present evidence, and independent evaluation), with [ARK. CODE ANN. § 28-65-210](#) (Repl. 2012), and [Kelley v. Davis, 216 Ark. 828, 830, 227 S.W.2d 637, 639 \(1950\)](#) (defining capacity by an ability to take part in the activities presented).

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See generally Devi, *supra* note 141, at 796 (considering varying levels of support needed based on a minimum threshold); NAT'L COUNCIL ON **DISABILITY**, *supra* note 13, at 133-34 (applying **supported decision-making** for people with different abilities).

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See generally NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 122-26 (noting concerns about financial management and listing supportive alternatives to guardianship).

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appointed limited guardian of the estate? If a guardian is needed, the court should explicitly list in clear language the extent of the guardian's authority.

Currently, Arkansas allows the respondent a right to counsel.²⁴⁵ The right to independent representation should be expanded to allow courts to appoint legal counsel if the alleged incapacitated person is unable to financially afford counsel.²⁴⁶ Arkansas does not afford additional protections that may be necessary to defend against an alleged incapacitation such as independent evaluations.²⁴⁷ "Least restrictive means" should be better defined; the court should be required to answer specific questions of fact and a decision should be based on those answers.²⁴⁸

Capacity decisions rely on evaluations and testimonial evidence regarding intelligence and ability. Standardized testing examines both intellectual capabilities as well as adaptive behaviors.²⁴⁹ Additional evidence of ability should be encouraged based on various theories of capacity. Some approaches determine cognitive ability through questions of understanding and resilience.²⁵⁰ Another model uses categories of decision-making abilities

Id.

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[ARK. CODE ANN. § 28-65-213\(a\)\(1\)](#) (Repl. 2012).

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See generally Mattison, *supra* note 200, at 20 (discussing MICH. COMP. LAWS SERV. § 330.1615; *id.* § 330.1617 which require courts to appoint representation and permit substitute representation upon request by an alleged incapacitated person).

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Compare [ARK. CODE ANN. § 28-65-212](#)(Repl. 2012) (noting evaluations that may be considered by the court), with MICH. COMP. LAWS SERV. § 330.1612 (LexisNexis 2018) (allowing financial aid for necessary independent assessments in proceedings about capacity in Michigan courts).

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See generally NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 121-22 (proposing factors to consider when evaluating the need for guardianship or an alternative).

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Definition of Intellectual Disability, AM. ASS'N ON INTELL. & DEV. DISABILITIES, <https://aaid.org/intellectual-disability/definition> (last visited Oct. 5, 2019).

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separated by levels of capability with consideration of ability to express intentions and understand consequences of decisions made.²⁵¹ Evaluative [*304] testing for people with developmental disabilities can be enhanced by asking questions using different wording and situations over a period of time.²⁵²

Regardless of the standards used, the court should make specific findings of fact based on individual abilities before concluding that guardianship is necessary. The standard would ideally make guardianship presumably unnecessary and rebutted only through clear and convincing evidence describing the person's available community services, existing support system, strengths and challenges, nature of each need, and potential legal replacements in lieu of guardianship.²⁵³

B. Arkansas Should Impose Greater Limitations on Guardians' Powers

Reformation efforts have, thus far, made minimal impact on the overall system.²⁵⁴ For example, limited guardianships have done little to actually restrict a guardian's powers or to empower the person subjected to it.²⁵⁵ One particularly troublesome hurdle is overcoming, or at least modifying, the best interest of the person standard, which is merely substitute decisionmaking and is inconsistent with principles of empowerment.²⁵⁶ The best interest

Harris, *supra* note 141, at 95.

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NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 34-36 (describing how capacity is determined by courts); *id.* at 79-82 (analyzing the use of expert testimony and factors used in determinations of incapacity). See also Harris, *supra* note 141, at 95 (describing the Cognitive Plus Three Step Functional Test as developed by Boni Saenz).

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Harris, *supra* note 141, at 101.

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NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 121-22.

254

See *id.* at 55-60 (briefly reviewing successes and failures of guardianship reform efforts nationally); see discussion *supra* Part II (discussing historical developments of guardianship in the United States and in Arkansas).

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Salzman, *supra* note 12, at 174-76. See also *NCI Charts (2015-16): Guardianship*, NAT'L CORE INDICATORS, <https://www.nationalcoreindicators.org/charts/?i=137&st=undefined> (last visited Feb. 2, 2019) (examining survey results finding only 18% of respondents from Arkansas had limited guardianships, while 44% had plenary guardianships).

standard is routinely used by guardians and courts.²⁵⁷ Statutory provisions that require a court to answer questions and attempt to ascertain the alleged incapacitated person's preferences may provide greater protection than the best interest standard alone.²⁵⁸

Using a person-centered planning approach, for example, puts the person served in a position of empowerment, rather than removed from the decision altogether.²⁵⁹ Rather than focusing on the best interest of the alleged incapacitated person, the court should consider the person in the context **[*305]** of his or her environment.²⁶⁰ Person-centered planning is a natural standard that could be incorporated into the structure of guardianship because both systems aim to support independence and preserve individual rights.²⁶¹

Though Arkansas law prohibits a guardian from consenting to certain medical procedures,²⁶² guardians should also be prohibited from taking other actions that are not specifically authorized by the court. The guardian's

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See *Devi*, *supra* note 141, at 803 (considering potential the best interest standard and describing it as a form of substitute decision-making).

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See NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 36 (discussing standards used by courts when determining the necessity of guardianship); Frolik, *supra* note 102, at 741-44 (2012) (noting the lack of guidance for guardians on how to make decisions on behalf of a ward).

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See MICH. COMP. LAWS SERV. § 330.1617 (LexisNexis 2018) (discussing guardianship proceedings, right to present evidence and confront witness, and independent evaluations).

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Johns, *supra* note 127, at 1547-48.

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See *id.* at 1549-50 (outlining the person-centered planning approach and including an examination of the current support system).

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Id. at 1547-48.

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authority should be limited, and, as a result, the individual's rights enhanced. Guardianship orders should expressly state powers granted to a guardian to ensure all unmentioned rights are retained by the ward.²⁶³ The current statutory language does not create clearly defined parameters for guardians or for courts when appointing guardians.²⁶⁴ Guardianship orders should be narrowly tailored; authority granted therein should be based on actual and individual needs.²⁶⁵ Limited guardianships should actually be limited.

C. Arkansas Should Require Guardians to Complete Mandatory Training Prior to Appointment

When guardianship is necessary, oversight of the guardianship and mandatory training for guardians should be used to protect the affected person.²⁶⁶ Without training, guardians have little guidance when fulfilling their role and even well-intentioned guardians can make decisions contradictory to their wards' wishes.²⁶⁷ Arkansas should require training to ensure guardians have adequate information defining their roles, duties, and responsibilities.²⁶⁸ To hold guardians accountable, the state should provide guidance for [*306] their decisions,

Compare [ARK. CODE ANN. § 28-65-302](#) (Repl. 2012) (listing decisions requiring court approval), and *id.* [§ 28-65-303](#) (outlining care, treatment, and confinement of a ward), with MICH. COMP. LAWS SERV. § 330.1623 (LexisNexis 2018) (prohibiting placement of the individual in a long-term care facility without the court's approval), and *id.* § 330.1620 (defining rights retained by a ward with a partial guardianship).

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See [ARK. CODE ANN. § 28-65-214](#) (Repl. 2012) (outlining guardianship orders).

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Id. [§ 28-65-301](#) (listing duties of a guardian).

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Compare *id.* [§ 28-65-214](#) (required contents of guardianship orders), with MICH. COMP. LAWS SERV. § 330.1620 (LexisNexis 2018) (outlining contents of a guardianship order), and *id.* § 330.1631 (requiring the consideration of less restrictive options).

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U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-655, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE, 1-3, 30-32 (2004), <https://www.gao.gov/new.items/d04655.pdf>.

267

Frolik, *supra* note 102, at 739, 742-43. See also Devi, *supra* note 141, at 803 (discussing the best interest standard and its resemblance to substitute decision-making).

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participation, and impact on the lives of their wards. Annual reports should also include a summary of the previous year's services provided to the individual, visits and activities on the ward's behalf, and all financial transactions.²⁶⁹

At the initial guardianship appointment, the court should make reasonable efforts to inform the person affected. Arkansas should revise the existing statute for the Rights of Incapacitated Persons to include information about how to request a change or dismissal of a guardian.²⁷⁰ A request for a modification or termination of a guardianship should be accepted in any form to accommodate for a range of abilities.²⁷¹ All requests for modification or termination should be followed by a hearing that adheres to all standards required in the initial proceeding.²⁷²

D. Arkansas Should Promote Alternatives to Guardianship and Make Alternatives Practicable for Persons with Intellectual Disabilities

See TEX. EST. CODE ANN. § 1104.003 (West 2017) (mandating training for guardians about their responsibilities, less-restrictive alternatives, and services available).

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Compare [ARK. CODE ANN. § 28-65-322](#) (Repl. 2012) (reports include current conditions, present living arrangements, need for continued guardianship services, and account of estate), with MICH. COMP. LAWS SERV. § 330.1631 (LexisNexis 2018) (reports include services provided to the ward, visits with the ward, actions done on behalf of the ward, and financial activity).

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Compare [ARK. CODE ANN. § 28-65-106](#) (Repl. 2012) (Rights of incapacitated persons), with MICH. COMP. LAWS SERV. § 330.1628 (LexisNexis 2018) (defining the rights of a ward in Michigan), and TEX. EST. CODE ANN. § 1151.351 (West 2017) (Bill of Rights for Wards).

271

Compare [ARK. CODE ANN. § 28-65-402](#) (Repl. 2012) (stating that restoration of capacity will be considered when "any person alleges in writing, verified by oath," that the person subjected to a guardianship is no longer incapacitated), with Mattison, *supra* note 200, at 20 (citing [MICH. COMP. LAWS § 330.1637](#)) (discussing the inclusive provisions that accommodate for individuals with varying abilities).

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Compare MICH. COMP. LAWS SERV. § 330.1637 (LexisNexis 2018) (the same due process protections from an initial appointment are provided in subsequent hearings), with [In re Estate of Lemley, 9 Ark. App. 140, 143, 653 S.W.2d 141, 143 \(1983\)](#) (the court acknowledged that where, once established, incompetency is presumed until sufficiently rebutted).

To facilitate a shift away from guardianships, alternative forms of support must be accessible and legally recognized.²⁷³ Many states require courts to consider less restrictive alternatives.²⁷⁴ Detailed statutory guidelines for areas of concern would ensure consistent application of these protections. Reformation cannot be successful without changes to services available and [*307] legal recognition of alternatives.²⁷⁵ The supported-decision based model needs legal acknowledgment to be practical as an alternative to formal guardianship.²⁷⁶

Arkansas should legally recognize decisions made using a supported decision-making model.²⁷⁷ Without a legally recognized alternative, people are forced to choose between traditional guardianship or the risk of having unmet needs.²⁷⁸ The state should conduct research on alternatives and modifications to guardianships to determine which approaches will best serve Arkansans. The state can promote alternatives and empowerment by increasing access to community-based supports.²⁷⁹ Reformation must include measures to legally recognize

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See Crane, *supra* note 60, at 188 (pointing out that supported decision-making systems are not legally recognized, which prevents this alternative from being a practical option).

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Id. at 187 (listing some alternatives); Salzman, *supra* note 12, 171-72. See also [ARK. CODE ANN. § 28-65-213](#) (Repl. 2012) (requiring the court to determine the "feasibility of less restrictive alternatives").

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See Crane, *supra* note 60, at 188 (discussing systematic changes needed to enable success of alternatives to traditional guardianships).

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Id.

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Id. See generally Dinerstein, *supra* note 16, at 455 (discussing trends toward the use of alternatives to guardianship for people with intellectual and developmental disabilities).

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Crane, *supra* note 60, at 188-89. See also NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 123-29 (discussing supports for people with disabilities based on the area in need of support); *id.* at 141-58 (comparing the opinions of people with disabilities, families, guardians, and professionals about guardianship and alternatives).

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Crane, *supra* note 60, at 180.

preferred alternatives. Arkansas should adopt and promote public policy that acknowledges an individual's right to self-determination and alternatives must be legally recognized.²⁸⁰

E. Implementation of Comprehensive Reforms Will Require Action, Training, and Oversight

There are difficulties inherent to changes of any large, well-established system.²⁸¹ New concepts may even initially seem to be accepted but, in reality, these concepts essentially become the original system with a different name.²⁸² New standards must be implemented through intentional action, extensive training, and continuous oversight.²⁸³ Alternative options to guardianship must be known and available to those seeking support.²⁸⁴ Information sharing must not rely on a generic list of options; it must provide **[*308]** meaningful consideration of all less restrictive options before guardianship is considered.

State representatives should be trained to promote individual freedoms using the recognized alternatives available.²⁸⁵ State actors, as well as other advocates, must make active and consistent efforts to promote

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See generally Devi, *supra* note 141, at 803 (discussing CRPD's recognition of the right to exercise legal capacity without discrimination based on diagnosis).

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See generally Bruce A. Arrigo, *Paternalism, Civil Commitment and Illness Politics: Assessing the Current Debate and Outlining a Future Direction*, 7 J.L. & HEALTH 131, 168 (1993) (discussing obstacles that inhibit change in large systems).

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See generally A. Frank Johns, [Person-Centered Planning in Guardianship: A Little Hope for the Future, 2012 UT. L. REV. 1541, 1558](#) (discussing support and acceptance of new concepts that sometimes results in a failure to implement meaningful changes).

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[Id. at 1557-61](#) .

284

Crane, *supra* note 60, at 203.

285

independence through empowerment rather than substitutive or controlling methods.²⁸⁶ Though not directly involved in the guardianship process, the Division of Developmental Disabilities Services (DDS)²⁸⁷ is in the best position to supply information and resources to people in need of support. DDS already provides information and oversight to people with developmental disabilities receiving or seeking support services.²⁸⁸ The values and underlying motivations of alternatives to guardianships are consistent with the mission of DDS, which includes protecting constitutional rights of people with disabilities.²⁸⁹ DDS could oversee the efficacy of alternatives to guardianship and provide additional supports, if necessary. Through information-sharing and statutory reforms, Arkansas can promote independence while still providing necessary protection to people with disabilities.

V. CONCLUSION

The current trend in civil rights seeks to empower people with intellectual and developmental disabilities by favoring alternatives to traditional guardianship. Arkansas's statutory model minimally reflects the societal shift toward a support-based model of advocacy. Significant statutory changes are necessary to create meaningful change in current guardianship standards. Arkansas should adopt new policies and incorporate systematic initiatives for people who need decision-making assistance. Arkansas should join other states in leading the country toward a more progressive view of advocacy and empower Arkansans who would otherwise be encumbered by a guardianship.

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See NAT'L COUNCIL ON DISABILITY, *supra* note 13, at 92-93 (discussing the systematic use of guardianship and promotion from teachers and school administrators).

286

See SIMPLICAN, *supra* note 14, at 122-25 (discussing an "alliance," rather than traditional advocacy, to empower to prevent overshadowing the person supported).

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Arkansas's Division of Developmental Disabilities Services is part of the Department of Human Services. *About Us*, ARK. DEPT OF HUM. SERV., <https://humanservices.arkansas.gov/about-dhs/ddds/about-us> (last visited Dec. 13, 2018).

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Id.

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Id.

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