

DEPARTMENT: GUARDIANSHIP REFORM: SUPPORTED DECISION-MAKING AND MAINE'S NEW PROBATE CODE

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Text

[*25] In the Winter/Spring Issue of the *Maine Bar Journal*, Bruce McGlauffin, Esq. pointed out the need for reforming Guardianship in Maine. ¹ Mr. McGlauffin was troubled by the Law Court's ruling in *Perry v. Dean* and its finding that the Department of Health and Human Services, when acting as public guardian or conservator, is immune from breach of fiduciary duty claims. Mr. McGlauffin suggested reform of the public guardianship program. The Maine Legislature's recent rewrite of the Probate Code, including a complete modernization of the state's guardianship law, offers better solutions to this and other problems with guardianship. ²

These changes, passed during the most recent legislative session, created several procedural protections that ensure that guardianships are not awarded until lesser restrictive alternatives that meet the individual's need are tried first. Among these is **Supported Decision-Making** (SDM), a major milestone in protecting those with **disabilities**, who often do not need a guardian, public or private.

Guardianship essentially strips a person of his or her legal identity by allowing another person to make decisions on one's behalf and often deprives individuals of many of their fundamental rights, such as freedom of association, consent to medical treatment, and the right to marry and have a family. The late Judge James Mitchell stated in his treatise, "Imposition of guardianship based on incapacity is the most severe restriction the law can place on a person short of imprisonment." ³

¹ Bruce McGlauffin, *Perry v. Dean: A Catalyst for Removing DHHS as Public Guardian*, 33 Me. Bar J. 27-31(2018).

² An Act To Recodify and Revise the Maine Probate Code, Me. P.L. 2018, ch. 402 (H.P. 91) (L.D. 123) (to be codified at [18-C M.R.S. §§ 1-101-9-404](#)) (effective July 1, 2019) (hereafter: "Maine Revised Probate Code").

³ Mitchell & Hunt, *Maine Probate Procedure: Guide to Official and Recommended Forms* § 5.07.2 (2017).

Mr. McGlaufflin is correct that guardianship reform should focus on preventing guardians from causing harm, not compensating individuals for harm already caused. He is also correct that the Department of Health and Human Services has a conflict of interest when it serves as guardian for individuals. He, however, has missed the larger conversation about the need for guardianship reform. ⁴ Certainly, where there is no option other than a public guardian, the system should be reformed to have an independent guardianship program. The simplest way to reduce the widespread conflicts of interests and risks of abuse and neglect present with both public and private guardianships, ⁵ as well as other problems with guardianship, is to empower and support individuals to make their own decisions.

It should be axiomatic that a person who does not need a guardian should not have one. This is not true for people with intellectual disabilities and autism nationally, nor is it true in Maine. For far too long, guardianship has been the primary tool used to protect adults with intellectual disabilities and autism who need assistance with decision-making. In our decades of work representing people with disabilities, Disability Rights Maine (DRM) has seen many families place their loved ones with disabilities under guardianship--often based on the recommendation of schools, service providers, or professionals--without having any information about less restrictive alternatives. ⁶ Nationally, many experts have recognized the overuse of guardianship for people with intellectual disabilities and autism ⁷ - approximately 35 percent of whom have full guardians. ⁸ In Maine, the overuse of guardianship for people with

⁴ In an attempt to support his position, Mr. McGlaufflin makes a number of misstatements about Disability Rights Maine (DRM). DRM is Maine's federally funded protection and advocacy agency (P&A) for people with disabilities in Maine, including individuals with intellectual disabilities and autism. DRM's mission is to ensure autonomy, inclusion, equality, and access for people with disabilities in Maine. Because DRM is Maine's P&A, DHHS contracts with DRM to provide advocacy services for individuals with intellectual disabilities and Autism, children with behavioral health needs, and individuals in both state psychiatric hospitals.

DRM provides advocacy services for all individuals with intellectual disabilities and Autism, but not full legal representation in every situation. The article is patently incorrect when it states that DRM has a conflict of interest policy which requires it to decline to advocate for some individuals when it advocates for other similarly situated individuals. No such policy exists. The author's conclusion that DRM declined to represent a particular client based on this fictitious policy is also inaccurate. DRM, like other law firms and legal services organizations, is required to abide by the Maine Rules of Professional Conduct, which prohibit representation of a client when a conflict of interest exists. See M.R. Prof. Conduct 1.7, 1.8, and 1.9. Additionally, Attorney McGlaufflin insinuates that Maine statute had been changed to eliminate the requirement of mandatory advocacy duties. While the provision cited did in fact change, he failed to note that [34-B M.R.S. § 5005-A](#) (and 5005 before it) has always given discretion to legal advocates on the cases taken on for full representation: "the agency may refuse to take action on any complaint that it considers to be trivial, to be moot or to lack merit or for which there is clearly another remedy available."

⁵ The risks of abuse, neglect, exploitation, and inherent conflicts of interest are present regardless of who serves as guardian. It is an inherent risk in an arrangement that takes away rights and decision making from one individual and gives that control to another person.

In a 2010 report, the Government Accountability Office (GAO) "identified hundreds of allegations of abuse, neglect, and exploitation by guardians in 45 states and the District of Columbia between 1990 and 2010. U.S. Gov't Accountability Office, GAO-17-33, The Extent of Abuse by Guardians Is Unknown, but Some Measures Exist to Help Protect Older Adults 158 (2016), <https://www.gao.gov/products/GAO-17-33> (last visited July 7, 2018). . The GAO found that in 20 cases guardians stole or improperly obtained \$ 5.4 million in assets from 158 people. *Id.* Likewise in just the last two years, the New Yorker, the Texas Observer, and the Las Vegas Review Journal have all had stories exposing abuse and exploitation by guardians. See Nat'l Council on Disability, Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination, 71-72 https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf (March 22, 2018), While the majority of cases cited by the GAO and in the news involve state or professional guardians, the National Council on Disability cited a recent Minnesota report finding that of 31 exploitation cases investigated, 24 involved a family member. *Id.*

⁶ There seems to be a widely held misconception that a person with an intellectual disability automatically needs a guardian upon the age of majority.

⁷ Nat'l Council on Disability, Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination, 88-94.

intellectual disabilities is more profound - approximately 67 percent of adults who receive developmental services in Maine have full guardians. ⁹

When it becomes effective on July 1, 2019, the Probate Code will require the parties to consider at every stage of the proceeding whether an individual's decision-making challenges can be addressed through SDM ¹⁰ and/or other less restrictive [*26] alternatives ¹¹ instead of through guardianship. It specifically requires that the petition for guardianship state why the person's needs cannot be met through less restrictive alternatives. The visitor must include in his/her report whether the person's needs could be met through a less restrictive alternative, and the court's order must specify its finding, by clear and convincing evidence, that the individual's needs cannot be met through alternatives. ¹²

Supported Decision-Making is an innovate alternative that allows an individual with a disability to work with a team of chosen supporters and obtain needed accommodations to make decisions about his or her own life. Individuals with disabilities select people they know and trust--friends, family, and professionals--to be part of a support network to help with their decision-making in the areas in which they require help. These supporters help the individual to understand the everyday situations and choices they encounter, explaining the pros and cons in a way that makes sense to the person with the disability. SDM builds on the natural supports in an individual's life and, in doing so, provides an opportunity for the individual to build decision-making skills. This process allows an individual to make his or her own decisions, retaining the person's fundamental rights and promoting self-determination.

The presence of one supporter (as compared to a single guardian) can serve as an important safeguard against abuse, neglect, exploitation, and conflicts of interests. People who use SDM have reported that it results in greater community inclusion, improved decision-making skills, and increased social and support networks. ¹³ In contrast,

⁸ Nat'l Core Indicators Project, Adult Consumer Report: Maine 2016-2017, https://www.nationalcoreindicators.org/upload/state-reports/ME_State_Report_2016-FINAL.pdf (last visited July 27, 2018).

⁹ *Id.*

¹⁰ Maine Revised Probate Code (to be codified at [18-C M.R.S. § 5-102\(32\)](#))("Supported decision making' means assistance from one or more persons of an individual's choosing: A. In understanding the nature and consequences of potential personal and financial decisions that enables the individual to make the decisions; and B. When consistent with the individual's wishes, in communicating a decision once it is made.").

¹¹ *Id.* (to be codified at [18-C M.R.S. § 5-102\(14\)](#)) (Less restrictive alternatives include: "appropriate technological assistance, appointment of an agent by the individual, including appointment under a power of attorney for health care or power of attorney for finances, or appointment of a representative payee.").

¹² *Id.* (to be codified at [18-C M.R.S. §§ 5-301\(1\)\(1\)\(A\)\(2\), 5-302\(2\) \(D\), 5-304\(4\)\(D\)](#)).

In addition to putting SDM and other alternatives at the forefront of any court proceeding considering guardianship, the Maine Revised Probate Code also improves the guardianship procedures by including language throughout to ensure that rights are not unnecessarily limited and helping to ensure individuals' access to the court process. For example, it includes a grievance process for individuals subject to guardianship. *Id.* (to be codified at [18-C M.R.S. § 5-126](#)). Under this provision, individuals can come before the court to raise and resolve concerns about their guardianship or how the guardian is carrying out its duties. In the past, too frequently when an individual disagreed with a guardian's decision or believed the guardian was otherwise not meeting their duties there was no mechanism to address it.

¹³ See, e.g., Pell & Mulkern, Human Services Research Institute, Supported Decision Making Pilot: Pilot Program Evaluation Year 2 Report,31-34, http://supporteddecisions.org/wp-content/uploads/2016/11/Evaluation-Year-2-Report_HSRI-2016_FINAL-2-1.pdf (last visited July 27, 2018).

people under guardianship are more segregated from their communities--they are less likely to choose where they live, less likely to have a job in the community, and less likely to have friends.¹⁴

In the last decade, SDM has been gaining substantial momentum in Maine, the United States, and internationally.¹⁵ In 2017, the American Bar Association (ABA) House of Delegates urged all state legislatures to amend guardianship statutes to include SDM as a less restrictive alternative.¹⁶ Likewise, the Maine Probate and Trust Law Advisory Commission, at the direction of the Maine Legislature, examined the concept of SDM and, in 2017, specifically recommended the amendment of the Maine Probate Code to include it.¹⁷ SDM is also a central part of the 2017 Uniform Law Commission's Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGPPA).¹⁸ Maine is the first state in the nation to enact the 2017 UGPPA,¹⁹ although Wisconsin, Texas, Delaware, Alaska, and the District of Columbia have all codified SDM.²⁰

¹⁴ See National Core Indicators Project, Adult Consumer Survey data 2013-14, www.nationalcoreindicators.org (last visited July 27, 2018).

¹⁵ SDM has been endorsed and promoted by the Maine Probate Trust Law Advisory Commission, the Maine Department of Health and Human Services, the American Bar Association, the National Guardianship Association, and the National Council on Disability.

In part, this momentum can be attributed to SDM's consistency with Human Rights Law. See *generally* Kristin Booth Glen, Supported Decision-Making and the Human Right of Legal Capacity, 3 INCLUSION 2 (2015), a <http://supportmydecision.org/assets/tools/AAIDD-article-Glen.pdf> (last visited July 27, 2018). In 2006, the United Nations passed the Convention on the Rights of Persons with Disabilities (CRPD). <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (last visited July 30, 2018) Article 12 of the CRPD requires Parties to the Convention to "recognize that [people] with disabilities enjoy legal capacity on an equal basis to others in all aspects of life" and requires signatories to "take appropriate measures to provide access by person with disabilities to the support they require in exercising their legal capacity." *Id.* Many have interpreted this provision to prohibit guardianship altogether. Kristin Booth Glen, *Supported Decision-Making and the Human Right of Legal Capacity*, 3 INCLUSION 2 (2015).

SDM is consistent with the Americans with Disabilities Act and the U.S. Supreme Court's *Olmstead* decision. See Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making As A Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. Colo. L. Rev. 157, 157-58 (2010) (arguing that guardianship and other forms of substituted decision-making violate the integration mandate outlined in the Supreme Court's *Olmstead* decision and subsequent case law. She contends "that by limiting an individual's right to make his or her own decisions, guardianship marginalizes the individual and often imposes a form of segregation that is not only bad policy, but also violates the [ADA's] mandate to provide services in the most integrated and least restrictive manner.").

¹⁶ <https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Annual%20Resolutions/113.pdf> (last visited July 27, 2018).

¹⁷ <http://supporteddecisionmaking.org/sites/default/files/PATLACReport-Supported-Decision-Making.pdf> (last visited July 27, 2018).

¹⁸ Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (Nat'l Conference of Comm'rs On Unif. State Laws 2017) 2, <http://www.uniformlaws.org/Act.aspx?title=Guardianship,%20>

[Conservatorship,%20and%20Other%20Protective%20Arrangements%20Act](http://www.uniformlaws.org/Act.aspx?title=Guardianship,%20Conservatorship,%20and%20Other%20Protective%20Arrangements%20Act) (last visited July 27, 2018) ("[T]he act recognizes the role of, and encourages the use of, less restrictive alternative, including supported decision-making and single-issue court orders instead of guardianship and conservatorship. To this end, the act provides that neither guardianship nor conservatorship is appropriate where an adult's needs can be met with technological assistance or supported decision-making.").

¹⁹ See <http://www.uniformlaws.org/Act.aspx?title=Guardianship,%20> [Conservatorship,%20and%20Other%20Protective%20Arrangements%20Act](http://www.uniformlaws.org/Act.aspx?title=Guardianship,%20Conservatorship,%20and%20Other%20Protective%20Arrangements%20Act).

²⁰ Nat'l Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination*, 135-36.

DRM was among the first organizations in the country that implemented SDM and has helped numerous individuals avoid guardianship through the use of SDM. ²¹ In June 2018, the Knox County Probate Court terminated the guardianship of a DRM SDM pilot project participant specifically because he was utilizing Supported Decision-Making. ²²

We have seen first-hand how successful ***Supported Decision-Making*** can be in the lives of people with ***disabilities***. SDM is an essential tool for reducing the use of unnecessary guardianship and can address the conflict of issues raised by Perry v. Dean by empowering and supporting people with disabilities to make their own decisions.

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²¹ For more information on DRM's work around Supported Decision-Making and additional resources, see www.supportmydecision.org. In addition to Maine, there are six other states with SDM pilot projects. Nat'l Council on Disability, Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination, 136.

²² In re Termination of Guardianship Joshua Strong, Kno. Cty. Prob. Ct. 2002-0082 (June 6, 2018). Since 2012, there have been court decisions in at least six additional states favoring SDM over guardianship. Nat'l Council on Disability, Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination, 135.