

# A NEW ERA OF GUARDIANSHIP REFORM

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# Understanding the Language

- Guardianship
- Conservatorship
- Substituted decision maker
- Supported decision making
- Incapacity/Incompetence

# A Little Bit of History

- The legal rationales for guardianship
  - *Parens patriae* and its origins
- Development in the United States
- Reform movements
  - National conferences
  - Uniform codes and model laws
- Reform
  - Due process & accountability reforms
  - Limits on guardian's powers
  - New views of capacity
- Counter revolution disguised as reform
  - Different standards for people with ID

# The Guardian's Role in Decision Making

- The best interest standard
- The substituted judgment approach

# So What's Wrong with Guardianship?

At best, guardianship will provide personal care and property management that an individual with a disability alone cannot handle. At worst, it will deprive that individual of decision-making authority that he or she *does* have the capacity to handle, and will, at the same time, create the opportunity for personal and financial abuse.

Michael L. Perlin, “Striking for the Guardians and Protectors of the Mind”: The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law, 117 Penn State L. Rev. 1159, 1171 (2013)(emphasis in original).

# The Good

- A form of protection
- Some safeguards against abuse
- A format and a standard for decision-making
- Clarity about who is the “decider”
- Someone to act in an emergency

# The Bad

- Loss of independence
- Loss of legal personhood – “civil death”
- Loss of dignity & dignity of risk
- Loss of civil rights (e.g., to marry, vote associate, choose where to live, accept or refuse medical treatment)
- Possible exploitation

# Evaluating Guardianship

Does guardianship promote:

- Independence & dignity
- Integration
- Self expression and self advocacy
- Least intrusive & restrictive interventions?

Do guardianship laws encourage due process and fairness?

# Extending Reform

- Fewer (no?) guardianships
- Limits on guardians' authorities
- Supported decision making as an alternative to guardianship
  - Supported decision making systems
  - Examples
  - *Guardianship of Dameris L.*

# Possible Legal Challenges to Guardianship

- State law
  - Many good provisions are frequently ignored
- ADA & 504
  - Is guardianship a violation of the integration mandate?
- 14<sup>th</sup> Amendment
  - Procedural due process
  - Substantive due process

# International Law

- Convention on the Rights of Persons with Disabilities (CRPD)
  - U.S. signed but did not ratify
  - Article 12 of CRPD relates to issues of capacity
- International guardianship reform provoked by the CRPD

# The Opportunities

This is the time to design and implement strategies to bring meaningful and even revolutionary reform to the basic concepts of substituted decision making.

It is time to think about guardianship in a new way -- to create new opportunities for people with disabilities – enhancing their independence but still providing necessary and desired protection.