

# Supporting people with disabilities to exercise autonomy through guardianship alternatives



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# Agenda:

- About DRM and the P&A system
- The civil rights implications of guardianship
- Montana guardianship law and personal autonomy
- Alternatives to guardianship
- Questions

# What is a P&A

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# Core Values

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These values are closely held by DRM, and are helpful in thinking about disability rights:

- **Dignity** – “The dignity of the human being is inviolable.” Mont. Const. Art. II, Sec. 4. This necessarily requires protection for the “dignity of risk.”
- **Equity** – in order to have equal access, some people need more help than others in the form of accommodations and other supports. All disability rights laws contemplate this.
- **Self-determination** – everyone has the human right to participate in essential decisions that impact their lives.
  - This is closely connected to the right of human dignity and essential due process protections.
  - People should be present and have a meaningful voice every where decisions about them are made.
  - DRM advocates for expressed interests, we do not substitute our judgment (best interests) for that of the community we represent.

# What DRM Does

## Issues we work on

- Education
- Employment
- Community living
- Voting
- Prevention of Abuse, Neglect, and Exploitation
- Other disability civil rights issues

## What we do

- “Pursue legal, administrative, and other remedies or approaches”
- Monitor and Investigate
- Information and referral
- Self-advocacy support
- Outreach, TA, training
- Public policy

## People we serve

- Any person with a disability under the ADA in Montana
- Regardless of age
- Regardless of income or assets
- Regardless of where they live in Montana

# What DRM Does Not Do

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## What we don't do (but we may provide information and referral about):

- Put people under guardianships, but we do advise on less restrictive alternatives
- Family law (divorces, custody, parenting plans, etc.)
- Criminal law
- Estate planning (special needs trusts, powers of attorney, wills, etc.)
- Tax, pension, bankruptcy
- Malpractice and personal injury
- Property disputes
- Other general civil legal issues that Montana Legal Services Assoc. or private attorneys might handle

# A minority that has always known exclusion

As a minority people with disabilities “[have] always known exclusion—maybe not exclusion from the front of the bus, but perhaps from even climbing aboard it; maybe not exclusion from pursuing advanced education, but perhaps from experiencing any formal education; maybe not exclusion from day-to-day life itself, but perhaps from an adequate opportunity to develop and contribute to his or her fullest capacity.”

Maiden speech of Senator Bob Dole on the floor of the U.S. Senate. 115 Cong. Rec. 8816 (Apr. 14, 1969), *available at* <https://www.govinfo.gov/content/pkg/GPO-CRECB-1969-pt7/pdf/GPO-CRECB-1969-pt7-3-1.pdf>. Senator Dole served for 27 years in the U.S. Senate. On April 14, 1945, he was permanently disabled serving his country in World War II.

# “Out of Sight, Out of Mind”

“For more than a century laws have been in place to segregate and isolate people with disabilities in large public hospitals away from society. These laws enforced a “charity” model of disability services, removing individual rights and treating adults with disabilities like children to be protected by others . . . .”

*The Americans with Disabilities Act at 25* at 11–12 [hereinafter NDRN Report] (Nat’l Disability Rights Network 2015) (emphasis added), available at [https://www.ndrn.org/wp-content/uploads/2019/03/ADA\\_at\\_25\\_Final.pdf](https://www.ndrn.org/wp-content/uploads/2019/03/ADA_at_25_Final.pdf)



# Warning

The following slides contain antiquated language and ideas about disability. They are included for historical reference only.

# A history of *de jure* segregation

“The exclusions of retarded children complained of are based upon four State statutes:  
(1) 24 Purd.Stat. Sec. 13-1375<sup>3</sup> which **relieves the State Board of Education from any obligation to educate** a child whom a public school psychologist certifies as uneducable and untrainable. The **burden of caring for such a child then shifts to the Department of Welfare which has no obligation to provide any educational services** for the child;  
(2) 24 Purd.Stat. Sec. 13-1304<sup>4</sup> which **allows an indefinite postponement of admission to public school of any child who has not attained a mental age of five years**;  
(3) Purd.Stat. Sec. 13-1330<sup>5</sup> which appears to *excuse* any child from compulsory school attendance whom a psychologist finds unable to profit therefrom and  
(4) 24 Purd.Stat. Sec. 13-1326<sup>6</sup> which **defines compulsory school age** as 8 to 17 years **but has been used in practice to postpone admissions** of retarded children until 8 or to **eliminate them** from public schools at age 17.”

*Pennsylvania Ass'n for Retarded Child. v. Com. of Pa.*, 343 F. Supp. 279, 282 (E.D. Pa. 1972); see also *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866, 876 (D.D.C. 1972) (class action invalidating D.C. law on equal protection and due process grounds).

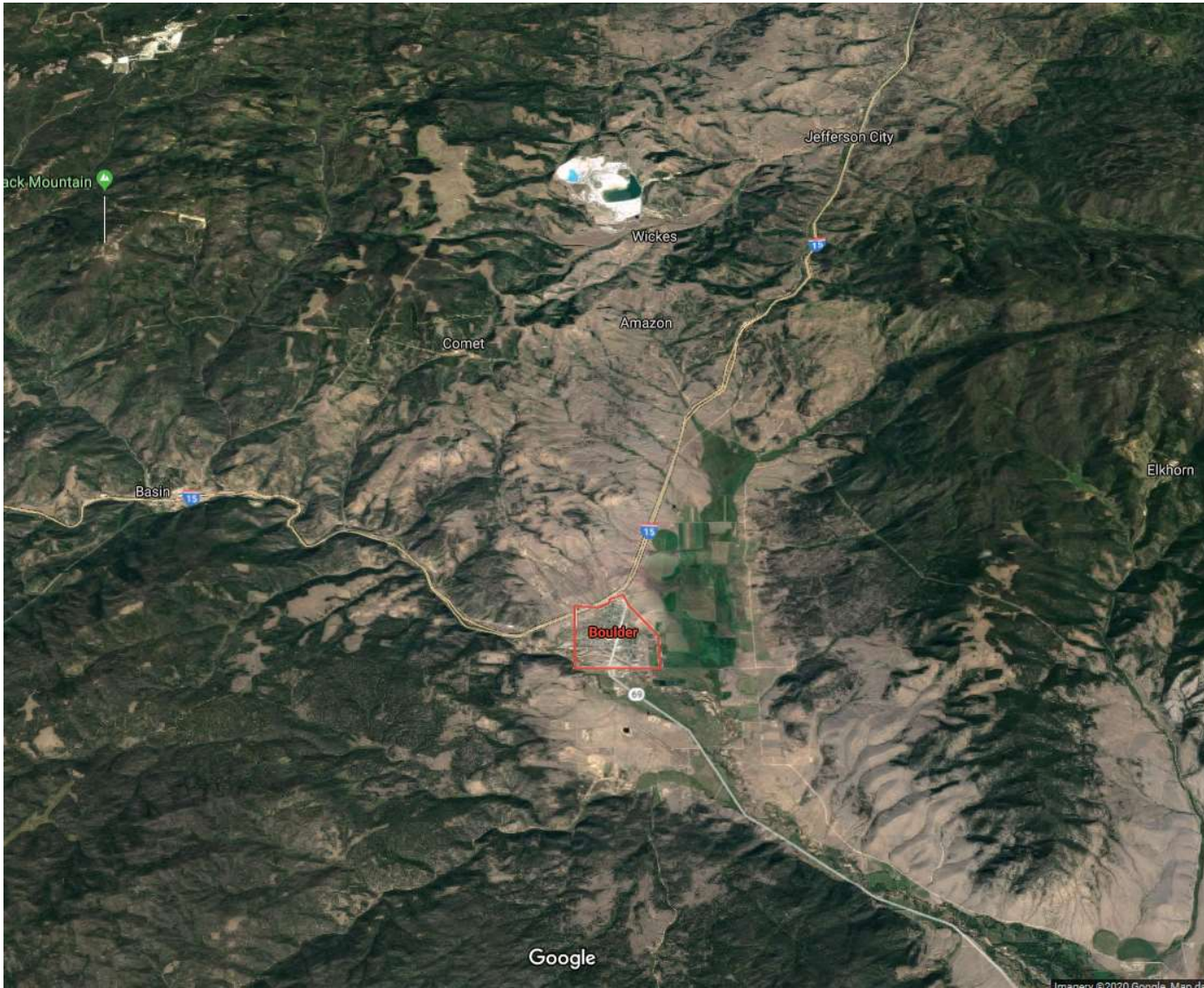
# Montana Before IDEA (1975)

- Defined “mentally retarded child” as a child “who is not capable of profiting from the regular instruction of a school because his mental ability is substantially below the mental ability of an average child of the same age.” R.C.M 75-7801 (1971)
- No compulsory education for children whose “bodily or mental condition does not permit his attendance at school and the child cannot be instructed on the [pre-IDEA” special education provisions. . . .”
- A child could be entirely excluded from any special education class where the class exceed a cap set by the Superintendent of Public Instruction or “the child’s intellectual ability, age, or behavior was not compatible with the class” as determined by the Superintendent of Public Instruction. R.C.M 75-7812 (1971)

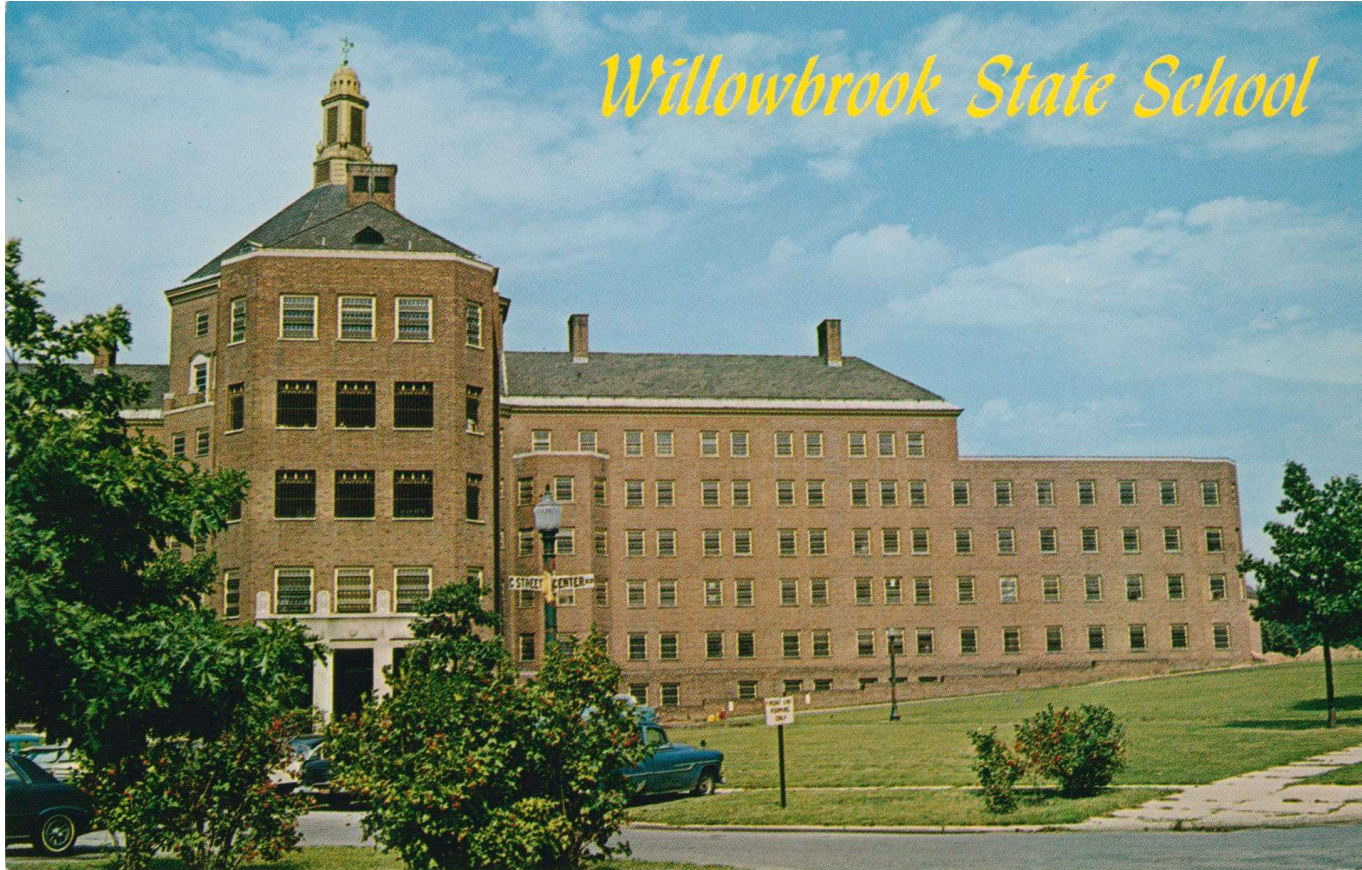


Source: Montana Historical Society





*Willowbrook State School*



## Disability Rights after Willowbrook: Disability Rights are Civil Rights

- The national outcry over the Willowbrook School led to:
  - the Rehab. Act of 1973 (*see* 29 U.S.C. § 794 ) and the 1977 “504 Sit-In”
  - Protection and Advocacy System (1975). *See* e.g. 29 U.S.C. § 794e.
  - Education for All Handicapped Children Act of 1975 (now IDEA). *See* 20 U.S.C. § 1400, et seq.



“The dignity of the human being is inviolable.”

Mont. Const., Art. II, Sec. 4.

“[I]ndividual dignity is, in all likelihood, the most important-- and yet, in our times, the most fragile-- of all human rights protected by Montana's Constitution.”

*Baxter v. State*, 2009 MT 449, ¶ 64, 354 Mont. 234, 224 P.3d 1211 (Nelson, J., specially concurring).

# Describing the problem

“There is a powerful and unique abrogation of rights when a person's care is entrusted to another under a guardianship arrangement. The typical ward has fewer rights than the typical convicted felon—they can no longer receive money or pay their bills. They cannot marry or divorce. By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. *It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty.*”

*Abuses in Guardianship of the Elderly and Infirm: A National Disgrace. A Briefing by the Chairman of the Subcommittee on Health and Long-Term Care of the Select Committee on Aging, 100<sup>th</sup> Cong. (prepared statement of Chairman Claude Pepper), H.R. Select Comm. on Aging, Subcomm. on Health and Long Term Care, Publ'n No. 100-641 at 4 (Sep. 25, 1987) (emphasis supplied).*

Available at <https://files.eric.ed.gov/fulltext/ED297241.pdf>

# Describing the problem

“each individual has an inherent property interest in his own person and has the capacity for and the right of rational self-determination which must be promoted and protected by civil society and political institutions.”

*Armstrong v. State*, 1999 MT 261, ¶ 30, 296 Mont. 361, 371-72, 989 P.2d 364, 372-73 (citing Larry M. Ellison and Dennis Nettik Simmons, *Right of Privacy*, 48 Mont. L. Rev. 1, 17-19 (1987); Jeffrey S. Koehlinger, *Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 Ind. L.J. 723 (1990)) (Explaining John Locke's conception of "liberty" enshrined in the U.S. Constitution.).

# What is a guardianship?

A guardianship is a court order “whereby the guardian assumes the power to make decisions about the ward's person or property [or both].”

“A guardianship is almost always an involuntary procedure imposed by the state on the ward.”

*Guardianship*, Black's Law Dictionary (11th ed. 2019).

# What rights are removed?

The “constitutionally protected individual interests implicated [by a full guardianship] [include:]

- the right to choose where to live and with whom to associate; . . .
- to make medical decisions regarding one's body; . . .
- to marry and to associate freely; . . .
- to travel or pursue in privacy the activities of daily living; and . . .
- to be free from unwanted constraints or incarceration.”

Susan G. Haines & John J. Campbell, *Defects, Due Process, and Protective Proceedings: Are Our Probate Codes Unconstitutional?*, 33 Real Prop. Prob. & Tr. J. 215, 227 (1998)

# When can a court order a guardianship?

- Establishing a guardianship rests upon a judicial determination that the person is “incapacitated and that judicial intervention in the person's personal freedom of action and decision is *necessary to meet essential requirements for the person's physical health or safety. . . .*” Mont. Code Ann. § 72-5-316(1) (emphasis added).
- Montana recognizes the significance of this rights deprivation, requiring a finding that “the identified needs of the person cannot be met by a less restrictive alternative.” *Id.* (Emphasis added).

# When can a court order a guardianship?

"Incapacitated person means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority, to the extent that the person *lacks sufficient understanding or capacity to make or communicate responsible decisions* concerning the person or which cause has so impaired the person's judgment that the person *is incapable of realizing and making a rational decision with respect to the person's need for treatment.*"

Mont. Code Ann. § 72-5-101(1) (emphasis added).

# When can guardianships be ordered?

- “Guardianship for an incapacitated person may be used only as is necessary to promote and protect **the well-being of the person.**
- The guardianship must be **designed to encourage the development of maximum self-reliance and independence** in the person and may be ordered **only to the extent** that the person's **actual mental and physical limitations require it.**
- An incapacitated person for whom a guardian has been appointed is **not presumed to be incompetent** and **retains all legal and civil rights except those that have been expressly limited** by court order or have been specifically granted to the guardian by the court.”

Mont. Code Ann. § 72-5-306 (emphasis added).

# Guardianships should be limited...

- An incapacitated person for whom a guardian has been appointed is **not presumed to be incompetent and retains all legal and civil rights except those that have been expressly limited** by court order or have been specifically granted to the guardian by the court.” Mont. Code Ann. § 72-5-306 (emphasis added).
- “An incapacitated person **may not be limited in the exercise of any civil or political rights except those that are clearly inconsistent with the exercise of the powers granted to the guardian** unless the court's order **specifically provides** for the limitations. The order must state that all rights not specifically limited are retained by the incapacitated person.” Mont. Code Ann. § 72-5-316(3) (emphasis added).

# But...

- Guardianship sought by parents are often uncontested.
- The need for and scope of the guardianship is often not adequately scrutinized.
- Frequently, they are granted without restriction, meaning almost all rights are effectively removed from the person under guardianship.

# What's wrong with guardianships?

- Unnecessary restriction of fundamental rights.
- “ ... can hinder or prevent inclusion, self-determination, and community integration, in conflict with the intent of the Americans with Disabilities Act (ADA 1990) and other federal laws.”
- the potential for abuse and exploitation of the individual under the guardianship;
- difficulty to undo once court enters a guardianship;
- “the guardianship outliving the guardian, potentially resulting in a total stranger becoming the individual’s guardian” and
- “the insertion of the government into the parent-child relationship in a manner that fundamentally changes the nature of that relationship.”

Ally Seneczko, *Special Education, Guardianships, and Procedural Due Process*, 81 Mont. L. Rev. 289, 290 (2020) (hereinafter Seneczko) (citations omitted), available at <https://scholarworks.umt.edu/mlr/vol81/iss2/5/>

# What does this have to do with schools?

“Under the threatening guise of ‘transfer of parental rights,’ state court systems are placing special education students under unnecessary guardianships at alarming rates once they reach the age of majority.”

A significant study showed that “students, parents, and special educat[ors] . . . had very little understanding of the implications of guardianships or its alternatives and transition plans often default to guardianship, without training on, or discussion of, the many preferable approaches available.”

Seneczko, 81 Mont. L. Rev. at 290, 297-98 (citations and quotations omitted).

# What does this have to do with schools?

“In contrast to the anticipated outcome of an IEP—preparing the student for further education, employment, and independence—guardianships impose lifelong constraints, deprive individuals of fundamental liberties, and are difficult to undo. Thus, the IDEA’s efforts to promote self-determination and independence are negated when an individual’s right to make decisions is eliminated through an established guardianship.”

Seneczko, 81 Mont. L. Rev. at 294 (citations omitted).

# Transition to adulthood

- “not later than the first IEP to be in effect when the child is 16, and updated annually thereafter [the IEP must include]—
- (aa) appropriate measurable postsecondary goals **based upon age appropriate transition assessments** related to training, education, employment, and, where appropriate, independent living skills;
- (bb) the transition services (including courses of study) **needed to assist the child in reaching those goals**; and
- (cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the **child’s rights** under this chapter, if any, **that will transfer to the child on reaching the age of majority** under section 1415(m) of this title.”

20 U.S.C. §1414(d)(1)(A)(i)(VIII)(aa)–(cc)

# What is transfer of parental rights?

- “(1) When a student with disabilities reaches the age of 18, parental rights under IDEA will transfer to the student in accordance with 34 CFR 300.520 and 34 CFR 300.320(c).” Mont. Admin. R. § 10.16.3502.
- “A State **must establish procedures** for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child's eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.” 34 C.F.R. § 300.520(b) (emphasis).

# And...

- School officials often tell parents to respond to the transfer of IDEA rights by placing the adult child under guardianship.
- Of course, this is legal advice.
- This is also incomplete and, therefore, not good legal advice.

# But...

- Montana never “established procedures” to appoint an educational decision maker for an adult student on an IEP who is not under a guardianship. **Therein lies the problem!** *See In re C.S.*, 2014 MT 74, ¶ 24, 374 Mont. 289, 294, 320 P.3d 981, 985; see also *Guardianship Alternatives and Transfer of Rights* (UMass Boston), <https://gator.communityinclusion.org/states/montana/> (last visited Oct. 18, 2022).

# Surrogates vs. educational decision makers

- A “surrogate parent” is an individual appointed (usually by a court) to protect the educational rights **of a minor student**, such as a child in foster care, who does not have any parents, who is a ward of the state, or whose parents cannot be found. 20 U.S.C. § 1401(23).
- **A surrogate parent is not appointed for an adult student.** Other legal procedures must be used in the case of an adult student who lacks the ability to give informed consent to educational decisions. *See In the Matter of C.S.*, 2014 MT 74, 374 Mont. 289, 320 P.3d 981; *see also* 20 U.S.C. § 1415(m)(2); 34 C.F.R. § 300.520(b), Mont. Admin. R. § 10.16.3504.

# The solution to the “transfer of rights problem ...”

- The solution to the appointment of an educational decision maker is a simple form, not a guardianship.
- Here’s California’s version (**as an example, not for use in Montana**): <https://www.courts.ca.gov/documents/BTB24-1H-4.pdf>
- Here’s a sample power of attorney for education: *Alternatives to Guardianship Toolkit*, Appx. D (Rural Institute at the University of Montana 2018), available at <https://transition.ruralinstitute.umt.edu/alternatives-to-guardianship/>
- **Schools should ask OPI, the Montana School Boards Association, and/or their legal counsel to develop a similar form to appoint an educational decision maker for an adult student who is still IDEA eligible.**

# Montana law now requires consideration of alternatives

- SB31 (2023) added the requirement to consider less restrictive alternatives to guardianships. Added these definitions:

"Less restrictive alternative" mean an approach to meeting a person's needs that restricts fewer rights of the person than would the appointment of a guardian. The term includes supported decisionmaking, appropriate technological assistance, and appointment of a representative payee." Mont. Code Ann. § 72-5-305.

(5) "Supported decisionmaking" means assistance from one or more persons of a person's choosing in:

- (a) understanding the nature and consequences of potential personal and financial decisions, which enables the person to make the decisions; and
- (b) communicating a decision, once made, if consistent with the person's wishes.

Mont. Code Ann. § 72-5-305

# Montana law now requires consideration of alternatives

- Requires new allegations in the petition (§ 72-5-319(i)):
  - (i) any less restrictive alternatives for meeting the alleged incapacitated person's needs that have been implemented or, if no less restrictive alternatives have been implemented, the reason why; and
  - (ii) the reason why a less restrictive alternative is insufficient to meet the alleged incapacitated person's needs
- Amends 72-5-316 to require a finding that “. . . that the identified needs of the person cannot be met by a less restrictive alternative . . .”

# Features of alternatives

- Person centered
- Consensual
- Flexible and easily modified as needs change
- Do not require court intervention or judicial determination of incapacity
- Preserves all rights of persons with disabilities
- Legally effective
- Cost effective
- Use natural supports to help people make better decisions

# Some Alternative to guardianships

- Supported decision making
- Effective estate planning, including limited powers of attorney (POA). *See* sample POA for Education in *Alternatives to Guardianship Toolkit*, Appx. D (Rural Institute at the University of Montana 2018), *available at* <https://transition.ruralinstitute.umt.edu/alternatives-to-guardianship/>
- Technological solutions

# Supported Decision Making

“The least restrictive alternative to guardianship is the practice of SDM. Most importantly, SDM is rooted in the belief that all people have the right to make choices and decisions about their own lives. SDM can be practiced in several ways, involving different forms and processes. The individual is supported to make a decision based on their needs, wants, and preferences. SDM is therefore highly individualized, and is the same process many of us use regularly to make a decision or choice if we do not have the information we need to move forward.”

Seneczko, 81 Mont. L. Rev. at 298-99 (citations and quotations omitted).

# Supported Decision Making (SDM)

“SDM is a type of person-centered planning, and the goal is for the individual to preserve control of their life and choices to the greatest extent. The student may consult with their trusted team members about any needs or concerns they have about their educational plan and ultimately submit the final approval for their IEP going forward.”

Seneczko, 81 Mont. L. Rev. at 299 (citations and quotations omitted).

## SUPPORTED DECISION MAKING AGREEMENT

I, \_\_\_\_\_, am in charge of my own life. Sometimes I need help to make decisions and understand my choices. My Supporters are people I trust to help me make decisions.

- I. I am my own person. I just need some help in a few areas. \_\_\_\_\_ have agreed to be my Supporters. I also receive support from \_\_\_\_\_. I need Supporters to help me make decisions about:
- A. Taking care of my finances and money, like maintaining bank accounts, paying the rent and bills on time, and keeping a budget so I know how much money I can spend.
- a. \_\_\_\_\_ currently helps me with my finances as my \*\*\*Representative Payee.\*\*\* \_\_\_\_\_ helps me handle my money and receives and pays out funds on my behalf when necessary.
- b. \*\*\* \_\_\_\_\_ will continue to be my Representative Payee.\*\*\*
- c. \*\*\* \_\_\_\_\_ will help me handle my money and receive and pay out funds on my behalf when necessary.\*\*\*

B. Making decisions about serious medical situations, like surgery, big injuries, and emergencies.

a. \_\_\_\_\_ agreed to help me with serious medical decisions and will be my Durable Medical Power of Attorney.

II. My disability affects some of my physical functionality. Some areas I need physical support include getting dressed, showering, transportation, etc. The physical limitations that I experience does not necessarily impact my ability to make decisions for myself as it relates to these areas.

III. I am asking that my Supporters help me in the following ways:

A. Give me information in a way I can understand.

B. Explain my wishes to other people. Sometimes, it might be helpful to explain when people do not understand the way I say things.

- C. Making choices about personal care, taking care of my personal hygiene, remembering to take my medicine, and helping me get dressed.
- D. Helping me make safe choices around the house for example with things such as turning off the stove or having working fire alarms in the home.
- E. My supporters will help me with housing, work, and friends, like helping me make choices about where I live and roommates.
- F. My supporters will help me find support services if I need them and terminate support services if no longer meet my needs.
- G. My supporters will help me with signing contracts and formal agreement. In helping me with this category, my supports will help me understand the contents of the agreement and if available, alternative options that I may consider.
- H. Helping me make every day medical decisions such as when to go to the doctor or dentist, when to pick up medications, when to schedule a check-up, etc. My Medical Power of Attorney will ultimately help me make medical decisions in serious situations, for example if I need surgery or have a big injury. My Medical Power of Attorney will make decisions on my behalf in emergency situations according to any current Medical Power of Attorney document that I sign. I may change the terms of my Medical Power of Attorney or revoke it.

IV. I can do the following things myself:

- A. Communicate my needs and desires. I can communicate what I want and don't want and how I make choices on my own without support.
- B. Make my own choices about what I want to wear, what I want to eat, and when I want to eat.
- C. Understand and get help if I am being treated poorly, or being abused or neglected, and I can communicate this to the appropriate person if I need support.
- D. Make my own decisions about drugs and alcohol.
- E. Make my own choices about dating, sex, pregnancy, and marriage.

- F. Make my own decisions about where I live, what I do, and who I see in my free time.
- G. I can independently keep my room and home clean.
- H. Make my own choices about traveling to places I go often, such as getting to work, going to the store, or going to a friend's home. I can also make my own choices about traveling places I do not go often, such as doctor's appointments and special events.
- I. Make my own decisions in understanding my work choices, choosing if I want to work, choosing classes or training I may need to get a job I want and applying for a job.
- J. Make my own choices about voting in any elections.

- V. I communicate with my Supporters by talking with them in person and over the phone. I get the support I need from my Supporters when I have a question or request their advice on a situation.
- VI. I know that I can decide to end this agreement at any time. I also know that I can add or remove Supporters when it is necessary or helpful to do so. My Supporters and I are going to sign below to show that we agree to this Supported Decision Making plan.
- VII. I have gone over all the information in this agreement, and I understand it. I am signing this because I want to. It is my free choice and my decision. This agreement will begin once everyone has signed below.

# Resources

**Alternatives to Guardianship, Rural Institute at UM (RI):** <https://transition.ruralinstitute.umt.edu/alternatives-to-guardianship/>

**Fact Sheets: Least Restrictive Approaches to Support Individual Decision Makers, RI**  
[https://courts.mt.gov/external/wings/resources/Adult%20Guardianship%20factsheet\\_FINAL\\_10.3.19.pdf?ver=2019-12-31-132733-253](https://courts.mt.gov/external/wings/resources/Adult%20Guardianship%20factsheet_FINAL_10.3.19.pdf?ver=2019-12-31-132733-253)

**Fact Sheet -** <https://transition.ruralinstitute.umt.edu/www/wp-content/uploads/Docs/Get-the-facts-final.pdf>

**National Resource Center on Supported Decision-Making:** <http://www.supporteddecisionmaking.org/>

**ACLU Supported Decision-Making resource library:** <https://www.aclu.org/other/supported-decision-making-resource-library>

**Center for Public Representation's SDM resource** (non-profit law firm for people with disabilities)  
<https://supporteddecisions.org/>

**Estate Planning (including Powers of Attorney) – Montana State University Extension**  
<https://apps.msueextension.org/montguide/index.html?FFD=estate>

***Guardianship Alternatives and Transfer of Rights* (UMass Boston):**  
<https://gator.communityinclusion.org/states/montana/>

**Books:** Karrie A. Shogren, et al., *Supported Decision-Making* (Cambridge 2018)

# Questions?

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