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## SPECIAL EDUCATION, GUARDIANSHIPS, AND PROCEDURAL DUE PROCESS

Ally Seneczko\*

### I. INTRODUCTION

Guardianship is a highly intrusive form of advocacy and should only be used as a last resort after all other alternatives have been explored. Far too often, people with disabilities are placed in overly broad and highly restrictive guardianships that deny the individual fundamental rights and the ability to make daily life choices.<sup>1</sup> A guardianship is a court-ordered arrangement for a person who has been found by a court to be incapacitated and “in need of someone to oversee his or her personal care and decision-making to protect the [person’s] health and safety.”<sup>2</sup> Under the threatening guise of “transfer of parental rights,”<sup>3</sup> state court systems are placing special education students under unnecessary guardianships at alarming rates once they reach the age of majority.<sup>4</sup> The Individuals with Disabilities Education Act (“IDEA”) requires that, once a child turns 18, rights regarding educational programming decisions transfer from the parent to the student for the remainder of their educational years.<sup>5</sup> Evidence indicates that this

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\* Ally Seneczko, J.D. 2020. A most special thanks to Roberta Zenker and Tal Goldin— for always encouraging and supporting my dreams, and for teaching and inspiring me to be as zealous of an advocate for the rights of people with disabilities as you both are. And, as always, a huge thank you to my family for their unending love and support.

1. This comment uses person-first language to emphasize the individual first and their disability second in order to support equality for people with disabilities.

2. Montana Guardianship Legal Assistance Program (MT-GLAP), Montana Judicial Branch, <https://perma.cc/W56G-NZ4E> (last visited May 12, 2020).

3. MONT. ADMIN. R. 10.16.3502 (2007); *see also* 34 C.F.R. § 300.520 (2007) (federal transfer of parental rights statute which provides that, when a child with a disability reaches the age of majority under state law, all rights accorded to the parents under the Individuals with Disabilities Education Act transfer to the child); 34 C.F.R. § 300.320(c) (provides the definition of individualized education program).

4. J. Matt Jameson et al., *Guardianship and the Potential of Supported Decision Making with Individuals with Disabilities*, 40(1) RES. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 36, 45 (2015) (Based on descriptive data from a national survey on guardianship and people with disabilities, results indicated that “regardless of who provides information about guardianship, and regardless of disability classification, full guardianship is consistently discussed most frequently while other options are rarely discussed.” Target participants of the study included parents and guardians of individuals with disabilities. The study was conducted in collaboration with the advocacy organizations and human rights committees primarily focused on the elimination of restraint and seclusion in schools, but “whose collective and individual member organizations all have a stake in issues relating to guardianship.” The study found that “school personnel discussed full guardianship 84% of the time compared with 16% discussing supported decision making.”).

5. 34 C.F.R. § 300.520.

transition process defaults to guardianships, and parents and educators generally lack knowledge or awareness on the long-term consequences of imposing a guardianship on adults.<sup>6</sup>

A growing recognition indicates that “overreliance on formal systems of substituted decision making (i.e., guardianship) 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.”<sup>7</sup> Supported decision making (“SDM”) is the least restrictive substituted decision making alternative to legal guardianship that “has the potential to avoid many of the legal and social pitfalls that guardianship presents.”<sup>8</sup>

Guardianship immediately results in a loss of the individual’s decision-making rights and has other long-term implications, including: (1) the potential for abuse and exploitation of the individual under the guardianship; (2) the difficulty in undoing a guardianship; (3) the guardianship outliving the guardian, potentially resulting in a total stranger becoming the individual’s guardian; and (4) the insertion of the government into the parent-child relationship in a manner that fundamentally changes the nature of that relationship.<sup>9</sup> This article seeks to explore the interaction between guardianships and special education in Montana, explain Montana’s current guardianship statutes and procedures, propose less restrictive alternatives to plenary guardianships, address and analyze constitutional due process issues, identify Tennessee’s current guardianship approach as a model for reform, and recognize current legislative reform efforts in Montana.

## II. BACKGROUND

In Montana, a court cannot establish a guardianship unless it finds that a “full guardianship is necessary to promote and protect the well-being of

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6. Jameson et al., *supra* note 4, at 45.

7. *Id.* at 36, 45–47. (“It was surprising that school personnel are not often identified as being involved in the training and education relation to guardianship. This is especially troubling given the mean and mode age of guardianship was shown to be at age 18 (school age) for individuals with disabilities in transition programs . . . Schools were only identified 12 times in the 305 responses as being a source of any information or education relating to guardianship in the transition process despite being identified as frequently being the professionals who initiate guardianship discussions. This is also surprising given IDEA 20 U.S.C. § 1400 (2004) requires that 1 year prior to a student with a disability reaching the age of majority, the IEP must include a statement that the student was informed of any rights that transfer to the student when he or she reached age of majority. As described, school personnel are identified as a primary source of an initial recommendation. In light of these data, it is troubling that schools are rarely identified as providing students or parents education or training relating to guardianship at this point.”)

8. *Id.* at 36.

9. *Id.* at 39.

the ward.”<sup>10</sup> Limited guardianships are rarely established. A 2008 qualitative study on transition and guardianship found that “full guardianship had become the default option for every student with an intellectual disability in the educational program examined.”<sup>11</sup> But individuals subject to guardianships often experience “low self-esteem, passivity, and feelings of inadequacy.”<sup>12</sup>

It was once assumed that capacity was static, and that the customary legal path for a client with diminished capacity was the appointment of a substitute decision-maker.<sup>13</sup> Today, however, it is well-known that there are wide variations in capacity and decision-making abilities among individuals with the same disability.<sup>14</sup> Individuals with disabilities may already possess the ability to make decisions for themselves or the ability to learn and develop decision-making capabilities.<sup>15</sup> Thus, the focus of guardianship proceedings should be determining whether the individual being subjected to guardianship may have future decision-making capacity.<sup>16</sup> The following subsections will explore the contrast between the independence-oriented trajectory of the IDEA and the unintended results of special education transition requirements on guardianships.

#### A. *The IDEA Intends to Promote Independence and Self-Determination*

Special education programming is governed by the IDEA, through which the federal government provides funding to the states to deliver special education services for students with disabilities.<sup>17</sup> “In exchange for receiving [the federal funds], states agree to comply with all of the rules and regulations in IDEA.”<sup>18</sup> The IDEA’s primary goal is to “ensure that all children with disabilities have available to them a free appropriate public education (“FAPE”) that emphasizes special education and related services de-

10. MONT. CODE ANN. § 72–5–306 (2019).

11. Jameson et al., *supra* note 4, at 37–38. (citing E. M. Payne-Christiansen, & P. L. Sitlington, *Guardianship: Its Role in the Transition Process for Students with Developmental Disabilities*, 43(1) EDUC. & TRAINING IN DEVELOPMENTAL DISABILITIES 3, 11, 17 (2008)).

12. *Id.* at 39.

13. Donna S. Harkness, *Supported Decision Making, The Missing Piece in the Puzzle of Planning for Clients with Diminished Capacity*, 54 TENN. B.J. 19 (2018).

14. *Id.* at 19.

15. *Id.*

16. *Id.* at 19–20.

17. 20 U.S.C. §§ 1400–1450 (2010); KYRIE E. DRAGOO, *THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FUNDING: A PRIMER*, CRS REPORT NO. R44624, at 1 (2019) (The IDEA is a grants statute that provides for federal funding for the education of children with disabilities and requires, as a condition for the receipt of such funds, that states agree to provide a free appropriate public education . . . to every eligible child).

18. TAL M. GOLDIN, *STUDENT RIGHTS: A HANDBOOK TO THE EDUCATIONAL RIGHTS OF STUDENTS WITH DISABILITIES IN MONTANA* 9 (2016).

signed to meet their unique needs and prepare them for further education, employment, and independent living.”<sup>19</sup> Montana is bound by the IDEA because it receives federal funding under the IDEA.<sup>20</sup>

In order for a child to be eligible for special education services under the IDEA, they must: (1) have a disability within the meaning of the IDEA; and (2) require special education services because of that disability.<sup>21</sup> Once a student qualifies for services, the school has a legal obligation to provide a FAPE that is uniquely tailored to the needs of the student.<sup>22</sup> This includes the formulation of an Individualized Education Plan (“IEP”), the “center-piece of the IDEA’s education delivery system.”<sup>23</sup> Although the school districts have a legal obligation to provide special education services, the services provided are often inadequate, not individually tailored to the student’s needs, and not updated frequently enough.<sup>24</sup> Consequently, the students’ parents often assume the role of primary advocates throughout their children’s educational years, starting as early as age three.

Once the child turns 16, the IEP must be revised to contain a transition plan, identifying “appropriate, measurable postsecondary goals based upon . . . transition assessments related to training, education, employment, and . . . independent living skills” and “the transition services . . . needed to assist the child in reaching those goals.”<sup>25</sup> State agencies, offering services such as vocational rehabilitation, are available to provide transition services to students and should be included in the transition planning.<sup>26</sup> Additionally, a Notice of Transfer of Rights is to be included in the IEP at least one year prior to the child turning 18, notifying the student that his or her educational rights will be transferred from the parents to the student once the student turns 18.<sup>27</sup> For most students, it is at this point that the process of establishing a legal plenary guardianship is initiated.<sup>28</sup>

19. *Id.* at 22; 20 U.S.C. § 1400(d)(1)(A); 20 U.S.C. § 1401(29) (“Special education” is defined as “specially designed instruction . . . to meet the unique needs of a child with a disability”).

20. *In re C.S.*, 320 P.3d 981, 985 (Mont. 2014).

21. MONT. CODE ANN. § 20–7–401(1).

22. MONT. CODE ANN. § 20–7–401(2), (4).

23. *In re Butte Sch. Dist. No. 1*, No. CV 14-60-BU-SHE, 2019 WL 343149 at \*4 (D. Mont. Jan. 28, 2019) (*quoting* *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017)).

24. *See, e.g.*, *Andrew F.*, 137 S. Ct. 988; *In re Butte Sch. Dist. No. 1*, 2019 WL 343149.

25. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)–(bb).

26. Office of Special Education and Rehabilitative Services, A Transition Guide to Postsecondary Education and Employment for Students and Youth with Disabilities, UNITED STATES DEPARTMENT OF EDUCATION (May 2017) <https://perma.cc/43J3-4REJ> (last visited May 12, 2020).

27. MONT. ADMIN. R. § 10.16.3502 (2007); *see also* 34 C.F.R. §§ 300.520 & 300.320(c) (2007).

28. Jameson et al., *supra* note 4, at 47; *see also* Theresa Baldry, *Alternatives to Guardianship Toolkit*, UNIVERSITY OF MONTANA RURAL INSTITUTE FOR INCLUSIVE COMMUNITIES, A CENTER FOR EXCELLENCE IN DISABILITY EDUCATION, RESEARCH, AND SERVICE 13 (Feb. 2018) [HTTPS://PERMA.CC/WG5L-KR5X](https://perma.cc/WG5L-KR5X) (last visited Mar. 14, 2020) (“For some families, the discussion of guardianship first

Indeed, the use of guardianship seems to have become so “embedded in the transition process of [the] IEP,” that in some IEP software programs, “information relating to guardianship is included in transition process forms.”<sup>29</sup> This bias towards guardianship affects millions of public school children with disabilities.<sup>30</sup> The information provided does not offer alternatives to guardianship and “the differences between full and partial guardianship for individuals . . . are often indistinguishable.”<sup>31</sup> Parents seek to become their child’s guardian on “someone else’s recommendation or with the belief that they need to do so to protect their child or be able to provide long term support.”<sup>32</sup> This has led to an overabundance of unnecessary guardianships being established at alarming rates, and the ultimate consequences of these guardianships are typically an afterthought—if ever considered at all.

*B. The Use of Guardianships in Response to the Transfer of Parental Rights Is an Unintended Result of IDEA Compliance Efforts*

In passing the IDEA, Congress intended for states to adopt additional procedural safeguards to ensure that children with disabilities have available to them services emphatically designed to prepare them for independent living.<sup>33</sup> The IDEA requires the state to appoint a parent or surrogate to assist in advising the student, if the student has not been determined to be incompetent but does not possess the ability to direct their educational programming sufficiently.<sup>34</sup> Notwithstanding this requirement, reliance on guardianship impedes self-determination of students with disabilities, directly conflicting with the intent of the IDEA.<sup>35</sup> Conversely, the development of “self-determination in young adults with disabilities is the ultimate goal of education, and . . . promoting self-determination may lead to improved postschool outcomes.”<sup>36</sup> In fact, “research has repeatedly found that

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comes up within the area of education. The Individualized Education Plan (IEP) requires Transfer of Rights paperwork to be completed at least one year before a youth turns 18”) (internal quotes omitted).

29. Jameson et al., *supra* note 4, at 39.

30. *Id.*

31. *Id.*

32. *Id.*

33. See 20 U.S.C. § 1400(d)(1)(A) (2010).

34. In re C.S., 320 P.3d 981, 985 (Mont. 2014) (quoting 20 U.S.C. § 1415(m)(2)) (“The law reads: If, under State law, a child with a disability who has reached the age of majority . . . who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter”).

35. Jameson et al., *supra* note 4, at 36.

36. Dorothy Squatrito Millar & Adelle Renzaglia, *Factors Affecting Guardianship Practices for Young Adults with Disabilities*, 68(4) EXCEPTIONAL CHILDREN 465 (2002).

people who exercise greater self-determination, those with more control over their lives, have greater independence and quality of life.”<sup>37</sup> In contrast to the anticipated outcome of an IEP—preparing the student for further education, employment, and independence<sup>38</sup>—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.<sup>39</sup> As such, the prevalence of guardianships over individuals with disabilities, while perhaps an unintended byproduct of the IDEA itself, directly conflicts with the IDEA’s ultimate goal of preserving individual autonomy.

*C. Guardianships and Their Consequences: Restricting Independence and Self-Determination*

In order to recognize and respect the rights of people with disabilities, alternatives to guardianship must be more commonly utilized. Commentator Sheryl Dicker described guardianship in this way:

Guardianship is a legal mechanism for decision making which comes in the guise of benevolence, as it was originally intended to protect the disabled individual and his property from abuse . . . yet, guardianship, in reality, reduces the [individual with a disability] to the status of a child. Few . . . persons ever truly benefit from the guardianship system as practiced in most states.<sup>40</sup>

Additionally, early studies of guardianship proceedings “found little benefit to the [individual] and concluded that many [guardianship] petitions were filed for the benefit of third parties or from “well-meaning but ineffective motives to aid vulnerable groups.”<sup>41</sup> The following subsections explain Montana’s current guardianship procedures, the interaction between guardianship law and special education, and the prevalence of guardianships.

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37. Jameson et al., *supra* note 4, at 36.

38. 20 U.S.C. § 1400(d)(1)(A).

39. Squatrito Millar & Renzaglia, *supra* note 36, at 466.

40. Sheryl Dicker, *Guardianship: Overcoming the Last Hurdle to Civil Rights for the Mentally Disabled*, 4 U. ARK. LITTLE ROCK L. REV. 485, 486 (1981).

41. Pamela B. Teaster et al., *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. R. 194, 196 (2007) (citing Margaret Blenkner et al., *Final Report—Protective Services for Older People: Findings from the Benjamin Rose Institute Study*, THE BENJAMIN ROSE INST. 161 (1974)).

### 1. *Guardianship: Montana's Current Procedures*

The guardianship process begins when an interested party petitions<sup>42</sup> a court to appoint him or her as guardian<sup>43</sup> over the individual upon the individual reaching majority. Montana's statutory language regarding the prospective ward's<sup>44</sup> (hereafter "individual subject to guardianship" or "individual") rights to procedural due process in a guardianship proceeding is generally permissive and does not adequately protect the individual's fundamental liberty interests. Montana requires courts, prior to appointing a guardian, to determine that an individual being subjected to guardianship is incapacitated.<sup>45</sup> In Montana, an incapacitated person is defined as:

Any person who is impaired by reason of . . . disability . . . 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 treatment.<sup>46</sup>

The individual subject to guardianship is entitled to notice,<sup>47</sup> permitted representation by counsel,<sup>48</sup> and permitted to attend the court proceedings.<sup>49</sup> If in attendance at the court proceedings, the individual is permitted to cross-examine witnesses, present evidence, and appeal the court's determination.<sup>50</sup> A prospective guardian need only establish the necessity of guardianship to the "court[']s] satisfaction."<sup>51</sup> This exceedingly low standard is

42. MONT. CODE ANN. § 72-5-315(1) (2019) (The incapacitated person or any person interested in the incapacitated person's welfare . . . may petition for a finding of incapacity and appointment of a guardian).

43. See MONT. CODE ANN. § 72-1-103(21) (defining "guardian" as "a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment[.]"); MONT. CODE ANN. § 72-5-305(1) (defining "[f]ull guardian" as "a guardian who possesses all the legal duties and powers [of the ward].")

44. MONT. CODE ANN. § 72-5-101(5) (defining "[w]ard" as "a person for whom a guardian has been appointed").

45. MONT. CODE ANN. § 72-5-315(1).

46. MONT. CODE ANN. § 72-5-101(1).

47. MONT. CODE ANN. § 72-5-314(1)(a) (providing that "[i]n a proceeding for the appointment . . . of a guardian of an incapacitated person . . . notice of hearing must be given to . . . the ward or the person alleged to be incapacitated . . ."); MONT. CODE ANN. § 72-2-314(2) (providing that "[n]otice must be served personally on the alleged incapacitated person . . .").

48. MONT. CODE ANN. § 72-5-315(2) (providing that "[t]he allegedly incapacitated person may have counsel of the person's own choice or the court may, in the interest of justice, appoint an appropriate official or order the office of state public defender . . . to assign counsel pursuant to the Montana Public Defender Act . . . to represent the person in the proceeding").

49. MONT. CODE ANN. § 72-5-315(4) (providing that "[t]he person alleged to be incapacitated is entitled to be present at the hearing in person and to see or hear all evidence bearing upon the person's condition. The person is entitled to be present by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury").

50. *Id.*

51. MONT. CODE ANN. § 72-5-316(1).

easily met through the introduction into evidence of medical documentation or evaluation by a court-appointed physician.<sup>52</sup>

## 2. *Guardianship and Special Education: The Status Quo*

The status quo regarding guardianship proceedings in special education is derived from a place of genuine concern for the child's educational rights. Parents are often pressured by the school district to seek guardianships for their children in order to retain their child's special education programming once the child becomes an adult. This attitude is demonstrated by a parent of a child in special education who writes:

What can happen if a Disabled Adult does not have a guardian? If a person is 18, and the parent has not done anything, then that person is a legal adult. They can enter contracts, refuse services, and sign leases. Basically, they can do anything that any other adult can do. They can even be drafted into the service! In some cases, you may be able to undo mistakes, but it will take time and money.<sup>53</sup>

This parent's writing was widely shared and is a notion that permeates across disciplines and has been promoted by attorneys who represent parents in obtaining guardianships. For example, Cahill & Associates, an Illinois law firm, generally advises site visitors that "guardianship may be a necessity for an 18-year-old who has a disability that prevents him or her from making decisions about his or her . . . education," and, "in fact, many school districts positively brow beat parents into getting guardianship of their 18-year-old."<sup>54</sup> Because the IDEA mandates that these students receive a FAPE, Cahill & Associates advises that, "unless the student has been declared disabled, all rights under the IDEA transfer from the parents to the student at age 18,"<sup>55</sup> and, therefore, the student needs a guardian to retain educational services.<sup>56</sup>

This information is misleading. Although Montana "operates under an exception that does not require school districts to educate youth through age 21[,] . . . each Montana school district may decide for itself if it will provide services beyond age 18 to all students with disabilities or under special circumstances."<sup>57</sup> Even after the student has turned 18, "an adult can be

52. MONT. CODE ANN. § 72-5-315(3).

53. Lisa Lightner, *How to Get Legal Guardianship for an Adult with Disabilities*, A DAY IN OUR SHOES (last updated February 19, 2020), [HTTPS://PERMA.CC/E4G9-TGXL](https://perma.cc/E4G9-TGXL) (LAST VISITED MAR. 14, 2020).

54. Mary Denise Cahill & Robert H. Farley, Jr., *Why Does an 18-Year-Old with Disabilities Need A Guardian?*, CAHILL & ASSOCIATES LAW (Jan. 2008), [HTTPS://PERMA.CC/CN7Y-EQ7P](https://perma.cc/CN7Y-EQ7P) (LAST VISITED MAR. 14, 2020).

55. *Id.*

56. *Id.*

57. GOLDIN, *supra* note 18, at 11; *see also* 20 U.S.C. § 1412(a)(1)(A) (2016) (Under the IDEA, schools may allow eligible students to retain their eligibility for educational services until the student

appointed [if the student] has not been determined incompetent by a court, but . . . does not have the ability to provide consent to educational services.”<sup>58</sup> Only in rare circumstances should a limited guardianship or power of attorney be explored for educational decision-making and the ultimate decision “*should be made with great care and [with the advice of] an attorney.*”<sup>59</sup> Less restrictive alternatives that are available to assist a student in directing their educational program, as discussed later in this article, should be explored first.

Some attorneys discourage the use of guardianship alternatives such as supported decision-making agreements,<sup>60</sup> advising parents that “these agreements are quite a vague form agreement, easily ignored and difficult to enforce.”<sup>61</sup> This idea is based on the outdated assumption identified previously that people with disabilities do not have the capacity to learn and develop the skills and abilities necessary for decision-making.<sup>62</sup> On the contrary, special education studies have shown that self-determination has been identified as “a critical component of effective transition planning for students with disabilities . . . [and is] correlated with an improved quality of life for adults with disabilities, particularly those outcomes as employment, community living, and post-secondary education.”<sup>63</sup> With sustained support, an individual with severe disabilities could continue to receive the same level of educational support without a plenary guardianship.

### 3. *Guardianship: Prevalence, Statistics, and the Legal Model of First Resort*

The transition process required by the IDEA and the guardianship process often occurs in quick succession.<sup>64</sup> After extensive research on the inner workings of guardianships and special education, scholar Dorothy Squatrito Millar found that “the majority of students, parents, and special educat[ors] in [the] study said that they perceived they exhibited or pro-

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either completes their educational programming goals or turns 21-years-old, whichever occurs first, regardless of whether the student is under a guardianship.).

58. *Id.* at 39.

59. *Id.* (emphasis in original).

60. Amanda Woodard, *Special Needs Guardianship: An Interview with Rick O’Connor, Guardianship Attorney*, ACHIEVEMENT CENTER OF TEXAS (Jan. 2018) <https://perma.cc/V2ES-8ESP> (last visited Mar. 14, 2020) (“Supported decision-making agreements are sometimes entered into connection with powers of attorney. The . . . agreement is a new device,” that, when entered into, “the person with the disability agrees to . . . listen to and consider and try to follow the advice of the [agent].”).

61. *Id.*

62. Harkness, *supra* note 13, at 19.

63. Colleen A. Thoma & Elizabeth Evans Getzel, “*Self-Determination is what it’s All About*”: *What Post-Secondary Students with Disabilities Tell us are Important Considerations for Success*, 40(3) EDUC. & TRAINING IN DEVELOPMENTAL DISABILITIES, 234 (2005).

64. Baldry, *supra* note 28, at 13.

moted self-determination, but did not recognize the disconnect between self-determination and guardianship.”<sup>65</sup> Most critically, “the participants had very little understanding of the implications of guardianships or its alternatives,”<sup>66</sup> and transition plans often default to guardianship, “without training on, or discussion of, the many preferable approaches available.”<sup>67</sup>

The results of Millar’s study showed that, of 447 individuals under a court-appointed guardianship, the most common recommendation for transition by school personnel was full guardianship, and the least common was supported decision-making.<sup>68</sup> In fact, the study found there is a “consistent pattern of the most restrictive form of guardianship being discussed the most frequently—school personnel discussed full guardianship 84% of the time compared with 16% discussing supported decision-making.”<sup>69</sup> In light of the data, other commentators emphasized that “schools are identified as a primary source of initial recommendation,”<sup>70</sup> yet are “rarely identified as providing students or parents education or training related to guardianship.”<sup>71</sup> Ultimately, in analyzing the data, it was discovered that as a child approaches majority, the transition process of the IEP is often the catalyst or first prompt for parents to seek out information and legal resources regarding guardianships.<sup>72</sup> However, parents are not provided adequate resources on alternatives to guardianships,<sup>73</sup> which could prevent parents from believing plenary guardianship is the only option, or, alternatively, assist parents in petitioning for the most appropriate and least restrictive guardianship necessary to meet the student’s needs.

#### D. Alternatives to Guardianship

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.”<sup>74</sup> SDM can be practiced in several ways, “involving different forms and processes.”<sup>75</sup> The individual is “supported to make a decision based on their needs, wants, and preferences.”<sup>76</sup> SDM is therefore highly individualized, and is “the same

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65. Jameson et al., *supra* note 4, at 39.

66. *Id.*

67. *Id.*

68. *Id.* at 44–45.

69. *Id.* at 45.

70. *Id.* at 47.

71. *Id.* at 47.

72. *Id.*

73. Squatrito Millar & Renzaglia, *supra* note 36, at 483.

74. Baldry, *supra* note 28, at 11.

75. *Id.*

76. *Id.*

process many of us use regularly to make a decision or choice if we do not have the information we need to move forward.”<sup>77</sup> Through SDM, “the individual chooses who to involve (such as friends, a family member, or a professional) to help them understand information, including the impact of different choices and what options should be considered before making a decision.”<sup>78</sup> 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.<sup>79</sup> The student may “consult with their trusted team members about any needs or concerns they have about their educational plan”<sup>80</sup> and ultimately submit the final approval for their IEP going forward.<sup>81</sup>

With the rapid and constant advancement in technology, the use of technology can also foster independence and reduce the need for guardianships. Technology can be used to “provide support in areas such as communication, medication or appointment reminders, notetaking for communication or items to be shared with the doctor, and monitoring exercise, sleep, and blood sugar levels.”<sup>82</sup>

Forms of moderate protective orders, such as power of attorney, conservatorship, or limited guardianship, should be explored before the petition and appointment of a plenary guardianship. A power of attorney can be limited to an educational power of attorney whose only power is to make educational decisions for the adult student concerning his or her educational plan.<sup>83</sup> A limited guardianship “must specify the particular powers that the limited guardian is proposed to exercise, and the particular areas of protection and assistance required.”<sup>84</sup> A conservatorship can be ordered by the court and utilized as a protective arrangement in which the conservator “is appointed to manage [the individual’s finances] and property.”<sup>85</sup> In this situation, the court considers the individual’s best interests and assigns the conservator’s responsibilities and duties accordingly.<sup>86</sup>

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77. *Id.*

78. *Id.*

79. *Person-Centered Planning*, PACER’S NATIONAL PARENT CENTER ON TRANSITION AND EMPLOYMENT (2019) <https://perma.cc/EJ7W-ZYQ2> (last visited Apr. 13, 2020) (explaining that “Person Centered Planning is an ongoing problem-solving process used to help people with disabilities plan for their future”).

80. Baldry, *supra* note 28, at 13.

81. *Id.*

82. *Id.* at 16.

83. *Id.* at 14; MONT. CODE ANN. § 72–5–320 (2019).

84. MONT. CODE ANN. § 72–5–320 (2019).

85. Baldry, *supra* note 28, at 22.

86. *Id.*

The interaction between the IDEA and guardianships<sup>87</sup> has created a perfect storm of procedural due process violations. Application of the *Mathews v. Eldridge*<sup>88</sup> balancing test to this specific issue will establish that increased process is due immediately after a petition for guardianship is filed, and guardianship statutes and procedures should be revised accordingly. The following constitutional argument focuses exclusively on the limited and specific issue outlined above and will demonstrate that increased procedural due process for all guardianship proceedings, at the petitioning stage, would benefit every individual subject to guardianship and ensure that such individuals' rights are adequately protected.

### III. CONSTITUTIONAL ARGUMENT

Under the United States Constitution, no State shall "deprive any person of life, liberty, or property without due process of law."<sup>89</sup>

Guardianships, however, serve to "unperson individuals and make them legally dead."<sup>90</sup> Despite the first reform efforts in the 1970s and 1980s, guardianship proceedings remained governed by inconsistent practices, paternalistic interventions, insufficient accountability, and lacked attention on the individual's rights.<sup>91</sup> A national guardianship symposium held in 1988, attended by experts in law, disability, mental health, aging, judicial practices, and government, resulted in five marked trends: (1) enhanced procedural due process; (2) a more robust determination of capacity based on functional ability, cognitive impairments, risks to the respondent, and the respondent's values; (3) emphasis on individual tailoring to the specific individual capacities; (4) increased court monitoring of appointed guardians; and (5) the development of public guardianship programs.<sup>92</sup>

In 2013, for the first time in history, a Virginia court held that Jenny Hatch, a woman with an intellectual disability, had the right to engage in SDM instead of being placed under a guardianship.<sup>93</sup> The court placed Jenny under a limited guardianship with authority over only two facets of her life, and provided for its termination after one year.<sup>94</sup> Once the limited

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87. Namely, the child's transition into adulthood; transfer of parental rights provision; status quo of the special education community; lack of training on guardianships and their long-term implications; and the general disregard of feasible alternatives to guardianships.

88. 424 U.S. 319, 335 (1976).

89. U.S. CONST. amend. XIV, § 1.

90. Teaster et al., *supra* note 41, at 196.

91. *Id.* at 197.

92. *Id.* at 197–98.

93. Final Order at 5, *Julia S. Ross et al. v. Margaret J. Hatch* (Va. Cir. Ct., Aug. 2, 2013) (No. CWF120000426P-03).

94. *Id.* at 5.

guardianship terminated, Jenny regained all decision-making authority.<sup>95</sup> This Virginia court was the first to hold<sup>96</sup> that, even while under the limited guardianship, Jenny was still to use SDM—“when her guardians make decisions for her, they should make the decision Jenny would have made, not what they think is in her ‘best interests.’”<sup>97</sup>

Similar to the aforementioned 2013 Virginia decision, for the first time in the State of Montana, a district court ordered SDM in a guardianship removal proceeding.<sup>98</sup> On February 18, 2020, after 43 years of being placed under a full guardianship—and after enduring financial exploitation by two of his guardians—Jacob finally became “the Engineer . . . in charge of [his] own life.”<sup>99</sup> With representation by Roberta Zenker of Disability Rights Montana, after hearing Jacob’s testimony and the testimony of individuals most familiar with him, Judge Menahan found that Jacob “is not an incapacitated person and is capable of, and entitled to, live as independently as possible.”<sup>100</sup> Judge Menahan wrote, Jacob’s “development of maximum self-reliance and independence in his person will be served without the services of a guardian.”<sup>101</sup> The First Judicial District Court of Montana then ordered the removal of Jacob’s guardian and adopted Jacob’s SDM Agreement.<sup>102</sup> This Order was the first of its kind in Montana to be adopted by a state district court.<sup>103</sup> The historic decision was captured by Judge Menahan, stating in that moment:

This case stands as a model for other people like you who don’t want guardians, who want to be able to make their own decisions, be their [own person]. This is great because this stands as a *precedent* that courts can look to, other people can look to, can point to, to say they want something that you have, and that’s the ability to make decisions regarding yourself.<sup>104</sup>

This case demonstrates not only the risks involved in guardianship proceedings, but also the significant value of representation by an attorney for an

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95. *Id.* at 6.

96. 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 MITCHELL HAMLINE L. REV. 873, 876 (2016) (“For the first time in a U.S. guardianship, supported decision-making was used as an alternative to plenary guardianship for a person with a disability. Just as importantly, the court noted that the Medicaid-funded services for which she was eligible were integral to providing supported decision-making skills necessary for succeeding independently.” (internal quotations omitted)).

97. Final Order at 5.

98. Order Granting Petition for Removal of Guardian & Conservator & Termination of Incapacity, *In re Guardianship/Conservatorship of J.H.* (Mont. Dist. Ct., Feb 18, 2020) (No. ADG 2004-51).

99. Newsletter, DISABILITY RIGHTS MONTANA (May 11, 2020) <https://perma.cc/YUT5-UR4J> (last visited June 7, 2020).

100. Removal Order & Termination of Incapacity.

101. *Id.*

102. *Id.*

103. Newsletter, DISABILITY RIGHTS MONTANA (May 11, 2020) <https://perma.cc/YUT5-UR4J> (last visited June 7, 2020).

104. *Id.*

individual in a guardianship proceeding. It stands as an important precedent for individuals, parents, educators, and attorneys seeking alternatives to traditional guardianship in Montana.

Otherwise, Montana declined to reform their guardianship laws in 2019.<sup>105</sup> Montana's guardianship laws still remain outdated, contain antiquated language, have not been revised in over 40 years, and are unconstitutionally vague under the Fourteenth Amendment of the United States Constitution. The result is a continued lack of protection of the fundamental rights of individuals with disabilities.

Guardianship issues in Montana go largely un-litigated, and thus judicial and societal attention is severely lacking. An individual's right to self-determination is a fundamental right, and an individual should not be deprived of this right without adequate due process.<sup>106</sup> In order to comply with due process requirements, Montana ought to reevaluate the demands of due process as applied to guardianship procedures and revise guardianship statutes accordingly to: (1) require, rather than just permit, representation by counsel; (2) mandate, rather than just permit, the individual's presence at the court proceedings; (3) adopt least-restrictive language in guardianship statutes; and (4) increase the standard of proof to establish incapacity to clear and convincing evidence.

A. *Mathews v. Eldridge Procedural Due Process Balancing Test and Rights Deprived*

Every person in Montana is equally protected from a deprivation of rights by the State. Article II, Section 17 of the Montana Constitution, identical to the Fifth Amendment of the United States Constitution, provides that "no person shall be deprived of life, liberty, or property without due process of law."<sup>107</sup> Although the phrase "due process" is not precisely defined in the Montana Constitution, the phrase "expresses the requirements of fundamental fairness," and "fundamental fairness requires fair procedures."<sup>108</sup>

Procedural due process imposes constraints on government decisions which "deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."<sup>109</sup> The United States Supreme Court, in *Mathews v. Eldridge*, established a

105. An Act Generally Revising Guardianship and Conservatorship Laws, S.B. 202, 66th Leg. § 38(1) (Mont. 2019).

106. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 286–87 (1990).

107. MONT. CONST. art. 2, § 17.

108. *In re A.F.C.*, 37 P.3d 724, 731–32 (Mont. 2001) (quoting *Lassiter v. Dep't of Social Serv's*, 452 U.S. 18, 24–25 (1981)).

109. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

balancing test to identify the specific commands of due process when determining whether a violation has occurred.<sup>110</sup> The Court will consider the following factors: (1) the private interest affected by the action; (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional procedural safeguards; and (3) government interests, including the extent of function involved and fiscal and administrative burdens that additional procedural requirements would entail.<sup>111</sup> Due process is “flexible and calls for such procedural protections as the particular situation demands.”<sup>112</sup>

Montana has fully adopted the federal *Mathews v. Eldridge* balancing test for determining the demands of due process.<sup>113</sup> Due to a lack of case law, the Montana Supreme Court has not had the opportunity to apply the *Mathews v. Eldridge* test to the specific issue of special education transition requirements and guardianships. When applying the balancing test to this specific issue, a comparison of termination of parental rights issues, civil commitment issues, and elder law can assist in identifying similar rights and similar due process commands. Additionally, the use of case law on guardianship statutes from other jurisdictions will assist in determining how this balancing test applies to the issue as it occurs in Montana.

#### 1. *The Individual’s Private Interests Affected by the State Action*

The first prong of the *Mathews v. Eldridge* test requires the court to examine the private interests of the individual affected by state action.<sup>114</sup> This requires an analysis of the individual rights at issue, the identification of those rights as individual liberties, and the subsequent protections they are afforded under the United States and Montana Constitutions.<sup>115</sup>

The right to exercise autonomous self-determination was identified as a fundamental liberty by the United States Supreme Court in *Cruzan v. Director, Missouri Department of Health*.<sup>116</sup> In a concurring opinion, Justice O’Connor stated that “our understanding of liberty is inextricably intertwined with our belief in physical freedom and self-determination.”<sup>117</sup> Other state courts have recognized a liberty interest in an individual’s “right to choose how they live, how they spend their money, and with whom they

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110. *Id.* at 334–35.

111. *Id.* at 335.

112. *Id.* at 334.

113. In re Mental Health of E.T., 191 P.3d 470 (stating “[t]o determine whether the demands of due process [are] met . . . we apply the balancing test adopted by the United States Supreme Court in *Mathews v. Eldridge*”).

114. *Mathews*, 424 U.S. at 335.

115. *E.T.*, 191 P.3d at 474–75.

116. 497 U.S. 261, 286–87 (1990).

117. *Cruzan*, 497 U.S. at 287 (O’Connor, J., concurring).

associate without undue governmental interference.”<sup>118</sup> Autonomy, “an adult person’s right to live life consistent with his or her personal values,” is one of the “bedrock principles of a free society.”<sup>119</sup>

Several courts and lawmakers have agreed that guardianship involves significant loss of liberty similar to that in criminal and involuntary commitment proceedings.<sup>120</sup> In fact, Congressman and Senator Claude Pepper stated that the typical individual under a guardianship “has fewer rights than the typical convicted felon” and “by appointing a guardian, the court entrusts to someone else the power to choose where [the individual] will live, what medical treatment they will get, and, in rare cases, when they will die.”<sup>121</sup> In *In re J.S.*,<sup>122</sup> a civil commitment proceeding, the Montana Supreme Court held that “there is no dispute that a civil commitment constitutes a significant deprivation of liberty, often involving the potential for compelled medication, which is among the historic liberties protected by the Due Process Clause.”<sup>123</sup>

Fundamental liberties and autonomy are taken from an individual when a guardianship is appointed; therefore, it is imperative to ensure that the guardianship is, in fact, necessary before the deprivation of rights takes place.<sup>124</sup> An individual has the right to the least restrictive guardianship suitable to his or her needs and conditions.<sup>125</sup> However, if a court grants a plenary guardianship,<sup>126</sup> the individual risks losing all of his or her fundamental rights.<sup>127</sup> The following non-exhaustive list describes rights that the guardian may exercise decision-making power over once a guardianship is

118. *In re Conservatorship of Groves*, 109 S.W.3d 317, 328 (Tenn. Ct. App. 2003).

119. *Id.* at 328.

120. *See In re Guardianship of Braaten*, 502 N.W.2d 512, 518 (N.D. 1993) (“The intrusion upon individual liberty by the involuntary imposition of a guardianship upon an incapacitated ward sufficiently resembles the involuntary commitment of a mental health patient to call for similar careful standards of decision making.”); *In re Boyer*, 636 P.2d 1085, 1090 (Utah 1981) (“Although the restrictions on, and deprivation of, personal freedom by appointment of a guardian are less in extent and in intrusiveness than by involuntary commitment, nevertheless, the loss of freedom may be substantial.”); *In re Guardianship of Reyes*, 731 P.2d 130, 131 (Ariz. Ct. App. 1986) (“Guardianship involves significant loss of liberty similar to those present in an involuntary civil commitment for treatment of mental illness . . .”).

121. Jameson et al., *supra* note 4, at 39. (quoting CLAUDE PEPPER, PREPARED STATEMENT, ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE, H.R. REP. NO.100-639, at 21 (1987)).

122. 401 P.3d 197 (Mont. 2017).

123. *In re J.S.*, 201 P.3d at 207 (citing *Vitek v. Jones*, 445 U.S. 480, 492 (1980)).

124. Kristin Mueller, *The Evolution of Guardianship Law in Iowa: A Search for Fairness and Justice in Guardianship Proceedings*, 45 DRAKE L. R. 963, 965–66 (1997).

125. *See* MONT. CODE ANN. § 72–5–306 (2019); MONT. CODE ANN. § 72–5–316 (2019).

126. *Matter of Guardianship of Hedin*, 528 N.W.2d 567, 572 (1995) (There are guardianships affecting property interest, which is “guardianship of the estate,” and guardianships affecting personal interests, which is “guardianship of the person,” and a “plenary guardianship,” controls both types of interests).

127. MONT. CODE ANN. § 72–5–321 (2019).

appointed: the right to privacy, which includes the right to privacy of the body and the right to private, and uncensored communication with others by mail, telephone, or personal visits;<sup>128</sup> the right to make decisions based on personal desires, preferences, and opinions; the right to choice of living arrangement and place of residence; the right to marry; the right to procreate; the right to explanations to medical procedures or treatment; the right to have personal information kept confidential; the right to review personal records, including medical, financial, and treatment records; the right to speak privately with an attorney, ombudsman, or other advocate; and the right to personal choice of employment.<sup>129</sup>

Guardianships infringe upon more than just the right to exercise autonomous self-determination identified in *Cruzan*. A guardianship subjects a person to a potential loss of all liberties guaranteed by both the United States and Montana Constitutions. This deprivation of fundamental rights is comparable to that in criminal and civil commitment proceedings, and as such, should implicate the highest protection under the private interest prong of the *Mathews v. Eldridge* procedural due process test.

## 2. *The Risk of Erroneous Deprivation and Probable Value of Additional Procedural Safeguards*

The second prong of the *Mathews v. Eldridge* balancing test weighs the potential risk of an erroneous deprivation of the individual's right and the probable value, if any, that additional procedural safeguards would provide.

The United States Supreme Court has emphasized that the opportunity to be heard at a meaningful time and in a meaningful manner is a fundamental requirement of due process.<sup>130</sup> In a concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*,<sup>131</sup> Justice Frankfurter stated that "the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."<sup>132</sup> This section argues that, in guardianship proceedings, the risk of an erroneous deprivation of a fundamental liberty is high, and current procedural safeguards are inadequate;

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128. This raises a particular issue in Montana, not addressed in this article, where persons within the jurisdiction of the state have a specific, constitutional right to privacy. See MONT. CONST. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed upon without the showing of a compelling state interest.").

129. Squatrito Millar & Renzaglia, *supra* note 36, at 474–75.

130. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

131. 341 U.S. 123 (1951).

132. *Id.* at 168 (Frankfurter, J., concurring).

therefore, potential guardians should be held to the heightened “clear and convincing” standard when proving inadequacy.<sup>133</sup>

*a. Risk of Erroneous Deprivation Involved in Guardianship Proceedings*

As evidenced by a comparison to civil commitment and parental termination proceedings, guardianships involve a high risk of error and inherent unfairness, which is why increased due process is necessary.

Like civil commitment proceedings,<sup>134</sup> the Montana Supreme Court has emphasized that guardianship proceedings are not adversarial in nature, but rather proceedings intended “to promote the best interest for whom guardianship is sought.”<sup>135</sup> However, unlike guardianships, in civil commitment proceedings, the respondent’s right to representation by counsel is constitutionally protected.<sup>136</sup> Civil commitment jurisprudence is “rooted in the right to dignity and the right to privacy,” and based on the principles of due process.<sup>137</sup> In *In re J.S.*, a civil commitment case, the Montana Supreme Court held that, despite the therapeutic purpose of the proceeding, it “nonetheless constitutes an effort by the State to deprive an individual of significant liberty interests,”<sup>138</sup> and thus demands increased due process requirements. In *In re S.M.*,<sup>139</sup> also a civil commitment proceeding, the Montana Supreme Court held that “the State has an important interest in seeing that proceedings lead to fair and accurate outcomes,” emphasizing that “there is a very real risk that [the lack of] representation in civil commitment proceedings would increase the likelihood of an unfair or erroneous result rather than enhancing the fairness or accuracy of the proceeding.”<sup>140</sup>

Parental termination proceedings also provide heightened procedural safeguards from potential due process deprivations. The Montana Supreme Court held, in *In re A.N.W.*,<sup>141</sup> that the State must provide “fundamentally fair procedures at all stages in the proceedings to termination . . . of rights.”<sup>142</sup> The Court emphasized that “fundamental fairness and due pro-

133. See MONT. CODE ANN. § 72–5–316(1) (stating that the current standard is to the *court’s satisfaction*).

134. See *In re J.S.*, 401 P.3d 197 (Mont. 2017) (stating that “while counsel has an adversarial role to play in the proceeding, ‘the . . . involuntary commitment process must, as a matter of public policy, strive to maintain the “therapeutic influence” of the legal system on the individual’”).

135. *In re Estate of Bayers*, 983 P.2d 339, 342 (Mont. 1999).

136. *In re J.S.*, 401 P.3d at 209.

137. *Id.* at 209.

138. *Id.* at 208.

139. 403 P.3d 324 (Mont. 2017).

140. *Id.* at 330.

141. 130 P.3d 619 (Mont. 2006).

142. *Id.* at 625.

cess require that a parent not be placed at an unfair disadvantage.”<sup>143</sup> Likewise, in *In re A.S.A.*,<sup>144</sup> the Montana Supreme Court held that fundamental fairness “requires that a parent, like the State, be represented by counsel at [a] parental termination proceeding,” and that, “[w]ithout representation, a parent would not have an equal opportunity to present evidence and scrutinize the State’s evidence.”<sup>145</sup> The Court emphasized that the potential for unfairness is especially high when an indigent parent is involved because “[i]ndigent parents often have a limited education and are unfamiliar with legal proceedings.”<sup>146</sup> Further, the Court stated that if an indigent parent is unrepresented, “the risk is substantial that the parent will lose her child due to intimidation, inarticulateness, or confusion.”<sup>147</sup> Thus, the Court concluded that the Montana Constitution guarantees an indigent parent the right to representation by counsel in proceedings brought to terminate parental rights.<sup>148</sup>

Like civil commitments and parental terminations, guardianships deprive individuals of significant liberty interests. Guardianships infringe on a person’s right to dignity and privacy, and, therefore, demand increased due process requirements. Like an indigent parent without representation in parental termination proceedings, where limited access, means, and resources increase the likelihood of unfairness, an individual subject to guardianship is likely to be erroneously deprived of fundamental liberty interests for similar reasons. Indeed, the potential for unfairness is particularly high for the very same reasons the petitioning party uses to argue that the individual requires a guardian.<sup>149</sup> Therefore, the risk of error and inherent unfairness involved in guardianship proceedings demands increased due process.

*b. The Value of Additional Safeguards Such as a Protected and Required Right to Representation by Counsel Is Evident*

In order to prevent the risk of erroneous deprivation of rights in guardianship proceedings, some states have required representation by counsel and presence at the guardianship proceedings.<sup>150</sup> Minnesota revised their guardianship statutes, requiring the immediate appointment of counsel after any guardianship petition is served, and made clear that, “counsel was to defend the rights of the proposed ward by providing counsel with the full

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143. *Id.* at 625.

144. 852 P.2d 127 (Mont. 1993).

145. *Id.* at 129.

146. *Id.*

147. *Id.*

148. *Id.* at 130.

149. Such as incapacity to manage one’s own decisions, education, finances, health, and property.

150. *E.g.* MINN. STAT. § 524.5-304 (2018).

right of subpoena, mandating that the proposed ward be fully consulted before the hearing, providing adequate time to prepare for the hearing, and requiring counsel to represent the person throughout the proceedings.”<sup>151</sup> Minnesota’s statute also mandates the individual’s presence at the guardianship hearing.<sup>152</sup> Furthermore, Minnesota’s statute contains the least restrictive language, which requires a court to find there is no other appropriate, less restrictive alternative.<sup>153</sup>

When an individual with a disability is subject to guardianship, the petitioner is arguing that the individual does not have the capacity to make decisions for him or herself. This suggests an inherent potential for unfairness. Thus, as in termination of parental rights proceedings, there is a substantial risk the individual may lose his or her fundamental rights due to intimidation, inarticulateness, or confusion in a guardianship proceeding. Without representation, an individual subject to guardianship does not have an equal opportunity to present evidence or scrutinize the petitioner’s evidence and should, therefore, have a right to representation by counsel in a guardianship proceeding under the Montana Constitution.

Guardianship proceedings are among the top five types of proceedings where petitioners would benefit from legal advice.<sup>154</sup> However, the Montana Guardianship Legal Assistance Program lacks sufficient resources or enough attorneys willing to dedicate pro bono hours to the program.<sup>155</sup> They have stated that due to the lack of a public guardianship system, “there is a great and very important need for attorneys willing to assist with guardianships . . . the need for attorneys outstrips by far the limited number of attorneys currently available and trained to provide these services.”<sup>156</sup>

Guardianships are often overbroad and focus on the powers of the guardian to make decisions rather than the duties of the guardian to protect the individual.<sup>157</sup> At best, an individual subject to guardianship may be deprived of fundamental liberty interests; at worst, the individual may be subject to abuse and exploitation by a potential guardian due to their extensive power over the individual’s affairs.<sup>158</sup> The full array of fundamental liber-

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151. A. Frank Johns, *Ten Years After: Where is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 *ELDER L.J.* 33, 74 (1999).

152. *MINN. STAT.* § 524.5-307(a).

153. *MINN. STAT.* § 524.5-304(f)(1).

154. Chief Justice Gray, *Legal Needs Survey Showing Results*, 29 *MONT. LAW.*, NOV. 2003, at 7.

155. Mont. Judicial Branch, *Montana Guardianship Legal Assistance Program (MT-GLAP)*, *MONT. COURTS* <https://perma.cc/F75F-327W> (last visited Mar. 29, 2020).

156. *Id.*

157. 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, 175 (2010).

158. Dari Pogach & Erica Wood, *When the Guardian is an Abuser*, *ABA COMM’ LAW & AGING*, June 2019, at 1, 3, <https://perma.cc/32YD-8TZV> (last visited Apr. 15, 2020).

ties at stake in guardianship proceedings necessitates fundamental fairness and fundamentally fair procedures. Fundamental fairness, here, should require that the individual subject to guardianship not be placed at an unfair disadvantage.

Although the resources are not adequate to support the high need for legal assistance,<sup>159</sup> and whereas the Office of Public Defenders is historically overburdened,<sup>160</sup> alternatives to guardianship are a low-cost and high-reward approach to sidestep any financial burden on Montana concerning the right to counsel. Regardless, where the risk of erroneous deprivation of fundamental liberties is so high, the fundamental fairness and due process requirements in guardianship procedures should rise to meet that demand.

*c. An Increased Standard of Proof, in Line with Uniform Guardianship Statutes Adopted by Other States, Will Assist in Remediating the Current Lack of Sufficient Procedural Safeguards*

States that have updated their guardianship statutes have uniformly adopted a “clear and convincing” standard of proof.<sup>161</sup> Iowa determined this standard was appropriate after looking to the analogous area of civil commitments.<sup>162</sup> In *Addington v. Texas*,<sup>163</sup> the United States Supreme Court held that in civil commitment cases, “the standard of proof must be by clear and convincing evidence.”<sup>164</sup> The insistence on this standard of proof was due to the potentially serious deprivation of liberty, the adverse social consequences, and the serious risk of error in civil commitment proceedings.<sup>165</sup> The Iowa Supreme Court reasoned that, because the liberty interest at stake

159. Mont. Judicial Branch, *supra* note 155.

160. See *ACLU: Montana Public Attorneys are Overburdened*, GREAT FALLS TRIBUNE, Sept. 17, 2015, <https://perma.cc/DX6J-DWDB> (last visited Mar. 29, 2020); Corin Cates-Carney, *Budget Cuts Will Cripple Montana’s Already Overburdened Public Defenders, Attorneys Say*, MONT. PUBLIC RADIO, Feb. 14, 2017, <https://perma.cc/64XP-M872> (last visited Mar. 29, 2020).

161. *E.g.* In re Guardianship of Hedin, 528 N.W.2d 567, 582–83 (Iowa 1995); Matter of Guardianship of Kelly, 920 P.2d 665, 669 (Ariz. App. 1st Div. 1996); Leslie Salzman, Using Domestic Violence Law to Move Toward A Recognition of Universal Legal Capacity for Persons with Disabilities, 39 CARDOZO L. REV. 521, 543 (2017) (High state courts, however, have addressed the substantive due process implications of guardianship. In the latter 1980s and 1990s, several state courts of last resort concluded that guardianship represented such a substantial intrusion on individual liberty that it resembled the loss of liberty flowing from involuntary civil commitment. Recognizing the significant loss of liberty inherent in guardianship, these high state courts concluded that States could impose a guardianship only to the extent it could demonstrate by clear and convincing evidence that there were no less restrictive arrangements to assist an individual with decision-making in those areas of function in which the individual needed assistance.).

162. In re Hedin, 528 N.W.2d at 580.

163. 441 U.S. 418 (1979).

164. In re Hedin, 528 N.W.2d at 580 (citing *Addington*, 441 U.S. at 433).

165. *Id.* at 580 (citing *Addington*, 441 U.S. at 425–26).

is so high, the “clear and convincing evidence standard is the appropriate one to apply.”<sup>166</sup>

In *In re Boyer*,<sup>167</sup> the Utah Supreme Court utilized similar reasoning, concluding that “clear and convincing evidence” should be the standard of proof under guardianship law.<sup>168</sup> The Court also used the *Mathews v. Eldridge* balancing test to determine the appropriateness of this standard and rejected a preponderance of the evidence standard as “providing inadequate protection to an [individual’s] interests.”<sup>169</sup>

Montana civil commitment proceedings utilize the clear and convincing standard, a standard “frequently invoked to protect important individual interests in civil cases.”<sup>170</sup> Clear and convincing proof “is somewhere between preponderance of evidence and proof beyond a reasonable doubt.”<sup>171</sup> The Montana Supreme Court has held that, like Utah, in a civil commitment procedure, “the clear and convincing standard of proof is high because of the important individual interests at stake.”<sup>172</sup> Montana defined this standard in *In re Shennum*, holding that the “calamitous effects of a commitment,”<sup>173</sup> and the “deprivation of a person’s liberty for up to three months and inevitable damage to a person’s reputation”<sup>174</sup> required a higher standard of proof.<sup>175</sup>

Montana’s standard of proof requires that a court need merely be “satisfied” that the person for whom a guardianship is sought is incapacitated.<sup>176</sup> Additionally, courts must find that judicial intervention in the person’s freedom of action and decision is necessary to meet the essential requirements for the person’s physical health or safety.<sup>177</sup> If a court finds that both components are satisfied, it may appoint a full guardian having the powers described in § 72–5–321.<sup>178</sup>

Due to the similar interests at stake between guardianships and civil commitments, where Montana has already adopted the clear and convincing standard, the standard for guardianship proceedings in Montana should be

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166. *Id.* at 581.

167. 636 P.2d 1085 (Utah 1981).

168. *In re Boyer*, 636 P.2d at 1092.

169. *In re Hedin*, 528 N.W.2d at 581 (1995) (citing *In re Boyer*, 636 P.2d at 1091).

170. *In re J.S.*, 401 P.3d 197, 207 (Mont. 2017).

171. *In re Shennum*, 684 P.2d 1073, 1079 (Mont. 1984).

172. *In re J.S.*, 401 P.3d at 207.

173. *In re Shennum*, 684 P.2d at 1078.

174. *Id.*

175. *Id.* at 1079.

176. MONT. CODE ANN. § 72–5–316 (1).

177. *Id.*

178. *Id.*

increased from “court satisfaction” to “clear and convincing evidence.”<sup>179</sup> Other states explicitly recognize the necessity of the clear and convincing evidence standard in protecting the rights of the individual in a guardianship proceeding.<sup>180</sup> Thus, the rote deprivation of an individual’s liberty interests in a guardianship procedure necessitates Montana’s adoption of the clear and convincing evidence standard.

### 3. *The State’s Governmental Interests and Administrative Burdens*

The State governmental interest is the third factor in the *Mathews v. Eldridge* balancing test.<sup>181</sup> Historically, when a person’s autonomy has become impaired, “public policy justifies others stepping in to make choices on the person’s behalf to promote the person’s best interests and to protect the person from harm.”<sup>182</sup> Public policy also favors allowing individuals to retain as much decision-making authority as possible and utilizing the least restrictive alternatives.<sup>183</sup> Other courts have held that the inability to care for oneself is the only legitimate state interest in imposing guardianship on a person.<sup>184</sup>

In *In re Braaten*,<sup>185</sup> the North Dakota Supreme Court held that imposition of guardianship is justified only if the individual’s recent or past behavior “actually endangers the life, health, or personal support of the [individual].”<sup>186</sup> The United States Supreme Court has held that, even when a governmental purpose is legitimate and substantial, “that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”<sup>187</sup>

Although Montana’s interest in protecting an individual from harm are legitimate and important, adding more due process requirements to guardianship proceedings will neither undermine nor frustrate this purpose. The individuals who do benefit from a full guardianship will still be protected and will likely still end up under a guardianship. However, increasing due process will protect the interests of those who would benefit from a less intrusive alternative, and will ensure that only individuals who truly need guardianship to protect their well-being are being placed under guardian-

179. See *In re J.S.*, 401 P.3d 197, 207 (Mont. 2017); *In re Shennum*, 684 P.2d 1073, 1079 (Mont. 1984).

180. See *In re Boyer*, 636 P.2d 1085, 1092 (Utah 1981); *In re Guardianship of Hedin*, 528 N.W.2d 567, 582–83 (Iowa 1995).

181. *In re Mental Health of E.T.*, 101 P.3d 470, 474 (Mont. 2008).

182. *In re Conservatorship of Groves*, 109 S.W.3d 317, 329 (Tenn. Ct. App. 2003).

183. *Id.* at 329.

184. *In re Boyer*, 636 P.2d at 1089.

185. 502 N.W.2d 512 (N.D. 1993).

186. *Id.* at 518.

187. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

ships. Coupled together, the transition process in special education and inadequate due process is resulting in people being placed under unnecessary guardianships. The following analysis identifies a narrower means to achieve the state interests for these specific purposes.

To meet the State's interests in these issues through more narrow means, the IDEA mandates explicitly that, for a child reaching the age of majority:

who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program . . . the State shall establish procedures for appointing the parent . . . to represent the educational interests of the child throughout the period of eligibility of the child . . .<sup>188</sup>

As applied, 20 U.S.C. §1415(m)(2) “directs that the State of Montana provide a procedure for the appointment of an educational representative for an adult student with a disability who cannot provide informed consent.”<sup>189</sup> However, a petitioner under the IDEA cannot benefit from 20 U.S.C. § 1415 (m)(2) if a State has not yet set up such a procedure.<sup>190</sup> In 2014, the United States District Court for the District of Montana heard this issue and held that “absent a state-provided procedural mechanism to implement 20 U.S.C. §1415 (m)(2)’s directive,” the petitioner has no cognizable claim against the school district under the IDEA.<sup>191</sup> Thus, because Montana had not established any such procedure under this regulation, Montanans cannot benefit from the IDEA’s narrower means for the State to reach its objectives specific to this issue.

Additionally, parents can remain active and involved without taking the extreme measure of seeking a court-appointed guardianship. An adult student can sign a consent for the release of information in nearly every capacity (e.g., medical, legal, educational, contractual, governmental), allowing providers and parents involved to openly communicate about the student’s needs.<sup>192</sup>

There can be no doubt that there is potential for substantial loss of fundamental liberties through a guardianship procedure. Such a loss, it has been argued, should invoke “the full panoply of procedural due process rights . . . .”<sup>193</sup> Thus, the considerations under prong one and two far out-

188. 20 U.S.C. § 1415 (m)(2) (2016).

189. *In re Butte Sch. Dist. No. 1*, No. CV 14-60-BU-SHE, 2019 WL 343149, \*13 (D. Mont. Jan. 28, 2019).

190. *E.g.*, *Reyes v. Manor Indep. Sch. Dist.*, 850 F.3d 251, 255 (5th Cir. 2007) (holding that, under the IDEA, petitioner could not benefit from 20 U.S.C. § 1415(m)(2) because, although federal law mandates states to set up such a procedure, Texas had not yet done so).

191. *In re Butte Sch. Dist. No. 1*, 2019 WL 343149 at \*13.

192. Baldry, *supra* note 28, at 22.

193. Sheryl Dicker, *Guardianship: Overcoming the Last Hurdle to Civil Rights for the Mentally Disabled*, 4 U.A. LITTLE ROCK L.J. 485, 489 (1981).

weigh the state's interest in protecting disabled individuals from harm. The State's interests can and must be pursued through the narrowest means. Additionally, any administrative burdens imposed by additional processes in guardianship proceedings should not overcome the need for increased due process in guardianship proceedings. More training for educators and parents on alternatives to guardianships can dispel misconceptions about guardianships and educate and inform individuals about less intrusive means to advance the student's best interests, self-determination, and independence.

*B. Montana's Guardianship Statutes Are Unconstitutionally Vague Under the Fourteenth Amendment*

In addition to an increase of due process requirements, Montana's guardianship statutes are unconstitutionally vague and should be revised to further constrain guardianship appointments. The Fourteenth Amendment of the United States Constitution establishes that a law fails to meet due process requirements if it is so vague that it leaves judges without any "legally fixed standards."<sup>194</sup> The void-for-vagueness doctrine applies when a person of common intelligence must necessarily "guess at its meaning and differ as to its application."<sup>195</sup> Montana's guardianship statute is unduly vague, uncertain, and broad, resulting in arbitrary decisions being made not based on objective, legally fixed standards.

By focusing on a model of incompetency or incapacity, courts base decisions for guardianships on outdated views of disability and cognitive impairments. Courts routinely apply different standards for determining capacity depending on the nature of the decision involved. Accordingly, "capacity should be determined on a decision-specific basis."<sup>196</sup> Outdated and inadequate standards of capacity rely on "rational decision-making," "reasonableness," or "responsible" language.<sup>197</sup> Many states have updated their guardianship language to move away from the model of incompetency. Montana, however, continues to utilize this model, leading to unnecessary and over-broad guardianship appointments.

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194. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966).

195. *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964).

196. *In re Groves*, 109 S.W.3d at 336.

197. *E.g.* *State Dep't of Human Serv's v. Northern*, 563 S.W.2d 197, 209 (Tenn. Ct. App. 1978); *Groves*, 109 S.W.3d at 336; *In re Boyer*, 636 P.2d 1085, 1088 (Utah 1981).

*1. Capacity as Two Concepts: Decision-Making Capacity Versus Functional Capacity*

Functional capacity encompasses an individual's ability to care for oneself and his or her property.<sup>198</sup> Alternatively, decision-making capacity relates to "one's ability to make and communicate decisions with regard to caring for oneself and one's property."<sup>199</sup> Functional capacity involves a person's ability to perform activities of daily living, including "personal hygiene, obtaining nourishment, mobility and addressing routine healthcare needs."<sup>200</sup> Thus, an inquiry into a person's functional capacity "seeks to ascertain whether a person has a functional impairment that endangers physical health or safety by rendering the person unable, either wholly or partially, to care for him or herself."<sup>201</sup> The functional capacity to care for property involves a person's ability to manage personal and real property, and finances. The inquiry into an individual's functional capacity to manage property should focus on whether the individual's ability to "make or communicate decisions regarding acquisition, administration, or disposition of his or her property may lead to the waste or dissipation of the property."<sup>202</sup>

The Tennessee Court of Appeals found that "decision-making capacity involves a person's ability to take in and understand information[,] process information in accordance with personal values and goals[,] make [decisions] based on information provided[,] and to communicate the decision."<sup>203</sup> The Tennessee Court of Appeals emphasized that "requiring that decisions be tested against a person's own values and goals reflects the importance of determining a person's capacity in light of his or her own habitual standards of behaviors and values, rather than the standards and values of others."<sup>204</sup> Furthermore, "[a] person does not lack decision-making capacity merely because he or she does things that others either do not understand or find disagreeable. Foolish, unconventional, eccentric, or unusual choices do not, by themselves, signal incapacity."<sup>205</sup> The court stated, however, that decisions based on "deranged or delusional reasoning, or irrational beliefs may signal decision-making incapacity."<sup>206</sup> The inquiry focuses primarily on the decision-making process. This inquiry should ac-

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198. *In re Groves*, 109 S.W.3d at 334.

199. *Id.*

200. *Id.*

201. *Id.* at 355.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 336.

count for the individual's ability to understand relevant information and deliberate or reason about the outcomes of a specific decision.<sup>207</sup>

A person's capabilities vary depending on the different types of decisions to be made. Determining capacity on a decision-specific basis requires an inquiry by the court into a variety of decision-making abilities. Montana's current model of incompetency allows a guardian to be appointed when a person can make a satisfactory decision without injuring themselves or their property interests and includes people who can make decisions with the help of others. The statute is not future-looking nor based on an individual's decision-making capacity and potential for learning and developing decision-making skills.

## 2. *Unconstitutional Statutory Vagueness*

Under the Fourteenth Amendment of the United States Constitution, a law fails to meet the requirements of due process if it is so "vague and standardless" as to leave judges "free to decide, without any legally fixed standards, what is prohibited and what is not in each case."<sup>208</sup> Language is considered too subjective and thus vague and overbroad when it focuses on "the content of the decision rather than on the capacity of the [individual] to engage in a rational decision making process."<sup>209</sup> The subjectivity of the language then results in the potential for an "arbitrary and nonuniform evaluation of *what* is decided rather than an objective evaluation of the *method* by which the decision is reached."<sup>210</sup> Procedural due process regarding incompetency adjudication involves "what standards a fact finder must follow in determining whether guardianship is appropriate, what standard of proof should be employed in the hearing, and how much power a guardian should have over the proposed [individual]."<sup>211</sup>

The Utah Supreme Court deemed a guardianship statute vague and overbroad based on the statute's definition of incapacity. Utah's statute defined "incapacitated person" as "any person who is impaired by reason of mental illness, mental deficiency, physical illness, or disability . . . to the extent that he lacks sufficient understanding or capacity to make or communicate *responsible decisions concerning his person*."<sup>212</sup> The Court criticized the emphasized words, holding that "the breadth and imprecision of that standard permits the determination of incompetency to be based on factors subjective to the trier of fact and factors extraneous to the legitimate inter-

207. *Id.*

208. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966).

209. *In re Guardianship of Hedin*, 528 N.W.2d 567, 574 (Iowa 1995).

210. *Id.* (citing *In re Boyer*, 636 P.2d at 1088 (Utah 1981) (emphasis in original)).

211. *Id.*

212. *In re Boyer*, 636 P.2d at 1087 (emphasis added).

ests of the state and the [individual].”<sup>213</sup> The Court emphasized that the standard allows a guardian to be appointed for a person who makes decisions regarded by some as irresponsible, even though the individual has sufficient capacity to make decisions “which allow him to function in a manner acceptable to himself and without any threat of injury to himself.”<sup>214</sup>

The Court also took issue with the word “responsible,” stating that it inappropriately focuses the appointing authority’s attention on the “content of the decision, rather than on the ability of the individual to engage in . . . [the] decision-making process.”<sup>215</sup> The Court held that the word “responsible,” statutorily undefined, leads to completely subjective and, therefore, potentially arbitrary, non-uniform evaluation of *what* is decided, rather than an “objective evaluation of the *method* by which the decision is reached.”<sup>216</sup> The Court concluded that the statute, as it stood, could have such a broad interpretation as to deem it unconstitutionally vague.<sup>217</sup> The Court suggested that the statute could be saved if the state adopted an interpretation that provided specific and objective standards for determining the ability of one to care for one’s self, the only legitimate state interest in imposing guardianship on a person.<sup>218</sup>

The Iowa Supreme Court followed Utah’s lead and held that Iowa’s guardianship statute was unconstitutionally vague under the same framework utilized by the Utah Supreme Court. In *In re Hedin*,<sup>219</sup> the Iowa Supreme Court criticized the language: “*unable to make or carry out important decisions concerning the proposed ward’s person or affairs.*”<sup>220</sup> The Court held that the language: (1) allowed a guardian to be appointed when a person could make satisfactory decisions; (2) indicated that the decisionmaker should focus on the content of the individual’s decision rather than on the individual’s decision-making capacity; and (3) the subjective nature of the language made the standard an arbitrary and non-uniform

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213. *Id.* at 1088.

214. *Id.*

215. *Id.*

216. *Id.* (quoting *Colyar v. Third Judicial Dist. Court*, 469 F. Supp. 424, 433 (D. Utah 1979)).

217. *Id.* at 1089; *see also Id.* at 1091–92 (“However, an erroneous judgment is of greater concern when an individual’s liberty is at stake, regardless of the nature of the proceeding, and it is therefore necessary to minimize error in guardianship cases to the extent possible without undermining or frustrating the important purposes served by the guardianship statutes. . . . [We] think those interests are best accommodated by requiring evidence of incompetency by clear and convincing evidence. A number of courts have imposed that standard in involuntary commitment cases. . . . We recognize that the deprivation of personal freedom is greater in commitment cases than in guardianship cases and that, in the latter cases, there are differences in the extent of curtailment of personal freedoms. Nevertheless, the interests at stake are not so different as to require that a different standard should govern.”).

218. *In re Boyer*, 636 P.2d at 1089.

219. 528 N.W.2d 567, 580 (Iowa 1995).

220. *Id.* at 575 (emphasis added).

evaluation rather than an objective methodological evaluation.<sup>221</sup> Thus, the statute lacked an adequate mechanism to preserve due process rights.<sup>222</sup>

The Court concluded that, to eliminate constitutional vagueness, a court must find that the individual's "decision-making capacity is so impaired that the [individual] is unable to care for his or her personal safety or unable to attend to or provide for such necessities as food, shelter, clothing, and medical care without physical injury or illness [occurring]."<sup>223</sup> Under this test, the evidence must establish that the individual is "unable to think or act for him or herself as to matters concerning . . . personal health, safety, and welfare," and the findings based on such evidence must "support the powers conferred on the guardian[, and] these powers should be articulated as clearly as each case permits."<sup>224</sup> In making each decision in a guardianship proceeding, courts must consider the availability of less restrictive alternatives or assistance available to meet the individual's needs.<sup>225</sup>

Under Montana's current statute, the focus is on the individual's current capacity, rather than on the individual's potential decision-making capacity. The definition of "incapacitation" under Montana's statute is:

any person who is impaired by reason of . . . disability . . . 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.<sup>226</sup>

The statute does not define responsible or rational.

Montana's statute uses both "responsible" and "rational" for determination of incapacity; however, neither term is defined, and the statute offers no objective method for evaluating whether a person's decision-making capacity is responsible or rational. Montana's statutory language, nearly verbatim to the language invalidated by Iowa and Utah Supreme Courts, is too subjective, based on the content of the decision, and lends to an arbitrary and non-uniform evaluation of decision-making capacity. Thus, the statute lacks any legally fixed standards and is unconstitutionally vague with regard to procedural due process requirements.

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221. *Id.* at 578.

222. *Id.* at 578.

223. *Id.* at 578–79.

224. *Id.* at 579.

225. *Id.*

226. MONT. CODE ANN. § 72–5–101(1) (emphasis added).

IV. A MODEL: TENNESSEE'S HOLISTIC APPROACH TO CAPACITY  
AND GUARDIANSHIP

Tennessee, when updating its guardianship laws, recognized that if courts were to instead focus on determining the extent of the disability and on the “actual effect that the disability has had on the person’s ability to function,” the law will recognize that “a person’s capacity must be measured along a continuum.”<sup>227</sup> Then Tennessee Supreme Court Justice William Koch Jr., in *In re Conservatorship of Groves*, stated:

Capacity is not an abstract, all-or-nothing proposition. It involves a person’s actual ability to engage in a particular activity. Accordingly, the concept of capacity is task-specific. A person may be incapacitated with regard to one task or activity, while retaining capacity in other areas because the skills required in one situation may differ from those required in another.<sup>228</sup>

Capacity is also situational and contextual, and it may even have a motivational component. It may be affected by many variables that constantly change over time. These variables include external factors such as the time of day, place, social setting, and support from relatives, friends, and supportive agencies. It may also be affected by neurologic, psychiatric, or other medical conditions . . . Finally, capacity is not necessarily static. It is fluid and can fluctuate from moment to moment. A change in surroundings may affect capacity, and a person’s capacity may improve with treatment, training, greater exposure to a particular type of situation, or simply the passage of time.<sup>229</sup>

Thus, “the pivotal inquiry involves not merely the diagnosis, but also the effect that the . . . condition has had on the capacity of the person for whom the conservator is sought.”<sup>230</sup> The court stated that participants in these proceedings “should avoid the subtle influences of ageism and the double standards that accompany it,” and that the “popular notion that the aging process entails progressive decline in capacity or competence vastly oversimplifies a complex process that affects an extraordinarily large and diverse group of persons.”<sup>231</sup>

Tennessee increased the standard of proof in their guardianship statutes to a “clear and convincing evidence” standard. Tennessee reasoned that, because of the value society places on individual autonomy and self-determination, “persons seeking the appointment of a conservator must prove by clear and convincing evidence that the person for whom a conser-

227. Harkness, *supra* note 13, at 20.

228. *In re Groves*, 109 S.W.3d at 333–34 (citing *Godinez v. Moran*, 509 U.S. 389, 413 (1993) (Blackmun, J., dissenting) (observing that “a person who is ‘competent’ to play basketball is not thereby ‘competent’ to play the violin”)).

229. *Id.* at 334.

230. *Id.* at 331.

231. *Id.* at 331–32.

vator is sought is a ‘disabled person.’”<sup>232</sup> The heightened standard of proof ensures that correct conclusions are drawn from the evidence.<sup>233</sup>

A holistic approach to guardianship includes an inquiry into both decision-making capacity and functional capacity based on a variety of factors and situations and focused on the effect of an impairment rather than diagnosis. This approach accounts for biases and societal beliefs about ageism. When compared to guardianships for people with disabilities, this approach would take into account societal beliefs about disability and the subtle influences of ableism. Conclusively, the increased use of a clear and convincing standard is necessary to protect the rights of individuals subject to guardianships.

#### V. 2019 LEGISLATURE SENATE BILL 202: PROPOSED REVISION OF MONTANA GUARDIANSHIP LAWS

Guardianship proceedings are inherently not designed for decision-making participation by the individual subject to guardianship. The concept of SDM “provides a unique vehicle to support a person who may have diminished physical, sensory, or mental capacity, but who still possesses decision-making capacity if provided the necessary aid.”<sup>234</sup> This concept first appeared in statutory form in 2015 in Texas, when Texas enacted the Texas Supported Decision Making Act.<sup>235</sup> Following the enactment of this statute, the American Bar Association launched a decision-making campaign to introduce the legal community to the concept of SDM.<sup>236</sup>

Statutory reform of Montana’s guardianship laws should be prioritized to prevent procedural due process violations of individuals that are occurring under the current statutory language. Revision of guardianship statutes would serve to: (1) modernize the law and protect the rights of individuals who are subject to guardianships; (2) encourage courts to impose the least-restrictive orders possible and preserve as many individual rights as possible; and (3) impose clear duties on guardians charged with the protection of others.

Senate Bill 202, proposed to the Montana Legislature at the 2019 session, sought to enact the Uniform Law Commission’s Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act. The bill proposed to amend the current law in multiple ways with the goal of in-

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232. *Id.* at 330.

233. *Id.* at 330.

234. Harkness, *supra* note 13, at 22.

235. *Id.*; TEX. ESTATES CODE ANN. §1357.001 (2015).

236. *Id.*

creasing the use of alternative arrangements for supporting people instead of full guardianships.

The bill also clarified the standard of incompetency:

The court may appoint a guardian if the court finds clear and convincing evidence that: (i) the respondent lacks the ability to meet essential requirements for physical health, safety, or self-care because the respondent is unable to receive and evaluate information or make or communicate decisions even with appropriate supportive services, technological assistance, or supported decision-making; and (ii) the respondent's identified needs cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative.<sup>237</sup>

The Bill explicitly included a demand for ordering the least restrictive<sup>238</sup> appointment, stating:

The court shall grant a guardian appointed . . . only those powers necessitated by the demonstrated needs and limitations of the respondent and issue orders that will encourage development of the respondent's maximum self-determination and independence. The court may not establish guardianship if a limited guardianship, protective arrangement instead of guardianship, or other less restrictive alternatives would meet the needs of the respondent.<sup>239</sup>

Short of mandatory representation, the Bill provided the necessary means for court-appointed representation if the individual so desires, under three circumstances: (a) when the respondent requests appointment; (b) when the visitor<sup>240</sup> recommends appointment; or (c) when the court determines that the respondent needs representation.<sup>241</sup> The bill explicitly defined the attorney's duties as: (a) to make reasonable efforts to ascertain the respondent's wishes; (b) to advocate for the respondent's wishes to the extent reasonably ascertainable; and, (c) if the respondent's wishes are not reasonably ascertainable, *to advocate for the result that is the least restrictive in type, duration, and scope*, consistent with the respondent's interests.<sup>242</sup> The Bill also mandated the individual's attendance at the guardianship proceeding.<sup>243</sup>

237. An Act Generally Revising Guardianship and Conservatorship Laws, S.B. 202, 66th Leg. § 38(1) (Mont. 2019).

238. *Id.* § 2(13) (providing that least restrictive alternative means "an approach to meeting an individual's needs which restricts fewer rights of the individual than would the appointment of a guardian or conservator. The term includes supported decision making, technological assistance, appointment of a representative payee, and appointment of an agent by the individual").

239. *Id.* § 38(2).

240. MONT. CODE ANN. § 72-5-315(3) (providing that "[w]henever possible, the court shall appoint as visitor . . . [to] interview the person who appears to have caused the petition to be filed and the person who is nominated to serve as guardian").

241. Mont. S.B. 202 § 42(1).

242. *Id.* § 42(2).

243. *Id.* § 44 (stating "[i]f it is not reasonably feasible for the respondent to attend at the assigned location . . . the court shall make reasonable efforts to hold the hearing at an alternative location conve-

The Bill increased the standard of proof to clear and convincing evidence and mandated that due process requirements be met at every step of the proceeding.<sup>244</sup> The Bill also removed the outdated use of the word “ward,” replacing it with “respondent” and “adult/individual subject to guardianship.”<sup>245</sup> Finally, the Bill insisted on a specific inquiry into an individual’s ability to make and communicate personal determinations.<sup>246</sup>

Sponsor Senator Roger Webb introduced the Bill as a clean-up bill, emphasizing Montana’s 45-year neglect of attention to the issue. In support of the Bill, Beth Brenneman, attorney for Disability Rights of Montana, advocating for people with disabilities, also stressed the lack of attention to the particular issue.<sup>247</sup> Brenneman highlighted that study after study reveals that “once someone loses control over their life, psychiatric issues quickly and seriously develop.”<sup>248</sup> The only opponent of Senate Bill 202 at the 2019 legislative session was the Montana Supreme Court Administrator’s office, who cited concerns about judicial workload and cost to defend their opposition to the bill. Thus, the measure was ultimately tabled.

## VI. CONCLUSION

The right of an individual not to be deprived of life, liberty, or property without due process is secured under the United States Constitution and the Montana Constitution.<sup>249</sup> Although the ultimate goal of the IDEA is independence and self-determination, the transfer of parental rights transition language is improperly leading parents to obtain guardianships over their adult children. The guardianships subsequently deny individuals fundamental liberties and limit independence and self-determination. Current Montana guardianship statutes are outdated and inadequate. The reapplication of the *Mathews v. Eldridge* test to Montana’s guardianship statutes establishes that current due process requirements are inadequate. Additionally, the stat-

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nient to the respondent or allow the respondent to attend the hearing using real time audio-visual technology”).

244. *Id.* § 47 (mandating that a “guardian for an adult must: (a) include a specific finding that clear and convincing evidence established that the identified needs of the respondent cannot be met . . . by a . . . less restrictive alternative, . . . ; (b) include a specific finding that clear and convincing evidence established the respondent was given proper notice of the hearing on the petition; (c) state whether the adult subject to guardianship retains the right to vote, and if the adult does not . . . , include findings that supports removing that right, . . . ; and (d) state whether the adult subject to guardianship retains the right to marry, and, if the adult does not retain the right to marry, include findings that support removing that right”).

245. *Id.* § 2(11)–(12).

246. *Id.* § 38(a)(i).

247. Hearing on S.B. 202 Before the Standing Comm., 66th Leg., Reg. Sess. (Mont. 2019) (testimony of Beth Brenneman, Attorney for Disability Rights Montana).

248. *Id.*

249. U.S. CONST. amend. XIV, § 1; MONT. CONST. art. II, § 17.

utes are unconstitutionally vague under the requirements of due process. Less restrictive alternatives to guardianship and limited guardianships are available but are not prioritized and are rarely used. Ultimately, guardianship reform is necessary to satisfy the demands of procedural due process.