

VIA EMAIL

December 16, 2014

Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

Re: Committee Print of B20-710, "Guardianship Amendment Act of 2014"

Dear Councilmembers:

We are writing you to raise our serious concerns regarding the Committee Print of Bill 20-710, the "Guardianship Amendment Act of 2014."

As advocacy organizations committed to advancing the right of people with disabilities to direct their own lives, we urge you, at a minimum, to: (1) amend the bill to ensure that any periodic review process of guardianship cover all adults under guardianship equally; and (2) create a commission, with broad representation of stakeholders, to examine the District's guardianship laws, procedure, and practice and build a true consensus on recommended legislative reforms.

A. Need for Equal Applicability of Court Review to Existing Guardianship Orders

We recognize that the Committee Print before you touches on important themes that are integral to an on-going discussion of adult guardianship reform in the District, including the need for close scrutiny of a guardian's authority over a person's right to associate and for people's attorneys to zealously advocate for their clients' expressed wishes. However, as written, the Committee Print contains a serious and ultimately fatal flaw.

Subsection 2(f) creates a new DC Code Section 21-2045.01, which requires "mandatory court review of guardianships" to determine "whether the guardianship continues to be the least restrictive to the ward in duration and scope." While we previously shared a number of concerns with staff of the Committee on the Judiciary and Public Safety regarding the fairly modest nature, rigor, and quality of the proposed review, our main concern with this subsection remains the same -- *i.e.*, it only applies to "guardianships in which a guardian is appointed on or after January 1, 2015" (emphasis added). That means that thousands of District residents who are currently under guardianship will not have the due process remedies afforded to other District residents who are appointed guardians after January 1st.

We oppose this January 1st cut-off date on a number of grounds.

- First and foremost, it is bad public policy for the District. If the DC Council believes that the kind of proposed review is necessary to protect the civil rights of people under guardianship, then it must be necessary to protect the civil rights of everyone under guardianship. After all, it is just as likely that people appointed guardians before January 1st are in overly intrusive guardianship arrangements as those placed in guardianship after that date. In fact, for people with intellectual and mental health related disabilities, those placed before January 1st are more likely to be in unwarranted guardianships, given that the exploration of important alternatives to guardianship – such as Supported

Decision-Making¹ – are only now gaining attention and traction in the District² and the United States.³

- Second, eliminating the prospective effective date of this section does not run counter to the general presumption against legislative retroactivity. As the DC Court of Appeals has held, “statutes that create additional remedies, relate to the modes of procedure, or confirm or clarify existing rights do not contravene the general proscription against the retrospective operation of legislation.”⁴ Adult guardianship cases, by their nature, remain open in D.C. Superior Court unless the court terminates guardianship, so that the Court can continue to have review authority over the scope of guardianship and the guardian’s actions vis-à-vis the ward and take remedial action as needed. Thus, applying the court review contemplated in Section 2(f) “merely alters the remedy and does not impair vested rights.”⁵
- Finally, including this kind of arbitrary cut-off date raises concerns on equal protection grounds and could expose the District to litigation.⁶

In light of the above, we ask that Subsection 2(f) of the Committee Print of B20-710 be revised to apply to all people currently under guardianship. After all, every other provision of the bill – including the protections on people’s right to association and zealous representation by counsel – does. If deemed administratively necessary for judicial efficiency, the DC Courts can phase-in

¹ “Supported Decision-Making” is a spectrum of practices, relationships, and arrangements that facilitate people with developmental, cognitive, and psychiatric disabilities in making their own decisions without the “need” for guardianship. See, e.g., Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities*, 19 Hum. Rts. Brief 8, 10 (Winter 2012) available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1816&context=hrbrief> (last visited December 1, 2014); Quality Trust, The Council on Quality & Leadership, & Burton Blatt Institute, *Supported Decision-Making: An Agenda for Action* (February 2014), available at <http://jennyhatchjusticeproject.org/node/264> (last visited December 1, 2014).

² See Testimony of Laura L. Nuss, Director of the DC Department on Disability Services, on Bill 20-710 at p. 5 (Oct. 15, 2014) (stating that “DDS, [its] sister agencies, and the Executive Office of the Mayor are committed to learning about and exploring supported decision making as an emerging best practice and implementing strategies for providing less restrictive protections for people over the next year”); D.C. Public Schools, *Transfer of Rights Guidelines* (Aug. 2013), available at <http://transitioncentral.files.wordpress.com/2011/12/transfer-of-rights-guidelines.pdf> (last visited December 1, 2014) (affirmatively recognizing supported decision-making as an alternative to guardianship for adult students with disabilities); University Legal Services, *Time for Change: A Call to Reform the District of Columbia’s Guardianship System* (March 10, 2014), available at <http://www.uls-dc.org/Time%20for%20Change.pdf>.

³ See, e.g., *Ross v. Hatch*, No. CWF120000426P-03, slip op. at 17 (Newport News, Va. Cir. Ct. Aug. 2, 2013); *In re Guardianship of Dameris L.*, 956 N.Y.S.2d 848 (N.Y. Cnty. Surr. Ct. 2012); *In re SCPA Article 17-A Guardianship Proceeding for Mark C.H., Ward*, 906 N.Y.S.2d 419 (N.Y. Cnty. Surr. Ct. 2010).

⁴ See *Edwards v. Lateef*, 558 A.2d 1114, 1146-47 (D.C. 1989) (internal citations omitted).

⁵ See *Montgomery v. District of Columbia*, 598 A.2d 162 (1991).

⁶ See *Faruki v. Rogers*, 349 F. Supp. 723, 734 (D.D.C. 1972) (holding that a statute failed to meet the rational basis test under the equal protection clause because the statutory preference in favor of native-born citizens did not have a “fair and substantial relation to the object of the legislation”) (citing *Reed v. Reed*, 404 U.S. 71, 76 (1971)); see also *Rinaldi v. Yeager*, 384 U.S. 305, 309-10 (1969) (holding the Equal Protection “does require that, in defining a class subject to legislation, the distinctions that are drawn have ‘some relevance to the purpose for which the classification is made’” and that, once established “avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to courts.”)(internal citations omitted).

or stagger the reviews. In the alternative, we ask that the section be severed from the bill and tabled for further discussion by the Commission recommended below.

B. Need for Commission to Recommend Legislative Reform Based on Consensus of Stakeholders

We have endeavored to educate the Committee on the Judiciary and Public Safety on concrete ways in which the District's guardianship law can be reformed to promote and protect the decision-making rights of people with disabilities. These recommendations included more robust and meaningful judicial review of existing and future guardianship orders by duly qualified professionals who recognize the capacity of a person with a disability can change or improve over time, as well as requirements for full exploration and exhaustion of less restrictive decision-making supports – such as powers of attorney and Supported Decision-Making – prior to the imposition of guardianship.

The majority of our recommendations have not been incorporated into the present bill. We appreciate the Committee's efforts to guide this important and overdue conversation regarding guardianship reform. Unfortunately, we do not believe that the present bill represents a consensus of DC stakeholders, and it should not be presented to the DC Council as such. The nature and timing of the legislative process has not allowed significant dialogue between interested parties – including the DC Courts and disability and elder rights advocates.

With continued time and commitment, the District can and should continue to make progress on examination and reforms of its guardianship system. Therefore, we continue to recommend the formation of a Commission⁷ to fully address these issues. We do not believe that the fiscal impact of such a Commission should be overly burdensome, given that members could serve without additional pay. Creating such a commission will go a long way in ensuring that this bill lives up to its original title and is truly a "Limitations of Guardianship Amendment Act."

Thank you for your attention to this critical issue in the lives of people with disabilities in the District. If you have any questions, please contact Morgan K. Whitlatch, Senior Attorney at Quality Trust for Individuals with Disabilities (at mwhitlatch@dcqualitytrust.org or 202-459-4004); Jennifer Lav, Managing Attorney, University Legal Services (at jlav@uls-dc.org or 202-547-0198 x103), or Robert Dinerstein, Professor of Law and Director of the Disability Rights Law Clinic at American University, Washington College of Law (at rdiners@wcl.american.edu or 202-274-4141).

⁷ The additional legislative language we recommended is: "There is established a Commission on Adult Guardianship Reform ("Commission") to examine issues regarding the use of guardianship for adults in the District of Columbia, including whether guardianship in the District of Columbia is being implemented to maximize the autonomy of persons under guardianship and as the least restrictive alternative to meet the person's needs. This examination shall include an exploration of the recognition and implementation of less restrictive alternatives to general guardianship, including limited guardianship, powers of attorney, and supported decision-making. The Commission shall consist of 10 members who shall represent the full range of stakeholders interested in guardianship issues, including people with disabilities and older persons subject to guardianship, and at least one representative of the following groups: the judiciary, the probate bar, non-profit legal services and/or advocacy agencies, individuals under guardianship, the Department on Disability Services, and other interested parties. The Commission shall issue a written report of its findings to the City Council within 18 months of its creation and shall include recommendations for statutory and systemic reform."

Sincerely,

Autistic Self Advocacy Network (ASAN)
Collaboration to Promote Self-Determination (CPSD)
Disability Rights Law Clinic, American University, Washington College of Law
Quality Trust for Individuals with Disabilities
National Organization on Disability (NOD)
Project ACTION!
Public Defender Service of the District of Columbia, Mental Health Division
RCM of Washington, Inc.
The Council of Parent Attorneys and Advocates (COPAA)
University Legal Services, Inc., Protection and Advocacy Program