

No. 14-0940

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IN THE  
SUPREME COURT OF TEXAS

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IN RE GUARDIANSHIP OF THE PERSON AND ESTATE OF RYAN KEITH  
TONNER, AN INCAPACITATED PERSON,  
*Petitioner.*

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On Petition for Review from  
The Court of Appeals, Seventh District  
Cause No. 07-13-00308-CV

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**BRIEF OF QUALITY TRUST FOR INDIVIDUALS WITH DISABILITIES,  
AARP, THE NATIONAL RESOURCE CENTER FOR SUPPORTED  
DECISION-MAKING, and THE AUTISTIC SELF ADVOCACY NETWORK,  
AS AMICI CURIAE IN SUPPORT OF PETITIONER**

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## **INTEREST OF AMICI CURIAE**

*Amici* are civil rights and social impact organizations involved in a broad array of advocacy, training, and policy efforts for the legal and lay communities.<sup>1</sup> *Amici* have strong interests in: (1) protecting older people and people with disabilities' right to express their own preferences, make their own decisions, and direct their own lives, free from overbroad or undue guardianship; and (2) advancing knowledge about and the use of Supported Decision-Making as a less-restrictive alternative to guardianship.

## **SUMMARY OF ARGUMENT**

*Amici* submit this brief in support of Petitioner (hereinafter “Mr. Tonner”) and to educate the court about Supported Decision-Making: a less-restrictive alternative to guardianship where people with limitations in decision-making choose trusted friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions without the need for a guardian. In contrast to guardianship, which is a drastic intervention that can give one person complete authority over another’s life, Supported Decision-Making empowers people to make their own decisions with the assistance of a formal or informal network of supporters.

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<sup>1</sup> This brief was entirely paid for by *amici*.

Over the past two decades, research has demonstrated a direct relationship between self-determination—the authority and opportunity to express preferences and make life choices—and quality of life. People with limitations who exercise greater self-determination are better problem solvers, more independent, more likely to be employed at higher-paying jobs, and less likely to be abused.

Guardianships imposed on people who can make their own decisions or utilize less-restrictive alternatives like Supported Decision-Making are undue, overbroad, violate legal rights and can lead to negative life outcomes. In contrast, Supported Decision-Making increases self-determination, can improve life outcomes, and furthers the intent of laws mandating self-determination and community integration.

Accordingly, *amici* urge this court to hold: (1) that Supported Decision-Making is an available, less-restrictive alternative to guardianship under Texas law; and (2) that, as appropriate, Mr. Tonner and others similarly situated have a legal right to use Supported Decision-Making instead of being subjected to guardianship.

## **ARGUMENT**

### **SUPPORTED DECISION-MAKING IS A LESS-RESTRICTIVE ALTERNATIVE TO GUARDIANSHIP, CAN INCREASE SELF-DETERMINATION, AND CAN IMPROVE LIFE OUTCOMES.**

#### **A. Guardianship Is A Drastic Intervention That Removes Legal Rights And Can Lead To Negative Life Outcomes.**

On September 25, 1987, a House Select Committee held hearings titled *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*. Summarizing the

Committee’s findings, Chairman Claude Pepper famously stated:

The typical ward has fewer rights than the typical convicted felon . . . . By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception . . . of the death penalty.<sup>2</sup>

In the wake of this alarm, policymakers, scholars, and some courts recognized that “even when it is functioning as intended [guardianship] evokes a kind of ‘civil death’ for the individual, who is no longer permitted to participate in society without mediation through the actions of another if at all.”<sup>3</sup> Research has shown that people subjected to overbroad or undue guardianship can suffer negative life outcomes from losing the right to make decisions and the opportunity to develop independent living skills.<sup>4</sup>

Guardianship can deprive people of their most basic and fundamental rights. It provides guardians with “substantial and often complete authority over the lives of

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<sup>2</sup> H.R. Rep. No. 100-641, at 1 (1987).

<sup>3</sup> Robert Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 Hum. Rts. Brief 8, 9 (2012).

<sup>4</sup> See, e.g., Leslie Salzman, *Guardianship for Persons with Mental Illness – A Legal and Appropriate Alternative?*, 4 St. Louis U. J. Health L. & Pol’y 279, 289-93 (2011) [hereinafter Salzman 2011]; Jennifer L. Wright, *Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA*, 33 Int’l J.L. & Psychiatry 350, 354 (2010) [hereinafter Wright 2010]; Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1119 (2013) [hereinafter “Kohn et al.”].

vulnerable [people].”<sup>5</sup> This control extends to personal and financial decisions.<sup>6</sup> A guardian of an estate has control over a person’s financial assets, including discretion to dispose of property or sign contracts.<sup>7</sup> Likewise, a guardian of a person dictates that person’s living conditions, social freedoms, and medical care.<sup>8</sup>

As the U.S. Supreme Court has held, people have a fundamental right to make decisions regarding their health care, property, living arrangements, and marriage.<sup>9</sup> Consequently, guardianship proceedings should be “subject to the highest constitutional standards”<sup>10</sup> because guardians may limit the “civil rights of [people] and their property.”<sup>11</sup> The demand for heightened due process in guardianship proceedings reflects the fundamental nature of the rights at stake.<sup>12</sup>

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<sup>5</sup> Judge David Hardy, *Who Is Guarding the Guardians? A Localized Call for Improved Guardianship Systems and Monitoring*, 4 NAELA J. 1, 7 (2008).

<sup>6</sup> Naomi Karp et al., AARP, *Guardianship Monitoring: A National Survey of Court Practices* 1-2 (2006).

<sup>7</sup> See, e.g., Fla. Stat. Ann. § 744.3215 (2006); see also Sens. Gordon H. Smith & Herb Kohl, S. Spec. Comm. on Aging, *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity* 7 (2007) (“[W]hen full guardianships are imposed, all of one’s fundamental rights are transferred to the guardian.”).

<sup>8</sup> *Guardianships: Little Progress in Ensuring Protection for Incapacitated Elderly People: Hearing Before the S. Spec. Comm. on Aging*, 109th Cong. 3-4 (2006) (statement of Barbara D. Bovbjerg, Dir. Of Education, Workforce, and Income Security Issues) (discussing possible loss of rights).

<sup>9</sup> See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990) (recognizing the significant liberty interest in refusing unwanted medical treatment); *Turner v. Safley*, 482 U.S. 78, 95 (1987) (recognizing the decision to marry as a fundamental right); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503-06 (1977) (finding the Constitution protects the ability of relatives to live together); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972) (broadly interpreting the right to own and control private property).

<sup>10</sup> A. Kimberley Dayton et al., *Advising the Elderly Client* § 34:9 (2008).

<sup>11</sup> *Sullivan v. Ganim*, No. CV094030012, 2009 Conn. Super. LEXIS 3516, at \*22 (Conn. Super. Ct. Dec. 10, 2009).

<sup>12</sup> *Id.*

For these reasons, legislatures, courts, and policymakers have acknowledged the need to identify and implement less-restrictive alternatives to guardianship that protect and advance the fundamental rights of people with limitations in decision-making.<sup>13</sup> Supported Decision-Making, in general and as exercised by Mr. Tonner, is such an alternative.

**B. Supported Decision-Making Is A Less-Restrictive Alternative To Guardianship That Empowers People With Limitations In Decision-Making To Make Their Own Decisions.**

Supported Decision-Making is a less-restrictive alternative to guardianship that empowers people with limitations in decision-making to express their own preferences, make their own decisions, and direct their own lives without the need for a guardian.<sup>14</sup> While there is no one-size-fits-all model of Supported Decision-Making, it occurs when people choose friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions.<sup>15</sup> In this way, it mirrors “what happens for most adults when they make decisions such as whether to get car repairs, sign legal documents and consent to medical procedures: they seek advice, input and information from friends, family or professionals who are knowledgeable about those issues, so they can make their

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<sup>13</sup> See, e.g., Kohn et al., *supra* note 4, at 1115-1120.

<sup>14</sup> See generally Salzman 2011, *supra* note 4, at 306-311.

<sup>15</sup> *Id.*, at 306-07; Dinerstein, *supra* note 3, at 9-1

own well-informed choices.”<sup>16</sup>

While Supported Decision-Making relationships can be “of more or less formality and intensity” ranging from informal support by people who “speak with, rather than for, the individual with a disability”<sup>17</sup> to more formalized “micro-board[s]” and “circles of support,”<sup>18</sup> they share three common elements:

(1) they are based on a set of guiding principles that emphasize the person with disability’s autonomy, presumption of capacity, and right to make decisions on an equal basis with others; (2) they recognize that a person’s intent can form the basis of a decision-making process that does not entail removal of the individual’s decision-making rights; and (3) they acknowledge that individuals with disabilities will often need assistance in decision-making through such means as interpreter assistance, facilitated communication, assistive technologies and plain language.<sup>19</sup>

Through these relationships,

an individual with limitations in decision-making abilities can receive support to understand relevant information, issues, and available choices, to focus attention in making decisions, to help weigh options, to ensure that decisions are based on her own preferences, and, if necessary, to interpret and/or communicate her decisions to other parties.<sup>20</sup>

Supported Decision-Making is increasingly being adopted by courts, legislatures, and policymakers as a less-restrictive alternative to guardianship. In

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<sup>16</sup> Quality Trust for Individuals with Disabilities, *Supported Decision-Making: An Agenda for Action* (2014), available at <http://jennyhatchjusticeproject.org/node/264> (last visited Dec. 15, 2014).

<sup>17</sup> Dinerstein, *supra* note 3, at 10.

<sup>18</sup> Kohn et al., *supra* note 4, at 1123.

<sup>19</sup> Dinerstein, *supra* note 3, at 10-11.

<sup>20</sup> Salzman 2011, *supra* note 4, at 306.



1999, the Supreme Court of Pennsylvania reversed an order placing Patricia Peery under guardianship because she “has in place a circle of support to assist her in making rational decisions concerning her personal finances and to meet essential requirements of health and safety.”<sup>21</sup>

In 2012, a New York court terminated the guardianship of Dameris L. because she is “able to engage in supported decision making.”<sup>22</sup> The court held “proof that a person with an intellectual disability *needs* a guardian must exclude the possibility of that person’s ability to live safely in the community supported by family, friends, and mental health professionals.”<sup>23</sup> It then found that Dameris made her own decisions, using the support of people who “understood [their] role, not as deciding for her, but in assisting her in making her own decisions.”<sup>24</sup> The court hailed Dameris’ Supported Decision-Making network as “a perfect example of the kind of family and community support that enables a person with an intellectual disability to make, act on, and have her decisions legally recognized....”<sup>25</sup>

In 2013, Margaret “Jenny” Hatch, a woman with Down syndrome, defeated a petition to place her under a permanent, plenary guardianship in favor of the

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<sup>21</sup> *In re Peery*, 727 A.2d 539, 540 (Pa. 1999).

<sup>22</sup> *In re Dameris L.*, 956 N.Y.S.2d 848, 856 (N.Y. Sur. Ct. 2012).

<sup>23</sup> *Id.* at 854 (emphasis in original).

<sup>24</sup> *Id.* at 853.

<sup>25</sup> *Id.* at 855.

successful Supported Decision-Making network she established.<sup>26</sup> At trial, Ms. Hatch presented evidence that she made her own decisions with the support of friends and professionals. The court denied the petition, naming the friends Ms. Hatch chose to support her as temporary limited guardians for one year, “with the . . . goal of transitioning to the supportive [*sic*] decision making model.”<sup>27</sup> The court charged the temporary guardians to “assist [Ms. Hatch] in making and implementing decisions we have heard termed ‘supported decision making.’”<sup>28</sup>

Legislatures and policymakers have also recognized and implemented Supported Decision-Making systems for people who might otherwise be placed under guardianship. In 2009, the Texas legislature created a pilot program to “promote the provision of supported decision making services to persons with intellectual and developmental disabilities and persons with other cognitive disabilities who live in the community.”<sup>29</sup> The program trained volunteers to support people in making “life decisions such as where the person wants to live, who the person wants to live with, and where the person wants to work, without impeding the

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<sup>26</sup> *Ross v. Hatch*, No. CWF120000426P-03, slip op. at 7 (Va. Cir. Ct. Aug. 2, 2013), available at [http://jennyhatchjusticeproject.org/docs/justice\\_for\\_jenny\\_trial/jhjp\\_trial\\_final\\_order.pdf](http://jennyhatchjusticeproject.org/docs/justice_for_jenny_trial/jhjp_trial_final_order.pdf) (last visited Dec. 15, 2014). Counsel for *amici* Martinis represented Ms. Hatch at trial. Counsel for *amici* Blanck testified as an expert witness.

<sup>27</sup> *Ross v. Hatch*, *supra* note 26, at 5. The temporary guardianship expired on August 2, 2014. *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Volunteer-Supported Decision-Making Advocate Pilot Program, Tex. Gov't Code Ann. § 531.02446 (2009) (expired on Sept. 1, 2013).

self-determination of the person.”<sup>30</sup>

In 2014, the Virginia General Assembly directed the state Secretary of Health and Human Services to study Supported Decision-Making and “recommend strategies to improve the use of supported decision making in the Commonwealth and ensure that individuals . . . are consistently informed about and receive the opportunity to participate in their important life decisions.”<sup>31</sup>

Also in 2014, the Administration for Community Living in the U.S. Department for Health and Human Services made funding available to create “a national training and technical assistance center on . . . supported decision making.”<sup>32</sup> The federal agency described Supported Decision-Making as “an alternative to and an evolution from guardianship” and stressed the importance of people “retain[ing] their own decision-making authorities . . . with the assistance of appropriate services and supports.”<sup>33</sup>

**C. Supported Decision-Making Increases Self-Determination And Can Lead To Improved Life Outcomes.**

In contrast to overbroad or undue guardianship, Supported Decision-Making increases a person’s self-determination, which can lead to improved life outcomes.

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<sup>30</sup> *Id.*

<sup>31</sup> See H.J.Res. 190, Reg. Sess. (Va. 2014).

<sup>32</sup> See Admin. for Cmty Living, U.S. Dep’t of Health & Human Servs., Funding Opportunity HHS-2014-ACL-AIDD-DM-0084, *Supported Decision Making*, available at <http://www.grants.gov/web/grants/view-opportunity.html?oppId=256168> (last visited Dec. 15, 2014).

<sup>33</sup> *Id.* at 2, 6.

For close to two thousand years, governments have appointed substitute decision-makers for those they believe are “by reason of age or disability . . . incapable of making such decisions for themselves.”<sup>34</sup> From the Roman Republic to the American, society has viewed these substitutes—now generally known as *guardians*—as “a humanitarian response to the vulnerability of the incompetent.”<sup>35</sup> Consequently, society has historically not examined whether people truly “need” guardianship or, once in a guardianship, whether they continue to “need” it.<sup>36</sup>

Nevertheless, research shows that, by taking away a person’s legal right to make decisions, guardianship decreases self-determination, a basic human need.<sup>37</sup> Self-determination “describe[s] actions that enhance the possibilities for people to control their lives.”<sup>38</sup> People exercise self-determination when making life choices—decisions simple and complex, casual and critical that determine where, how, and with whom they live life. By doing so, they become “causal agents . . . actors in their lives instead of being acted upon.”<sup>39</sup>

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<sup>34</sup> Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 Psychol., Pub. Pol’y & L. 6, 27 (1995).

<sup>35</sup> Lawrence A. Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good*, 9 Stan. L. & Pol’y Rev. 347, 350 (1998).

<sup>36</sup> Jennifer L. Wright, *Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings*, 12 Elder L.J. 53, 60 (2004).

<sup>37</sup> EDWARD DECI, INTRINSIC MOTIVATION 208 (1975).

<sup>38</sup> Michael L. Wehmeyer, *Self-Determination and Individuals with Severe Disabilities: Re-examining Meanings and Misinterpretations*, 30 Res. & Prac. for Persons with Severe Disabilities 113, 119 (2005) (internal quotations omitted) [hereinafter Wehmeyer 2005].

<sup>39</sup> Michael Wehmeyer et al., *Promoting Causal Agency: The Self-Determined Learning Model of Instruction*, 66 Exceptional Child. 439, 440 (2000).

When people are denied self-determination, their performance across-the-board can suffer, leading them to “feel helpless, hopeless, and self-critical. . . [they] will not behave because [they] can see no use in behaving.”<sup>40</sup> Denial of self-determination can also lead to “self-handicapping” behavior: using a perceived inability to do one thing as an excuse to avoid doing others.<sup>41</sup>

Hence, it is not difficult to understand how overbroad or undue guardianship can cause a “significant negative impact on . . . physical and mental health, longevity, ability to function, and reports of subjective well-being.”<sup>42</sup> Before being placed under guardianship, people must listen to witnesses saying they cannot make decisions and a judge finding they are unable to “take care of themselves in a manner that society believes is appropriate.”<sup>43</sup> Once a judge appoints someone to make their life choices, “[w]hy . . . should they attempt a task that they have been told they are incompetent to perform?”<sup>44</sup> Even worse, as a former judge writes, people under guardianship are at risk “from neglect or abuse, may lack adequate medical treatment, rehabilitative services, appropriate reassessment, and adjustment of medications, or may be inadequately or inappropriately housed or unnecessarily

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<sup>40</sup> Deci, *supra* note 37, at 208.

<sup>41</sup> See, e.g., Edward E. Jones & Steven Berglas, *Control of Attributions About the Self Through Self-Handicapping Strategies: The Appeal of Alcohol and the Role of Underachievement*, 4 *Personality & Soc. Psychol. Bull.* 200 (1978).

<sup>42</sup> Wright 2010, *supra* note 4, at 354.

<sup>43</sup> Marshall B. Kapp, *Geriatrics and the Law: Understanding Patient Rights and Professional Responsibilities* 109 (3d ed. 1999).

<sup>44</sup> Winick, *supra* note 34, at 18.

confined.”<sup>45</sup>

Furthermore, research shows that overbroad or undue guardianship can harm people by denying them the opportunity to exercise or develop important living skills. For example, people who lose the legal right to make financial decisions may “become[] gradually disengaged from the management of those finances as well as the interactions with others involved in that management—banking, shopping, financial planning . . . even giving gifts to loved ones.”<sup>46</sup> Similarly, when people lose the right to make medical decisions, they “may get little information about [their] condition or treatment options . . .”<sup>47</sup> Overbroad or undue guardianship “can also isolate the individual by explicitly depriving a ward of the right to make certain social decisions regarding how or with whom he will spend time.”<sup>48</sup>

In contrast, Supported Decision-Making can increase self-determination and improve life outcomes.<sup>49</sup> Research has repeatedly found that people with disabilities who exercise greater self-determination have a better quality of life. Two recent studies found that people who increased their self-determination became better employed, more independent and had more community integration.<sup>50</sup> Another found links

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<sup>45</sup> Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 Colum. Hum. Rts. L. Rev. 93, 121 n.132 (2012).

<sup>46</sup> Salzman 2011, *supra* note 4, at 291.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *See, e.g.*, Kohn et al., *supra* note 4, at 1154.

<sup>50</sup> Karrie A. Shogren et al., *Relationships Between Self-Determination and Postschool Outcomes*

between people with disabilities' self-determination and their perceived quality of life.<sup>51</sup>

These findings build upon decades of research identifying a direct relationship between self-determination and life outcomes. One study found that people with greater self-determination were more likely to want to live independently, manage their money and be employed.<sup>52</sup> Another found that individuals who exercised more self-determination were more likely to live independently, have greater financial independence, be employed at higher paying jobs, and make greater advances in their employment.<sup>53</sup> Still another found that women with intellectual disabilities provided with education in self-determination were more likely to identify abusive situations and less likely to suffer abuse.<sup>54</sup>

Hence, Supported Decision-Making stands in stark contrast to overbroad or undue guardianship. Instead of “divest[ing] the individual of the ability to make

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for Youth with Disabilities, 4 J. Special Educ. 256 (forthcoming Feb. 2015), available at <http://www.academia.edu/4518360/> (last visited Dec. 15, 2014); Laurie Powers et al., *My Life: Effects of a Longitudinal, Randomized Study of Self-Determination Enhancement on the Transition Outcomes of Youth in Foster Care and Special Education*, 34 Child. & Youth Services Rev. 2179 (2012).

<sup>51</sup> Janette McDougall et al., *The Importance of Self-Determination to Perceived Quality of Life for Youth and Young Adults with Chronic Conditions and Disabilities*, 31 Remedial & Special Educ. 252 (2010).

<sup>52</sup> Michael Wehmeyer & Michelle Schwartz, *Self-Determination and Positive Adult Outcomes: A Follow-Up Study of Youth with Mental Retardation or Learning Disabilities*, 63 Exceptional Child. 245 (1997).

<sup>53</sup> Michael Wehmeyer & Susan Palmer, *Adult Outcomes for Students with Cognitive Disabilities Three-Years After High School: The Impact of Self-Determination*, 38 Educ. & Training Developmental Disabilities 131 (2003).

<sup>54</sup> Ishita Khemka et al., *Evaluation of a Decision-Making Curriculum Designed to Empower Women with Mental Retardation to Resist Abuse*, 110 Am. J. Mental Retardation 193 (2005).

crucial self-defining decisions,”<sup>55</sup> Supported Decision-Making “retains the individual as the primary decision maker, while recognizing that the individual may need some assistance . . . in making and communicating a decision.”<sup>56</sup> Instead of subjecting people with disabilities to “marginalization and isolation from mainstream society,”<sup>57</sup> it empowers them to be “causal agents” in their lives,<sup>58</sup> able and authorized to make their own life choices, with access to the improved life outcomes associated with greater life control.

**D. Supported Decision-Making Protects And Advances Crucial Legal Rights.**

Supported Decision-Making also protects due process and other critical legal rights. Even though state guardianship laws have been reformed in an attempt to decrease over-reliance on guardianship,<sup>59</sup> courts “continue to hold deeply embedded tendencies toward protection over autonomy, and . . . continue to issue guardianship orders that are not necessary and are overly broad in scope.”<sup>60</sup> For example, one study found that over 90% of the guardianship cases it reviewed resulted in plenary guardianship, where the guardian was authorized to make all life decisions for the

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<sup>55</sup> Salzman 2011, *supra* note 4, at 291.

<sup>56</sup> Dinerstein, *supra* note 3, at 10.

<sup>57</sup> Salzman 2011, *supra* note 4, at 293.

<sup>58</sup> Wehmeyer 2005, *supra* note 38, at 115.

<sup>59</sup> See Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. Colo. L. Rev. 157, 163-82 (2010) (describing reforms) [hereinafter “Salzman 2010”].

<sup>60</sup> *Id.*



person.<sup>61</sup>

The preference for overbroad and undue guardianship persists despite state and federal laws mandating self-determination and community integration,<sup>62</sup> leading legal commentators to argue that such guardianship violates the Americans with Disabilities Act (ADA).<sup>63</sup> The ADA states that discrimination against people with disabilities includes “the discriminatory effects of . . . overprotective rules and policies.”<sup>64</sup> With the intent of remedying the long history of such discrimination, the ADA requires that states “administer [their] services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”<sup>65</sup> The “most integrated setting” is one “that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.”<sup>66</sup>

People subjected to overbroad or undue guardianship face the same unlawful discrimination and resulting harm as the plaintiffs in the landmark U.S. Supreme Court case *Olmstead v. L.C., ex rel. Zimring*.<sup>67</sup> There, two women with intellectual

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<sup>61</sup> Pamela B. Teaster et al., *Wards of the State: A National Study of Public Guardianship*, 37 *Stetson L. Rev.* 193, 219 (2007).

<sup>62</sup> See, e.g., Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub. L. No. 106-402, 114 Stat. 1677 (2000); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990); Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999); Tex. Estates Code Ann. § 1101.103(a), (b)(6) (2011); Tex. Estates Code Ann. § 1001.001(b) (2011); Tex. Estates Code Ann. § 1101.152(b)(2) (2011).

<sup>63</sup> See, e.g., Salzman 2010, *supra* note 59, at 314-327.

<sup>64</sup> 42 U.S.C. § 12101(a)(5) (2012).

<sup>65</sup> 28 C.F.R. § 35.130(d) (2008).

<sup>66</sup> 28 C.F.R. Pt. 35, App. A (2010) (addressing 28 C.F.R. § 35.130).

<sup>67</sup> 527 U.S. 581 (1999).

disabilities argued that Georgia violated the ADA when it provided them services in segregated institutions rather than integrated community settings. The Court agreed, holding “[u]njustified institutional isolation . . . is a form of discrimination.”<sup>68</sup>

Because people in overbroad or undue guardianships typically lack any say over where they live, whether they receive medical care, with whom they will socialize, and even whether they will marry,<sup>69</sup> they are “constructively isolate[d]” from their communities.<sup>70</sup> As a result, they suffer the same discrimination and harm as the *Olmstead* plaintiffs, including perpetuation of “unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life” and “diminish[ment of] . . . everyday life activities . . . including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”<sup>71</sup> This damage is magnified because the ADA requires governments to make modifications to their policies and practices “to avoid discrimination on the basis of disability”<sup>72</sup> and “in many cases, if not most, individuals with impairments affecting decision-making abilities would be able to participate in the decision-making process with appropriate assistance.”<sup>73</sup>

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<sup>68</sup> *Id.* at 600.

<sup>69</sup> Salzman 2011, *supra* note 4, at 289-290.

<sup>70</sup> Salzman 2010, *supra* note 59, at 167-170.

<sup>71</sup> *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600-01 (1999).

<sup>72</sup> 28 C.F.R. § 35.130(b)(7) (2008).

<sup>73</sup> Salzman 2010, *supra* note 59, at 201.

In contrast, Supported Decision-Making furthers the intent of laws mandating self-determination and community integration. For example, Texas’ guardianship law requires courts to consider “the development or maintenance of maximum self-reliance and independence in the incapacitated person.”<sup>74</sup> Consequently, courts may not impose a guardianship without reviewing whether the person would benefit from alternatives that “allow the individual to live in the least restrictive setting.”<sup>75</sup>

Supported Decision-Making furthers the purpose of Texas law by ensuring that people are able to make their own decisions and increase their self-determination—which research has correlated with increased opportunities to live in more integrated, less-restrictive settings.<sup>76</sup> A review of the evidence below certainly suggests that Mr. Tonner has successfully established Supported Decision-Making relationships that have empowered him to make his own decisions without the need for a guardian for several years. The record reflects him making decisions regarding employment,<sup>77</sup> his finances,<sup>78</sup> and health care<sup>79</sup> with the support of friends and professionals. Hence, granting his prayer to be freed from guardianship in favor of

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<sup>74</sup> Tex. Estates Code Ann. § 1001.001(b) (2011).

<sup>75</sup> Tex. Estates Code Ann. § 1101.103(b)(6) (2011); *see also id.* § 1101.152(a) (discussing limited guardianships that “permit the proposed ward to care for himself . . . commensurate with the proposed ward's ability”).

<sup>76</sup> *See, e.g.,* Karrie A. Shogren et al., *supra* note 50.

<sup>77</sup> *See* R.R. 2 Pg 47 Ln 24 – Pg 48 Ln 11.

<sup>78</sup> *See* R.R. 2 Pg 54 Ln 1-2, R.R. 2 Pg Ln 12-17; R.R. 2 Pg 54 Ln 23-25.

<sup>79</sup> *See* R.R. 2 Pg 16 Ln 16-18, R.R. 2 Pg 18 Ln 2-4, R.R. 2 Pg 18 Ln 14-16, R.R. 2 Pg 17 Ln 9-12.

his effective Supported Decision-Making relationships would further Texas' goal of developing his "maximum self-reliance and independence."<sup>80</sup>

Similarly, Mr. Tonner's continued use of Supported Decision-Making as an alternative to guardianship would advance a main goal of the ADA: "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency."<sup>81</sup> As shown, *supra*, Supported Decision-Making increases self-determination, which is correlated with more independent, integrated living and enhanced employment.

Finally, by increasing self-determination and providing access to the resulting positive life outcomes, Supported Decision-Making furthers the purpose of the Developmental Disabilities Assistance and Bill of Rights Act: to "assure that individuals with developmental disabilities . . . have access to needed . . . forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life."<sup>82</sup>

### **PRAYER**

*Amici* respectfully pray that this Court hold: (1) that Supported Decision-Making is a less-restrictive alternative to guardianship under Texas law; and (2) that, as appropriate, Mr. Tonner and others similarly situated have a right to use

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<sup>80</sup> Tex. Estates Code Ann. § 1001.001(b) (2011).

<sup>81</sup> 42 U.S.C. § 12101(a)(7) (2012).

<sup>82</sup> 42 U.S.C. § 15001(b) (2012).

Supported Decision-Making instead of being subjected to guardianship.

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Dated: January 29, 2015.

**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the length/word limit limitation of Texas Rule of Appellate Procedure 9.4(i). Excluding the parts of this brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1), this brief contain 4,495 words.

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**CERTIFICATE OF SERVICE**

I certify that I have served a true copy of the foregoing Brief electronically on January 29, 2015.

/s/ Iris Y. González  
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## **APPENDIX: AMICI CURIAE STATEMENTS OF INTEREST**

Quality Trust for Individuals with Disabilities (QT) is an independent, nonprofit advocacy organization dedicated to ensuring that people with disabilities have the supports and services they need to live full and meaningful lives in the places and ways they choose. QT partners with people with disabilities, their families, advocates, professionals, and providers to create a community where everyone is respected and valued, belongs and contributes, and shapes their own present and future. QT has an interest in Supported Decision-Making being recognized as a less-restrictive alternative to guardianship because a large percentage of the people QT supports are at risk of or in overbroad or undue guardianship. Accordingly, greater recognition and use of Supported Decision-Making will directly benefit people with limitations in decision-making in the District of Columbia and beyond.

AARP is a nonprofit, nonpartisan organization with a membership that strengthens communities and fights for the issues that matter most to families such as health care, employment, income security, retirement planning, affordable utilities and protection from financial abuse. To that end, AARP supports the enactment of guardianship laws and procedures that protect older people's due process rights. These should include, at minimum, consideration by the court of less-restrictive alternatives to guardianship in determining whether

guardianship is necessary.

The National Resource Center for Supported Decision-Making is a federal grant-funded legal advocacy, research, and education center.<sup>83</sup> The National Resource Center collaborates with aging and disability communities, networks, researchers, professionals, and providers to examine and reform guardianship and Supported Decision-Making law, policy, processes, and methods as needed to make Supported Decision-Making a universally accepted alternative to guardianship. Hence, the National Resource Center has an interest in Supported Decision-Making being recognized and implemented as a less-restrictive alternative to guardianship in Texas and nationwide.

The Autistic Self Advocacy Network (“ASAN”) is a national, private, nonprofit organization, run by and for individuals on the autism spectrum. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN’s advocacy activities include combating stigma against individuals with significant disabilities, promoting nondiscriminatory access to health care, and educating the public about

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<sup>83</sup> The National Resource Center’s work on this brief was supported, in part by grant number HHS-2014-ACL-AIDD-DM-0084, from the U.S. Administration for Community Living, Department of Health and Human Services, Washington, D.C. 20201. Grantees undertaking projects under government sponsorship are encouraged to express freely their findings and conclusions. Points of view or opinions do not, therefore, necessarily represent official Administration for Community Living policy.



the inherent value of the lives of individuals with developmental disabilities. ASAN has an interest in people with disabilities being judicially recognized as able and authorized to make their own decisions and direct their own lives, without the “need” for a guardian.