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Disability Rights Maryland

Testimony in Opposition of House Bill 691

Maryland House Health and Government Operations Committee—March 3, 2020

Disability Rights Maryland (DRM), formerly *Maryland Disability Law Center*, is Maryland's federally-designated protection and advocacy organization charged with defending and advancing the rights of people with disabilities. For over 40 years we have worked with people with disabilities to create a society that values their full participation and inclusion in our communities. DRM regularly encounters people with disabilities who have been subject to unnecessary guardianships and experience profound deprivation of their civil rights and liberty as a result. Our legal services include community education and advice on state guardianship law and alternatives to guardianship, like powers of attorney and supported decision-making, which offer greater protection for individual rights. Disability Rights Maryland joins our colleagues at the Developmental Disabilities Council, People on the Go Maryland, and the Maryland Centers for Independent Living in opposition of House Bill 691 for the reasons they provide in their testimony as well as our reasons set forth in this testimony. HB 691 would expand the number of professionals able to sign a certificate of incompetency for a guardianship petition to include nurse practitioners, without requiring any specialization or training requirements. Our advocacy and work in this area has revealed abuse and misuse of guardianship in Maryland. It should be more difficult to place someone under guardianship in Maryland, instead this bill will make it easier.

The implications of guardianship cannot be overstated. It is a far-reaching intervention that some have equated to civil death as it strips a person of their legal capacity and places their decision-making authority in the hands of another.¹ Guardianship removes a person's ability to be the architect of their life and make the decisions that form their identity, including whether they marry and form a family, where they live, what education, job or training opportunities they may have, and what services or health care they receive. Critically, once established, guardianship is often permanent. DRM has witnessed clients be unnecessarily subject to guardianship because of negative stereotypes and biases that prevail in our society and judicial systems about people with disabilities. Our clients have been certified incompetent and placed under guardianship merely because of their diagnoses or IQ scores, with little regard to their actual capabilities or the presence of less restrictive alternatives like powers of attorney or surrogate decision-making. Maryland law mandates that less restrictive alternatives to guardianship be pursued before guardianship is imposed. In practice, we have seen less restrictive alternatives be ignored, often due to professionals, including medical professionals, being uneducated about these alternatives. This has led to an overuse of guardianship in our state. Overbroad or unnecessary guardianships

¹ See National Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination* (March 22, 2018) at 17 available at https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf

have a significant adverse impact on a person's "physical and mental health, longevity, ability to function, and reports of subjective well-being".²

Currently, under Maryland law, in order to file a petition for guardianship the petitioner needs to attach two certificates of incompetency finding that an alleged disabled person lacks the legal capacity to make responsible decisions due to their disability. One of these certificates must be signed by a physician due to the significant liberty interest at stake. The other certificate may be signed by a physician, a licensed psychologist or a licensed certified social worker—clinical. HB 691 proposes adding nurse practitioners to this list. However, as drafted, HB 691 does not require that a nurse practitioner have any specific specialization or training in capacity assessment to sign a certificate, meaning that a nurse practitioner with a specialization in dermatology would be able to sign this certificate. Not all nurse practitioners are trained to make determinations on person's mental capacity. According to the American Bar Association's 2016 Report on this issue if the Maryland legislature passed this bill, it would be one of only five states in the United States to explicitly allow nurse practitioners to sign a certificate of incompetency without requiring their specialized training in providing capacity assessments.³

In the wake of a handful of guardianship bills that were introduced in the legislature last session, the Maryland State Bar Association started a Guardianship Task Force to investigate how Maryland's guardianship laws should be reformed in light of the Uniform Law Commission's recent recommendations. We believe this issue should be aptly debated and considered by that task force prior to amending our current statute.

It is our understanding that this bill may have been proposed due to allegedly increasing numbers of people in hospitals who are unable to be discharged due to their inability to consent to this discharge. In contrast, DRM has seen cases where hospitals or other entities petition for guardianship in circumstances when there actually is a family member willing to serve as surrogate decision-maker or power of attorney, but the hospital disagrees with their position about what care is needed and petitions for guardianship instead. Furthermore, guardianship is not a discharge plan. Placing someone under guardianship does not render them able to immediately access supports and services in the community, which will actually lead to their discharge. There are waitlists for many of these services. Thus, even when a guardian is appointed, there is no guarantee that the person will actually be expediently discharged.

² Wright, J. (2010). Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA. *International Journal of Law and Psychiatry*, 33(5-6), 350-368. <http://dx.doi.org/10.1016/j.ijlp.2010.09.007>.

³ American Bar Association commission on Law and Aging, "Role of Clinical Evaluation Professionals in Adult Guardianship Proceedings: Survey of State Statutes" (July 29, 2019) available at https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartclinicaleval.pdf



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Given the profound liberty interests at stake in guardianship proceedings, DRM recommends the House **oppose** House Bill 691. Given the significant and often permanent deprivation of a person's civil rights in guardianship and its overuse in Maryland, we should be looking at reforming our guardianship statutes to ensure that only those with specialized knowledge in disability and competency matters are able to sign certificates of incompetency.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Megan Rusciano", with a horizontal line underneath it.

Megan Rusciano

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