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## **More Than #FREEBRITNEY: Remediating Constitutional Violations In Guardianship for People with Disabilities**

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# MORE THAN #FREEBRITNEY: REMEDYING CONSTITUTIONAL VIOLATIONS IN GUARDIANSHIP FOR PEOPLE WITH INTELLECTUAL DISABILITIES

Hannah Shotwell\*

*Adult guardianship is used as a method to restrict the decision-making rights of some individuals with intellectual or developmental disabilities who have been deemed “incompetent.” However, the use of guardianship to remove someone’s decision-making rights violates the equal protection rights granted by the New Mexico Constitution. Discrimination against people with developmental disabilities must be substantially related to an important governmental interest, and the current state of guardianship fails to meet that bar. Further, guardianship violates the state constitutional guarantee of due process because it infringes on the fundamental right to the least restrictive means of care. New Mexico must adopt the less restrictive alternative of supported decision-making as the default to restricting the decision-making rights of people with developmental disabilities to rectify its unconstitutional use of guardianship.*

## I. INTRODUCTION

Imagine having your right to vote, to get married, to choose where you want to live, to choose who you socialize with, taken away. Imagine being found “incapacitated” by a judge who refuses to hear what you have to say because you have a disability. Imagine having to ask someone you do not know for permission to use your own money. Imagine being held hostage, physically restrained, and segregated from your friends and family. This is the reality for some individuals with developmental and intellectual disabilities who are confined within an adult guardianship.<sup>1</sup>

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\* J.D. Candidate, University of New Mexico School of Law, Class of 2023. I would like to thank Professors Carol Suzuki and J. Walker Boyd and well as my colleagues on the journal for their invaluable review and feedback. Special thanks to Molly Samsell for her thoughtful peer edits of this Comment. Thank you also to Professors Jim Ellis and Ann Delpha for encouraging me to pursue this topic, as well as to my dad, Jim Shotwell, for his work with people with I/DD in New Mexico that sparked my interest in advocacy for this group. Finally, I am beyond grateful to Elisa Ciblis who put up with many late-night pleas for help and provided me with incredible amounts of guidance and support throughout this entire process.

1. This loss of rights was the experience of Michael Lincoln-McCreight, a 26-year-old with a developmental disability in Florida who was placed in a plenary guardianship when he turned 18 and aged out of foster care. Reina Sultan, *The Horror of an Unwanted Conservatorship, According to People Who*

Guardianship derives from the English common law concept of *parens patriae*, in which the state is obligated to care for those who cannot care for themselves.<sup>2</sup> Thus, courts grant “guardians” the legal authority to make decisions on behalf a person with “profoundly limited ability to protect themselves . . . .”<sup>3</sup> In the last five years, New Mexico’s guardianship laws and practices have been the subject of scrutiny from disability rights activists, the media, and the public due to reports of egregious abuse.<sup>4</sup> Then, in 2020, guardianship abuses became nationally relevant when pop icon Britney Spears spoke publicly about the financial and emotional abuse she suffered under the control of a conservator<sup>5</sup> since 2008.<sup>6</sup> Currently, New Mexico defaults by statute to a limited form of adult guardianship when someone formally petitions the court seeking the appointment of a guardian for an individual allegedly “in need of protection.”<sup>7</sup> This limitation on the scope of guardianship theoretically protects the rights of the individual in need of support. However, though the state guardianship statutory scheme requires guardianships shall not be imposed if there is a less restrictive alternative that would meet the individual’s needs,<sup>8</sup> guardianships in which the guardian has the power to make all decisions for the protected person are imposed far more often than other types of less restrictive interventions.<sup>9</sup> Guardianship removes considerable, and even fundamental, rights from an individual. Despite this, people with limited decision-making capacity who need support and who are eligible for guardianship under New Mexico law continue to have their civil rights unnecessarily and discriminatorily restricted by the imposition of guardianships. For New Mexico to honor its duty to provide support for individuals with limited capacity, and to honor these individuals, the state must take steps to expand the scope of work performed by existing public guardianship programs to include the provision of less restrictive alternatives to guardianship.

Under the New Mexico Constitution, people with developmental disabilities have a right to the least restrictive means of intervention and the right to be free from unlawful discrimination. Moreover, the current system of guardianship in New Mexico violates the equal protection and substantive due process rights of

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*Lived It*, VICE (Jul. 8, 2021, 5:00 AM), <https://www.vice.com/en/article/e5n57n/what-its-like-to-live-under-a-conservatorship-or-guardianship-britney-spears>.

2. Erica Wood, *History of Guardianship*, in *GUARDIANSHIP OF ADULTS: ACHIEVING JUSTICE, AUTONOMY, AND SAFETY* 17–48 (Mary Joy Quinn ed., 2005).

3. David Godfrey, *Challenges in Guardianship and Guardianship Abuse*, 42 *BIFOCAL* 84 (2021).

4. An investigative series published by the Albuquerque Journal led to considerable reform of New Mexico’s system of adult guardianship. See Diane Dimond, *Who Guards the Guardians: A Series by Diane Dimond*, *ALBUQUERQUE J.* (last updated Mar. 13, 2017, 8:22 AM), <https://www.abqjournal.com/898385/who-guards-the-guardians-a-5-part-series-by-diane-dimond.html>.

5. Though definitions vary by state, in New Mexico a guardian is appointed for the protection of a *person*, while a conservator is appointed for the protection of *property*. N.M. STAT. ANN. § 45-5-101(A) (2021). In Britney Spears’ case, her “conservator” was a guardian under New Mexico’s definition.

6. Liz Day, Samantha Stark & Joe Coscarelli, *Britney Spears Quietly Pushed for Years to End Her Conservatorship*, *N.Y. TIMES* (Nov. 2, 2021), <https://www.nytimes.com/2021/06/22/arts/music/britney-spears-conservatorship.html>.

7. N.M. STAT. ANN. § 45-5-301.1 (2021).

8. N.M. STAT. ANN. § 45-5-304(C)(4) (2021).

9. Lucy Beadnell & Jonathan Martiniz, *Rethinking Guardianship and Substitute Decision Making: Supported Decision-Making and the Reform of Virginia Law, Policy, and Practice to Protect Rights and Ensure Choice*, 39 *DEV. MENTAL HEALTH* 1, 4 (2020).

people with developmental disabilities that are guaranteed by the state constitution. Legal recognition of supported decision-making, a less restrictive alternative to guardianship that allows a person with developmental disabilities to make their own decisions instead of having a guardian make decisions for them,<sup>10</sup> and implementation of a statutory requirement that less restrictive alternatives to guardianship be tried and exhausted before the implementation of guardianships is the appropriate remedy for these constitutional violations.

In this Comment, I will first address how New Mexico's system of guardianship fails to treat people with I/DD equitably and to place people with I/DD in the least restrictive form of intervention. Second, this comment aims to address potential constitutional violations in the provision of guardianship. I will discuss how Supreme Court precedent lacks the protection necessary to challenge guardianship laws. Then, I will consider how greater protections within the New Mexico Constitution are robust enough to protect people with I/DD from unwarranted placement in guardianship. Finally, I will address possible statutory and private remedies to the unconstitutionality of guardianship. The impacts of guardianship abuse and exploitation are tragic and unimaginable, and the state must do more to prevent the cruelty people in need of supports often suffer.

## II. BACKGROUND

The group of people with disabilities addressed in this Comment are individuals with intellectual and/or developmental disabilities (I/DD) subject to guardianship under New Mexico law. New Mexico's statutory definition of I/DD is a "severe chronic disability of an individual, which . . . is attributable to a mental or physical impairment, including the result from trauma to the brain, or combination of mental and physical impairments."<sup>11</sup> The disability must manifest "before the person reaches the age of twenty-two" and must "continue indefinitely."<sup>12</sup> Additionally, the disability must result in substantial functional limitations in areas of "major life activity," including self-care, learning, mobility, capacity for independent living, economic self-sufficiency, and receptive and expressive language capabilities.<sup>13</sup> Finally, a developmental disability, as defined in New Mexico, "reflects the person's need for a combination and sequence of special, interdisciplinary or generic care treatment or other support and services that are of lifelong or extended duration and are individually planned and coordinated."<sup>14</sup> Examples of I/DD may include autism, cerebral palsy, Down syndrome, and brain injuries occurring before the age of twenty-two.<sup>15</sup> Though people without experience working with people with I/DD often consider this class of individuals to be uniform,

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10. *What is Supported Decision-Making?*, CTR. FOR PUB. REPRESENTATION, <https://supporteddecisions.org/about-supported-decision-making/>.

11. N.M. STAT. ANN. § 28-16A-6(A)(1) (2021).

12. *Id.* § 28-16A-6(A)(2)–(3) (2021).

13. *Id.* § 28-16A-6(A)(4) (2021).

14. *Id.* § 28-16A-6(A)(5) (2021).

15. NAT'L COUNCIL ON DISABILITY, TURNING RIGHTS INTO REALITY: HOW GUARDIANSHIP AND ALTERNATIVES IMPACT THE AUTONOMY OF PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 21 (Jun. 10, 2019), [https://ncd.gov/sites/default/files/NCD\\_Turning-Rights-into-Reality\\_508\\_0.pdf](https://ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_0.pdf) [hereinafter TURNING RIGHTS INTO REALITY].

individuals with I/DD experience varied functional impairments and adaptive deficits.<sup>16</sup> Moreover, capacity levels impaired by I/DD are not fixed but instead can develop and change due to a variety of therapeutic strategies, life experiences, and time.<sup>17</sup> People with I/DD do not have homogenous needs and interests.

Further, this Comment will consider recognition of the right to the “least restrictive alternative” of intervention or supports. The “least restrictive alternative”<sup>18</sup> doctrine arose from the movement to limit involuntary civil commitment for individuals with mental illness and I/DD.<sup>19</sup> The doctrine is based on the premise that support and treatment for people with I/DD and mental illness” should be provided in the least restrictive setting possible” (e.g., in the community versus in an institution).<sup>20</sup> When using the least restrictive alternative doctrine to consider forms of intervention for people with I/DD, this Comment will refer to the least restrictive form of “support” or “intervention” rather than the least restrictive form of “treatment.” This distinction is necessary as there is no cure for I/DD, and I/DD is not something that is “wrong” with an individual that needs to be fixed. Rather, I/DD is a personal characteristic that the individual can manage or minimize with appropriate support.<sup>21</sup>

#### A. New Mexico Guardianship Proceedings

In some cases, adults with I/DD are subject to guardianship as a method to control and limit their actions and decision-making capabilities in the name of protection. Guardianship is a legal process where a court removes some or many of the legal and decision-making rights from an individual and transfers those rights to another person, a “guardian.”<sup>22</sup> Guardianships can be either plenary or limited—plenary guardianship is a “full” guardianship where the court gives the guardian the power to exercise all delegable legal rights and duties on behalf of the person within the guardianship, whereas limited guardianship only provides a guardian with authority granted explicitly by court order and the person under guardianship retains the rights not granted to the guardian.<sup>23</sup> By statute, New Mexico defaults to the latter “limited guardianships.”<sup>24</sup>

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16. See, e.g., Brief for the American Association on Intellectual and Developmental Disabilities & the ARC of the United States as Amici Curiae Supporting the Petitioner at 19, *Moore v. Texas*, 137 S.Ct. 1039 (2017) No. 15-797.

17. TURNING RIGHTS INTO REALITY, *supra* note 15, at 21.

18. The “least restrictive alternative” standard used in consideration of support for people with I/DD is not to be confused with the concept of the “least restrictive means” test in constitutional law. For discussion of the constitutional “least restrictive means” test, see *infra* Part III.A.1.

19. RISDON N. SLATE, JACQUELINE K. BUFFINGTON-VOLLUM & W. WESLEY JOHNSON, THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS AND OPPORTUNITY FOR THE JUSTICE SYSTEM 35 (2d ed. 2013).

20. *Id.*

21. See, e.g., PSEUDOSCIENCE IN CHILD AND ADOLESCENT PSYCHOTHERAPY: A SKEPTICAL FIELD GUIDE (2019) (ed. Stephen Hupp).

22. TURNING RIGHTS INTO REALITY, *supra* note 15, at 23.

23. *Id.* at 11.

24. N.M. STAT. ANN. § 45-5-301.1 (2021).

In New Mexico, guardianship proceedings are triggered when someone formally petitions the district court seeking the appointment of a guardianship for a person in need of protection.<sup>25</sup> Then, the district court appoints a guardian *ad litem*, a court visitor, and a qualified healthcare professional as a safeguard for the alleged incapacitated person's rights.<sup>26</sup> A guardian *ad litem* is an attorney appointed to represent and protect the rights of the alleged incapacitated person; it is their job to ensure that a guardian is appointed only if guardianship is the least restrictive method of intervention that serves individual's needs.<sup>27</sup> The court visitor is a social worker (or other similar professional) who reports on the needs of the person believed to be incapacitated and the appropriateness of the guardianship.<sup>28</sup> Finally, the qualified health care professional describes the protected person's level of intellectual and developmental functioning and whether there may be a deficit in any area.<sup>29</sup> After the appointment of these parties, they each must file a report with the court before the day of the hearing concerning the capacity of the alleged incapacitated person.<sup>30</sup> These reports are intended to protect the alleged incapacitated person's rights from being unwarrantably abridged by providing the court with a basis of understanding of the person's capacity.

However, the way court-appointed professionals make capacity determinations is deeply problematic. In general, physicians and psychiatrists provide opinions that are based largely on generalities of a person's diagnosis rather than on any observable trait of the particular individual.<sup>31</sup> Further, even if they have a clinical basis for determining an individual's capacity, the experts that make these determinations may not have sufficient legal context to determine whether the individual is incapacitated as the law defines it.<sup>32</sup> Determinations of capacity are further complicated by New Mexico's statutory preference for limited guardianships. Preference for limited guardianships means that "physicians not only have to make a medical diagnosis, assess the person's functional abilities, and determine capacity in light of a legal standard they might not fully understand, they have to repeat this process with respect to each right that may be removed from the person."<sup>33</sup> Despite these complexities in determining capacity, the professional's opinion is usually given great deference by the court.<sup>34</sup>

If the judge finds the individual incapacitated, the district court determines whether a limited or full guardianship is appropriate.<sup>35</sup> A court can find a person

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25. *Id.* § 45-5-303(A) (2021).

26. *Id.* § 45-5-303(D)–(F) (2021).

27. *Id.* §§ 45-5-303(D), -303.1 (2021).

28. *Id.* § 45-5-303(F)(1)–(3) (2021).

29. *Id.* § 45-5-303(E)(1)–(2) (2021).

30. *Id.* §§ 45-5-303(E), (F), -301.1(7) (2021).

31. NAT'L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 77–78 (Mar. 22, 2018), [https://ncd.gov/sites/default/files/NCD\\_Guardianship\\_Report\\_Accessible.pdf](https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf) [hereinafter BEYOND GUARDIANSHIP].

32. *Id.* at 78 ("In one study, only 30 percent of doctors were able to correctly apply the definition of legal competence (capacity) in a fact-pattern drawn from an actual legal case.").

33. *Id.* at 78–79.

34. *Id.* at 79.

35. N.M. STAT. ANN. § 45-5-304 (2021).

“incapacitated” due to I/DD when the individual demonstrates either partial or complete functional impairment by reason of a “mental deficiency, physical illness or disability” to the extent the individual is unable to manage their personal affairs, financial affairs, or both.<sup>36</sup> New Mexico statute imposes limited guardianships by default, and “an incapacitated person for whom a guardian has been appointed retains all legal and civil rights except those which have been expressly limited . . . or have been specifically granted to the guardian by the court.”<sup>37</sup> The state guardianship statute emphasizes that courts should only use guardianship when necessary “to promote and to protect the well[-]being of the person . . . and shall be ordered only to the extent necessitated by the person’s actual functional mental and physical limitations.”<sup>38</sup>

In fact, guardianships are only permissible if the court finds, by clear and convincing evidence “there are no available alternative resources that are suitable with respect to the alleged incapacitated person’s welfare, safety, and rehabilitation [and] the guardianship is appropriate as the least restrictive form of intervention consistent with the preservation of the civil rights and liberties of the alleged incapacitated person.”<sup>39</sup> Despite this, courts often do not take advantage of the option of, and statutory default to, limited guardianship and as such rarely limit a guardian’s authority.<sup>40</sup> Most guardianship orders are not time-limited and remain in effect until the person subject to guardianship dies or until a court modifies the order, even though a person with I/DD’s capacity can change over time.<sup>41</sup> Courts often make assessments of incapacity based on stereotypes that lead them to undervalue the competencies and credibility of people with I/DD.<sup>42</sup> Courts also may not make the proper distinction between what they perceive as the rationality of a person’s decision and what that person’s actual ability to make a decision is.<sup>43</sup> Thus, even the statutory preference for limited guardianship is not enough to keep people with I/DD from being forced into guardianships when pervasive stereotypes about I/DD exist, despite available less restrictive alternatives and a statutory preference for limited guardianship.

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36. *Id.* § 45-5-101 (2021)

37. *Id.* § 45-5-301.1 (2021); *see also* Maureen A. Sanders & Kathryn Wissel, *Limited Guardianship for the Mentally Retarded*, 8 N.M. L. REV. 231 (1978).

38. N.M. STAT. ANN. § 45-5-301.1 (2021).

39. *Id.* § 45-5-304(C)(3)–(4).

40. BEYOND GUARDIANSHIP, *supra* note 31, at 36.

41. *Id.* at 89. Modification of guardianships are rare, perhaps in an effort to “promote judicial economy” and avoid further judicial consideration of the matter. *Id.*

42. *Id.* *See also* TURNING RIGHTS INTO REALITY, *supra* note 15, at 70 (“An attorney described an interaction she once had with a judge: ‘I think of a conversation with a judge . . . about a person with Down syndrome. The judge told me that of course anyone with Down [syndrome] should have a guardian by virtue of the diagnosis.’”).

43. BEYOND GUARDIANSHIP, *supra* note 31, at 89. Other factors include the court wanting to err on the side of protection, experiencing difficulties in determining the exact areas of decision-making in need of assistance, desiring to avoid confusion about the scope of the guardian’s authority, and wishing to promote judicial economy by avoiding future proceedings to expand the scope. *Id.*

Guardianship always puts the rights of a person deemed incapacitated at risk, regardless whether it is plenary or limited.<sup>44</sup> Though in New Mexico a protected person does not automatically lose all of their rights,<sup>45</sup> a court can grant guardians the right to consent to (or to withhold consent from) medical or other professional care, counsel, treatment, or service on behalf of the protected person.<sup>46</sup> Still other rights can be removed and transferred to a guardian who can exercise these rights on behalf of the individual, such as the right to apply for government benefits, to manage money or property, and to decide where to live and with whom to associate.<sup>47</sup> Guardians even have the authority to pursue divorce on behalf of a protected person.<sup>48</sup> Because of its legal implications on an individual's civil rights, courts must recognize guardianship as "an extraordinary intervention in a person's life and affairs" and, as such, an option of last resort.<sup>49</sup>

To protect the rights of individuals in need of support, courts should first explore and exhaust alternatives that are chosen and able to be canceled or changed by the people with disabilities themselves, and are thus inherently less restrictive than options, like guardianship, that limit the input of the individual.<sup>50</sup> If the court finds these supports to be ineffective in ensuring the individual's well-being, then guardianship can be considered.<sup>51</sup> Guardianship can be a necessary, and is sometimes even a lifesaving, measure for people with I/DD who are unable to care for themselves, manage their finances, or make medical decisions. However, the shortfalls of guardianship have left at-risk adults susceptible to abuse, neglect, and exploitation.<sup>52</sup>

The experiences of people with I/DD who are confined within guardianships are notably absent, both within the state and nationally, from recent conversations about reform. For example, while New Mexico has experienced and exposed some of the most prominent cases of guardianship abuse—employees of two local guardianship firms embezzled a combined \$15 million from their elderly

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44. By definition, guardianships are used to remove some decision-making rights from individuals deemed incapacitated. See TURNING RIGHTS INTO REALITY, *supra* note 15, at 23.

45. For example, the right to marry, to vote, to practice religion, to control personal spending money, etc. is retained by the protected person. See ELLEN LEITZER ET AL., THE HANDBOOK FOR GUARDIANS AND CONSERVATORS: A PRACTICAL GUIDE TO NEW MEXICO LAW 1 (Merri Rudd, ed., 2007).

46. N.M. STAT. ANN. § 45-5-312(B)(3) (2021).

47. *Id.*

48. Nelson v. Nelson, 1994-NMCA-074, ¶ 20, 118 N.M. 17, 878 P.2d 335.

49. TURNING RIGHTS INTO REALITY, *supra* note 15, at 25.

50. *Id.* at 26.

51. *Id.*

52. Press Release, New Mexico Governor Michelle Lujan Grisham, Gov. Lujan Grisham Authorizes Measure Strengthening Guardian Oversight to Protect Vulnerable Adults (Apr. 8, 2021) (<https://www.governor.state.nm.us/2021/04/08/gov-lujan-grisham-authorizes-measure-strengthening-guardian-oversight-to-protect-vulnerable-adults/>). For example, guardians are often legally empowered to liquidate wards' assets to pay their own bills. In New Mexico, owners of Ayudando Guardians embezzled \$10 million from more than 800 clients. Heidi Blake & Katie J.M. Baker, *Beyond Britney: Abuse, Exploitation, and Death Inside America's Guardianship Industry*, BUZZFEED NEWS, (Sep. 17, 2021, 1:02 PM), <https://www.buzzfeednews.com/article/heidiblake/conservatorship-investigation-free-britney-spears>.



clients and restricted their ability to interact with friends and family<sup>53</sup>—consideration of the abuses faced by adults with I/DD in guardianships is lacking. On a national scale, throughout 2020 and 2021 guardianship abuses captured national attention as Britney Spears spoke publicly about the rights her conservatorship denied her, including her reproductive rights, her ability to get married, and her choice in medications she had to take, despite adverse side effects.<sup>54</sup> While Spears' experience with her conservator broadly raised awareness of the issue of guardianship abuses,<sup>55</sup> her public presence and access to a large audience made her restoration of rights all the more likely—a resource that most people trapped in guardianships do not have. It is impossible to quantify the scope of abuse by guardians. However, this abuse is certainly not limited to corporate guardians exploiting wealthy clients in their care, or to individuals in the public eye; these abuses are a devastating reality for many under the control of a guardian. This Comment aims to give consideration to this group of people who have suffered in silence.

Recent New Mexico state legislative reforms to the institution of guardianship attempt to curb neglect, abuse, and exploitation. Still, these reforms do little to address how and why guardianships begin. For example, after a 2021 amendment to the state's guardianship statute, judges must be informed by a petitioner whether any less restrictive alternatives are available before turning over an incapacitated person's life and bank account to the control of a guardian.<sup>56</sup> In spite of these reforms, guardianship problems persist because reform has not addressed errors when people who have been deemed incapacitated, but for whom guardianship is not appropriate, are “involuntarily, and unwarrantably placed into a guardianship in the first place.”<sup>57</sup> It is impossible to predict how the new statutory requirements will impact the civil rights of people with I/DD who face guardianship in the long-term. However, the measures do not go far enough in rectifying and preventing the abuses suffered by protected persons. The reforms do not ensure that people with I/DD receive support through the least restrictive means available, nor do they ensure that people with I/DD will not face discriminatory placement in guardianships.

## B. The Supported Decision-Making Model

One of the least restrictive alternatives to guardianship is supported decision-making (SDM), a model in which individuals with I/DD whose decision-

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53. Dillon Bergin, *Vulnerable New Mexico Elders Find Themselves Trapped in Guardianship*, SANTA FE NEW MEXICAN (Apr. 4, 2022), [https://www.santafenewmexican.com/news/local\\_news/vulnerable-new-mexico-elders-find-themselves-trapped-in-guardianship/article\\_d7d7f4ac-7227-11eb-aa44-938efda28c8b.html](https://www.santafenewmexican.com/news/local_news/vulnerable-new-mexico-elders-find-themselves-trapped-in-guardianship/article_d7d7f4ac-7227-11eb-aa44-938efda28c8b.html).

54. Ronan Farrow & Jia Tolentino, *Britney Spears's Conservatorship Nightmare*, THE NEW YORKER (Jul. 3, 2021), <https://www.newyorker.com/news/american-chronicles/britney-spears-conservatorship-nightmare/>.

55. See, e.g., Blake & Baker, *supra* note 52.

56. These reforms include increasing oversight by court auditors and the creation of a pilot program wherein “volunteer court visitors will meet with those under guardianship . . . to ensure their welfare.” *Editorial: New Guardianship Law Adds Oversight, Favors Alternatives*, ALBUQUERQUE J. (May 17, 2021, 12:02 AM), <https://www.abqjournal.com/2391336/new-guardianship.html>.

57. Dillon Bergin, “*The Court Has Plans for You*,” SEARCHLIGHT NEW MEXICO (Feb. 18, 2021), <https://searchlightnm.org/the-court-has-plans-for-you/>.

making autonomy might otherwise be limited or removed make and communicate their own decisions in any number of formal and informal arrangements, with support from trusted family and friends.<sup>58</sup> There is no uniform model of SDM, but generally supported decision-making is flexible in how it is applied to an individual's specific circumstances, and in how it is applied to the same person over time.<sup>59</sup> A supported decision-making agreement can only exist if the person with I/DD chooses it and is comfortable with their designated supporters.<sup>60</sup> The person within a SDM agreement retains their full legal capacity, can revoke the agreement at any time, and must be consulted by their representative before any decisions can be finalized.<sup>61</sup> A person using supported decision-making identifies what types of decisions they want help with and chooses people they trust to help them understand, make, and communicate those decisions.<sup>62</sup> Although SDM agreements usually involve a single decision-making supporter, private supported decision-making relationships may also occur in a "circle of support" of friends and family or a "microboard" of an organization acting as the supporter for an individual with a disability.<sup>63</sup>

While many individuals engage in informal forms of supported decision-making, others benefit from documenting various provisions in a formal agreement, including the names and roles of supporters and details about the scope of their assistance, authority, and duties.<sup>64</sup> Formalizing supported decision-making can help ensure that the choices of people with I/DD are respected. These agreements serve as documentation that a person can make their own informed decisions.

While there is not a uniform approach to legal recognition of SDM, several states have adopted statutes enacting SDM as an alternative to guardianship.<sup>65</sup> For example, Rhode Island's Supported Decision-Making Act legally recognizes SDM agreements that follow a statutorily recognized form<sup>66</sup> and that are signed by each party to the agreement in the presence of witnesses.<sup>67</sup> An adult with I/DD can only enter into an agreement voluntarily and without undue influence.<sup>68</sup> Under the statute, any decision or request made with the assistance of a supporter within an agreement shall be recognized as the decision or request of the principal.<sup>69</sup> Individuals are presumed to have legal capacity, and execution of a SDM agreement cannot be used as evidence of incapacity.<sup>70</sup> Finally, an individual may revoke a SDM agreement at

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58. Zachary Allen & Dari Pogach, *More States Pass Supported Decision-Making Agreement Laws*, 41(1) BIFOCAL 159, 160 (2019).

59. *What is Supported Decision-Making?*, DISABILITY RTS. CTR. N.H. (Fall 2021), <https://drcnh.org/flyers/what-is-supported-decision-making/>.

60. *Id.*

61. Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 177 PENN ST. L. REV. 1111, 1122 (2013).

62. *What is Supported Decision-Making?*, *supra* note 59.

63. Kohn, Blumenthal & Campbell, *supra* note 61, at 1123.

64. Allen & Pogach, *supra* note 58, at 160.

65. *Id.* at 159.

66. 42 R.I. GEN. LAWS ANN. § 42-66.13-10 (West 2021).

67. *Id.* § 42-66.13-5 (West 2021).

68. *Id.* § 42-66.13-7 (West 2021).

69. *Id.* § 42-66.13-7 (West 2021).

70. *Id.* § 42-66.13-4 (West 2021).

any time.<sup>71</sup> Such statutes remove the problematic determinations of capacity that plague guardianship schemes<sup>72</sup> and allow individuals with I/DD to maintain their autonomy.

However, as with any method of influence being exerted over vulnerable populations, including people with I/DD, supported decision-making comes with its own set of risks. For example, there are concerns supporters could use agreements “to unduly influence or exploit” the individual with I/DD.<sup>73</sup> There are also concerns that formal SDM agreements may unnecessarily formalize a decision-making model that works better as an informal arrangement.<sup>74</sup> However, supported decision-making has the potential to provide individuals with I/DD the help they may need to manage their affairs and make decisions about their own lives, and, by doing so, improve their well-being and promote their dignity.<sup>75</sup> There are real problems with the current guardianship system which may be diminished by recognition of supported decision-making as a less restrictive available.<sup>76</sup>

By legally recognizing supported decision-making as a less restrictive alternative to guardianship, New Mexico can offer a form of decision-making restraint that does not violate the right of people with I/DD to the least restrictive form of intervention and to be free from unconstitutional discrimination. If an individual with I/DD can meet their needs through SDM, there is no reason to strip the individual of their rights by imposing a guardianship.<sup>77</sup>

### III. ANALYSIS

New Mexico’s statutory preference for limited guardianship has little practical effect on restraining the ability of courts to remove someone’s rights. First, there is an overuse of plenary guardianships, despite statutory directives favoring limited guardianships.<sup>78</sup> This overreliance is likely attributable to stereotypes about people with I/DD that foster a presumption of incapacity.<sup>79</sup> Second, there is a “lack of explicit statutory authority for less restrictive arrangements,” such as supported decision-making.<sup>80</sup> Third, the burden is on the guardian *ad litem* to present less restrictive alternatives at a guardianship hearing, and it is at the judge’s discretion to

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71. *Id.* § 42-66-13.5(g) (West 2021).

72. *See supra* Part II.A.

73. Allen & Pogach, *supra* note 58, at 161.

74. *See generally* Kohn, Blumenthal & Campbell, *supra* note 61.

75. *Id.* at 1154.

76. *Id.*

77. Nina A. Kohn, *Legislating Supported Decision-Making*, 58 HARV. J. LEGIS. 313, 349–50 (2021).

78. Ellen Pinnes & Jim Jackson, *Guardianship 101*, NEW MEXICO LEGISLATURE: DISABILITIES CONCERNS SUBCOMMITTEE (Sep. 24, 2019), [https://www.nmlegis.gov/Committee/Handouts\\_List?CommitteeCode=DISC&Date=9/24/2019](https://www.nmlegis.gov/Committee/Handouts_List?CommitteeCode=DISC&Date=9/24/2019). There are empirical studies using national data that support the finding that plenary guardianships are overused, and statutory preference for limited guardianship does not mean that judges will use it. *See, e.g.*, Pamela B. Teaster, Erica F. Wood, Winsor C. Schmidt, Jr. & Susan A. Lawrence, *Public Guardianship After 25 Years: In the Best Interests of Incapacitated People?*, A.B.A. COMM. ON LAW AND AGING (2007). The statistical overuse of plenary guardianship in New Mexico is beyond the scope of this Comment.

79. Pinnes & Jackson, *supra* note 78.

80. *Id.*

determine if those less restrictive alternatives are truly insufficient.<sup>81</sup> While the court appointed guardian *ad litem*'s duty is to represent the alleged incapacitated person and present that person's position to the court, in practice they act as a neutral role with the potential protected person's "best interests" in mind, with minimal consideration of the concerns of the individual facing guardianship.<sup>82</sup> Moreover, judges often rely on stereotypes to determine a person's decision-making capacity, rather than considering the actual capacity of the person.<sup>83</sup> Having an intellectual disability does not automatically mean an individual lacks the ability to care for themselves or to make their own decisions.<sup>84</sup> However, this nuance is not often considered by courts.

In the following two sections, I will first explore how United States constitutional protections under equal protection and due process fail to protect this group of individuals. Second, I will discuss how the state guardianship statute violates New Mexico's greater constitutional equal protection rights for individuals with I/DD. Finally, I will demonstrate that the fundamental right to the least restrictive means of intervention can be found in the due process clause of the state constitution and show that guardianship violates this right for people with I/DD.

Retaining guardianship, limited or plenary, as a statutory default to remove the decision-making abilities of people with I/DD will always violate these individuals' equal protection and substantive due process rights. New Mexico's guardianship statutory scheme unnecessarily and unconstitutionally discriminates against individuals with I/DD. As the state attempts to remedy guardianship abuses through statutory reform, it must consider recognizing a new default form of decision-making restraints. New Mexicans have a constitutional right to the least restrictive form of treatment and a right to be free from discrimination—and guardianship violates both of these rights.<sup>85</sup>

The United States Constitution grants individuals certain, limited rights that cannot be abridged by government action. The New Mexico Constitution, however, provides greater protections than its federal counterpart in many areas.<sup>86</sup> As it exists currently, New Mexico's provision of guardianship for people with I/DD violates both their substantive due process right to the least restrictive means of intervention and their equal protection right to be free from discrimination on the basis of disability. While these rights exist under the United States Constitution, federal courts have declined to extend a higher level of scrutiny to individuals with I/DD

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81. See N.M. STAT. ANN. §§ 45-5-303(D), -303.1, -304 (2021).

82. *Id.*

83. BEYOND GUARDIANSHIP, *supra* note 31, at 89.

84. See, e.g., *Autonomy, Decision-Making Supports, and Guardianship: Joint Position Statement of AAIDD and the Arc*, AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, <https://www.aaid.org/news-policy/policy/position-statements/autonomy-decision-making-supports-and-guardianship> (adopted Mar. 16, 2016).

85. Guardianship statutory schemes could also potentially be challenged as violating the Americans with Disabilities Act's mandate requiring that public entities provide services in the least restrictive setting appropriate for the individual. See Kohn, *supra* note 77, at 355. However, consideration of the ADA is beyond the scope of this Comment.

86. *State v. Granville*, 2006-NMCA-098, ¶ 18–19, 140 N.M. 245, 142 P.3d 933.

facing restrictive means of treatment.<sup>87</sup> Thus, the only constitutional remedy available to individuals with I/DD who are unnecessarily subjected to guardianship under New Mexico state law in violation of their constitutional rights is through the state constitution.

## A. United States Constitutional Protections

### 1. Due Process

Under the due process clauses of the United States Constitution's Fifth and Fourteenth Amendments, the federal and state governments are prohibited from depriving any person of "life, liberty, or property, without due process of law."<sup>88</sup> The Supreme Court has found that these due process guarantees protect certain substantive rights that are not enumerated in the Constitution, but are "deeply rooted in [the] Nation's history and tradition."<sup>89</sup> These previously recognized fundamental rights include the right to marry,<sup>90</sup> aspects of parental autonomy,<sup>91</sup> and the right to bodily integrity.<sup>92</sup> Any state action infringing on these "substantive," or fundamental, rights is prohibited unless the infringement is "narrowly tailored to serve a compelling state interest" ("strict scrutiny").<sup>93</sup> By contrast, rights that are *not* fundamental, such as economic and social rights, may be abridged by a law that is "rationally related to a legitimate state interest" ("rational basis").<sup>94</sup>

Lower courts recognize that being provided care in the least restrictive form of intervention is a right. This right was a major tool for moving institutionalized patients out of state hospitals and into a community setting in the 1970s.<sup>95</sup> As supported in a number of lower federal court decisions, the existence of the right rests on the argument that the state cannot deprive people of liberty to an extent unwarranted to meet its legitimate goals;<sup>96</sup> though the state has the power to commit people with mental disabilities to inpatient treatment, it cannot do so when means "less restrictive of liberty [are] available to accomplish the same ends."<sup>97</sup>

However, the Supreme Court has yet to find the right to the least restrictive form of intervention in the fundamental right to liberty. First, in *Pennhurst State*

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87. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 583 (1999); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

88. U.S. CONST. amends. V, XIV, § 1.

89. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

90. See *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (recognizing the fundamental due process right to marriage).

91. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (discussing the parental right to control a child's education).

92. See *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278–79 (O'Connor, J. concurring) (discussing well-established, traditional rights to bodily integrity).

93. *Id.*

94. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

95. Paul S. Appelbaum, *Least Restrictive Alternative Revisited: Olmstead's Uncertain Mandate for Community-Based Care*, 50 PSYCHIATRIC SERVS. 1271, 1271 (Oct. 1999).

96. See, e.g., *Lake v. Cameron*, 364 F.2d 657, 660 (D.C. Cir. 1966) (holding that "deprivations of liberty solely because of dangers to ill persons themselves should not go beyond what is necessary for their protection").

97. Appelbaum, *supra* note 95, at 1271.

*School and Hospital v. Halderman*, the Court declined to find that the bill of rights provision of the Developmentally Disabled Assistance and Bill of Rights Act created any substantive right for people with I/DD to receive “appropriate treatment” in the “least restrictive” environment.<sup>98</sup> Then, in *Youngberg v. Romeo*, the Court declined to extend the rights to reasonable safety and freedom from physical restraint to a broad right to the “minimally adequate care and treatment that appropriately may be required” for an individual, instead holding that people with I/DD only have a right to “minimally adequate or reasonable [treatment] to ensure [their] safety and freedom from undue restraint.”<sup>99</sup> Finally, in *Olmstead v. L.C.*, the Court found that Title II of the Americans with Disabilities Act<sup>100</sup> requires states to place people with mental disabilities in community settings rather than institutions “when the [s]tate’s treatment professionals determine community placement is appropriate.”<sup>101</sup> However, again the Court declined to extend this right to a broad substantive due process right to the least restrictive form of intervention.<sup>102</sup>

The Supreme Court’s reluctance to find a substantive right to the least restrictive form of intervention limits the ability of people with I/DD placed in guardianships to challenge the statutory scheme which has restricted their rights. Under New Mexico’s guardianship statute, a person petitioning the court for an individual with I/DD to be placed in a guardianship has the burden of informing the judge of lesser-restrictive alternatives and why they are not appropriate for the case at hand.<sup>103</sup> Despite this burden on the petitioner, courts incorrectly place people with I/DD in guardianships because of judicial failure to accurately consider the right of people to make decisions in the least restrictive setting as a fundamental right. Because of this, the statute is accorded a strong presumption of validity under rational basis review.<sup>104</sup>

A statute fails rational basis only when it “rests on grounds wholly irrelevant to the achievement of the State’s [legitimate] objective.”<sup>105</sup> The Supreme Court has repeatedly found that providing care, treatment, and other services to people with I/DD is a legitimate state interest.<sup>106</sup> While the Court has not addressed whether this interest in providing services is met by providing guardianships, the Court has determined that the interest can be met by serving individuals in institutional settings<sup>107</sup>—an even more restrictive means of controlling people with I/DD than guardianships. Thus, it is highly likely that the Court would find that the

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98. *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 18 (1981).

99. *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982).

100. Title II of the ADA prohibits discrimination based on disability in public services furnished by governmental entities and public accommodations provided by private entities. 42 U.S.C. §§ 12131–65.

101. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 582 (1999).

102. *See id.* at 608 (Kennedy, J., concurring in part) (stating that states do not have an affirmative duty to provide care in the least restrictive setting when the system for that lesser restrictive care does not exist).

103. N.M. STAT. ANN. § 45-5-303(B)(4)(b) (2021).

104. *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993).

105. *Id.* at 324 (internal quotation marks omitted).

106. *E.g.*, *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 12 (1981).

107. *See Addington v. Texas*, 441 U.S. 418, 426 (holding that due process requires proof more substantial than preponderance of the evidence when the state exercises its interest in providing care to citizens who cannot care for themselves by civil commitment).

state's interest is also rationally met by placing people with I/DD in guardianships, even if there are lesser restrictive options available. Whether a state *could* have chosen a less rights-restrictive means for achieving its state interest is irrelevant to rational basis review.<sup>108</sup> Therefore, a challenge to New Mexico's guardianship statute based on a substantive due process violation of the right to the least restrictive form of intervention would be unlikely to prevail at the federal level. Though the Court has never outright denied the substantive right to the least restrictive means of intervention, it is unlikely this trajectory of disinclination to find a right will change course. However, a constitutional challenge to guardianship may succeed at the state level, as considered below.

## 2. *Equal Protection*

The Equal Protection Clause of the Fourteenth Amendment states that “[n]o [s]tate shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>109</sup> To determine if a law violates federal constitutional equal protections, a court must first determine if there is a discriminatory classification. A law can be facially discriminatory<sup>110</sup> or facially neutral but applied in a discriminatory manner.<sup>111</sup> If the law is neutral on its face, but has a disproportionate impact on a particular group, there must be a showing of discriminatory purpose for courts to apply heightened scrutiny.<sup>112</sup> If there is a discriminatory classification, the court then determines what level of judicial scrutiny applies and analyzes if the challenged legislation is unconstitutionally discriminatory under that standard of review. The United States Supreme Court has created three standards of judicial scrutiny for reviewing equal protection claims: strict scrutiny,<sup>113</sup> used for discrimination based on a suspect classification;<sup>114</sup> intermediate scrutiny,<sup>115</sup> used for discrimination based

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108. *Heller*, 509 U.S. at 330.

109. U.S. CONST. amend. XIV, § 1.

110. *See, e.g.*, *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954) (challenging laws requiring or permitting segregation according to race).

111. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976) (challenging police recruitment procedures that disproportionately excluded Black people from being recruited).

112. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 273–74 (1886) (holding the contested law violated equal protection as applied, although neutral on its face because it was applied so invidiously to discriminate on the basis of race).

113. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) (stating to overcome strict scrutiny, the action must be “necessary to further a compelling governmental interest . . . [and] narrowly tailored to further that interest”).

114. Suspect classifications are based on race, national origin, religion, and alienage. *See generally* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (discussing race); *Graham v. Richardson*, 403 U.S. 365 (1971) (discussing national origin/alienage).

115. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating to overcome intermediate scrutiny, the law must further an “important governmental objective[] and must be substantially related to the achievement of [that objective]”).

on quasi-suspect classifications;<sup>116</sup> and rational review,<sup>117</sup> used for other discriminatory classifications. Finally, a court determines whether the discriminatory classification satisfies the appropriate level of judicial scrutiny.

The Supreme Court has held that laws discriminating against people with developmental disabilities are afforded rational basis, and thus must be rationally related to a legitimate government purpose.<sup>118</sup> In *Cleburne v. Cleburne Living Center*, the Court declined to find that I/DD<sup>119</sup> is a suspect or quasi-suspect class calling for a higher standard of judicial review.<sup>120</sup> The Court reasoned that distinct legislative responses at the state and federal level to the problems facing people with I/DD reflect “the real and undeniable differences between the [developmentally disabled] and others” and the need for governments to have flexibility in shaping their remedial efforts.<sup>121</sup> Because people with I/DD have a “reduced ability to cope with and function in the everyday world,” they are inherently different from other persons.<sup>122</sup> Further, “how this large and diversified group is to be treated under the law is a difficult and often technical matter” better left to be addressed by legislators “guided by qualified professionals,” rather than the “ill-informed opinions of the judiciary.”<sup>123</sup> Additionally, the Court dismissed the claim that people with I/DD are politically powerless as “the legislative response [to the plight of those with I/DD] . . . could hardly have occurred and survived without public support . . . negat[ing] any claim that [people with I/DD] are politically powerless in the sense that they have no ability to attract the attention of lawmakers.”<sup>124</sup> Finally, the Court emphasized its reluctance to identify people with I/DD a quasi-suspect class because “it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others . . . who can claim some degree of prejudice from at least part of the public at large.”<sup>125</sup> In sum, “[b]ecause [developmental disability] is a characteristic that the government may legitimately take into account in a wide range of decisions . . . [the Court] will not presume that any given legislative action, even one that disadvantages [people with developmental disabilities], is rooted in considerations that the Constitution will not

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116. Gender and illegitimacy are considered quasi-suspect classes. See *Trimble v. Gordon*, 430 U.S. 762 (1977) (holding that illegitimacy received intermediate scrutiny); *Craig v. Boren*, 429 U.S. 190 (1976) (holding gender is a quasi-suspect class).

117. See, e.g., *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 (1973) (stating a legislative classification must be sustained if the classification is “rationally related to a legitimate government interest”).

118. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

119. The Court uses derogatory terms to reference people with I/DD. See, e.g., *id.* These references have been changed to reflect changing social attitudes and to respect the individuals who are being considered. See generally Robert L. Schalock, Ruth A. Luckasson & Karrie A. Shogren, *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELLECTUAL & DEVELOPMENTAL DISABILITIES 116 (2007).

120. *Cleburne*, 473 U.S. at 446.

121. *Id.* at 444.

122. *Id.* at 442.

123. *Id.* at 442–43.

124. *Id.* at 445.

125. *Id.*



tolerate.”<sup>126</sup> Thus, the Court declined to provide people with I/DD a higher level constitutional protection when challenging discriminatory statutory schemes.

The Supreme Court’s refusal to recognize people with I/DD as a class that requires heightened scrutiny means that a constitutional challenge to New Mexico’s state guardianship law must show the statute is not rationally related to a legitimate governmental purpose. In *Cleburne*, the Court determined that a city ordinance requiring a special permit for homes for people with I/DD was not rationally related to the government’s legitimate interests in addressing the safety and fears of residents in the adjoining neighborhood and public safety concerns regarding the number of people to be housed in the home.<sup>127</sup> The Court considered both the evidentiary record that showed an irrational prejudice against people with I/DD as the reason for the city ordinance and the underinclusive nature of the ordinance as it did not require a special permit for other forms of “group” housing, such as sororities and hospitals.<sup>128</sup>

However, New Mexico’s guardianship statute is different from the city ordinance in *Cleburne*: 1) it does not “single out” people with I/DD, it covers all “incapacitated persons,” and 2) the history of the statute indicates its purpose is to protect people with I/DD from abuse and to provide a method of support, rather than to discriminate.<sup>129</sup> Providing care, treatment, and other services to people with I/DD are legitimate state interests.<sup>130</sup> Further, New Mexico’s guardianship statute is rationally related to this goal, as the statute provides decision-making supports for people with I/DD. Thus, the statute is “rationally related” to a legitimate governmental interest and would likely be upheld if challenged on federal equal protection grounds.<sup>131</sup>

## B. New Mexico’s Greater Protections for People with I/DD

Even though relief is likely not available for individuals with I/DD challenging New Mexico’s guardianship statute on federal constitutional grounds, there are alternative options. The New Mexico Constitution may provide greater protections than its federal counterpart.<sup>132</sup> When examining a state constitutional

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126. *Id.* at 446. Though beyond the scope of this comment, scholars have debated whether *Cleburne* was wrongly decided, and people with developmental disabilities should have been declared a suspect or quasi-suspect class. *See, e.g.*, Michael E. Waterstone, *Disability Constitutional Law*, 63(3) EMORY L. J. 527 (2014).

127. *Cleburne*, 473 U.S. at 448.

128. *Id.* at 450.

129. *See Editorial: New Guardianship Law Adds Oversight, Favors Alternatives*, *supra* note 54.

130. *E.g.*, *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 12 (1981).

131. Though beyond the scope of this comment, it is possible state guardianship laws could face constitutional challenges in other ways. In *Tennessee v. Lane*, the Court determined that Congress could abrogate a state’s sovereign immunity under the 14th Amendment, Section 5 by passing a statute that provided a remedy for discrimination based on disability and enforcement of the right of access to the courts. 541 U.S. 509, 531 (2004). This “hybrid analysis,” considering a discriminatory classification in conjunction with a fundamental right, could perhaps be used to challenge state guardianship statutes under federal constitutional protections.

132. *State v. Granville*, 2006-NMCA-098, ¶ 10, 140 N.M. 345, 142 P.3d 933; *see also* Linda M. Vanzi, Andrew G. Schultz & Melanie B. Stambaugh, *State Constitutional Litigation in New Mexico: All Shield and No Sword*, 48(2) N.M. L. REV. 302, 305 (2018) (discussing greater constitutional protections in New Mexico found by the state courts).

issue, New Mexico courts follow the three-step interstitial approach.<sup>133</sup> Under the interstitial approach, the court asks first “whether the right being asserted is protected under the federal constitution.”<sup>134</sup> Second, if the right being asserted is protected, then the state constitutional claim is not reached and the analysis ends; if the right being asserted is not protected, then the state constitution is examined.<sup>135</sup> Third, the court may diverge from federal precedent and identify a right that is not recognized at the federal level when existing federal precedent is flawed,<sup>136</sup> when there are structural differences between the state and federal government,<sup>137</sup> or when there are distinctive state characteristics.<sup>138</sup>

In this section, I will first discuss how the due process protections of the state constitution are more expansive than the protections under the federal constitution due to distinct state characteristics. Therefore, New Mexico courts should find a right to the least restrictive form of intervention and that state guardianship laws violate that right for people with I/DD. Second, I will address how independent analysis of the state’s equal protection clause leads to the application of a higher level of constitutional scrutiny for people with I/DD than a federal court would use in analogous situations. Under this higher level of scrutiny, the state guardianship scheme violates the equal protection rights of people with I/DD.

### 1. *Due Process*

#### i. Fundamental Right to the Least Restrictive Form of Intervention

Article II, Section 18 of the New Mexico Constitution requires “due process of law” when a state deprives any person of “life, liberty, or property.”<sup>139</sup> Like at the federal level, “due process of law includes both procedural due process and substantive due process.”<sup>140</sup> There are three levels of judicial scrutiny for New Mexico Constitutional due process analysis: rational basis,<sup>141</sup> intermediate

133. *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1.

134. *Id.*

135. *Id.*

136. *See, e.g., Campos v. State*, 1994-NMSC-012, ¶ 10, 117 N.M. 155, 870 P.2d 117 (“[W]e must decline to adopt the blanket federal rule that all warrantless arrests of felons based on probable cause are constitutionally permissible in public places. . . . [W]e believe that each case must be reviewed in light of its own facts and circumstances.”).

137. *See, e.g., State v. Attaway*, 1994-NMSC-011, ¶ 24, 117 N.M. 141, 870 P.2d 103 (holding New Mexico Constitution embodies a knock-and-announce requirement for entry to execute warrant—federal constitution only later interpreted similarly in *Wilson v. Arkansas*, 514 U.S. 927 (1995)).

138. *See, e.g., State v. Cordova*, 1989-NMSC-083, ¶ 15, 109 N.M. 211, 784 P.2d 30 (concluding that New Mexico has not experienced rigidity and technicalities leading to federal abandonment of two-part test of informer’s veracity and basis of knowledge as probable cause to issue warrant).

139. N.M. CONST. art II, § 18.

140. *Martinez v. Pub. Emps. Ret. Ass’n of N.M.*, 2012-NMCA-096, ¶ 37, 286 P.3d 613.

141. *See, e.g., ACLU of N.M. v. Albuquerque*, 2006-NMCA-078, ¶ 19, 139 N.M. 761, 137 P.3d 1215. If the legislation does not affect a fundamental right or create a suspect classification, nor impinge upon an important individual interest, rational basis review applies. Under rational basis review, the burden is on the challenger to show that the statute has no rational relationship to a legitimate government purpose. *Id.*

scrutiny,<sup>142</sup> and strict scrutiny.<sup>143</sup> The appropriate level of judicial scrutiny is based on the “nature and importance of the individual interests asserted and the classifications created by the statute.”<sup>144</sup> New Mexico courts use the same standards of review to analyze both due process and equal protection.<sup>145</sup> In examining the constitutionality of a statute for substantive due process, courts first analyze whether the statute implicates a fundamental or important right.<sup>146</sup> Based on that determination, the court establishes which level of judicial scrutiny is warranted and applies it to the statute.<sup>147</sup>

Although New Mexico courts have not departed from federal case law in the interpretation of the due process clause of Section 18 in finding fundamental rights, the New Mexico Supreme Court has hinted that Article II, Section 4, of the state constitution might be a conduit through which New Mexicans might be entitled to greater due process protections.<sup>148</sup> Article II, Section 4, of the New Mexico Constitution (“Inherent Rights Clause”) guarantees that “all persons . . . have certain natural, inherent, and inalienable rights” entitled to protection, including the enjoyment of “life and liberty.”<sup>149</sup> There is no analogous provision in the United States Constitution to the Inherent Rights Clause. New Mexico courts have stated that the Inherent Rights Clause offers “more expansive” protections than those offered by the United States Constitution’s Due Process and Equal Protection guarantees.<sup>150</sup> Although the exact delineation of the scope of this “more expansive” protection remains elusive, the New Mexico Supreme Court has suggested that the provision “may . . . ultimately be a source of greater due process protections than those provided under federal law.”<sup>151</sup> However, the court has never held the Inherent Rights Clause to be the sole source of either a fundamental or important constitutional right.<sup>152</sup>

New Mexico courts should recognize the right to the least restrictive form of intervention under New Mexico’s due process and inherent rights protections of liberty interests. Under the interstitial approach, a state constitutional question is not

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142. *See, e.g., id.* Intermediate scrutiny applies when legislative classifications infringe on important, but not fundamental, rights. Under intermediate scrutiny, the government must show the scheme is “substantially related to an important governmental interest.” *Id.*

143. *See, e.g., id.* Strict scrutiny is appropriate when “the violated interest is a fundamental personal right or civil liberty guaranteed by the constitution.” *Id.* Under strict scrutiny analysis, the government must show there is a “compelling state interest supporting the challenged scheme, and [] show that the statute accomplishes its purpose by the least restrictive means.” *Id.*

144. *Martinez*, 2012-NMCA-096, ¶ 37, 286 P.3d 613.

145. *Marrujo v. N.M. State Highway Transp. Dep’t*, 1994-NMSC-116, ¶ 9, 118 N.M. 753, 887 P.2d 747.

146. *State v. Druktenis*, 2004-NMCA-032, ¶ 52, 135 N.M. 223, 86 P.3d 1050.

147. *Id.*

148. *See, e.g., Morris v. Brandenburg*, 2016-NMSC-027, ¶ 51, 376 P.3d 836.

149. N.M. CONST. art. II, § 4.

150. *Cal. First Bank v. State*, 1990-NMSC-106, ¶ 44, 111 N.M. 64, 801 P.2d 646.

151. *Morris*, 2016-NMSC-027, ¶ 51, 376 P.3d 836; *see also Morris v. Brandenburg*, 2015-NMCA-100, ¶ 113, 356 P.3d 564 (Vanzi, J., dissenting) (“I think it is plain that Section 4 supplements and expands the liberty rights afforded by Section 18’s due process clause to ensure maximum protection for the lives and liberty of New Mexicans.”).

152. *Morris*, 2016-NMSC-027, ¶ 51, 376 P.3d 836.

reached if the right being asserted is protected under the federal constitution. The right to the least restrictive form of intervention is not protected under the federal constitution,<sup>153</sup> and state courts should diverge from this precedent due to distinctive state characteristics.

The New Mexico Supreme Court was most recently asked to expand the fundamental liberty rights of New Mexicans in *Morris v. Brandenburg*. In *Morris*, the court declined to find that there is a fundamental right to physician aid-in-dying under New Mexico's constitutional due process provision.<sup>154</sup> The court refused to depart from federal precedent based on flawed federal reasoning, finding that the federal analysis set forth in the Supreme Court case, *Washington v. Glucksberg*, which addressed the same constitutional question, was not flawed.<sup>155</sup> Petitioners asserted that *Glucksberg* was flawed because the *Glucksberg* approach to substantive due process claims has since been abandoned and because *Glucksberg* reviewed a facial challenge that "did not have the evidence we have today [demonstrating] the safety of aid in dying."<sup>156</sup> The court dismissed the idea that the *Glucksberg* approach of defining rights in relation to historical practices had been abandoned, finding instead that *Glucksberg* addressed a unique issue that was more difficult to define than other interests that had come before the Supreme Court, such as marriage.<sup>157</sup> Further, the court agreed with the *Glucksberg* Court's analysis concerning legitimate government interests, finding that legitimate government interests exist which would be abrogated by finding physician aid-in-dying a fundamental right.<sup>158</sup>

Additionally, the court did not find any distinctive state characteristics that would justify departure from federal precedent.<sup>159</sup> The court found that New Mexico's historical reverence for patient autonomy and dignity in end-of-life decision-making, as evidenced in multiple state statutes, explicitly did not extend to physician aid-in-dying.<sup>160</sup> The court also disagreed with the assertion that a terminally ill patient's decision to seek physician aid-in-dying is rooted in already recognized fundamental rights. Instead, the court found that state judicial precedent limited these existing rights and prevented an expanded right that may protect physician aid-in-dying.<sup>161</sup> Therefore, the court followed *Glucksberg* and found that New Mexicans do not have a fundamental right to physician aid-in-dying.

Unlike the right at issue in *Morris*, which was addressed federally in *Glucksberg*, the U.S. Supreme Court has never specifically answered the question of whether there is a fundamental right to the least restrictive form of intervention or support in the provision of care and services for people with mental illness and I/DD. Instead, the Court narrowly tailors a person's interest in the least restrictive intervention to existing fundamental rights, such as liberty and freedom from

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153. See *supra* Part III.A.1; see also *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 18 (1981).

154. *Morris*, 2016-NMSC-027, ¶ 38, 376 P.3d 836.

155. *Id.* ¶ 34.

156. *Id.* ¶ 32.

157. *Id.* ¶ 33.

158. *Id.* ¶ 34.

159. *Id.* ¶ 38.

160. *Id.* ¶ 36.

161. *Id.* ¶ 38.

physical restraint.<sup>162</sup> Thus, New Mexico courts could not depart from federal precedent here based on flawed federal analysis.

However, New Mexico does have distinct state characteristics, including a historical respect for the right of people to receive the least restrictive form of support as evidenced in case law and statute, that courts could rely on to find a fundamental right to the least restrictive means of intervention under the New Mexico Constitution. Unlike in *Morris*, where the court found that the state's historical respect for patient autonomy explicitly excluded the right to physician aid-in-dying, the state's respect for the right to the least restrictive form of intervention is not exclusionary. Moreover, the Inherent Rights Clause of the state constitution is a unique provision that provides the basis for the courts to find more expansive liberty rights than those under federal precedent. New Mexico's historical respect for the right to the least restrictive means of intervention and distinct provisions of the state constitution are sufficient evidence that the courts should recognize it as a fundamental right for purposes of due process analysis.

New Mexico has numerous statutes that emphasize the states' reverence for the right to the least restrictive form of intervention. First, New Mexico was one of the first states to define the "least restrictive alternative" doctrine for purposes of involuntary commitment.<sup>163</sup> Second, in an instruction to a 2021 statutory implementation working group of guardianship stakeholders, the group members were to "identify the least restrictive decision-making options for alleged incapacitated persons . . ."<sup>164</sup>—an explicit recognition to the right in the guardianship context. Third, the state guardianship statute directs guardians to "exercise supervisory powers over the protected person in a manner that is the least restrictive form of intervention consistent with the order of the court."<sup>165</sup> Regardless of the misguided application of this provision,<sup>166</sup> the statute recognizes the interest of people placed in a guardianship and their right to be subject to the least-restrictive form of intervention. Fourth, the administrative code states that any emergency intervention "shall be the least restrictive intervention necessary to meet the emergency" when limiting a person with developmental disabilities' rights in an effort to prevent physical harm.<sup>167</sup> Most notably, the Children's Mental Health and Developmental Disabilities Code recognizes the "right to individualized treatment or habilitation services," including the "right to prompt treatment and habilitation

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162. See *supra* Part III.A.1.

163. *Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, ¶ 27, 138 N.M. 331, 120 P.3d 413; N.M. STAT. ANN. § 43-1-3(D)(1) (2021) (enacted in 1977, defines "the least drastic means principle" as the "habilitation or treatment and the conditions of habilitation or treatment for the client . . . that are no more harsh, hazardous or intrusive than necessary to achieve acceptable treatment objectives for the client"). *But see* *State v. Sanchez*, 1969-NMSC-090, 80 N.M. 438, 457 P.2d 370 (holding that due process did not require the state to consider less restrictive alternatives to total institutionalization). New Mexico's civil commitment statute, the Mental Health and Developmental Disabilities Code, N.M. STAT. ANN. sections 43-1-2 to -25 (2021), was primarily authored by University of New Mexico School of Law Professor James W. Ellis, who strongly advocated for legislation that encompassed the least restrictive means doctrine.

164. N.M. STAT. ANN. § 34-2-18(B) (2021).

165. *Id.* § 45-5-312(A) (2021).

166. See *supra* Part II.A.

167. N.M. CODE R. § 7.26.3.11 (2021).

pursuant to an individualized treatment plan and consistent with the least restrictive means principle.”<sup>168</sup> As the right to the least restrictive form of intervention is statutorily recognized for juveniles, and the right for adults is not statutorily precluded, New Mexico courts could find that the right to the least restrictive form of intervention extends to everyone.

Further, the right to the least restrictive form of intervention is found in New Mexico case law within the context of civil commitment. In *Garcia v. Las Vegas Medical Center*, the court found that New Mexicans have a substantive due process right to be free from civil commitment *unless* the proposed commitment is “consistent with the client’s treatment needs and the least drastic means principle.”<sup>169</sup> In *LaBalbo v. Hymes*, the court reaffirmed this idea, stating that the substantive liberty interest in maintaining treatment services can be found in plain, statutory language indicating a “right to appropriate habilitation services . . . consistent with the least drastic means principle. . . .”<sup>170</sup>

Moreover, the Inherent Rights Clause provides distinct additions to the rights afforded by the federal Constitution and is a basis to diverge from federal precedent. The framers of the state Constitution enumerated certain “inherent” rights, including the rights of people “to ‘enjoy[] and defend[]’ their own ‘li[ves] and liberty’ against unjustified intrusions by the government.”<sup>171</sup> The section is not “ornamental,” but is important in considering the liberty rights of New Mexicans.<sup>172</sup> In *Morris*, the court declined to find a right to physician aid-in-dying under the Inherent Rights Clause, reasoning that physician-assisted suicide runs directly contrary to the state’s interest in preserving life and the individual right to life.<sup>173</sup> In contrast, New Mexicans certainly have a *liberty* interest in being free from unwarranted forms of restriction under the guise of treatment or support. Fundamental liberty interests have been traditionally extended to, among other things, the right of “bodily integrity,” which has been broadly described as a “freedom to care for one’s health and person[.]”<sup>174</sup> Substantive due process protects the individual “interest in independence in making certain kinds of important decisions.”<sup>175</sup> The interest in self-definition, which is “at the heart of liberty,” is no less than “the right to define one’s own concept of existence.”<sup>176</sup> Certainly, the right of people with I/DD to “define one’s own concept of existence” is closely related to the right to the least restrictive form of intervention.<sup>177</sup> Between the Inherent Rights

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168. N.M. STAT. ANN. § 32A-6A-7(A) (2021).

169. *Garcia v. Las Vegas Med. Ctr.*, 1991-NMCA-053, ¶ 20, 112 N.M. 441, 816 P.2d 510.

170. *LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 14 n.2, 115 N.M. 314, 850 P.2d 1017.

171. N.M. CONST. art II, § 4.

172. *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 112, 356 P.3d 564 (Vanzi, J., dissenting); *see also* Marshall J. Ray, *What Does the Natural Rights Clause Mean to New Mexico*, 39 N.M. L. REV. 375 (2009).

173. *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 30, 376 P.3d 836.

174. *Doe v. Bolton*, 410 U.S. 179, 213 (1973) (Douglas, J., concurring).

175. *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (footnote omitted).

176. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

177. *But see in re B.B.*, 516 N.W.2d 874 (Iowa 1994) (declining to find a right to the least restrictive form of intervention, regardless of the availability of a less restrictive placement). However, Iowa, unlike New Mexico, does not have a “Inherent Rights Clause” or similar provision that lacks an analogous federal provision.

Clause's extended protections of individual liberty, and the state's recognition of the importance of receiving supports or intervention in the least restrictive manner, the courts should find that New Mexicans have a fundamental right to the least restrictive form of intervention.

Finally, in the New Mexico Court of Appeal's decision on *Morris*, the court declined to find a fundamental right to aid-in-dying in part because recognition of the right would be an act of "selective discrimination" as only a "select few" would have it.<sup>178</sup> A similar argument could be used to refute the recognition of the right to the least restrictive form of intervention. However, this contention is flawed—the right to the least restrictive form of intervention belongs to all New Mexicans. The fact that the right "may be invoked only by some people who find themselves in certain circumstances is also true of other constitutional rights."<sup>179</sup> Though the right to the least restrictive form of supports or intervention may only be exercised by some people, it belongs to all New Mexicans and all New Mexicans could benefit from it.

New Mexico's distinctive state characteristics, including the unique language of the inherent rights clause and the recognition of the right to the least restrictive form of intervention in state case law and statute, mean the state courts should depart from federal precedent and recognize the right to the least restrictive form of support.

ii. Guardianship Violates the Right to the Least Restrictive Form of Intervention

New Mexico's guardianship statute infringes on the fundamental right of people with I/DD to the least restrictive means of support. As it exists now, New Mexicans with I/DD are subject to having their ability to control their finances, living situation, and personal life removed, even though a less drastic form of intervention may be appropriate for the individual. While a petitioner for a guardianship has the burden to inform the court of available lesser-restrictive forms of intervention and establishing why they are inappropriate in that particular guardianship case, judges fail to take these potentially lesser-restrictive options into account and improperly impose guardianships.<sup>180</sup> If state courts recognized the fundamental right to the least restrictive form of support for people with I/DD, the following analysis shows the current scheme of guardianship would violate state constitutional protection of fundamental rights.

When a fundamental due process right is implicated, courts apply strict scrutiny to determine if a statute violates that right.<sup>181</sup> Under strict scrutiny analysis, the government must show there is a compelling state interest supporting the challenged scheme and that the statute accomplishes its purpose by the least

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178. *Morris v. Brandenburg*, 2015-NMCA-100, ¶¶ 44–47, 356 P.3d 564.

179. *Id.* ¶ 73 (Vanzi, J., dissenting). For example, the parental autonomy rights recognized by the Constitution apply to all citizens, though not all citizens will have children. Reproductive autonomy rights to use contraception belong to everyone, even though not everyone will be in situations to exercise those rights. *Id.*

180. *See supra* Part II.A.

181. *ACLU of N.M. v. Albuquerque*, 2006-NMCA-078, ¶ 19, 139 N.M. 761, 137 P.3d 1215.

restrictive means.<sup>182</sup> In the case of guardianship, the state has an important, if not compelling, interest in providing supports and services for people with I/DD. However, guardianship is not the least restrictive means of achieving this interest. For example, the state could statutorily recognize and promote less drastic means of decision-making supports, such as supported decision-making, as the default method of removing people's ability to make their own decisions.<sup>183</sup>

Even though there is a statutory preference for limited guardianships in New Mexico, which theoretically does not violate the right to the least restrictive form of intervention, limited guardianships are overused and unwarrantably imposed on individuals for whom a less restrictive method would be appropriate.<sup>184</sup> This statutory preference therefore is not the "least restrictive means" of achieving the state's compelling interest in providing supports and services to people with I/DD for purposes of strict scrutiny analysis. If New Mexico courts recognized the substantive due process right to the least restrictive means of intervention, the state guardianship statute and its implementation would not withstand strict scrutiny.

## 2. Equal Protection

The Equal Protection Clause of the New Mexico Constitution states that "no person shall be . . . denied equal protection of the laws."<sup>185</sup> The New Mexico Equal Protection Clause affords "rights and protections" independent of the United States Constitution.<sup>186</sup> New Mexico courts use a three-step analysis to determine if a petitioner's equal protection rights have been violated. First, petitioners must prove they are "similarly situated to another group but are treated dissimilarly" because of a legislative classification.<sup>187</sup> Second, if petitioners are similarly situated, then the court determines what level of scrutiny should be applied to the legislation they are challenging.<sup>188</sup> Courts apply one of three levels of judicial scrutiny based on the "nature and importance of the individual interests asserted and the classifications created by the statute."<sup>189</sup> The same standards of review are used in analyzing both due process and equal protection.<sup>190</sup> Finally, the court determines if the challenged legislation is constitutional under equal protection analysis using the appropriate level of judicial scrutiny.<sup>191</sup>

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182. *Id.* This reference to the "least restrictive means" is not to be confused with the "least restrictive means of intervention" doctrine. *See supra* Part II.

183. *See infra* Part IV.A. The implementation of supported decision-making would mean the burden would be on petitioners for a guardianship to prove (with a to-be-determined evidentiary standard) that the alleged incapacitated person's needs would not be met with a lesser restrictive means of decision-making restraints. As it is now, courts can impose limited guardianships with the acknowledgement that there are lesser restrictive means available, but judges often rely on discriminatory assumptions to dismiss the actual capacity of the alleged incapacitated person. *See supra* Part II.A.

184. *See supra* Part II.A.

185. N.M. CONST. art. II, § 18.

186. *Chapman v. Luna*, 1985-NMSC-056, 102 N.M. 768, 701 P.2d 367.

187. *Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, ¶ 8, 138 N.M. 331, 120 P.3d 413.

188. *Id.*

189. *Martinez v. Pub. Emps. Ret. Ass'n of N.M.*, 2012-NMCA-096, ¶ 37, 286 P.3d 613.

190. *Marrujo v. N.M. State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 9, 118 N.M. 753, 887 P.2d 747.

191. *Breen*, 2005-NMSC-028, ¶ 9, 120 P.3d 413.



i. Similarly Situated Analysis

The threshold question in analyzing all equal protection challenges is whether the legislation creates a class of similarly situated individuals who are treated dissimilarly.<sup>192</sup> In *Wagner v. AGW Consultants*, the court was presented with the question of whether a fee limitation on attorney's fees distinguished between similarly situated individuals.<sup>193</sup> Though the law in question was neutral on its face, as applied, it created two classes of worker's compensation litigants: "those who do and do not reach the limitation at the administrative stage, and consequently those who can and cannot lawfully pay an attorney a reasonable fee on appeal."<sup>194</sup> The court emphasized the disparate impact this has on the two classes of worker's compensation litigants. For workers' attorneys, if the fee cap is met at the administrative level, they will not be paid on appeal, and thus most likely will not continue to represent the worker.<sup>195</sup> Meanwhile, a fee cap likely does not have the same effect on employers' attorneys as they are paid if they win or lose, and not subject to the judicial approval or fees.<sup>196</sup> Thus, the court determined that the law in question did create two classes of similarly situated litigants.

Similarly, New Mexico's guardianship statute creates a classification of similarly situated individuals, even though the law is neutral on its face. Section 45-5-301.1 provides that guardianship is available for an "incapacitated person."<sup>197</sup> An incapacitated person is anyone "who demonstrates over time either partial or complete functional impairment by reason of mental illness, mental deficiency, physical illness or disability," or any other cause (except minority) to the extent that the person is unable to manage their personal affairs.<sup>198</sup> The facial classification is between persons who are "inherently different"—individuals who are impaired and individuals who are not. However, in practice, the statute dissimilarly impacts people within the "incapacitated" class, specifically people with I/DD.<sup>199</sup> It is "erroneous to rely on the notion that a classification based on a unique physical characteristic is reasonable simply because it corresponds to some 'natural' grouping."<sup>200</sup> For elders, loss of capacity typically increases over time and rarely improves.<sup>201</sup> In contrast, for individuals with I/DD, capacity may improve with age and experience; for some, capacity is cyclical.<sup>202</sup> Moreover, for people with I/DD, stereotypes often foster the

192. *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 35, 122 N.M. 524, 928 P.2d 250.

193. *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 22, 137 N.M. 734, 114 P.3d 1050.

194. *Id.* ¶ 23; *see also* *Yick Wo v. Hopkins*, 118 U.S. 356, 273–74 (1886) (holding the contested law violated equal protection as applied, although neutral on its face).

195. *Wagner*, 2005-NMSC-016, ¶ 57, 137 N.M. 734, 114 P.3d 1050 (Bosson, C.J., concurring in part).

196. *Id.* ¶ 57 (Bosson, C.J., concurring in part).

197. N.M. STAT. ANN. § 45-5-301.1 (2021).

198. *Id.* § 45-5-101(F) (2021).

199. Consideration of others within the "incapacitated" class who are treated dissimilarly, such as the elderly, is beyond the scope of this Comment.

200. N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶ 39, 126 N.M. 788, 975 P.2d 841 (quoting Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 346 (1949)).

201. Pinnes & Jackson, *supra* note 78.

202. *Id.*

presumption of incapacity.<sup>203</sup> As a result of these differences, classes of individuals within the designation of “incapacitation” may experience disparate effects of guardianship. While guardianship may be appropriate for many who are “incapacitated,” for people with I/DD whose capacity has improved over time, or who are designated “incapacitated” due to stereotypes, decision-making restraints are unwarrantably placed on them via guardianship. Therefore, there is a classification of similarly situated persons with disparate outcomes in the case of guardianship, meeting the first element of the Equal Protection Clause.

ii. I/DD as a Sensitive Class

The second step in analyzing an equal protection claim in New Mexico is to determine if the class of individuals being discriminated against is a sensitive or suspect class that requires more rigorous review by the court.<sup>204</sup> Only legislation that “affects the exercise of a fundamental right or a suspect classification such as race or ancestry” is subject to strict scrutiny.<sup>205</sup> Legislation can trigger intermediate scrutiny review when it either restricts the ability to exercise an important right, or treats the person challenging the constitutionality of the legislation differently because they belong to a sensitive class.<sup>206</sup> In New Mexico, courts have applied intermediate scrutiny to classifications based on I/DD because such discrimination is based on a sensitive classification.<sup>207</sup>

In *Breen v. Carlsbad Municipal Schools*, the New Mexico Supreme Court determined that individuals with I/DD belong to a sensitive class as defined by equal protection jurisprudence.<sup>208</sup> A group of people qualifies as a sensitive class justifying intermediate scrutiny when they have been “subjected to a history of discrimination and political powerlessness based on a characteristic or characteristics that are relatively beyond the individuals’ control such that the discrimination warrants a degree of protection from the majoritarian political processes.”<sup>209</sup> The court noted that people with “mental disabilities” have suffered historical societal and political exclusion based on a characteristic out of their control, including segregation, forced institutionalization, and exclusion from citizenship.<sup>210</sup> Even among the broader disability community, the court reasoned that forms of I/DD are the “most negatively perceived of all disabilities,” leading to greater and more grotesque examples of discrimination.<sup>211</sup> Further, it considered Congress and the New Mexico Legislature’s enactment of laws that ensure better living standards for individuals with I/DD, indicating a continuing need for this group be protected from societal discrimination.<sup>212</sup> By defining people with I/DD as a suspect class, the New Mexico

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203. *Id.*

204. *Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, ¶ 12, 138 N.M. 331, 120 P.3d 413.

205. *Id.* ¶ 11.

206. *Id.* ¶ 13.

207. *See generally id.*

208. *Id.* ¶ 17.

209. *Id.* ¶ 21.

210. *Id.* ¶ 22.

211. *Id.* ¶ 24 (quoting Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J.L. & HEALTH 15, 20 (1993–94)).

212. *Id.* ¶ 25.

Supreme Court determined it is appropriate to apply intermediate scrutiny to classifications based on mental disability.<sup>213</sup>

iii. New Mexico's Guardianship Scheme Violates Equal Protection

The final step in equal protection analysis is to apply the appropriate level of judicial scrutiny to the challenged legislation.<sup>214</sup> As considered above, legislative classifications based on I/DD are subject to intermediate scrutiny. When courts apply intermediate scrutiny to legislation challenged under equal protection in New Mexico, the courts will uphold the legislation if the classification is "substantially related to an important government interest."<sup>215</sup> When applying intermediate scrutiny, the courts must examine the governmental interests served by the legislative classification, and whether the classifications under the statute bear a substantial relationship to any such important interests.<sup>216</sup> In determining whether there is a substantial relationship, the court employs a "least restrictive alternative analysis," under which "the least restrictive alternative need not be selected if it poses serious practical difficulties in implementation, [but] the existence of less restrictive alternatives is material to the determination of whether the classification substantially furthers an important governmental interest."<sup>217</sup> The party supporting the constitutionality of the legislation must show that the discriminatory classification is based on "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions."<sup>218</sup> Finally, courts balance the importance of the governmental interest against the burdens imposed on the individual and on society.<sup>219</sup>

In *Breen*, the court considered whether different treatment under the New Mexico Workers' Compensation Act between those that suffered physical disability and those that suffered mental disability violated equal protection.<sup>220</sup> Under the statute, mental disability compensation was limited to 100 weeks, while compensation for physical disability could be granted for a lifetime.<sup>221</sup> The respondents argued that the governmental interest in treating workers with I/DD differently was to protect the financial viability of Worker's Compensation and to prevent fraudulent claims of mental disability, as claims of mental disabilities are harder to diagnose and "are more susceptible to fraudulent claims."<sup>222</sup> While the court allowed that keeping Worker's Compensation financially sound was an

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213. *Id.* ¶ 28.

214. *Id.* ¶ 8.

215. *See, e.g.*, *Marrujo v. N.M. State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 9, 118 N.M. 753, 887 P.2d 747.

216. *Breen*, 2005-NMSC-028, ¶ 30, 138 N.M. 331, 120 P.3d 413.

217. *Trujillo v. City of Albuquerque*, 1990-NMSC-083, ¶ 25, 110 N.M. 621, 798 P.2d 571 (internal quotation marks omitted) (overruled on other grounds by *Trujillo v. City of Albuquerque*, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305).

218. *Breen*, 2005-NMSC-028, ¶ 30, 138 N.M. 331, 120 P.3d 413 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982)).

219. *Id.* ¶ 31.

220. *Id.* ¶ 33.

221. *Id.*

222. *Id.*

important governmental interest, it determined that the discriminatory classification was not substantially related to that interest.<sup>223</sup> First, the court stated that the purpose of the Worker's Compensation Act is to prevent workers from "becoming a public charge and to assist the worker in returning to work with minimal dependence on compensation awards."<sup>224</sup> Second, the court noted that the Act is the only available remedy for workplace accidents, with no other means of remedy, meaning that mentally disabled workers are burdened with severely less time to transition into a job that is not compromised by their disability.<sup>225</sup> Third, in addressing the claim that the classification is intended to prevent potential fraud, the court identifies several other existing mechanisms to prevent fraud, which are all valid and less restrictive than arbitrarily limiting the amount of compensation of people with mental disabilities.<sup>226</sup> When balancing this arbitrary limit against the severe burden it places on workers with mental disabilities, the court found that the disparity in compensation was not substantially related to the important government interests alleged and thus violated equal protection.<sup>227</sup>

Similarly, intermediate scrutiny applies in the case of guardianship as the dissimilar treatment at issue is of people with I/DD. The New Mexico Guardians of Incapacitated statute provides for the implementation of a guardianship for individuals the court deems incapacitated.<sup>228</sup> The disparity alleged is that this law permits the removal of decision-making abilities from individuals who are deemed incapacitated, which disparately impacts people with I/DD, whose decision-making capacity changes over time, leaving them impermissibly restricted within a guardianship. There are certainly important government interests in providing guardianships for people with I/DD who need support, including providing support for people with limited capacity, preventing abuse and exploitation, and ensuring that people are able to sufficiently care for themselves for both individual and public health. However, the implementation of guardianship is not "substantially related" to these government interests.

First, while the existence of lesser restrictive alternatives is not dispositive for purposes of intermediate scrutiny, the availability of less restrictive means is material to determine whether the discriminatory classification furthers an important government interest. Here, there are certainly lesser restrictive alternatives to guardianship that would further the government's important interest in providing support for people with I/DD and promoting individual and public health, including supported decision-making agreements, powers of attorney, and authorized representatives.<sup>229</sup>

Second, the discriminatory classification is, at least in part, based on stereotyping. Stereotypes promulgated by the courts can land people with I/DD in

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223. *Id.* ¶ 35.

224. *Id.* ¶ 36 (quoting *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 12, 122 N.M. 524, 928 P.2d 250).

225. *Id.* ¶ 38–39.

226. *Id.* ¶ 40–44.

227. *Id.* ¶ 48.

228. N.M. STAT. ANN. § 45-5-301.1 (2021).

229. See *infra* Part IV.A; *Alternatives to Guardianship*, DEVELOPMENTAL PATHWAYS COLORADO (June 24, 2021), <https://www.dpcolo.org/alternatives-to-guardianship/>.

guardianships, even if their level of capacity would be better supported with a different form of intervention.<sup>230</sup> For example, some practitioners have argued that judges “don’t know enough about the [disability] themselves to understand that, even if someone . . . can’t even speak . . . [they] still may be able to make decisions for themselves so long as they can get the support that they need.”<sup>231</sup> Additionally, though medical professionals may base their determinations of capacity on the individuals ability, or inability, to complete basic activities of daily living, this evidence is used to support the need for guardianship, even though a person who needs supports in daily living may still be able to make their own decisions.<sup>232</sup>

Third, the burden imposed on the individual who is subject to guardianship is high. Someone with I/DD who is placed in a guardianship not only has their right to the least restrictive means of intervention limited,<sup>233</sup> but also faces difficulty to getting out of a guardianship once one is in place. Compared to other states, New Mexico has a relatively permissible process for protected persons to restore their rights. The state permits an informal request for restoration of an “incapacitated” person’s rights, such as an informal letter.<sup>234</sup> Additionally, the statute broadly permits any interested party to petition for restoration.<sup>235</sup> Following receipt of a request for review, the court will hold a status hearing to determine the appropriate order to be entered.<sup>236</sup> Usually, courts rely on medical examinations and in-court observations of the individual to determine whether the protected person has regained capacity.<sup>237</sup> However, studies indicate that petitions for restoration are uncommon.<sup>238</sup> This may be because of an individual’s lack of awareness of their right to pursue restoration or lack of ability to obtain sufficient evidence to satisfy the petitioner’s burden to show the need for guardianship has ended.<sup>239</sup> Also, courts can be reluctant to revisit guardianships in a bid to conserve judicial resources and preserve the finality of court orders.<sup>240</sup> This means that people with I/DD can be stuck in a guardianship that was discriminatorily and improperly put in place.

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230. See *supra* Part II.A.

231. BEYOND GUARDIANSHIP, *supra* note 31, at 146; see also John Pollock & Megan Rusciano, *Right to Counsel in Restoration of Rights Cases*, 42 BIFOCAL 75, 76 (Mar. 11, 2021) (“Historically, we have denied people with disabilities the right to marry, to attend school, to reproduce, and to live among us. Even as recently as the 1960s, it was very easy for people with mental illness and developmental disabilities in the United States to be ‘committed’ to secure facilities with relatively little procedure or focus on their rights or their humanity. This legacy continues to infect our guardianship proceedings by reinforcing the stereotypes and assumptions that people with disabilities are incapable of managing their own lives.”).

232. Pollock & Rusciano, *supra* note 231, at 76.

233. See *supra* Part II.A.

234. N.M. STAT. ANN. § 45-5-307 (2021).

235. *Id.*

236. *Id.*

237. Jenica Cassidy, *Restoration of Rights for Adults Under Guardianship*, 36 BIFOCAL 63, 64 (Feb. 1, 2015).

238. *Id.* at 63.

239. *Id.* Even if the protected person can obtain a medical evaluation to prove their competency, they are still subject to discriminatory determinations of capacity by judges. See, e.g., *supra* Part II.A.

240. See BEYOND GUARDIANSHIP, *supra* note 31, at 110–17.

Because of the availability of lesser restrictive alternatives, the use of stereotyping to create the discriminatory classification, and the high burden on individuals improperly subject to guardianship, it is likely that the state's guardianship structure would not withstand intermediate scrutiny.

#### IV. REMEDIES

New Mexico's statutory use and implementation of guardianship violates both the due process rights and equal protection rights of people with I/DD. To remedy this unconstitutional mechanism of decision-making supports, the state must adopt a less restrictive alternative that both honors the right of people with I/DD to the least restrictive form of intervention and is less ripe for discriminatory abuse. The most salient option is for the state to adopt supported decision-making<sup>241</sup> as the legal default option of decision-making intervention for adults in need of supports and to require exhaustion of less restrictive forms of intervention before guardianship is pursued.

Additionally, the passage of the New Mexico Civil Rights Act<sup>242</sup> has created the possibility of people who are improperly placed in guardianships to bring a private suit for monetary damages against government agencies that unconstitutionally impose guardianships. The availability of this private right of action may lead to increased litigation on the unconstitutionality of guardianship which could be an avenue for state courts to recognize the substantive right to the least restrictive form of intervention.

##### A. Requiring Exhaustion of Less-Restrictive Methods of Intervention

Currently, petitioners for guardianship in New Mexico have the burden of demonstrating that lesser restrictive means of intervention have been considered and why those lesser restrictive means are "insufficient to meet the alleged incapacitated person's . . . need."<sup>243</sup> Additionally, the court can only appoint a guardian only if "guardianship is appropriate as the least restrictive form of intervention. . . ."<sup>244</sup> However, as previously discussed, courts often make improper determinations of an alleged incapacitated person's capacity that leaves this statutory safeguard essentially moot.<sup>245</sup> The state has taken on the responsibility of providing care to those who the state believes cannot care for themselves; to live up to this self-imposed obligation, the state must *require* petitioners for guardianship to exhaust less-restrictive methods of decision-making restraints for people with I/DD before the court can impose a guardianship. By legally recognizing and defining less restrictive means of intervention within the existing guardianship statutory scheme, including supported decision-making, the imposition of an exhaustion requirement would more properly protect the rights of individuals who are deemed incapacitated.

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241. *See supra* Part II.B.

242. N.M. STAT. ANN. §§ 41-4A-1 to -13 (2021).

243. N.M. STAT. ANN. § 45-5-303(B)(4) (2021).

244. N.M. STAT. ANN. § 45-5-304(C)(4) (2021).

245. *See supra* Part II.A.

Statutory recognition of supported decision-making and the removal of limited guardianship as the default method of decision-making restraints on an individual combats both the substantive due process and equal protection violations that arise from the imposition of guardianships. The New Mexico legislature is aware of supported decision-making as a less restrictive alternative to guardianship. In 2018, a bill was introduced that would have formally recognized supported decision-making as a less restrictive alternative to guardianship.<sup>246</sup> However, the enacted version does not include a reference to supported decision-making.<sup>247</sup> In 2020, several bills were introduced that, had they passed, would have appropriated funds for the creation of a task force to study supported decision-making as an alternative to guardianship in New Mexico.<sup>248</sup> In 2021, a similar bill was introduced to fund the creation of a task force.<sup>249</sup> While that bill failed, \$15,000 “[t]o fund a task force to develop and recommend legislation around supported decision-making” was passed in the House appropriations bill.<sup>250</sup> State lawmakers certainly recognize the need to find alternatives to guardianship for people with I/DD,<sup>251</sup> and yet have made frustratingly small steps to implement supported decision-making as an alternative.

A number of other states have passed comprehensive legislation related to supported decision-making. As of 2021, 10 states and the District of Columbia enacted statutes formally recognizing supported decision-making agreements.<sup>252</sup> However, these statutes may be “ultimately inconsistent with the supported decision-making model and may undermine its stated goals of empowering individuals with disabilities.”<sup>253</sup> While these statutes give rights to supporters and protect third parties who rely in good faith on supported decision-making agreements, they fail to expand the rights of individuals with I/DD.<sup>254</sup> Even though the passage of these statutes has

246. S.B. 19, 53rd Leg., 2d Reg. Sess. (N.M. 2018). Fiscal impact reports and committee reports for S.B. 19 did not provide any information on why the provision including supported decision-making was removed from the final bill.

247. See N.M. STAT. ANN. § 45-5-107 (2021).

248. H.B. 67, 54th Leg., 2d Reg. Sess. (N.M. 2020); H.M. 23, 54th Leg., 2d Reg. Sess. (N.M. 2020).

249. H.B. 94, 55th Leg., 1st Reg. Sess. (N.M. 2021). The legislation would have appropriated \$35,000 for a task force; the Developmental Disabilities Planning Council (“DDPC”), which would have been responsible for the task force, estimated that at least \$35,000 would be needed to adequately staff the task force. *Id.*

250. H.B. 2, § 5(72), 55th Leg., 1st Reg. Sess. (N.M. 2021). However, see the discussion in *supra* note 249—\$15,000 is not enough to adequately fund the task force.

251. N.M. LEGIS. FIN. COMM., FISCAL IMPACT REPORT HOUSE BILL 94, 55th Leg., 1st Reg. Sess. (Jan. 26, 2021) (“DDPC also reported without the establishment of an alternatives [*sic*] to guardianship such as SDM, the rise in guardianship requests may overwhelm the system.”).

252. See generally Supported Decision-Making Agreements Act, ALASKA STAT. ANN. § 13.56.010–.195 (West 2020); Supported Decision-Making Act, DEL. CODE ANN. tit. 16, §§ 9401a–9410a (West 2020); D.C. CODE ANN. § 7-2131–2134 (West, through Feb. 3, 2021); IND. CODE ANN. §§ 29-3-14-1–13 (West 2020); Supported Decision-Making Agreement Act, LA. ACT 258 (2020); Supported Decision-Making Act, NEV. REV. STAT. ANN. § 162c.010–.300 (West 2020); N.D. CENT. CODE ANN. § 30.1-36-01 to 30.1-36-08 (West 2019); Supported Decision-Making Act, 42 R.I. GEN. LAWS ANN. §§ 42-66.13-1–10 (West 2020); Supported Decision-Making Agreement Act, TEX. EST. CODE ANN. § 1357.001–.102 (West 2019); Uniform Guardianship, Conservatorship, and Other Protective Agreements Act, WASH. REV. CODE ANN. § 11.130.001–.915 (West 2021); WISC. STAT. ANN. § 52.01–.32 (West 2019).

253. See Kohn, *supra* note 77, at 327.

254. *Id.* at 333.

been hailed as an advancement for “the rights of individuals with disabilities,” the statutes uniformly do not provide a right to make decisions with supporters that will be recognized by third-parties, nor do they provide a right to a “fiduciary level of care from the supporter.”<sup>255</sup>

In contrast to these states, New Mexico should recognize supported decision-making by expanding existing public guardianship programs to include the provision and facilitation of decision-making support.<sup>256</sup> Further, in drafting legislation, legislators should be mindful of achieving the goal of recognizing the autonomy and rights of people with I/DD.<sup>257</sup> New Mexico must statutorily recognize the rights of people with I/DD to the least restrictive form of intervention and impose an affirmative duty of care on supporters to ensure supported decision-making does not permit the same kinds of abuse that guardianship has. Supported decision-making has the potential to empower individuals with I/DD to “retain ultimate legal decision-making authority.”<sup>258</sup> The benefits of supported decision-making are far reaching; people with I/DD who are allowed to exercise greater self-determination have better life outcomes and quality of life.<sup>259</sup> Legal recognition of supported decision-making is the first step for New Mexico to adequately recognize people’s right to the least restrictive form of intervention and to prohibit unconstitutional discrimination in the imposition of guardianships.

Moreover, rather than simply codifying a state-sponsored supported decision-making agreement, New Mexico must also require supported decision-making be attempted and found to be an inappropriate method of support for the individual before a court can limit the individual’s decision-making rights via guardianship. The legislature should amend the state guardianship scheme to require exhaustion of less restrictive means of decision-making supports before guardianships can be imposed by the courts.<sup>260</sup> First, the exhaustion requirement would make it far less likely, if not impossible, for judges to default to restrictive plenary guardianships.<sup>261</sup> Second, requiring petitioners to prove that a more restrictive means of intervention is necessary for an individual makes it harder to achieve those more restrictive means, such as guardianship, thus discouraging actors from unwarrantably seeking guardianships. Third, supported decision-making

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255. *Id.* at 329. For example, the right to a fiduciary level of care from supporters would mean the supporter owes the individual duties of “acting in good faith, with loyalty and without self-interest, and avoiding conflicts of interest.” *Id.* at 330.

256. *See id.* at 355 (“Expanding the scope of public guardianship programs to include public supporter programs would be consistent with the Americans with Disabilities Act’s integration mandate requiring that public entities provide services in the most integrated setting appropriate to meet the needs of persons with disabilities.”).

257. *See* Rachel Mattingly Phillips, *Model Language for Supported Decision-Making Statutes*, 98 WASH. U. L. REV. 615 (2020).

258. BEYOND GUARDIANSHIP, *supra* note 31, at 131.

259. *Id.*

260. Such legislation would have to include a limited exception for the exhaustion requirement in cases where guardianship is necessary to provide support for an individual. Requiring petitioners prove by “clear and convincing” evidence that exhaustion is not appropriate, and thus an immediate imposition of guardianship is appropriate, could work.

261. *See supra* Part II.A.



agreements are easier to modify and extinguish than guardianship agreements,<sup>262</sup> which more appropriately reflects people with I/DD's changing capacity over time.<sup>263</sup> Finally, while the discriminatory biases that color the implementation of guardianships would not be eliminated by an exhaustion requirement, requiring petitioners to attempt less restrictive forms of decision-making support means that judges will have more information available to make an informed, unbiased decision when implementing guardianships.

New Mexico's guardianship statute "should be amended to explicitly prohibit the use of guardianship where supported decision-making would meet the individual's needs."<sup>264</sup> The approach proposed by the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act ("UGCOPAA")<sup>265</sup> is to appoint guardians only if the court finds by clear and convincing evidence<sup>266</sup> that "the respondent's identified needs cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative."<sup>267</sup> This heightened burden on the petitioner for adult guardianship makes it harder for guardianships to be unwarrantably implemented. New Mexico is progressive in that it has already requires judges to find by clear and convincing evidence a guardianship is warranted before one can be implemented.<sup>268</sup> However, this heightened evidentiary standard is not enough when determinations of capacity are based on stereotypes, as is unfortunately the case all too often.<sup>269</sup> Only a prohibition on the implementation of guardianship until less restrictive means of intervention, like supported decision-making agreements, have been attempted.

By implementing supported decision-making as the default option for limiting someone's decision-making rights and putting the burden on the petitioner to show why a more restrictive means is appropriate for an individual, New Mexico can finally take the steps necessary to ensure people's rights are not unnecessarily and unjustifiably restricted via guardianship. Recognition and implementation of supported decision-making as the default method of decision-making restriction emphasizes that people with I/DD have rights and autonomy.

## B. Private Right of Action Under the New Mexico Civil Rights Act

Under the New Mexico Civil Rights Act, a person who has been deprived of any rights, privileges, or immunities pursuant to the bill of rights of the New Mexico Constitution due to the acts or omissions of a public body or person acting

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262. *What is Supported Decision-Making?*, *supra* note 59.

263. BEYOND GUARDIANSHIP, *supra* note 31, at 89 ("Most guardianship orders are not time-limited and so last until the subject's death or a court modification or termination of the order, even though an individual's capacity can change over time.").

264. This proposed statutory amendment comes from Kohn, *supra* note 77, at 350.

265. UNIF. GUARDIANSHIP, CONSERVATORSHIP & OTHER PROTECTIVE ARRANGEMENTS ACT § 102(31) (UNIF. L. COMM'N 2017) [hereinafter UGCOPAA].

266. Clear and convincing means the evidence is substantially more likely to be true than untrue. *Colorado v. New Mexico*, 467 U.S. 310 (1984).

267. UGCOPAA, *supra* note 244, § 301(a)(1)(B).

268. N.M. STAT. ANN. § 45-5-304(C) (2021).

269. *See supra* Part II.A.

on behalf of a public body has a private right of action.<sup>270</sup> Thus, under the Civil Rights Act people with I/DD who are unconstitutionally subject to guardianship potentially have a basis to sue a state agency for deprivation of their due process and equal protection rights. The use of a private right of action in these cases may provide opportunities for state courts to define the right to the least restrictive form of intervention and could provide a remedy for people who have been unconstitutionally restricted by guardianships.

Prior to the enactment of the New Mexico Civil Rights Act in the summer of 2021, there was a “lack of a means to assert state constitutional rights.”<sup>271</sup> The only available mechanisms for enforcing a state constitutional right were to seek injunctive relief or file a suit for declaratory judgment—two forms of equitable proceedings allowing a plaintiff to secure non-monetary relief for the violation of a right.<sup>272</sup> Local practitioners hypothesize that New Mexico courts have not used the state constitution to expand the civil rights of New Mexicans because there was little incentive for attorneys to pursue these cases.<sup>273</sup> Now, with the New Mexico Civil Rights Act, which allows for monetary damages in cases of state constitutional claims,<sup>274</sup> there is a greater incentive for attorneys to bring civil cases challenging state violations of an individual’s constitutional rights and for judges to expand the civil rights of New Mexicans. Thus, it is possible that cases aimed at unconstitutional uses of guardianship could lead state courts to recognize the right to the least restrictive form of intervention and find the state’s guardianship scheme is unconstitutional.

To bring an action under the New Mexico Civil Rights Act, a public body, or a public actor, must have deprived a potential plaintiff of a constitutional right.<sup>275</sup> Any action brought pursuant to the New Mexico Civil Rights Act must be brought against a public body.<sup>276</sup> In most, if not all, guardianship cases, the public actor is the district court judge who imposes an order of guardianship. Judges, however, are immune from monetary liability “for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.”<sup>277</sup> The New Mexico Civil Rights Act does not waive judicial

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270. N.M. STAT. ANN. § 41-4A-3(B) (2021).

271. Linda M. Vanzi, Andrew G. Schultz & Melanie B. Stambaugh, *State Constitutional Litigation in New Mexico: All Shield and No Sword*, 48(2) N.M. L. REV. 302, 306 (2018).

272. *Id.*

273. *Id.* at 302.

274. N.M. STAT. ANN. § 41-4A-3(B) (2021) (“A person who claims to have suffered a deprivation of any rights . . . may maintain an action to establish liability and recover actual damages. . . .”); *id.* § 41-4A-5 (2021) (“In any action brought under the New Mexico Civil Rights Act, the court may, in its discretion, allow a prevailing plaintiff or plaintiffs reasonable attorney fees and costs to be paid by the defendant.”).

275. N.M. STAT. ANN. § 41-4A-3(B) (2021).

276. N.M. STAT. ANN. § 41-4A-3(C) (2021). A “public body” for purposes of the New Mexico Civil Rights Act is a “state or local government, an advisory board, a commission, an agency or an entity created by the constitution of New Mexico or any branch of government that receives public funding. . . .” *Id.* § 41-4A-2 (2021).

277. *Stump v. Sparkman*, 435 U.S. 349, 365 (1978) (quoting *Bradley v. Fisher*, 80 U.S. 335 (1871)) (defining the common law doctrine of judicial immunity).

immunity;<sup>278</sup> therefore, an individual unconstitutionally deprived of their rights through a judicially imposed guardianship would not be able to use the New Mexico Civil Rights Act to challenge the guardianship order.

However, a constitutional challenge could be brought by the “perfect plaintiff.”<sup>279</sup> Petitions for guardianship are initiated by an individual who has an interest in the welfare of the person to be protected.<sup>280</sup> This “interested person” can be a public actor—in New Mexico, the Developmental Disabilities Council’s Office of Guardianship (“OOG”) can act as an interested person and petition the court for appointment of a guardian.<sup>281</sup> If the OOG—a public body—petitioned for the appointment of a guardian on behalf of a protected person, the protected person/plaintiff may have a cause of action under the New Mexico Civil Rights Act because they were deprived of their right to the least restrictive form of intervention and to be free from discrimination on the basis of disability.

Additionally, an individual who is appointed a public guardian may have a cause of action. Typically, courts appoint a family member to serve as a guardian for a person in need of decision-making support.<sup>282</sup> However, if no family member is available or able to take on the responsibility of a guardianship, a professional guardian may be appointed instead. In New Mexico, the OOG is a publicly funded agency that contracts with professional guardians to provide guardianship services for protected persons who do not have individuals in their life who can act as a guardian *and* who are income eligible.<sup>283</sup> Thus, an individual who is appointed a guardian provided by the OOG may have a cause of action under the New Mexico Civil Rights Act for the OOG’s deprivation of the protected person’s rights to the least restrictive form of support and to equal protection due to the appointment of a public guardian.

In specific circumstances, the New Mexico Civil Rights Act could be an avenue for individuals with I/DD to challenge the constitutionality of guardianship, for the right to the least restrictive means of intervention to be recognized, and for plaintiffs to recover monetary damages for unconstitutional uses of guardianship. However, the herculean burden of civil rights litigation would be difficult to take on for many, let alone individuals who have been stripped of their decision-making rights.

## V. CONCLUSION

“The #FreeBritney movement has drawn international attention to the conservatorship of Britney Spears, but though her celebrity is exceptional, her

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278. N.M. STAT. ANN. § 41-4A-10 (2021).

279. See, e.g., Kimberly Strawbridge Robinson, *Supreme Court Lawsuits in Search of a Plaintiff*, BLOOMBERG L. (Apr. 16, 2018, 1:58 P.M.), <https://news.bloomberglaw.com/business-and-practice/supreme-court-lawsuits-in-search-of-a-plaintiff> (“The pursuit for a perfect test case isn’t new . . . Public interest lawyers on both the right and the left often seek out plaintiffs and initiate litigation specifically to change the law. . .”).

280. N.M. STAT. ANN. § 45-5-303(A) (2021).

281. N.M. STAT. ANN. § 28-16B-3 (2021).

282. *Guardians and Conservators*, NEW MEXICO COURTS, <https://adultguardianship.nmcourts.gov/>.

283. N.M. STAT. ANN. § 28-16B-3(B)(1) (2021).

predicament is far from unique.”<sup>284</sup> The number of people confined by a guardianship at any time is unknown; as a result we know there are problems with the institution, but we have no idea the true scope.<sup>285</sup> New Mexico’s use of guardianship infringes on individuals with I/DD’s equal protection rights and right to the least restrictive form of intervention under the New Mexico constitution. Because of New Mexico’s ability to grant greater constitutional protections than those that are available under the United States constitution, guardianship could be challenged and found unconstitutional under the state constitution. As an alternative, the state should implement supported decision-making as the less restrictive alternative to guardianship, requiring that petitioners for decision-making restrictions prove that a more restrictive means is necessary for an individual. Recognition of the autonomy of people with I/DD and their ability to make informed decisions is the only way New Mexico can honor the due process and equal protection rights of these individuals.

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284. Katie J.M. Baker & Heidi Blake, “*My Human Rights are Being Violated*”: *Fighting a Family Conservatorship*, BUZZFEED NEWS, (Sep. 20, 2021, 10:09 A.M.) <https://www.buzzfeednews.com/article/katiejmbaker/family-guardianship-conservatorship-disabilities?bfsource=relatedmanual>.

285. *Godfrey*, *supra* note 3, at 84.