S.133 rebuttal presentation and recommended changes to the wording of the bill by David Searles, January 25, 2022

To Senator Sears and the Vermont Senate Judiciary Committee

Good morning.

I have proposed a re-wording the bill to address concerns that were raised. But first I think it's necessary to address an opinion stated by one of the witnesses that involuntary guardianship in Vermont is not in violation of the Americans with Disabilities Act.

Remember I told you that I could not understand the ADA deficiencies of involuntary guardianship until I understood voluntary guardianship?

Here is an example: Back in the day, before power steering, power brakes and automatic transmissions, the occupation of driving a truck was pretty much limited to men with the required brawn. Now because of these developments, that occupation is available to a much wider range of people. But it didn't only take advances in technology to allow the broadening of the base, it took a significant change in attitudes as well.

Voluntary guardianship is a tool just as real as power brakes, steering and automatic transmissions are, however, for society to take full advantage of it, it <u>also</u> takes a significant change in attitudes.

Everyone at least knows of someone undergoing treatment for some serious medical problem. In order to allow those individuals to be able to maintain some degree of control over their lives, the law provides for the simple creation of an advance health care directive. A little-known aspect of that law is that the probate court has jurisdiction over any legal controversies which may arise under such directives, even with the probate court having the express authority to issue declaratory judgements concerning them. So, in practically every regard an advance health care directive is a voluntary guardianship. A patient creating one is not declared mentally

incompetent and can revoke it at will. The person the patient designates as health care proxy is in all regards the patient's guardian, with the probate court as the patient's superior guardian, just as in a voluntary guardianship.

The witness who stated the opinion that involuntary guardianship in Vermont did not violate the ADA apparently has simply never undergone the required change in attitude. That witness, an attorney, stated that over the years he had represented various persons for whom involuntary guardianships had been applied for, but he also shared that he had never represented anyone in a voluntary guardianship. That statement was very telling.

I'm going to refer to this provision in the probate guardianship statute several times:

> **... only the least restrictive <u>form</u> of guardianship shall be ordered to the extent required by the individual's actual mental and adaptive limitations**. (14 V.S.A. § 3060)

From a text search, it appears that the statutes of two states have adopted the phrase "least restrictive form of guardianship." While Vermont's wording is straight forward, but it doesn't seem to be very effective. Compare Vermont's wording with Rhode Island's:

> "The legislature finds that adjudicating a person totally incapacitated and in need of a guardian deprives that person of all his or her civil and legal rights and that this deprivation may be unnecessary. The legislature further finds that it is desirable to make available, the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs." (R.I. Chapter 33-15-1 Legislative Intent – Limited Guardianship and Guardianship of Adults)

Going back to the discussion:

Before a court created an involuntary guardianship, if the above Vermont mandate actually meant anything, wouldn't you think that the court would first have to formally determine whether the proposed subject of a guardianship could qualify under the voluntary guardianship standard? (Remember that standard merely requires that the person be able to understand the nature of the guardianship being proposed.)

Vermont judiciary could have written procedures into the rules which would ensure that the courts in every instance abide by that mandate. But for whatever reason the required attitude change seems yet to have made to 111 State Street. So it's no surprise that there is an attorney regularly involved in guardianship litigation in Vermont who has never been involved in a voluntary guardianship case.

But more to the point, regarding adult guardianship, Vermont does have an Americans with Disability Act problem. Let us acknowledge the elephant in the room:

A tale of two systems: title 12 Involuntary guardianship in the probate court, and title 18 involuntary guardianship in the family court for adults having developmental disabilities:

Procedural protections compared:

The family court procedures for establishing an involuntary guardianship of developmentally disabled adults contain <u>none</u> of these protections:

• requirement for a court order to conduct a guardianship evaluation 14 V.S.A. § 3067[a]

• requirement of a showing that the alleged incapacity is caused by disability (as opposed to some other factor such as a treatable medical or emotional condition) 14 V.S.A. § 3061(1)(B)

• requirement that the determination of a person's alleged need for guardianship be based upon evidence of recent behavior 14 V.S.A. § 3061(2 & 3)

• requirement the guardianship evaluation specify the aspects of the person's affairs which s/he is in fact able to self-manage, or would be able to self-manage if s/he were provided appropriate aids and services 14 V.S.A. § 3067(c)(2)(A & B)

(In this last one there is a clear implication in the probate statute that a person does not need a guardian for those aspects of her or his affairs the person can self-manage, or could self-manage, if provided appropriate aids and services.)

There is no specific statement within the family court guardianship statutes that; "only the least restrictive form of guardianship shall be ordered to the extent required by the individual's actual mental and adaptive limitations."

And the most glaring deficiency: there being no provision at all in the family court adult guardianship statutes for voluntary guardianship.

The Office of Public Guardian stated in its fiscal year 2020 report, that the office was guardian of over 700 people with developmental disabilities**. Not one of them in a voluntary guardianship**. However, according to that same report, OPG serves an additional 64 people with developmental disabilities who are not under guardianship, as their social security representative payee. So obviously, there is nothing necessary about having a person with a developmental disability declared incompetent for OPG to provide services to them.

Vermont statute allows for OPG to be an involuntary guardian - however statute does not allow for OPG to provide those exact same services within a voluntary guardianship.

Title 18, Chapter 215 clearly identifies that the involuntary guardianship provisions therein are intended for individuals with developmental disabilities. From the federal rules implementing the Americans with Disabilities Act:

> A public entity (including a state) may not utilize criteria or methods of administration that have the effect of

> subjecting qualified individuals with disabilities to discrimination on the basis of disability.

Our country's sad 58-year experiment with *Plessy v. Ferguson* shows that "separate but equal" never works. If there was ever a legitimate justification as to why there are separate standards and procedures in different courts to establish adult guardianships, in large part segregated by label of disability, it is apparently lost to history. I have put this question to both the DAIL commissioner and OPG director and neither could provide an explanation. So apparently there is no reason why the same procedures shouldn't apply in the same court for all adults regardless of the existence of disability, and regardless of disability type.

So, I think it's safe to say that in fact Vermont does have an Americans with Disabilities Act problem with adult guardianship.

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Break for questions regarding the above.

But going back to the concept of finality:

In general, if as a result of a final decision in a civil case there is an injustice, the party affected may apply under rule 60(b) for the court to revisit the matter. Assuming the affected person makes the application within the rule 60(b) timelines, the opening phrase of the rule would still apply:

> "On motion and upon such terms as are just, the court may relieve a party …"

So, for example, the party opposing reconsideration could make a case that the relief the moving party was asking for, if granted, would significantly harm the opposing party who relied on the validity of the final order to take some action. If, concerning a final determination by the court of the location of a property line the opposing party had built a garage – that

certainly would prejudice the rights of the opposing party concerning the garage, and intervention via rule 60(b) likely would be blocked because such intervention on balance would not be just.

But for instance, a person sits in jail because of an unlawful conviction – perhaps the person can show that the acceptance of a guilty plea was improper, or that the person was denied effective assistance of counsel – our over-arching principle as a society is that the state has no interest in keeping a person in prison as a result of an illegal proceeding. Habeas corpus allows a final order of a criminal court to be revisited even decades later. Finality, while important, when compared to society's need for justice must always be a secondary consideration.

Similarly, on the question of whether the probate court should have not found my daughter to be mentally incompetent, and that it should have created a voluntary guardianship instead of an involuntary one – if there was a person with an adverse interest to my daughter's, that person would have the opportunity to present a case as to how the court altering its prior decision would negatively affect them.

But in fact there is no such party. The real problem is, and I don't think that any of you will find this shocking is that judges are loathe to criticize one another. In my daughter's case, not only did the court not recognize that the bar against my daughter being able to obtain a voluntary guardianship violated the Americans with Disabilities Act (which was a completely understandable error), the court accepted the state's involuntary guardianship of my daughter as conclusive, and the evaluation didn't come anywhere near complying with the statute that specified what was supposed to be in the report.

However well-meaning the court was in its creation of the involuntary guardianship at the time – which we in fact supported – in hindsight it was a negligent decision – in law we don't say judges are negligent – we are polite about it and say was an abuse of discretion. But under the circumstances,

especially, as the family court/probate court debacle indicates – my daughter's case is just the tip of the proverbial iceberg.

Is it any wonder that not one of the institutional witnesses favored passage of the bill?

And no, I am sorry – sealing the record – even if it could put the genie back in the bottle concerning my daughter's reputation – does not address the problem.

As I have stated previously, in practically no other type of case does the court, as in guardianship have an actual fiduciary obligation to the principle, in this case the person under guardianship. It isn't pretend. it isn't window dressing. It is a real obligation. And a real aspect of the fiduciary obligation is that the fiduciary must - not should - the fiduciary must act in manner regarding the principle which enables that person to reasonably trust the fiduciary.

So there are two reputations at stake here, my daughter's and the court's. My daughter is entitled under the Americans with Disabilities Act to not have the state deprive her of her reputation because of disability. But she is just as legally entitled to the good reputation of the court. As a matter of law, she is entitled to be able to reasonably trust the court will in every instance protect her best interests under the guardianship.

Along these lines, since the fiduciary was negligent and damaged the fiduciary estate, the person under guardianship is entitled to have the fiduciary make her whole. This isn't some off the wall concept, if you were to read the 1215 Magna Carter, upon which our bill of rights is founded, you will find the requirement stated for making wards whole after waste of their property by their guardian.

Normally if a fiduciary makes an error that would reasonably cause the principle to not trust the fiduciary, the fiduciary can be replaced. An appointed guardian is also a fiduciary, and if the court has reason to believe that the guardian cannot be

trusted, the court can order the appointed guardian to be replaced. This is a regular thing for the probate court to do. In fact in a relatively recent case Judge Kilgore himself ordered the replacement of an appointed guardian.

Which brings us to the dilemma, since by law the court itself is the superior guardian, not looking at the individual judge, but at the court itself - what do we do if the court does something that causes the person under guardianship not to be able to reasonably have trust that it will always protect his or her best interests?

I submit to you, in that instance, the fiduciary court must have the authority to reopen the matter to see if there is any alteration of its prior orders that can be made that can restore that trust. That is all we ask in this bill.

The court should have the authority to upon motion reopen the case and upon such terms as are just, to issue findings and conclusions as the validity or invalidity of its previous orders, and where necessary, correct them.

Proposed changes to the wording of the bill:

But the points raised regarding the present wording of the bill were well made.

I can see how that wording might give the impression that a significant change was being proposed to the established role of the probate court. So instead of its current wording, the bill ought to closely tack the wording of rule 60 and rule 60.1.

This is how I would suggest that the bill should be:

(The underlined text is directly from the present court rules)

a. In addition to the provisions of Probate Rule 60<u>: on motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding</u> in a guardianship

proceeding which has been terminated under this chapter to address or prevent manifest injustice.

Note: the phrase "prevent manifest injustice" is from rule 59 of the federal rules of civil procedure. It is a legal standard that is not unfamiliar to the courts. The term was quoted in regard to that federal rule over 24 times in the last two years in decisions from just the Vermont federal district court and the 2nd U.S. circuit court of appeals.

b. In addition to the provisions of Probate Rule 60.1: on motion of a party, or a person claiming an interest in the proceeding, or on its own initiative, the court may order that a proceeding be reopened for purposes of modifying or enforcing a decree or for other action of the court. The issuance of an order granting relief pursuant to subdivision "a" of this section shall be additional grounds for granting a motion under this subdivision.

c. As used in this section, "manifest injustice" includes any circumstance in which the court issued a guardianship order in violation of a right, under state or federal law, of the person for whom the guardianship was created.

Note: The wording of subsection c was changed to emphasis that mere procedural errors would not be considered a manifest injustice, but that denial of actual rights under state and federal law would be.

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This concludes my prepared remarks. If there are any questions, I will be happy to answer them.

Thank you very much for your time, and your patience.

David Searles