LEGAL AID CENTER of Southern Nevada
Since 1958

Written Comments to AB461 (BDR 13-156)

Submitted to: Senate Health and Human Services Committee via senhhs@sen.state.nv.us

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Legal Aid Center of Southern Nevada, Inc. appreciates the opportunity to provide comments to Assembly Bill 461. Legal Aid Center commends the sponsors of this bill and their intent to homogenize health care directives and promote patient autonomy amongst the different States. Legal Aid Center further commends the sponsors' willingness to work with stakeholders to address their concerns. However, Legal Aid Center must respectfully oppose AB461 in its current form.

AB461 poses serious concerns and far reaching consequences for our clients who face, the prospect of guardianship, who are in guardianship or who are hoping to avoid guardianship. The bill further offers no liability to hospitals and other medical providers who might ignore lawfully executed Powers of Attorneys or ignore the directive of a named agent in a Power of Attorney, in favor of a default surrogate, all for expediency's sake. While not inclusive, Legal Aid Center's concerns are outlined as follows:

I. Definition of Capacity

Legal Aid Center works hard, together with our community partners, to educate the community about executing Powers of Attorney and other documents as a way to avoid guardianship. We believe the definition of capacity described in Section 28 would make it extremely difficult, if not impossible, for practitioners to determine if an individual has the capacity to execute a Power of Attorney or Supported Decision Making Agreement or other supportive mechanism. It would preclude many citizens from executing Powers of Attorney or other supportive mechanisms and lead to more unnecessary guardianships. Nevada has been on the frontlines in recognizing that individuals diagnosed with dementia or intellectual disability nonetheless may have capacity to execute Powers of Attorney (NRS 162A.865 and NRS 162A.870). This bill would eviscerate the Legislature's commendable work in that regard with this new definition of capacity.

II. Definition of reasonably Available

The definition of what it means to be "reasonably available" with regard to a named agent under a Power of Attorney or guardian (Section 21), is vague and highly subjective. Legal Aid Center has represented numerous individuals who have lawfully executed a Healthcare Power of Attorney only to have their named agent's directives ignored or have the hospital make little to no attempt to contact them prior to filing a petition for guardianship. This bill would provide additional opportunities for hospitals and other medical providers to ignore the wishes of the patient who had the forethought and took the initiative to execute a POA and name a Healthcare

agent they trust AND then provides immunity when the hospitals take advantage of those opportunities resulting in negative outcomes.

III. Potential for court action.

AB461 provides for the potential for additional and unnecessary litigation when a health care professional has deemed a patient lacks capacity. Section 31 sets up a legal framework but fails to explain how it would work. If the individual objects to the health care professional's determination that they lack capacity, the individual, and other named persons, may petition the district court to determine whether the individual lacks capacity. Section 31 states that the district court "shall" appoint legal counsel for the proceedings if the individual does not have legal counsel, but offers no information on where that legal counsel would come from, who pays for counsel, or whether the legal counsel would be acting as a guardian ad litem or an advocate for the individual. Section 31 also fails to state which court the individual would file in – probate court, guardianship court, civil court – and what jurisdictional authority that court would have should there be a finding the person lacks capacity.

IV. Default Surrogate

AB461 provides, primarily through the definition of "reasonably available", for the expansion of the concept of a default surrogate. Currently, NRS 449A.551 provides for the appointment of a default surrogate by a healthcare professional when a patient has no named agent or guardian and the decision must be made as to whether to administer or withdraw life-sustaining treatment. AB461 would allow a default surrogate to be named for ANY health care decision, including a decision for placement to a lower level of care. This is a dangerous and concerning expansion of a default surrogate's authority and seriously undermines an individual's right to have the agent of their choice make medical decisions for them.

V. Repeal of other Supportive Mechanisms

AB461 seeks to repeal Powers of Attorney for individuals diagnosed with dementia or intellectual disability (Section 82). Currently Nevada's statutes mandate counsel be provided to adults facing guardianship, provides a Bill of Rights outlining the rights a person in guardianship retains (NRS 159), and provides authority for use of Supported Decision Making Agreements, Healthcare Powers of Attorney for individuals with dementia, and Healthcare Powers of Attorney for individuals with intellectual disabilities. Nevada's legislation, with regard to the rights of adults with cognitive deficits, is at the forefront in recognizing the rights of adults with disabilities and acknowledging that individuals with cognitive disabilities still retain decisional capabilities. This bill would eviscerate the commendable work that Nevada has done in this regard. It would be nothing short of tragic to repeal NRS 162A.865 (intellectual disability) and NRS 162A.870 (dementia). Legal Aid Center's clients with cognitive deficits would not be able to avoid guardianship without these supportive measures. Guardianship can put a strain on judicial resources and it can strain familial relationship, often burdening the family member who is the

appointed guardian. Furthermore, it removes a less restrictive alternative to guardianship and would make guardianship the default option rather than the last resort option.

For these, and other reasons, Legal Aid Center of Southern Nevada opposes AB461.

Sincerely,

/s/Debra A. Bookout

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