Public Comment for AB 461

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My name is Dana Sisk and I am the Adult Guardianship Supervising Attorney at Northern Nevada Legal Aid, where we represent the majority of Protected Persons under Guardianship in Northern Nevada. It is in that capacity and a member of the Nevada Coalition of Legal Service Providers that I bring this concern today, but I am also a member of the Nevada Guardianship Commission, which is opposed to this bill in its current form.

While we appreciate the efforts involved, respectfully, we cannot support this bill. It conflicts with our Nevada Guardianship statutes, accepted practice in Nevada, as well as rights of those most vulnerable in our community, facing Guardianships. If implemented, it would require many more legal Guardianships and court resources in our state. Guardianships are the last legal resort when no other lesser restrictive alternatives exist, because of the extreme burden it places on someone's constitutional rights.

I know that my colleagues will be addressing various parts of this bill in comments including the ability of third parties to override Power of Attorneys (POAs) and court appointed guardians without court approval, which should not be supported, however, I wanted to focus on something that we as attorneys for those facing Guardianship deal with every single day- which is the very basic determination of capacity.

Capacity is clearly defined in Nevada in NRS 159.019 and any new legislation should mirror this definition. A person is incapacitated if, he or she, for reasons other than being a minor, is unable to receive or evaluate information or make or communicate decisions to such an extent that the person lacks the ability to meet essential requirements for physical health, safety or self-care without appropriate support.

This bill attempts to define a new and more extreme definition of capacity which creates a higher bar and barrier to an individual to direct who makes decisions for them when that need arises. It requires someone to be "willing and able" to understand the nature, consequences, risks and benefits of 1) health care decisions, 2) health care instructions, AND 3) appointment of an agent in order to nominate an agent for health care decisions. This is an extremely high and impractical bar. Most citizens who are not medically trained as physicians do not understand all of the nature, consequences, or risks and benefits of any given medical decision, nor are they expected to. This definition limits the ability of many individuals to create less-restrictive alternatives because we are going to be holding those who may be suffering from slightly diminished capacity but still understand the general type of support that they need to a standard that the average person may not be able to meet.

It is a direct conflict to our Guardianship statues and the Nevada Guardianship Commission directives which seek to maximize the independence of Nevadans by ensuring that lesser restrictive alternatives are used whenever possible. We see individuals who are able indicate that they wish for a parent, spouse, or friend to make decisions for them, but they would not be able to understand what a certain medical procedure would entail, the risks, or the benefits involved. With this definition of capacity to

execute a POA, many individuals would be prohibited from executing POAs and be required to come to court to face Guardianship, when it otherwise could be avoided.

There is also a section which repeals existing statutory authority for people with dementia or intellectual disabilities from obtaining POAs. Our Guardianship statues require that we always consider less restrictive alternatives to Guardianship because it is such an imposition on a person's constitutional rights. As attorneys that represent those with limited capacity, we regularly use POA for those with dementia and intellectual disabilities as a lesser restrictive alternative to Guardianship. Not everyone with less than average capacity needs a court ordered Guardian. We have an interest as a society in maximizing the independence of individuals with disabilities. We empower every individual to live as independently as possible and make as many decisions as they are able. We should not be going back to an antiquated model where even a small insult to capacity means that any right to make or direct decision making is eliminated and must be decided by a court.

Our Nevada Guardianship statutes in NRS 159 and the Protected Person's Bill of Rights developed by the Nevada Guardianship Commission enable independence and support lesser restrictive alternatives whenever possible. If a person is able to nominate an individual whom they trust and can indicate the types of decisions that they would like that individual to make for them, then that's the support that that that individual needs, not a complete removal of their right to choose the person they trust to act for them. The removal of this statutory right is such an unnecessary use of court resources and invasion on a person's right to chose who makes decisions for them.

Finally, I understand that many of my colleagues will be addressing this, but, among many other sections, we cannot support language such as in section 46 (2) that "a health care decision made by certain agents prevails over the decision of the guardian appointed for the individual, unless otherwise ordered by a court." A legal guardian is literally ordered by the Court to make decisions for the benefit of the Protected Person and should have final authority. This language will create confusion and prolonged legal battles where there need not be any and likely even cause a delay in medical care provided to those that need it.

We do urge you as advocates of every Protected Person in Northern Nevada, to oppose or greatly amend this bill so that it supports the independence of all people in Nevada, especially those who are most vulnerable. Thank you for your careful consideration for the rights and freedoms of Nevadans.