

Senate Judiciary Committee

Sonja Caldwell 271-2117

HB 540, relative to supported decision-making as an alternative to guardianship.

Hearing Date: April 14, 2021

Time Opened: 2:51 p.m.

Time Closed: 3:29 p.m.

Members of the Committee Present: Senators Carson, Gannon, French and Whitley

Members of the Committee Absent : Senator Kahn

Bill Analysis: This bill establishes supported decision making as an alternative to guardianship.

Sponsors:

Rep. Chase

Rep. Langley

Rep. Marsh

Rep. Weber

Rep. Cannon

Rep. Gordon

Rep. M. Pearson

Rep. Berch

Sen. Whitley

Rep. McMahon

Sen. Rosenwald

Who supports the bill: 65 people signed up in support of the bill. Full sign in sheet available upon request.

Who opposes the bill: No one

Who is neutral on the bill: No one

Summary of testimony presented in support:

Rep Wendy Chase

- This bill creates an alternative to guardianship for adults with disabilities and families who wish to establish a way to provide support without taking away self-determination.
- Few options currently exist for families to provide support to loved ones with a disability. This often comes up when one turns 18 and families want to continue supportive roles.
- Right now, there are no meaningful, recognized alternatives to guardianship which removes decision making power from the person and gives it to the guardian. Powers of attorney can also be used for financial or healthcare decisions, but this typically involves the full takeover of decisions for someone and are often only available when someone becomes completely unable to make a decision for themselves.
- This bill would create a legally recognized alternative so people in a range of circumstances can get support they need without the court removing their freedom of choice when it is unnecessary to meet their needs.

- People with disabilities often need help with finances or complex information or health decisions. This bill would make that support available for adults with disabilities.
- The bill would not disturb the ability of guardianship for those who need it. The standards for creating guardianship will remain same.
- She became guardian of her daughter at age 27 until she passed away on her 34th birthday. Her daughter became disabled by cancer at age 3. Treatments left her reasoning and emotional levels immature. She sought guardianship after many trips to the emergency room where she could not be in the room or help make decisions for medical care. She had to explain to a judge why her daughter could not make decisions while she listened to that. If supported decision-making had been a choice at that time instead of guardianship it would have made a huge difference in her daughter's life and in her relationship with her daughter.
- Rep. Lucy Webber supports the bill but could not be here today.

Rep. William Marsh

- He supports the bill and has personal experience.
- His younger sister had stroke in her 30s. She was legally competent but had issues.
- His parents left her a trust to provide for her. It was being mismanaged. He was able to guide her through managing her affairs.
- Consequently, he is supportive of guided decision-making as a less expensive alternative to guardianship.

Sen. French asked if this must be codified in law or if it can be done with a contract.

Rep. Marsh said that in his case they were able to do it without law or contracts, but he cannot answer that.

Rep. Rebecca McBeath

- She is a NH attorney for guardianships.
- Supported decision-making is an additional tool for the citizens of NH. She strongly supports our guardian statutes and thinks they are well written, but this would allow people not to go through guardianship process.
- During the pandemic she had an auditorily impaired client who could not talk on the phone or meet with agencies to get benefits and their needs met. This required a guardianship during the pandemic to have someone else talk and share their information. The reason they needed a guardianship was because agencies would not accept a contract, or anything written by hand. Codifying this brings it up to the notch where state and federal agencies can rely on it.

Michael Skibbie – Disability Rights Center

- He supports the bill. It is the result of a collaborative effort over last the year working with input from lawyers and national experts and other organizations. Supported decision-making (SDM) has received attention nationally in recent years and in the last five years, ten states have adopted SDM statutes. The National Bar Association and National Guardianship Association have supported its use.
- To appreciate value of the bill, it is important to understand guardianship, which is the complete removal of decision-making ability through the court. It can be tailored to certain areas such as finance or housing. Those decisions would no longer be made by the individual with the disability but by the guardian. When broadly imposed, it is similar to the complete

responsibility and authority parents have over a child. It is an important option for those who truly need that level of intervention.

- This bill creates a legally recognized alternative for people that might only need support and advice when making important decisions not removal of their freedom to make their own decision.
- This bill recognizes that many of us can retain our freedom of choice as long as we have the advice and support we need to make those choices. Decision-making is a learned skill. People who maintain self-determination are more independent, healthier, and better able to recognize and resist abuse. They also tend to be more integrated in their communities.
- Sections 2 and 3 of the bill make minor changes to the guardianship statute to identify the availability of SDM as one of the things a court can consider in determining if guardianship is the only way to support and protect a person with disabilities and as the basis for determining if a guardianship is no longer needed.
- Section 4 deals with the transition of a special education student. This is an area of current responsibility of special educators to help prepare a child with a disability for adult life. Sometimes this includes discussions of whether guardianship should be pursued once a child turns 18. Families often pursue guardianship because they do not know of alternative ways to remain involved in their child's life into early adulthood. Once guardianship is in place, it is unlikely to be undone. This bill would require special educators to include information about the SDM alternative if they have discussions with a family about pursuing guardianship. The bill directs the Dept. of Education to prepare materials to be used in such discussions.
- The remainder of the bill sets up the new chapter establishing SDM as a formal alternative to guardianship. NH uses guardianship more than the average state. The national rate is 56% and the rate in NH is 76%. This is a strong indicator that we may have people under guardianship today that could be successful under alternatives.
- The availability of this being in a statute and including this recommended form agreement makes it more likely that it will become known to families as an alternative. Another aspect is, to the extent there is a question on the part of a health care provider or financial advisor, that they will be more likely to accept it as an alternative.

Sen. French said he does not see anywhere in the contract where it authorizes anyone to communicate with the supporter.

Mr. Skibbie said that on the bottom of page 7, line 35, it says that a supporter can assist in the gathering of information, including healthcare information with a HIPAA release. The intent is not to require someone to communicate with anyone.

Sen. French said the reason for doing this is so a supporter could make calls for an individual and get information from banks or doctors but this does not allow anyone to talk to the supporter. When he has tried to help people before he has had to get notarized letters allowing people to talk to him on behalf of someone else.

Mr. Skibbie said you would need to use otherwise recognized releases of information. Simply being a supporter does not give you open access to private information because the principal is still in charge.

Sen. French asked if you still need a release, why this bill is needed.

Mr. Skibbie said the entire law identifies responsibilities of supporters; it disqualifies certain people from being supporters who may have acted inappropriately. It identifies for third parties that this is a legally recognized arrangement.

Sen. Carson noted that in the section of the contract concerning supporters, a person can decide what they want a supporter to do by checking things. She asked if this is where someone can designate another person to gather information and give them permission.

Mr. Skibbie said that is intended to be used if there was a subject area that was not listed above. It is not an area to give a release of information.

Christine Parshall

- She is the parent of a young adult with autism. When she was 18 and they went through the transition process with the school district, they considered guardianship but decided it was not appropriate; it seemed intimidating and excessive for their needs.
- Recently, they reconsidered, particularly because of healthcare. Then she learned about this bill. SDM would be a more appropriate tool for her family. There are times when the lack of guardianship slows down her attempts to work on her daughter's behalf.
- Having something in place like SDM would expedite that process and break down barriers without full guardianship. She does not want to take decision making rights away from her daughter; she thinks she is capable.

Judith Jones

- She is an attorney in NH of elder and disability law.
- She has brought guardianships on behalf of families but also represented proposed wards.
- This would give us a legally recognized mechanism for personal decision-making. In many cases, parents are concerned about the stigma of a court order determining an adult child is incapacitated. The process can be traumatizing.
- The other benefit of SDM is some guardianships were necessary at time they were sought but this could be a good tool for terminating guardianships. Over the years, one client took life skill courses that advanced her decision-making capabilities.
- Another client was very educated but unable to communicate and has a complex medical condition. SDM would give the authority to the parent in this case to serve in the role of supporter to assist with communication.
- In serving as a caregiver for her mother, when powers of attorney were not activated, she served in the role of a supporter, however, providers were looking to her for decision making even though mother had capacity. SDM would emphasize for providers that the supporter is not the decision maker; it is the patient.
- This is based on core NH values and the fundamental right of individuals to make choices.

Lisa Beaudoin – ABLE NH

- Their members support the bill.
- RSA171A established NH's community-based system of supports and services for people with developmental disabilities. A key element is the ability to be self-determining. SDM is an important alternative to guardianship, which advances the development of skills for self-determination
- NH closed its state institution 30 years ago, in an effort to advance the civil and human rights of individuals with disabilities, and to make real, the opportunity for these folks to access the American Dream. SDM is yet another tool in the quest to fully include disabled Americans in the dream.
- SDM is a process that facilitates people to become more integrated in community. This model increases protection against abuse and exploitation.

- This model empowers those with disabilities and the aging to remain at the center of decision-making processes in their lives. Maximizing choice and control increases positive health outcomes, happiness, and safety.
- SDM is normal. Most of us use informal supports in seeking advice from friends. This is an important structure for people with disabilities to have what is typical. The ADA talks about modifications and having this legal structure is like a modification on what is normal with supported decision-making. This bill enhances dignity for people with disabilities.

Cheryl Steinberg – Attorney NH Legal Assistance.

- She supports the bill and agrees with previous testimony about why this is a good bill.
- She speaks with many older people with some diminished capacity. Capacity is not an all or nothing thing; there is a range.
- This tool is a good alternative to guardianship, as taking away someone's independence is significant.

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Date Hearing Report completed: April 15, 2021