# Love, Marriage, & Neurodiversity: Using Neuroscience to Equalize Marriage Rights for People with Intellectual & Developmental Disabilities Under Guardianship Arrangements

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*ABSTRACT: People with intellectual and developmental disabilities ("IDD") are subjected to strict control through guardianship arrangements. While guardianships are meant to protect people with IDD, they often strip people of self-determination and freedom. In recent years, neuroscience and the neurodiversity movement have redefined our understandings of decision-making capacity, but the law has failed to adopt these advances to the detriment of the disabled. This failure to allow choice and liberty is particularly clear when people with IDD wish to get married or engage in romantic or sexual relationships. This denial of true marriage equality and choice for people with IDD is devoid of scientific understanding and fundamentally discriminatory. States can rectify their antiquated guardianship laws by adopting a supported-decision-making ("SDM") model that provides assistance in decision-making when needed for romantic relationships and marriage decisions, while continuing to maintain the choice, liberty, and dignity of a person with IDD.*

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## INTRODUCTION

For the last thirteen years, Britney Spears has had a protracted battle for the right to make her own personal and financial choices.[1] Her struggle to regain power over her own decision-making gained momentum in 2021, turning into a worldwide movement (#FreeBritney) that thrust the American overuse of conservator and guardianship arrangements[2] into the public eye.[3] People across America have been surprised and aghast at the treatment of a famous popstar by her own family members. Britney was allegedly blocked from setting her own work schedule, driving her own car, making medical decisions, retaining her own lawyer, and she was even prevented from filing

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[1] Jon Blistein, *Britney Spears' Conservatorship: What's Going on and What's Next?*, ROLLING STONE (Nov. 12, 2021), https://www.rollingstone.com/music/music-news/britney-spears-conservatorship-timeline-1193156 [https://perma.cc/2G4C-U7CM].

[2] See *infra* Section I.C for an explanation of the differences between guardianships and conservatorships.

[3] Blistein, *supra* note 1; Jeevan Ravindran, *'You Guys Saved My Life,' Britney Spears Tells #FreeBritney Movement*, CNN (Nov. 17, 2021, 9:53 PM), https://www.cnn.com/2021/11/17/entertainment/britney-spears-conservatorship-freebritney-instagram-scli-intl/index.html [https://perma.cc/6LJH-64G3].

complaints about emotional abuse by her family members.[4] Britney's conservatorship finally ended in November 2021, but questions about the unethical level of control the conservatorship placed on the popstar remain.[5]

Perhaps the most salient issue the Britney Spears case has brought to the public's attention is the removal of her personal freedom to get married and have children.[6] Court testimony revealed that Britney's father and conservator—Jamie Spears—had forced her to keep an unwanted IUD and strictly monitored all of her romantic relationships since the creation of the conservatorship in 2008.[7] Under the law, Britney's father could prevent her from signing and filing a marriage certificate. The reality of Britney Spears's situation is that it is not rare.[8] Millions of people each year are subjected to guardianship arrangements that are unwanted, unduly strict, and rife with abuse and coercion.[9] These guardianships are particularly prevalent for people with intellectual and developmental disabilities ("IDD")—where the default assumption is that a disability diagnosis necessitates the strictest forms of a guardianship arrangement. What was seen as a cruel aberration in the case of Britney Spears is unfortunately a part of the daily lives of people with IDD.

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4. Ronan Farrow & Jia Tolentino, *Britney Spears's Conservatorship Nightmare*, NEW YORKER (July 3, 2021), https://www.newyorker.com/news/american-chronicles/britney-spears-conservatorship-nightmare [https://perma.cc/CR23-7858]; *see also* Erica Schwiegershausen, *I Know What It's Like to Have Your Sanity Questioned*, THE CUT (June 25, 2021), https://www.thecut.com/2021/06/what-britney-spearss-testimony-says-about-mental-illness.html [https://perma.cc/82N3-X7LG] ("Britney recalled being medicated against her will and coerced into entering a mental-health facility. She said that she isn't able to see her friends or ride in her boyfriend's car . . . . In her testimony, she called the conservatorship 'abusive' and repeated multiple times that she wants to end it. 'I don't feel like I can live a full life,' she said.").

5. Anastasia Tsioulcas, *Britney Spears' Conservatorship Has Finally Ended*, NPR (Nov. 12, 2021, 5:16 PM), https://www.npr.org/2021/11/12/1054860726/britney-spears-conservatorship-ended [https://perma.cc/FA7F-DLUA].

6. Elizabeth Wagmeister, *Britney Spears Is Engaged, but Can Her Conservatorship Prevent Her from Getting Married?*, VARIETY (Sep. 14, 2021, 8:10 AM), https://variety.com/2021/music/news/britney-spears-engaged-conservatorship-marriage-restrictions-prenup-1235063670 [https://perma.cc/VYT5-SZAA].

7. *See* Schwiegershausen, *supra* note 4 ("[Britney] wants to get married and have a baby but hasn't been allowed to have her IUD removed (seemingly violating a basic human right)."); Farrow & Tolentino, *supra* note 4.

8. Heidi Blake & Katie J.M. Baker, *Beyond Britney: Abuse, Exploitation, and Death Inside America's Guardianship Industry*, BUZZFEED NEWS (Sept. 17, 2021, 5:02 PM), https://www.buzzfeednews.com/article/heidiblake/conservatorship-investigation-free-britney-spears [https://perma.cc/HF9E-VKP4]; *see also* Schwiegershausen, *supra* note 4 ("My heart breaks for Britney, who has had the people closest to her questioning her capacity for over a decade. The reaction to her testimony has been shock, but in some ways, it's not so surprising given the frequency with which the mentally ill are deemed 'incompetent' . . . .").

9. Blake & Baker, *supra* note 8 ("BuzzFeed News identified 20 cases in which young or middle-aged people died under questionable circumstances, including murder, severe neglect, or malnourishment. A 31-year-old man was abused by care home staff and buried in concrete for months before his guardian realized he was missing. No charges were brought against her and she is still in charge of 130 people.").

People with IDD under guardianship arrangements face two levels of difficulty in love and marriage. The first is the incorrect assumption that disabled people do not aspire to marry and are incapable of feeling love or sexual attraction.[10] The second is the default assumption that guardianships protect people with IDD from their inability to make rational decisions or choices about their own lives because they lack decisional capacity.[11] Both of these assumptions are scientifically incorrect, discriminatory, and continue a pattern of isolation for people with disabilities. Advances in neuroscience have shown that current legal understandings of capacity for decision-making are flawed and incomplete.[12] Decision-making is not a static skill, and the human brain is not an unchanging computer.[13] People with IDD can have the same decisional making capabilities as the non-disabled when provided support and room to make informed decisions and mistakes.[14]

The impetus for guardianship is to protect individuals who lack decisional capacity. This protectionist scheme effectively bars aspirations of love and marriage for people with IDD, who are often under guardianship arrangement. However, neuroscience has revealed that this high level of protectionism in the law is unwarranted. To equalize marriage rights for people with IDD and align the law with scientific knowledge of decisional capacity, the guardianship system must give way to more equitable alternatives. This Note examines the recent advances in neuroscience and neurodiversity as they relate to decisional capacity. Specifically, it analyzes the abilities of people with IDD to enter romantic and marital relationships through an alternative to guardianship arrangement called supported decision-making. Ultimately, this Note argues that strict plenary guardianships must give way to less strict alternatives in order to promote well-being, self-determination, and provide people with IDD the emotionally fulfilling life to which every human being is entitled.

Part I analyzes the current advances in neuroscience and neurodiversity and their applications to current concepts of guardianship. It also provides historical legal background on the use of guardianships and other forms of isolation to control disabled sexuality. Part II summarizes the current civil rights framework for disabled marriage equality and the incorrect assumptions that state laws and judges make about IDD and decision-making capacity. Part II also analyzes how guardianships are used to overregulate the marriage decisions of people with IDD, resulting in poor psychological outcomes and further disability discrimination. Part III proposes a solution to the guardianship

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[10] MICHAEL L. PERLIN & ALISON J. LYNCH, SEXUALITY, DISABILITY, AND THE LAW 7, 9 (1st ed. 2016).

[11] Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1154 (2014).

[12] Niklas Altermark, *The Ideology of Neuroscience and Intellectual Disability: Reconstituting the 'Disordered' Brain*, 29 DISABILITY & SOC'Y 1460, 1461 (2014).

[13] *Id.* at 1464.

[14] *Id.* at 1466.

problem and the overregulation of marriage decisions: the Supported Decision-Making Model ("SDM"). SDM properly aligns assistance in decision-making with self-determination and freedom of choice for people with IDD. This Note argues that states should change the default guardianship model for support and guidance to an SDM process, with options for stricter formal guardianships only where absolutely necessary. To better reflect new scientific understandings of the ever-evolving human brain and preserve the liberty and dignity of people with IDD, plenary guardianships must be reexamined.

## I. NEUROSCIENCE, NEURODIVERSITY, AND MARRIAGE UNDER GUARDIANSHIP ARRANGEMENTS

The modern concept of neuroscience—that scientists can use brain and neuronal structures to explain human behavior—was first used in the legal context in criminal law.[15] The use of neuroscience in the courtroom largely began with the presentation of brain experts to testify about a defendant's brain abnormality or damage as an explanation for their criminal behavior.[16] The lion's share of neuroscience has continued in criminal proceedings, but with new applications in civil law emerging.

### *A. NEUROSCIENCE IN THE LAW*

Law and neuroscience are a natural pairing; the two disciplines "[b]oth look at man, at his behaviour, and it is inevitable that they end up meeting and crossing over each other."[17] Neuroscience at its core studies how the human brain and neuronal connections cause behavior.[18] Law then applies neuroscience to attempt to explain individual instances of behavior.[19] Neuroscience has helped fill in the gap between our thoughts and our actions,

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[15] The idea that damage to brain structure could cause personality changes was first studied in the case of Phineas Gage, a man whose entire personality changed after surviving a work accident where a railroad spike went through his head. Lawyers extrapolated from the Gage case that the structural change argument could translate to their own criminal clients in claiming temporary insanity due to brain damage. KEVIN DAVIS, THE BRAIN DEFENSE 17–19 (2017); Giacomo Rizzolatti, *Foreword* to NEUROSCIENCE AND LAW: COMPLICATED CROSSINGS AND NEW PERSPECTIVES, at vii, viii (Antonio D'Aloia & Maria Chiara Errigo eds., 2020).

[16] *See, e.g.*, DAVIS, *supra* note 15, at 17.

[17] Antonio D'Aloia, *Law Challenged. Reasoning About Neuroscience and Law*, *in* NEUROSCIENCE AND LAW: COMPLICATED CROSSINGS AND NEW PERSPECTIVES 1, 4 (Antonio D'Aloia & Maria Chiara Errigo eds., 2020). The melding of neuroscience and law has even led to a new legal field called NeuroLaw. *See generally* NEUROLAW: AN INTRODUCTION (Eugenio Picozza ed., 2016) (exploring the applications of neurolaw past, present, and future).

[18] Oliver R. Goodenough & Micaela Tucker, *Why Neuroscience Matters for Law*, *in* NEUROSCIENCE AND LAW: COMPLICATED CROSSINGS AND NEW PERSPECTIVES 51, 51–52 (Antonio D'Aloia & Maria Chiara Errigo eds., 2020).

[19] *Id.* at 55 ("Law is a scavenger. It grows by feeding on ideas from outside, not by inventing new ones of its own." (quoting E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 38 (1985))).

and law has capitalized on the usefulness of this gap-filling function.[20] Scholars believe that the use of neuroscience in law can help paint a more accurate picture of the reasons behind human actions and move the law closer to capturing reality.[21]

However, law uses neuroscience only in rare instances and is slow to adopt new developments in the field.[22] The lag is often due to the necessity for legal stability and the ever-changing nature of scientific exploration.[23] Lawyers present brain scans in court to create doubt for a defendant's culpability, but brain scans are only a snapshot of a brain, not definitive proof of legally meaningful dysfunction and are open to multiple interpretations.[24] Law distills what is useful in legal practice, but often sacrifices scientific accuracy to do so.[25] Judges are generally hostile to neuroimaging due to a lack of technical expertise and the potential misuse of the technique due to their lack of expertise.[26] The use of neuroscience to explain single instances of human behavior through brain imaging likely will not accelerate the evolution of neuroscience in legal practice.[27]

Accurate application of neuroscience and the law should derive from the design of new scientifically competent laws and procedures, not from individual brain scans or brain mapping.[28] By using neuroscience to inform law and shape policy, lawyers and legislators can set standards informed by science; standards that will inevitably have an impact on individual cases.[29] By setting policy in line with neuroscience, lawyers can align accurate neuroscience and

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[20] *Id.* at 56.

[21] Antonio Gusmai, *Neuroscience and the "Mute Law," in* NEUROSCIENCE AND LAW: COMPLICATED CROSSINGS AND NEW PERSPECTIVES 81, 90 (Antonio D'Aloia & Maria Chiara Errigo eds., 2020).

[22] The legal field has largely ignored recent developments in neuroscience, like brain blood flow mapping and diagnostic biomarkers that can help spot early dementia and Alzheimer's disease. *See* Betsy J. Grey, *Aging in the 21st Century: Using Neuroscience to Assess Competency in Guardianships*, 2018 WIS. L. REV. 735, 760–64 (2018). "The law traditionally relies on changes in observed behavior before it acts, so the availability of biomarker evidence, and its ability to look at brain states, has the potential to unsettle all kinds of legal assessments." *Id.* at 766.

[23] Goodenough & Tucker, *supra* note 18, at 55.

[24] Sonia Desmoulin-Canselier, *Another Perspective on "Neurolaw": The Use of Brain Imaging in Civil Litigation Regarding Mental Competence, in* NEUROSCIENCE AND LAW: COMPLICATED CROSSINGS AND NEW PERSPECTIVES 529, 532 (Antonio D'Aloia & Maria Chiara Errigo eds., 2020).

[25] Stephen J. Morse, *Neuroscience and Law: Conceptual and Practice Issues, in* NEUROSCIENCE AND LAW: COMPLICATED CROSSINGS AND NEW PERSPECTIVES 415, 419 (Antonio D'Aloia & Maria Chiara Errigo eds., 2020).

[26] DAVIS, *supra* note 15, at 281 ("'The attitude of judges towards neuroscience is one of ambivalence and skepticism,' [Judge Jed Rakoff] says." ); *see also* Desmoulin-Canselier, *supra* note 24, at 537–39 (describing judges' reluctance to uniformly credit developing neurological testing methods).

[27] Desmoulin-Canselier, *supra* note 24, at 539 ("[A] brain scan or MRI alone is not sufficient evidence to justify a legal determination of incompetence.").

[28] Goodenough & Tucker, *supra* note 18, at 58 ("At a high level, we can use neuroscience to inform our policy considerations as we *design the content of law.*").

[29] *Id.*

law without asking judges to become experts on complex science.[30] This Note does not advocate for the use of neuroscience in specific cases per se; rather, it advocates for the use of a new area of neuroscience in how we design and apply law to individual cases.

### *B. Neuroscience and IDD: The Neurodiversity Movement*

Modern neuroscience is a constellation of different fields that combine to study the brain and its effect on human actions.[31] As applied to intellectual disability, the main applications of neuroscience happen at the nexus of psychiatry, psychology, and brain mapping. Intellectual and developmental disabilities are traditionally "understood as a condition of the brain, defined by the global classification systems as concurrent deficits in cognitive abilities . . . and adaptive capacities that appear before adulthood."[32] Put simply, IDD is recognized as a disability that starts before a child turns eighteen and is characterized by differences in learning ability (reasoning and problem solving) and adaptive behavior limitations (personal care, money and time concepts, and schedule or routine maintenance).[33] Definitions of IDD are not entirely stable and have changed immensely overtime. Because IDD "is perceived as a diagnosis of brain functioning, any re-conceptualization of the brain is bound to have implications for how the condition is understood."[34]

A reconceptualization of the brain in people with IDD,[35] particularly autism, has occurred in recent years through the neurodiversity movement.

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[30] *Id.*

[31] Altermark, *supra* note 12, at 1461.

[32] *Id.* at 1462. Some definitions of IDD include an IQ threshold. IQ testing has been highly criticized as a measure of actual intelligence in recent years and will not be used for the definition of IDD in this Note. *See generally* Brink Lindsey, *Why People Keep Misunderstanding the 'Connection' Between Race and IQ*, ATLANTIC (May 15, 2013), https://www.theatlantic.com/national/archive/2013/05/why-people-keep-misunderstanding-the-connection-between-race-and-iq/275876 [https://perma.cc/YEX8-JDKN] (explaining that IQ tests cannot distill general mental ability and the design of the tests have failed to account for cognitive, environmental, and social system differences).

[33] IDD can be characterized by nervous system disorders (brain, spine, coordination, seizures, etc.), sensory system disorders (sight, touch, etc.), metabolic issues, and degenerative conditions. *See About Intellectual and Developmental Disabilities (IDDs)*, NAT'L INST. CHILD HEALTH & HUM. DEV. (Nov. 9, 2021), https://www.nichd.nih.gov/health/topics/idds/conditioninfo/default [https://perma.cc/Q2NY-VR67]. IDD is essentially an array of conditions, limitations, and disorders that can range widely from person to person. *Id.* IDD includes autism, down syndrome, cerebral palsy, and Fragile-X syndrome, among others. *Id.*

[34] Altermark, *supra* note 12, at 1462.

[35] This Note uses both person first (i.e., a person *with* IDD) and identity first (i.e., an autistic person) interchangeably to describe disability. While the general consensus since the passage of the Americans with Disabilities Act has been to use person first language, that convention has been changing in recent years. Many disabled self-advocates prefer the identity first structure because they are proud of their identity as a disabled individual, and that identity is not severable from their personhood or life experiences. *See* EMILY LADAU, DEMYSTIFYING DISABILITY: WHAT TO KNOW, WHAT TO SAY, AND HOW TO BE AN ALLY 10–18 (2021); Lydia Brown, *Identity-First*

Neurodiversity started primarily as a social justice movement led by autistic self-advocates but has grown immensely in recent years.[36] Neurodiversity is premised on the combination of two ideas; the first from disability studies, called the social model of disability.[37] The social model of disability states that disability is a societally constructed concept. While people's bodies may have limitations, society disables individuals by building and maintaining environments that are exclusionary and discriminatory.[38] Second, the scientific idea of biological diversity and natural variation of species informs the neurodiversity concept that differences in human cognitive ability are part of a natural spectrum of human functioning, not pathology.[39] The two ideas come together to create a new paradigm: Society pathologizes and ostracizes cognitive differences that are in fact just biological variations of human brain function.[40] The neurodiversity movement frames functioning in a much broader context to ultimately "view individuals as valuable and deserving of acceptance and rights regardless of their functional propensities."[41] This paradigmatic shift from characterizing an "abnormal brain" to a "functionally different" brain, has consequences on the perception of IDD.[42]

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*Language*, AUTISTIC SELF ADVOC. NETWORK, https://autisticadvocacy.org/about-asan/identity-first-language [https://perma.cc/3WM8-5FK2].

[36] Robert Chapman, *Neurodiversity and the Social Ecology of Mental Functions*, 16 PERSPS. PSYCH. SCI. 1360, 1360 (2021).

[37] JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 8 (1998) ("[D]isability is not a medical category but a social one. Disability is socially constructed. For example, if a particular culture treats a person as having a disability, the person has one.").

[38] *See* KIM E. NIELSEN, A DISABILITY HISTORY OF THE UNITED STATES 162 (2012); *see also* Stella Young, *I'm Not Your Inspiration, Thank You Very Much*, TED, at 07:26 (June 2014), https://www.ted.com/talks/stella_young_i_m_not_your_inspiration_thank_you_very_much?language=en [https://perma.cc/YZC5-VYR6] ("And that quote, 'The only disability in life is a bad attitude,' the reason that that's bullshit is because it's just not true, because of the social model of disability. No amount of smiling at a flight of stairs has ever made it turn into a ramp. Never. Smiling at a television screen isn't going to make closed captions appear for people who are deaf. No amount of standing in the middle of a bookshop and radiating a positive attitude is going to turn all those books into braille. It's just not going to happen.").

[39] Andrea Lollini, *Brain Equality: Legal Implications of Neurodiversity in a Comparative Perspective*, 51 N.Y.U. J. INT'L L. & POL. 69, 74–76 (2018).

[40] Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 98 (2012).

[41] Chapman, *supra* note 36, at 1366.

[42] It is often suggested that neurodiversity ignores the real limitations and struggles people with IDD face. Critics of neurodiversity argue that by reframing IDD as "normal" cognition, individuals will not receive the medical and assistive services they need. *See* Ryan H. Nelson, *A Critique of the Neurodiversity View*, 38 J. APPLIED PHIL. 335, 342–45 (2021). However, proponents of Neurodiversity push back and state that thinking of cognition on a spectrum of functioning does not ignore limitations, rather it acknowledges that those limitations are in part societally designed and capable of remedy politically. *See* Lollini, *supra* note 39, at 95. The components of IDD that are medically important and in need of additional supports should still be treated as such but should not encapsulate an individual's entire existence. *See* Robert Chapman, *Neurodiversity, Disability, Wellbeing*, *in* NEURODIVERSITY STUDIES: A NEW CRITICAL PARADIGM 57, 65 (Hanna

Primary scientific research has confirmed the underlying propositions of neurodiversity in recent years. Neuroscience once theorized that the human brain was like a computer, processing inputs and spitting out a predetermined set of behavioral outputs.[43] That metaphor has given way to a much more complex idea of the brain called plasticity.[44] Brain plasticity is the theory "that neurons, through several different processes, are able to give shape, take shape and thereby to transform the brain . . . instead of being the artefact described in the computer metaphor, the plastic brain is an ongoing process of integrating context into its organizational patterns."[45] The brain is ever changing in response to its environment and context. A brain with IDD is no exception: "[T]he cognition of individuals with intellectual disability is characterized by neuroplasticity, which means that the brains of individuals belonging to this group develop through relations with the milieu in which they are situated."[46] The nexus of neuroscience and neurodiversity have provided a new, more flexible, concept of "impaired cognition."[47] Rather than thinking of IDD as wholly outside the range of "normal," the bright line category is replaced with a spectrum of abilities and limitations that are context dependent to an individual and the life they lead.

### C. *GUARDIANSHIPS AND CONSERVATORSHIPS: THE BASICS*

Guardianship and conservatorship arrangements are legal processes governed almost entirely by state law. Depending on the state, the process generally involves the appointment of a person by a judge or jury to oversee a protected person.[48] Courts often have a great deal of power over when to create and how to operate an individual guardianship.[49] The process begins by the potential guardian petitioning a court for a guardianship hearing.[50] The court then weighs the submitted evidence on the protected person's

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Bertilsdotter Rosqvist, Nick Chown & Ann Stenning eds., 2020) ("[A]lthough disabilities do often come with local bads—that is, things that can make life locally harder—this does not necessitate that disability is the kind of thing that is inherently bad for global wellbeing.").

[43] *See* Altermark, *supra* note 12, at 1464.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 1466.

[47] Thomas Armstrong, *The Myth of the Normal Brain: Embracing Neurodiversity*, 17 AMA J. ETHICS 348, 348–50 (2015).

[48] NAT'L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION LITERATURE REVIEW 5 [hereinafter NCD LIT. REV.], https://ncd.gov/sites/default/files/Beyond%20Guardianship%20Literature%20Review.docx [https://perma.cc/75R3-ARLS].

[49] SPECIAL COMM. ON AGING, ENSURING TRUST: STRENGTHENING STATE EFFORTS TO OVERHAUL THE GUARDIANSHIP PROCESS AND PROTECT OLDER AMERICANS, S. REP. NO. 115-392, at 11 (2018). The process for establishing a conservatorship is generally identical to establishing a guardianship. *Id.*

[50] The petitioner for guardianship is often times a family member of the protected person, but not always. Guardians can be court appointed or even take the form of a corporation. *See id.*

capacity for decision-making and grants, modifies, or denies the petition.[51] Guardianships fall into two categories: guardians appointed to oversee the "personal and health" related decisions of a protected person, and those appointed "to oversee financial and property" based decisions (a conservator).[52] This Note will focus on the former, in particular, the personal relationship decisions related to love and marriage that guardians oversee. However, the majority of states have one body of laws that governs both conservators and guardians.[53]

After appointment, a guardian then makes some, or all, of the decisions for the protected person based on the court's finding that the protected person lacks capacity in one or more areas of their life or daily functioning.[54] Guardianship arrangements that place all decision-making on the guardian are termed plenary or full guardianships.[55] Guardianships that allow the protected person to retain decision-making over certain areas of their life are termed limited or partial guardianships.[56]

The guardianship laws that states employ fall on a spectrum of how much decision-making power is reserved for the protected person after a guardian is appointed.[57] Many states (fifteen) use the least self-determinative model, the substituted decision-making model.[58] In this model, guardians attempt to adopt the desires and decisions of the protected persons and make decisions based on what the person would want.[59] While guardians are ethically

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[51] *Id.*

[52] *Id.*

[53] Annemarie M. Kelly, Lewis B. Hershey & Christina N. Marsack-Topolewski, *A 50-State Review of Guardianship Laws: Specific Concerns for Special Needs Planning*, 75 J. FIN. SERV. PROS. 59, 69 (2021).

[54] NAT'L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 27–29 (2018) [hereinafter, *NCD Beyond Guardianship Report*], https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf [https://perma.cc/38JX-HAMC].

[55] *Id.* at 78.

[56] *Id.* The exact population of people under guardianship arrangements is unknown, as not every state employs reporting mechanisms for monitoring the number and types of guardianships in their jurisdiction. Rough estimates put the number of protected persons at around 1.5 million, with plenary guardianships representing approximately eighty-seven percent of active guardianship arrangements. NCD LIT. REV., *supra* note 48, at 7.

[57] For a comprehensive list of guardianship law state statutes, see Angela Haddon & Sarah Winston, *How Do Guardians Make Up Their Minds*, 40 BIFOCAL 13, 13–14 (2018).

[58] Kelly et al., *supra* note 53, at 69.

[59] *Id.* For examples of substituted decision statutes, see CAL. PROB. CODE § 2355 (West 2022) (healthcare choices of the conservator); COLO. REV. STAT. ANN. § 15-14-314 (West 2022) (general duties of guardian); and GA. CODE ANN. § 29-4-22 (West 2022) (same). It is important to note that while many of these statutes use the phrase "best interest" to describe the guardian's ethical role, the actual weight of the statute functions more as substituted decision-making by giving decision-making power over multiple areas to the guardian. *See* statutes cited *infra* note 62.

encouraged to discern the wishes of the protected person,[60] there is no mechanism to even incentivize guardians to adhere to these wishes or consult the protected person.[61] The second model—the best-interest standard—is the second-most-used model, with thirteen states adopting this model in their probate codes.[62] The best-interest standard still places the majority of power within the control of the guardian, but uses slightly different wording within the statute. The guardian makes decisions based on their "belief about what is in the general best interest of the protected person."[63] While the best-interest standard attempts to control the actions of the guardian by focusing on the interests of protected person, in operation the best-interest standard works very much like the substituted decision model.[64]

The other guardianship models and standards adopted by states attempt to account for the power imbalance by returning some decision-making to the protected person, although as previously stated, this occurs on a spectrum. There are three remaining categories of standards for self-determinative decision-making. The first is maximum self-reliance (adopted by seven states), where a "[g]uardian fosters the protected person's independence as much as possible."[65] The second is the least restrictive (adopted in six states), where a guardian must use the least intervention possible and facilitate the protected person's own decision-making skills.[66] Finally, there are nine state that have adopted various other standards.[67] This grouping of states adopts ambiguous or hybrid policies for guardianship. Some have also recently adopted the Supported Decision-Making Model[68] which is an alternative to guardianship entirely.[69]

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[60] This is generally done through an informal training program or brochure. For an example, see generally PROB. CT. CUYAHOGA CNTY., OHIO, GUARDIANSHIP TRAINING HANDBOOK, https://probate.cuyahogacounty.us/pdf/grda/GRDTrainingHandbook.pdf [https://perma.cc/PCJ5-3V5J].

[61] Kelly et al., *supra* note 53, at 69.

[62] *Id.* For examples of best interest standards, see FLA. STAT. ANN. § 744.361 (West 2022); IDAHO CODE ANN. § 15-5-304 (West 2022); LA. CIV. CODE ANN. art. 392 (2022); and MD. CODE ANN., EST. & TRUSTS § 13-206 (West 2022).

[63] Kelly et al., *supra* note 53, at 69–70.

[64] *Id.* (noting that the standard still centers around the "guardian's best intentions and guesswork . . . . Though well intended, the logic supporting these models is somewhat patronizing in nature").

[65] *Id.* For examples of maximum self-reliance statutes, see KY. REV. STAT. ANN. § 387.500 (West 2022); and ARK. CODE ANN. § 28-65-105 (West 2022).

[66] Kelly et al., *supra* note 53, at 70. *See generally* VT. STAT. ANN. tit. 14, § 3069 (West 2021) (example of the least intervention possible model).

[67] Kelly et al., *supra* note 53, at 70. For examples of hybrid statutes, see ME. STAT. ANN. tit. 18–C, § 5–313 (2019); MISS. CODE ANN. § 93-20-309 (West 2022); and UTAH CODE ANN. § 75-5-312 (West 2022).

[68] Discussed further in the solution proposed by this Note. *See infra* Part III.

[69] Kelly et al., *supra* note 53, at 69–70; Zachary Allen & Dari Pogach, *More States Pass Supported Decision-Making Agreement Laws*, 41 BIFOCAL 159, 159–60 (2019). Illinois recently passed

Historically, the majority of persons under guardianship were age sixty-five and above, representing approximately sixty percent of guardianships.[70] Although exact demographic data on guardianships are unknown, multiple studies have noted that the age demographics have been shifting younger over time.[71] As age has shifted, so too have the reasons for guardianship. Dementia—although still the majority diagnosis attached to petition for guardianship—is now closely followed by mental illness and IDD.[72] Some studies have estimated as much as fifty-three percent of people diagnosed with IDD are under guardianship arrangement nationally, and in some states this number is as high as eighty-nine percent.[73] While guardianships may be the best option of support for some, they are also rife with potential abuse because of the legal power bestowed upon guardians.[74] When the power differential is combined with the continued societal commitment to underestimating those with disabilities, the result is overuse and inequality, particularly in the realm of love and marriage.

### *D. Love and Marriage with IDD*

Contrary to common assumptions, people with IDD have a concrete conception of love.[75] The perception of love and relationships in those with IDD is universally positive and reflects an understanding that love holds a very important position in the lives of others and could hold an important position in their own lives.[76] They are able to connect the concept of love to the feelings "of togetherness, happiness and trust" and "love as an emotion itself."[77] Even more concretely, people with IDD are able to connect the feeling of love to

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an SDM alternative to guardianship, which went into effect February 27, 2022. *See* Supported Decision-Making Agreement Act, H.B. 3849, 102d Gen. Assemb., Reg. Sess. (Ill. 2022).

[70] NCD LIT. REV., *supra* note 48, at 8.

[71] *Id.* (stating that the age range has shifted significantly into the eighteen to sixty-four range).

[72] *Id.* The changing demographics on age and underlying diagnosis may have shifted as more people with IDD were deinstitutionalized after a protracted fight for disability rights. This demographic change may also switch back to the older than sixty-five group as the baby boomer generation begins to age. *Id.* at 8–11.

[73] NAT'L CORE INDICATORS, WHAT DO NCI DATA TELL US ABOUT PEOPLE WITH IDD WHO HAVE GUARDIANS COMPARED TO THOSE WHO DON'T (2021), https://www.nationalcoreindicators.org/upload/core-indicators/NCI_Data_Highlight_Guardianship_2021_Final.pdf [https://perma.cc/VHY2-LW8Y]. This Note does not argue that guardianships are not helpful for certain individuals at certain times in their lives; rather, this Note argues that relying solely on guardianship as a solution for decision-making is problematic based on what we now know about the human brain and decision-making capacity.

[74] Sheryl Dicker, *Guardianship: Overcoming the Last Hurdle to Civil Rights for the Mentally Disabled*, 4 U. ARK. LITTLE ROCK L. REV. 485, 485–87 (1981).

[75] Jenni Mattila, Kaarina Määttä & Satu Uusiautti, '*Everyone Needs Love'– An Interview Study About Perceptions of Love in People with Intellectual Disability (ID)*, 22 INT'L J. ADOLESCENCE & YOUTH 296, 302 (2017).

[76] *Id.*

[77] *Id.*

the action of showing love, connecting experiences in their own lives with the feelings of love.[78] In one study, young adults with IDD

> longed for love, talked about it with warmth, and expressed great interest and enthusiasm toward it. . . . [A]nd love was defined even as the prerequisite of good life . . . . [L]ove was seen as a very important and necessary part of life. In addition, it was mentioned to be every human being's right . . . [and] crucial to well-being.[79]

Love and supportive relationships are not often discussed in relation to disability, particularly when the question of sex and sexuality are tied to the conversation. Generally, discussions of disabled sexuality and the need for romantic relationships are taboo because "[w]e want to close our eyes to the reality that persons with mental disabilities are sexual beings, and we want to close our eyes even more to the fact that their sexuality may be much more like 'ours' than it is different."[80] While disability activists and self-advocates have been arguing for equality for decades, the rest of society has failed to listen, particularly when it comes to disability and marriage equality.

The broader scientific community is still catching up to the disability rights movement (although scientific communities are further along than the law in many respects).[81] In 2014, a peer-reviewed scientific article announced "that 'the recognition that individuals with disabilities have a *desire* for sexual relationships with other people is a relatively new concept in the scientific community.'"[82] Despite some acceptance of disabled sexuality, disability scholars and lawyers are often met with backlash and anger at the suggestion that

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[78] *Id.*

[79] *Id.* at 301.

[80] PERLIN & LYNCH, *supra* note 10, at 9. Scholars also believe that much of mainstream society's distress over disabled sexuality stems from Puritanical laws that erroneously connected all disabilities with disease and deformity from sexually transmitted diseases, like syphilis and gonorrhea. *See* SUSAN M. SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC 157–61 (2009) (discussing how "ugly laws" impacted public perception of women's rights, prostitution, and promiscuity throughout the twentieth century). While these so-called "ugly laws" have been removed as society has grown and changed, Puritanical ideas still underpin much of American thinking around disability as contagious and unsightly. *Id.*

[81] The exact start date of the disability rights movement is not agreed upon, but many historians place the organized national civil rights movement around 1977, when disability rights self-advocates across the country organized sit-ins to protest the federal government's failure to sign and implement the regulations for section 504 of the Rehabilitation Act. *See* FRED PELKA, THE ABC-CLIO COMPANION TO THE DISABILITY RIGHTS MOVEMENT 278–79 (1997). *See generally* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993) (chronicling the early disability rights movement through the passage of the American with Disabilities Act).

[82] PERLIN & LYNCH, *supra* note 10, at 1 (quoting Laura Gilmour, Veronica Smith & Melike Schalomon, *Sexuality and ASD: Current State of Research*, *in* COMPREHENSIVE GUIDE TO AUTISM 569, 569 (Vinood B. Patel, Victor R. Preedy & Colin R. Martin eds., 2014)).

disabled individuals want relationships.[83] Much of the backlash centers on normative beliefs about disability and misunderstandings of IDD. A common misconception is that people with IDD represent a difference in functioning so far removed from the norm that their entire essence, including needs for romantic and sexual relationships, is effectively barred by their diagnosis. The entirely one-dimensional representation of people with IDD causes a level of dehumanization that defaults to two competing representations of disability and sexuality: infantilization or hypersexuality.[84] Viewed through either of these reductionist lenses, the sex and love lives of those with IDD are subject to a high level of control, either from a paternalistic viewpoint to protect the individual with IDD from supposed poor decisions, or to protect society from the person with IDD who is hypersexual and unable to control urges.[85]

The focus on the level of difference and the subsequent dehumanization denies people with IDD their "basic humanity and their shared physical, emotional, and spiritual needs. By asserting that theirs is a primitive morality, we allow ourselves to censor their feelings and their actions. By denying their ability to show love and affection, we justify this disparate treatment."[86] Creating space for disabled marriage necessitates societal understandings of disabled sexuality and love because it is undeniable that love and marriage are fundamental parts of society and the human experience.[87]

### *E. MARRIAGE WITHIN A GUARDIANSHIP ARRANGEMENT*

Marriage has historically been placed into the realm of contract law as part economic proposition and part romantic endeavor.[88] As society has evolved, marriage has moved into a more spiritual understanding away from formalistic

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[83] *See id.* at 1–2; *see also* Michael L. Perlin & Alison J. Lynch, *"All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 260 (2014) (noting that the author, Michael Perlin, was once called "an agent of the devil" at a conference for suggesting that people in institutions should be provided condoms and STD testing).

[84] *See* Perlin & Lynch, *supra* note 83, at 260.

[85] *Id.* Questions of the ability of individuals with disabilities to consent to sexual intercourse are often raised as part of this conversation. Research has revealed—not that people with disabilities are unable to understand or act on consent—but rather they are never taught the importance of making this type of decision because of the worry of sexual abuse or coercion. These are real concerns; however, society must reevaluate the wholesale removal of agency from people with disabilities in this area of decision-making. *See* Anna Arstein-Kerslake, *Understanding Sex: The Right to Legal Capacity to Consent to Sex*, 30 DISABILITY & SOC'Y 1459, 1468–69 (2015).

[86] Perlin & Lynch, *supra* note 83, at 260 (citing Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517, 537 (1994)).

[87] Mattila et al., *supra* note 75, at 297 ("Whether love was conscious or unconscious, connected to intellectuality or not, it is clear that love is one of very basic human abilities on which societies are based.").

[88] Anna Glezer & Jeffery J. Devido, *Evaluation of the Capacity to Marry*, 45 J. AM. ACAD. PSYCHIATRY & L. 292, 293 (2017).

contract law, but the underpinnings of contract law still remain.[89] While state laws vary widely on their marriage codes, most adhere to the idea that marriage remains a contract and that competence and understanding of that contract are fundamental to the union.[90] State laws tend to organize around four main postulates when assessing competence to marry. A person must be able to: (1) "express a clear and consistent choice"; (2) "understand the risks and benefits of the decision, as well as the alternatives"; (3) apply the risks and information to their own life and individual situation; and (4) make decisions without a condition that threatens their ability to engage in rational thought.[91] Although states pose different versions of these questions, it is generally required that a person meet all four to marry.[92]

There is no particular way in which courts assess these questions, and the ultimate decision is placed under the discretion of a judge.[93] Marriage becomes more complex if the person has IDD and is under a guardianship arrangement. Marriage under guardianship can be restricted by the guardian, particularly when the state uses a substituted decision-making model.[94] Depending on the state, a guardian may have to pre-approve a marriage, although some states take away this power from guardians and only allow the court to decide whether marriage is appropriate for a protected person.[95] States use a variety of statutory language to restrict relationships and marriage under guardianship and Iowa's statutory language represents a typical state statute in this area:

> A guardian may be granted the following powers which may only be exercised upon court approval . . . . Denying all communication, visitation, or interaction by a protected person with a person with whom the protected person has expressed a desire to communicate, visit, or interact or with a person who seeks to communicate, visit, or interact with the protected person. . . . The court may make a finding that the protected person lacks the capacity to contract a valid marriage.[96]

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[89] *Id.*

[90] *Id.* at 294.

[91] *Id.* at 295–96.

[92] *Id.* at 296.

[93] *Id.* at 296–97. Judicial discretion is not inherently negative, but judges that have antiquated understandings of capacity for decision-making will default to guardianship, rather than to less strict alternatives.

[94] Jacob Quasius, Note, *The Next Step in Marriage Equality: Indiana Restrictions on Marriage for Individuals Under Adult Guardianship*, 31 GEO. MASON C.R.L.J. 135, 138 (2021).

[95] *Id.* at 139–41. Some states also use a hybrid method where a guardian can give support for marriage only after a court order, but both steps are necessary for the marriage of a protected person to occur. *Id.*

[96] IOWA CODE ANN. § 633.635 (West 2022).

A person under guardianship can be denied any romantic contact, even contact as innocent as a letter or text message,[97] by their guardian and the court. This is the high level of social control a guardian can implement on an individual once guardianship is established.

In 1993, Joseph Shapiro published *No Pity*, a seminal disability rights book that chronicled the history of the disability rights movement and the passage of the Americans with Disabilities Act ("ADA").[98] In the last chapter, Shapiro tells the story of an intellectually disabled man named Jim: Jim was committed to an institution by his family at age twelve, sometime in the early 1960s, where he was then appointed a public guardian.[99] The guardian continued Jim's commitment in the institution for another thirty-plus years.[100]

Between the inertia of institutional life and the caseload of the public guardian, Jim's abilities were rarely reassessed. While at the institution, Jim met a woman named Robin, who became his close friend and eventually his girlfriend.[101] Robin was moved out of the institution into a group home, but Jim stayed in the institution despite requests for reassessment of his capabilities. Jim remained in the institution when he could have lived in a community—and he and Robin went years without seeing each other.[102]

While Jim's story may seem part of a distant past, it is not. Jenny Hatch, a disability rights advocate, petitioned for her freedom from guardianship in 2012. Jenny was not allowed to see her friends, extended family members, or even her attorneys while under her guardian's care.[103] She was placed in a group home against her will, where she was effectively denied outside visitors through the home's use of a visitation form with strict terms and conditions.[104] People who took the time to fill out the extensive form were routinely denied

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[97] *See* Blake & Baker, *supra* note 8.

[98] *See* SHAPIRO, *supra* note 81, at 8–11.

[99] *Id.* at 289–321.

[100] *Id.*

[101] *Id.*

[102] *Id.* Following up on Jim's story thirty years after the publishing of *No Pity*, author Joe Shapiro notes this about Jim's goals for love and about love for people with IDD more broadly:

> Sadly, we didn't spark a great romance between Jim and Robin. He may have seen her one more time. But that was it. It's hard for people with intellectual disabilities [to] make their desire for love and romance a real thing. They, generally, can't drive. And don't have disposable income. Those are barriers for dating. . . . Jim made it clear he would like a woman in his life. And some small attempts were made to help him get there. But it never happened.

Email from Joseph Shapiro, Author of *No Pity*, to Marisa Leib-Neri, J.D. Candidate, Iowa Coll. L. (Jan. 31, 2022, 15:52 CST) (on file with author).

[103] Trial Closing Arg. at 20–21, Ross v. Hatch (Va. Cir. Ct. 2013) (No. CWF120000426P-03), http://www.jennyhatchjusticeproject.org/docs/justice_for_jenny_trial/jhjp_trial_closing_argument.pdf [https://perma.cc/P9WA-YFC8].

[104] Visitation Request Form for Margaret J. Hatch (Mar. 3, 2013), http://www.jennyhatchjusticeproject.org/docs/justice_for_jenny_trial/jhjp_trial_visitation_request_form.pdf [https://perma.cc/HFA5-ZX7D].

visitation access anyway.[105] Jenny was unable to see platonic friends through the guardianship model, let alone develop a romantic relationship. As late as 2021, in the case of Britney Spears, the same history repeated itself.

As demonstrated by the stories of Jim, Jenny Hatch, and Britney Spears, romance, relationships, and marriage for people under guardianships is overregulated.[106] While the everyday person can fly to Las Vegas and "get hitched" without expressing consistent choice or a thought to the consequences, a person with IDD is assessed in multiple ways and hits barriers on their way to the altar—if they even get there at all.[107] In the majority of states, even if an individual with IDD is allowed contact with a romantic partner, a judge can outright deny a marriage contract by the mere fact the person is under guardianship; no additional assessment is needed for the individual decision. In a society that champions and incentivizes marriage, that people with IDD are not allowed the same decisions or mistakes as non-disabled individuals speaks volumes to the level of paternalistic control over the disabled when it comes to marriage and love.[108]

## II. THE OVERREGULATION OF MARRIAGE IN GUARDIANSHIP ARRANGEMENTS

As stated above, marriage is overregulated for people with disabilities. Legitimate societal concerns about coercion,[109] sexual assault,[110] disabled reproduction,[111] and parental neglect[112] have been at the center of discussions

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[105] *Jenny in Her Own Words*, JENNY HATCH JUST. PROJECT, http://jennyhatchjusticeproject.org/jennys_words [https://perma.cc/72PP-GC2S].

[106] Quasius, *supra* note 94, at 149.

[107] Critics of disabled sexual liberation often state that the sexual and marriage decisions of disabled individuals have greater repercussions for caretakers and for society as a whole. Many of these sentiments are reminiscent of the eugenics era that only "marriages of good stock" should be promoted because disability represents only a negative burden to society. *See* Natalia Gerodetti, *Eugenic Family Politics and Social Democrats: "Positive" Eugenics and Marriage Advice Bureaus*, 19 J. HIST. SOCIO. 217, 220–27 (2006)*; see also* Ivan Brown, *The New Eugenics and Human Progress*, 16 J. POL'Y & PRAC. INTELL. DISABILITIES 137, 137–39 (2019) (discussing the ways eugenics is present in modern policy). Other scholars point out that the continued use of eugenic principles in modern society would be detrimental to the diversity of human problem solving and antithetical to societal progression. For one such example, see generally Christopher Gyngell & Thomas Douglas, *Selecting Against Disability: The Liberal Eugenic Challenge and the Argument from Cognitive Diversity*, 35 J. APPLIED PHIL. 319 (2016).

[108] Many disability rights activists argue that a fundamental form of disability discrimination is that only the non-disabled are afforded the right to make choices and the mistakes that inevitably occur from these choices. *See The Right to Take Risks and Make Mistakes: Equal Recognition Before the Law for People with Disabilities*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R, (May 15, 2014), https://www.ohchr.org/en/newsevents/pages/legalequality.aspx [https://perma.cc/YKF8-WDGN].

[109] Perlin & Lynch, *supra* note 83, at 292–93.

[110] *Id.*

[111] *Id.* at 288–92.

[112] *Id.*

to expand guardianships as the default form of decision-making for decades.[113] Although all of these worst-case scenarios represent but a small slice of disabled relationships, they are used to justify a high level of paternalistic control.[114] This disregards the fact that guardianships have an abysmal track record of these same types of abuse.[115] Despite the strong constitutional framework of rights afforded to American citizens in regards to marriage, a separate set of discriminatory rules continues to apply to people with disabilities and judges continue to use antiquated understandings of decision-making capacity to place people with disabilities under plenary guardianship arrangements where they may not be needed.

### A. *People with Disabilities Have a Right to Marry and Live in Their Communities*

The Supreme Court has highlighted that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival" and that "[s]tates have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order."[116] In *Loving v. Virginia*, the Court held that laws banning interracial marriage were unconstitutional under the Equal Protection clause of the Fourteenth Amendment, stating: "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."[117] Forty-eight years later in *Obergefell v. Hodges*, the Court concluded that same-sex marriage is protected on the same legal basis.

Applying the marriage equality principles articulated in *Loving* and *Obergefell* to people with disabilities is a rational legal extension of both decisions. The Court stated in *Obergefell* that, "[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning," and that marriage "allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs,

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[113] *NCD Beyond Guardianship Report*, *supra* note 54, at 107.

[114] Perlin & Lynch, *supra* note 83, at 288–92.

[115] Each of these worst-case scenarios also occur in non-disabled relationships (where restraints on marriage and sexuality are absent); however, disability creates an "overexposure" to child protective services and other social service agencies. NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 72–85 (2012), https://ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf [https://perma.cc/7YM4-BUX5]; Alaina Leary, *Parents with Disabilities Are Often Overlooked in Society*, GOOD HOUSEKEEPING (Apr. 16, 2021), https://www.goodhousekeeping.com/life/parenting/a36121631/exceptional-mom-and-dads-alaina-leary [https://perma.cc/9K2R-LGUE].

[116] Loving v. Virginia, 388 U.S. 1, 12 (1967) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)); Obergefell v. Hodges, 576 U.S. 644, 646 (2015).

[117] *Loving*, 388 U.S. at 12.

marriage is essential to our most profound hopes and aspirations."[118] People with IDD that aspire to marry should not be restrained from doing so, particularly when marriage is a central signifier of societal participation and community integration. Denying equal marriage opportunities to those with IDD only continues generations of disability isolation, ultimately reinforcing the cycle of dehumanization and commitment to further community isolation for those with IDD.[119]

This approach is consistent with Article XIV of the United Nations Convention on the Rights of Persons with Disabilities, which states that people with disabilities have legal capacity on "an equal basis with others," and the capacity to make legal decisions cannot be taken away solely due to disability.[120] The Convention interprets the equal footing of legal capacity to mean that, while people with disabilities may need help in everyday decision-making, their freedom to make decisions on their own is of the utmost importance.[121]

While the United States has not formally adopted the Convention, the Supreme Court bolstered an adjacent right of the disabled in *Olmstead v. Zimring ex rel. L.C.*, holding that people with disabilities have a right to receive care in the most integrated setting available.[122] While *Olmstead* discussed the unnecessary institutionalization of people with disabilities, the parallels to guardianships cannot be ignored. Justice Ginsburg, writing for a majority of the *Olmstead* Court, reasoned that unjust isolation of individuals with disabilities is a form of discrimination for two reasons:

> First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.[123]

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[118] *Obergefell*, 576 U.S. at 670, 657.

[119] Perlin & Lynch, *supra* note 83, at 260. There are also other significant hurdles to marriage that disabled individuals face outside of the issues raised in this Note. *See generally* Sarah Kim, *Marriage Penalty Prevents Marriage Equity for People with Disabilities*, WORLD INST. DISABILITY (Sept. 22, 2021), https://wid.org/marriage-penalty-prevents-marriage-equity-for-people-with-disabilities [https://perma.cc/V4PJ-WYHN] (explaining that, in order to keep social security disability benefits, people with disabilities must forgo marriage or file for divorce due to marriage penalty rules on asset amounts).

[120] U.N. Convention on the Rights of Persons with Disabilities art. 12, Dec. 13, 2006, 2515 U.N.T.S. 3 ("States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.").

[121] *Id.*

[122] Olmstead v. Zimring *ex rel.* L.C., 527 U.S. 581, 598–99 (1999).

[123] *Id.* at 600–01 (citations omitted).

Many of the sentiments expressed in *Olmstead* are applicable to guardianship. The two forms of discrimination caused by needless institutionalization and community isolation are also caused by overly restrictive guardianship arrangements. States employ guardianships as the default step for family and estate planning when intellectual disability is involved.[124] But "guardianship should be imposed only when alternative mechanisms for meeting its objectives are not reasonably feasible."[125] Restricting the everyday choices for people with IDD, particularly those that promote social support and well-being like romantic relationships, only further relegates people with IDD to isolated lives. To continue to deny marriage to people with disabilities under guardianship is a fundamental mismatch with both the marriage rights articulated in *Loving* and *Obergefell*, and the community integration concepts essential to the holding in *Olmstead*.

### *B. STATE LAWS AND JUDGES HAVE AN ANTIQUATED UNDERSTANDING OF CAPACITY FOR DECISION-MAKING*

Currently, most states rely on guardianship as the default for decision-making and unduly restrict the rights of people with disabilities under these arrangements. While the strictness of guardianships may vary by state, all guardianships implement forms of substituted decision-making as the first step in the decision-making process.[126] In practice, very few states adopt limited guardianships,[127] and even fewer adopt supported decision-making, despite the American Bar Association's recommendation of it as the best course of action.[128] While states have attempted to reform their guardianship laws over time, "the[] reforms have had . . . little effect on judicial behavior" in granting limited guardianships, or exploring alternatives to guardianship

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[124] Nina A. Kohn & Jeremy A. Blumenthal, *A Critical Assessment of Supported Decision-Making for Persons Aging with Intellectual Disabilities*, 7 DISABILITY & HEALTH J. S40, S40–41 (2014).

[125] Kohn et al., *supra* note 11, at 1154.

[126] *Id.* at 1117–18 ("[G]uardianships are imposed on many individuals without sufficient evidence of their decision-making incapacity and . . . disability alone appears to be used as a sufficient justification for the imposition of guardianship. Thus, rather than being treated as the extraordinary proceedings that they are, guardianships are often treated as a routine part of permanency planning . . . .").

[127] *Id.* at 1118; J. Matt Jameson et al., *Guardianship and the Potential of Supported Decision Making with Individuals with Disabilities*, 40 RSCH. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 36, 37 (2015).

[128] *See generally* AM. BAR ASS'N, PRACTICAL TOOL FOR LAWYERS: STEPS IN SUPPORTING DECISION-MAKING (2016), https://www.americanbar.org/content/dam/aba/administrative/law_aging/PRACTICALGuide.pdf [https://perma.cc/RQ45-G984] (outlining how the American Bar Association suggests supported decision-making should be implemented). Connecticut is one such state that strongly suggests guardians only use substituted decision-making as a last resort. *See* OFF. PROB. CT. ADMIN. STATE OF CONN., CONNECTICUT STANDARDS OF PRACTICE FOR CONSERVATORS 4–6 (2018), http://www.ctprobate.gov/Documents/Connecticut%20Standards%20of%20Practice%20for%20Conservators.pdf [https://perma.cc/95XQ-CPTE].

entirely.[129] The exact reasons for the failure to stray away from strict plenary guardianships is unknown, but scholars believe that it may stem from judicial inertia[130]; judicial uncertainty about untested alternatives to guardianship[131]; and, most important to this Note, a failure on the part of states and judges to set aside preconceived notions about disability and mental capacity.

Under the legal definition, mental capacity is a stagnant skill that a person either has, or does not have.[132] While states may have a sliding scale to gauge the requisite capacity for different types of decisions, the general consensus is that if incapacitated in one area, an individual can be placed under plenary guardianship.[133] For example, if someone is unable to count, they may not be able to handle their own finances or get to important medical appointments on time; but in many states, this lack of counting ability may be enough for full guardianship.[134] Advances in neuroscience have shown, however, that mental capacity for decision-making is far more fluid than the law calculates. In fact, decision-making is more akin to a skill we develop over time with practice than an inherent talent we are born with.[135] While IDD is a lifelong identity, people with IDD are not frozen in their development. Just as all people improve areas of cognition over time, so do people with IDD.[136] Misconceptions about IDD as an unchanging mental incapacity often push judges to decide an individual lacks capacity without any evidence other than the diagnosis of IDD itself, and judges rarely revisit the grounds for creating a guardianship once it is granted.[137]

Research on decision-making has revealed that an overreliance on formalized systems of guardianships or substituted decision-making prevents full inclusion and growth of individuals with IDD. Research has

> found that adults with disabilities who exercised higher levels of self-determination were more likely to live independently, have greater financial independence, be employed at higher paying jobs, and be promoted more frequently in their employment positions.

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[129] Kohn et al., *supra* note 11, at 1118.

[130] *Id.*

[131] Jameson et al., *supra* note 127, at 39–40.

[132] *See* Glezer & Devido, *supra* note 88, at 292.

[133] *Id.* at 294. While limited guardianships are possible if a person has strengths in one area of capacity but weaknesses in another, judges have been resistant to adopt limited guardianships overall. *See* Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8, 10 (2012).

[134] *See* IOWA CODE ANN. §§ 633.552–633.558.

[135] Shirli Werner, *Individuals with Intellectual Disabilities: A Review of the Literature on Decision-Making Since the Convention on the Rights of People with Disabilities (CRPD)*, 34 PUB. HEALTH REVS. 1, 14–18 (2012).

[136] Jameson et al., *supra* note 127, at 40.

[137] *Id.* at 38.

> . . . .
>
> Research has consistently shown that people with disabilities who exercise greater self-determination . . . are better problem solvers, and are better able to resist and avoid abuse.[138]

Psychologists and neuroscientists have studied the concept of "learned helplessness" for decades and have concluded that the less autonomy an individual has, the more likely they are to stop developing the skills needed to facilitate their autonomy.[139] This concept is well known in the field of disability rights. Studies have shown that when sent away to institutions apart from their community, disabled individuals' faculties steadily declined from lack of use.[140] Once removed from the institution and placed in a community setting, their skills increased over time.[141] While guardianship is preferable to an institution alone,[142] the guardianship still strips away full decision-making power from the individual with IDD. Neuroscience has revealed that the human brain is a muscle that needs exercise to develop its faculties. Failing to allow people with IDD to develop their brains through making simple life choices that most non-disabled people make every day actively denies advances in science and is fundamentally discriminatory.

Returning decision-making power to individuals with IDD is not without some downside, as the "[a]lternatives that provide more autonomy naturally come with more risk."[143] These risks likely present both monetary and efficiency costs to the caretakers of people with IDD (as well as the IDD individual themselves); however, any costs must be weighed against the fundamental civil rights and psychological well-being of those with IDD under guardianship. By reframing capacity as an ever-growing skill, caretakers and legal professionals can begin to shape alternatives to guardianship by "developing a 'system' whereby everyone knows the basic context of who makes what decisions and how such decisions get made," thus "hav[ing] the practical effect of easing" risk and care concerns.[144]

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[138] *Id.* at 37–38 (citations omitted).

[139] Sean Burke, *Person-Centered Guardianship: How the Rise of Supported Decision-Making and Person-Centered Services Can Help Olmstead's Promise Get Here Faster*, 42 MITCHELL HAMLINE L. REV. 873, 888 (2016).

[140] SHAPIRO, *supra* note 81, at 311–17.

[141] *Id.* at 317–21.

[142] Many guardians opt to place the protected person they oversee in an institution anyway. Guardianship has not generally been a solution to the deinstitutionalization of people with disabilities but can be when a guardian opts to have their ward remain within their community. *See generally* SHAPIRO, *supra* note 81 (exploring the pitfalls of institutionalization). The fact that this choice is solely up to a guardian—and not the person with a disability—is precisely the problem this Note aims to address.

[143] Burke, *supra* note 139, at 888.

[144] *Id.*

## III. THE SUPPORTED DECISION-MAKING MODEL: RETURNING MARRIAGE CHOICE AND SELF-DETERMINATION TO INDIVIDUALS WITH IDD

Supported decision-making refers to a few different types of processes that help facilitate an intellectually disabled individual's right to make their own choices. SDM redefines the traditional legal concept of autonomy, relying on a relational idea of oneself that is "*inter*dependent rather than [an] *in*dependent phenomenon."[145] The interdependent model of autonomy "advances a more realistic view of autonomy which acknowledges that individuals rely to a greater or lesser extent on others to help them make and give effect to decisions."[146] At its most basic, SDM is a

> series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life[,] . . . rely[ing] on peer support[,] . . . community support networks and personal assistance, so-called natural supports (family, friends), or representatives.[147]

SDM processes are intentionally broad in definition because they are tailored to individual needs, not imposed universally as a strict scheme.[148] However, SDM regimes are set up around three guiding principles: (1) "[E]mphasize the person with [a] disability's autonomy, presumption of capacity, and right to make decisions on an equal basis with others; (2) . . . a person's intent [alone] can form the basis of a decision-making process"; and (3) individuals with disabilities will often need auxiliary aids (interpreters, assistive technology, facilitated communication, etc.) and other assistance in decision-making.[149] These elements come together to underpin the general intent of an SDM scheme, which "is to ascertain a sense of the supported person's wishes and preferences, and to give expression to them, rather than simply making decisions on the person's behalf."[150]

### A. *SDM AS AN ALTERNATIVE TO GUARDIANSHIP*

Supporters of SDM argue that returning the majority of decision-making control to a person with IDD still reaches the goals of a guardianship without

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[145] *See* Piers Gooding, *Supported Decision-Making: A Rights-Based Disability Concept and Its Implications for Mental Health Law*, 20 PSYCHIATRY, PSYCH. & L. 431, 435 (2013).

[146] *Id.* (noting the amount of reliance one may have on another for decision-making assistance "is a matter of degree, rather than a case of absolutes" (quoting Robert M. Gordon, *The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making*, 23 INT'L J.L. & PSYCHIATRY 61, 65 (2000))).

[147] Dinerstein, *supra* note 133, at 10 (citation omitted).

[148] Gooding, *supra* note 145, at 435.

[149] Dinerstein, *supra* note 133, at 10–11.

[150] Gooding, *supra* note 145, at 435.

stripping an individual of their choices.[151] SDM is not just a change to the guardianship standard; it is a complete alternative that lies outside of the formal legal system.[152] "[T]here is no 'fall back' . . . standard" in the model for SDM when a decision cannot be reached.[153] However, the raised level of risk inherent to the SDM model is precisely the point, because with true freedom comes risk and consequences: both are natural parts of life.[154] These are the risks that non-disabled people are afforded in practically everything they do. The goal of SDM is to provide a support system to handle negative consequences, rather than taking the riskier choices away at the front-end of the process and making a decision without consulting the person with IDD.[155]

SDM customizes a decision-making process for each individual with IDD. The person with a disability chooses their own individual or team of individuals to consult on decision-making matters. This can be done informally, but many areas have moved toward SDM contracts that establish some legal remedies for potential abuse without creating a formal guardianship arrangement.[156] The people who provide support to a person with IDD through an SDM know the individual with IDD's strengths and weaknesses and can tailor the content of decision-making, accommodating the disability during the process.[157]

Those wary of SDM often state that there is no empirical evidence to support that SDM provides better outcomes or decreases the potential for abuse.[158] SDM still involves a third party of some sort (friend, family, or representative) assisting in making decisions, and the same potential for

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[151] Burke, *supra* note 139, at 891. Jenny Hatch, the first person with IDD to successfully petition to end her plenary guardianship, remarked that "[s]he wanted someone to help her reach her goals but not control her life." *Id.*

[152] *Id.* at 882 ("[SDM] work can happen outside the context of the courts, saving time and investment in expensive legal proceedings.").

[153] *Id.* Critics of SDM often raise concerns about where to allocate liability if something goes wrong under the model if there is no one legally "in charge" so to speak. *See* Kohn & Blumenthal, *supra* note 124, at S41. However, this argument fails to account for the fact that guardians also have little to no liability assigned to them for the actions of their ward. *See Is the Guardian Liable to a Third Party for Acts of the Ward?*, BERG BRYANT ELDER L. GRP., PLLC, https://www.bbelderlaw.com/is-the-guardian-liable-to-a-third-party-for-acts-of-the-ward [https://perma.cc/J9T5-UJ27]. Therefore, guardianship and SDM are functionally equivalent when assigning liability for decisions that go may wrong.

[154] For an example of an SDM arrangement, see *Supported Decision-Making: Timberly and Tonya*, DISABILITY RTS. TEX. (Aug. 21, 2018), https://www.disabilityrightstx.org/en/video/supported-decision-making-timberly-and-tonya/ [https://perma.cc/3AZU-M7GZ].

[155] Burke, *supra* note 139, at 882.

[156] For an example of an SDM contract, see *Supported Decision-Making Agreement—Sample Form*, DISABILITY RTS. TEX. (Aug. 16, 2018), https://www.disabilityrightstx.org/en/publication/supported-decision-making-agreement-sample-form [https://perma.cc/F2L4-SH2S].

[157] Burke, *supra* note 139, at 882 ("Customizing a decision-making process involves time, expertise, patience, and room for trial and error . . . .").

[158] Kohn & Blumenthal, *supra* note 124, at S41–42; Lawrence A. Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good*, 9 STAN. L. & POL'Y REV. 347, 350 (1998).

coercive practices (but without court oversight) is still present with this setup.[159] While these are logical and fair concerns to have about SDM, continuing to use plenary guardianship subjects disabled individuals to the very same issues—but with less self-determination.[160] Guardianships have been the standard for people with IDD for generations with the same empirical evidence gaps, potential for abuse, and lack of meaningful oversight from the courts.[161] Reforms to guardianship laws have been unsuccessful because judges fail to implement limited guardianships when plenary guardianships are still available.[162]

The solution is to adopt models that are alternatives to guardianship entirely as the starting point.[163] For states that struggle with the amount of risk involved in abandoning guardianships entirely, a graduated approach is possible. Many scholars believe that a middle ground approach that starts off with an SDM model and gradually reaches plenary guardianship as a person with IDD demonstrates they need more guidance is still preferable to the full guardianship model currently serving as the default.[164] Additionally, states could adopt a limited guardianship model, where a person with IDD uses an SDM model for some decisions (like marital decisions) and a stricter guardianship model for other decisions (like financial or medical decisions).[165] Either way, by creating a new default that is individualized and supportive, people with IDD can begin to regain their freedom of choice.

### *B. NEUROSCIENCE & NEURODIVERSITY SUPPORT THE ADOPTION OF SDM AS AN ALTERNATIVE TO GUARDIANSHIP*

New understandings of the capacity for decision-making as an ever-developing skill that takes practice as people age necessitates a new approach to guardianships. It is irresponsible to the development and well-being of individuals with IDD to hand over their decision-making abilities when science supports otherwise. SDM's relational model of autonomy, or autonomy with support, falls precisely within both the need to recognize capacity as a changing skill and the neurodiversity concept of a spectrum of cognitive differences.[166] While no long-term empirical studies have been done to test

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[159] Kohn & Blumenthal, *supra* note 124, at S41–42.

[160] Blake & Baker, *supra* note 8 ("In many states, guardians can force wards to undergo invasive medical procedures including the implantation of contraceptive devices — and in several cases, wards were permanently sterilized.").

[161] *Id.* ("Court clerks have failed to perform vital checks in hundreds of cases, and lax vetting has left vulnerable people in troubling hands. The owner of one major guardianship corporation was given control of hundreds of wards — including young people — despite having been repeatedly accused of domestic abuse and assault involving children.").

[162] *See* Frolik, *supra* note 158, at 350.

[163] *See* Dinerstein, *supra* note 133, at 9–11.

[164] *Id.*

[165] *Id.*

[166] Gooding, *supra* note 145, at 434.

the success of SDM—as it is too new a concept for widespread statistical analysis—evidence from human rights and legal aid groups supports its effectiveness in the everyday lives of people with IDD.[167]

A recent study in 2020 on the successes and failures of implementing SDM instead of plenary guardianships was completed in New York.[168] The study involved a five-year plan, over a million dollars in grant funding, and coordinated efforts by different areas of state social service agencies, judges, private lawyers, as well as family and community members.[169] The study revealed that SDM "really works," and that "[a] well planned, theoretically grounded and thoughtfully supervised facilitation process enables diverse persons with [IDD], with impairments of varying severity, to make their own decisions authentically, with the supports they choose themselves."[170]

A scientifically informed version of guardianship is possible, but unlikely. Judges have demonstrated over time that when given the option to provide a strict guardianship regime, they will pick that option—even when less strict alternatives like limited guardianship are available. An alternative to the guardianship model is the best way to move forward and toward equality in choice for people with IDD.

### *C. Marriage Decisions: SDM in Practice*

By adopting the SDM model people with IDD have the option to date, engage in sexual relationships, and get married without unnecessary court intrusion into their personal decisions. The American Civil Liberties Union ("ACLU") published a guide to SDM that outlines how an individual's plan to approach marriage and dating could be presented.[171] The central focus should be on explaining and understanding emotions and feelings of love toward others and how to develop those feelings into stable and supportive long-term relationships.

There are multiple foreign countries that have formally adopted SDM practices into law. British Columbia and Australia both have formal contract provisions and have either passed acts to comply with the UN Convention on the Rights of People with Disabilities or recommended drastic legal overhauls

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[167] Quality Trust is the leading non-profit and lobby organization advocating for SDM procedures in the United States. They are an example of the type of organization that can both design and facilitate SDM models for people with IDD. *See* THE JENNY HATCH JUST. PROJECT, http://jennyhatchjusticeproject.org [https://perma.cc/WQ7G-A5FV].

[168] Kristin Booth Glen, *Supported Decision-Making from Theory to Practice: Further Reflections on an Intentional Pilot Project*, 13 ALB. GOV'T. L. REV. 94, 96 (2020).

[169] *Id.* at 102–03.

[170] *Id.* at 155.

[171] *See generally* ZOE BRENNAN-KROHN, AM. CIV. LIBERTIES UNION, HOW TO MAKE A SUPPORTED DECISION-MAKING AGREEMENT: A GUIDE FOR PEOPLE WITH DISABILITIES AND THEIR FAMILIES, https://health.ucdavis.edu/mindinstitute/centers/cedd/pdf/sdm-how-to-make-aclu.pdf [https://perma.cc/F7H4-4NRK] (providing a guide on how to make a supported decision).

to their guardianship laws.[172] While these SDM procedures do not formally route an individual case through the court system, they do provide a legally binding contract with oversight by social service agencies so individuals can report potential abuse and neglect.[173] With these SDM procedures in place, data will start to emerge on the effectiveness of these procedures. This data will allow these countries to decrease their reliance on plenary guardianship systems.[174]

There is always a question about disabled individuals being effective parents, and because marriage and parenting often go hand in hand, concerns about the well-being of children are inevitable, but ultimately overstated.[175] There is very little evidence to support that having a parent with a disability is detrimental to childhood well-being or that children with disabled parents are neglected or in danger at higher rates.[176] Nor is there any shame in parents asking for assistance in raising children; non-disabled people use outside assistance to help raise children as a standard practice. The use of babysitters, family, nurses, social workers, etc. are all common occurrences for the non-disabled parent.[177] Individuals with disabilities that want to start a family should be given the same courtesy and assumption of parenting competency that non-disabled individuals are. Just as the conversations around guardianship should assume competency and employ an SDM process before implementing plenary guardianship, so too should conversations about disabled parenting.

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[172] *Understanding the Lived Experience of Supported Decision Making*, B.C.L. INST., https://www.bcli.org/project/understanding-lived-experience-supported-decision-making [https://perma.cc/8FBS-KCDT]; *Towards Supported Decision-Making in Australia*, AUSTRALIAN L. REFORM COMM'N (Sept. 18, 2014), https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/1-executive-summary-2/towards-supported-decision-making-in-australia [https://perma.cc/W9HW-VJH4]; PIERS GOODING, A NEW ERA FOR MENTAL HEALTH LAW AND POLICY: SUPPORTED DECISION-MAKING AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 134–44 (2017).

[173] *See PRACTICAL Tool*, SENIORS FIRST BC, https://seniorsfirstbc.ca/for-professionals/supported-decision-making/practical-tool [https://perma.cc/WK9X-ZUGQ].

[174] *See* AUSTRALIAN L. REFORM COMM'N, PARLIAMENT OF AUSTL., *Appendix 3: Summary of Key Recommendations from Previous Reports* (2014), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report/e03 [https://perma.cc/KW9D-4JUA].

[175] *See* NAT'L COUNCIL ON DISABILITY, *supra* note 115, at 72–86. Additionally, it is much more likely that a non-disabled parent is abusive toward their disabled child than the other way around. *See* Janice A. Brockley, *Martyred Mothers and Merciful Fathers: Exploring Disability and Motherhood in the Lives of Jerome Greenfield and Raymond Repouille*, *in* THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES 293, 293–308 (Paul K. Longmore & Lauri Umansky eds., 2001).

[176] *See* NAT'L COUNCIL ON DISABILITY, *supra* note 115, at 187–88.

[177] Sarah Jane Glynn, *Fact Sheet: Child Care*, CTR. FOR AM. PROGRESS (Aug. 16, 2012), https://www.americanprogress.org/article/fact-sheet-child-care [https://perma.cc/5EVB-JWTK].

## CONCLUSION

A person with an intellectual or developmental disability has the right to make decisions for their own health and well-being just as any non-disabled person does. While the self-determination of disabled people should apply in every area of life, it is perhaps most important for building personal and romantic relationships. Preconceived notions about people with intellectual and developmental disabilities as being incapable of—or not needing—love relegates these individuals to a vicious cycle of ostracization and misunderstanding. People with IDD need and deserve love and marriage just as much as any other human being. However, society's paternalistic control over the disabled and stagnant assumptions about capacity threatens autonomy and true equality.

The law has a responsibility to accurately reflect what neuroscience has revealed about the cognitively diverse and ever-developing human brain. As our concepts of IDD and disability change through better understandings of the human mind, so too should our laws that strip or tightly control the liberty and self-determination of people with IDD. While guardianship has been the standard practice in the United States, there is very little evidence that it is empirically the better option, both through a fundamental rights perspective, and also through an outcomes-based perspective. Advances in neuroscience have shown us that stringent control over the decisions of the disabled has stripped people with decision-making capacity of their right, not only to take risks, but to love and be loved in ways that are fundamental to the human experience. Until guardianship is discarded for systems that properly integrate the science of decision-making, people with IDD cannot achieve true marriage equality. Under guardianship's guise of protection from risks and mistakes, people with IDD have been denied the opportunity to live and love on their own terms—a denial of equality that is both scientifically and constitutionally unjustified.