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GUARDIANSHIP: A VIOLATION OF THE AMERICANS WITH DISABILITIES ACT AND WHAT WE CAN DO ABOUT IT

BY ALEXUS ANDERSON¹

I. INTRODUCTION

Marshall was placed under guardianship at the age of eighteen. When asked why, his response is simple: “The school told my parents I needed it.” Like many parents across the nation, Marshall’s parents were under the belief that they were acting in the best interest of their son, and in order to help him succeed in life, guardianship was the answer. If everyone supporting Marshall – the school, the doctor, and even case workers – are recommending guardianship to Marshall’s parents, it could not be the wrong decision.

Marshall was diagnosed with fetal alcohol syndrome and bipolar disorder at the age of eight. He required additional help in his schooling, was placed on an IEP (Individualized Education Plan), and at the age of eighteen, still needed help making decisions regarding his education and personal welfare. His parents, wanting to continue looking out for their son, petitioned for guardianship.

At the time, Marshall, like many eighteen year olds, was not making the best decisions. He had gotten into drugs and felt a little lost on his life path. He developed depression and had frequent experiences of hospitalization as he grappled with his transition into adulthood. When asked whether he thinks guardianship was the right choice, Marshall does admit, it may have been.

After five years under guardianship, Marshall has a steady job, pays his own bills, and provides for his own housing. His day is dictated by his own

¹ Alexis Anderson, J.D., University of St. Thomas, School of Law, 2019. The author is very appreciative to Professors John Kantke and Virgil Weibe for their input and counsel with this Note.

responsibilities and demonstrating the self-sufficiency often equated with growing up.

Unfortunately for Marshall, he is still under guardianship. His parents continue to have the ability to look at his medical records or attend any doctor's appointment at his protest. They can make the decision as to what governmental benefits he applies for and set up a different place for him to live. Although they do not necessarily exert their power anymore, they continue to have the ability to control where he lives and the decisions that he makes.

When asked why Marshall petitioned for termination, his answer is powerful and thought-provoking: "I just want to be my own man." Marshall wants to have the ability to celebrate his own successes knowing that he made those decisions for himself. On the day that the judge signed the order for Marshall to no longer have a guardian dictate his life path, I will never forget his smile. The look of pure joy in his eyes at the ability to get his life back. The weight that seemed to lift from his demeanor as he realized that his life was his and only his to live.²

For most, it is not even a consideration that at some point, the life they are living or the decisions they are making may not be theirs. The small triumphs that accompany making good decisions, or even learning from poor ones, will not be theirs to celebrate. Sometimes growing up is the antidote for guardianships, and Marshall's situation begs the question of whether guardianship is and was really necessary in the first place.

It is easy to forget the weight of what attorneys do on a daily basis. After a while, it can seem routine – just every day happenings. But to a client, the decision to pursue guardianship should not be normal. The stripping of someone's rights and giving them to someone else should not seem like an easy decision. Never should petitioning for guardianship become routine and it takes careful examination of the facts that may support it.

In theory and historically, guardianship is thought of as the paternal savior some people may need, but in practice, guardianship carries many flaws. It can often leave those with disabilities unheard and underestimated. It can create the assumption that someone with a disability will automatically make a poor decision without understanding the consequence. Sometimes what gets lost in translation is the fact that the "same human rights exist for

² These facts come from this author's personal experience practicing and observing guardianship proceedings in Hennepin County, Minnesota.

a person with a disability whether or not he or she has the capacity to understand those rights or assert them.”³

By gaining an understanding of guardianship and its history, we see that guardianship has evolved over time, but still has a long way to go. In analyzing the correlation between guardianship and the Americans with Disabilities Act (“ADA”), a foundation can be made for guardianship reform. It takes attorneys knowing their options to pursue alternatives that will rapidly evolve guardianship and make it the last option instead of the first.

The purpose of this paper is to educate attorneys and families considering guardianship for their clients or loved ones and help them consider whether a less restrictive alternative may be a viable first approach. This paper contains five sections: (i) The history of guardianship in America; (ii) misconceptions about guardianship; (iii) examining guardianship with the Convention on the Rights of Persons with Disabilities; (iv) guardianship and the intersection with the ADA; and, (v) alternatives to consider before guardianship. The first section reviews where guardianship had its start in our nation and how it has evolved over time to develop a better understanding of why considering other alternatives serves great importance. The second section analyzes the misconceptions that guardians may have in Minnesota and how they often exercise overly broad powers. The third section briefly explores what other nations are doing instead of pursuing guardianships through the Convention on the Rights of Persons with Disabilities. This section establishes the momentum across the world to rethink guardianship. The fourth section investigates the correlation between guardianship and the ADA. This section explains why pursuing guardianship as a first option may hinder the rights of those with disabilities. The fifth section provides explanations of less restrictive alternatives and how they can be explored before guardianship. When considering guardianship, it is important to first consider its roots and evolution in America.

II. HISTORY OF GUARDIANSHIP IN AMERICA

Guardianship has been a part of America’s roots since the colony’s commute across the ocean. There are early reports from Massachusetts and Delaware chronicling the community coming together to support those with

³ Anita Smith, *Are Guardianship Laws and Practices Consistent with Human Rights Instruments?*, in *COMPARATIVE PERSPECTIVES ON ADULT GUARDIANSHIP*, 247 (A. Kimberley Dayton ed., 2014).

disabilities.⁴ Upon the achievement of independence and determining Federal and State Powers, guardianship fell under state law.⁵

As early as the 1700s, the state garnered a more paternal function over those with disabilities and this caused variation across the nation.⁶ This paternal function led to the creation of civil commitment, which was the replacement of guardianship during this time.⁷ It was the government's responsibility to exercise all powers over the ward, confining him or her to a mental hospital.⁸

In the 1960s, advocates awakened Americans to what was happening in these facilities simply by providing awareness.⁹ Attorneys began trying to hold mental facilities accountable for their failure to care for patients in the most humanitarian way. Until attorneys and advocates took a stand, there were no standards and civil commitment facilities were dangerous for both patients and staff. The judiciary was pivotal in looking at the rights of those facing civil commitment with the following cases.

In *Jackson v. Indiana*, a petty thief was found guilty and convicted to a psychiatric hospital even though there was testimony that Jackson was not competent.¹⁰ It was also proven that there were no resources within the psychiatric hospital available to help Jackson with his disabilities.¹¹ In the end, the Justice System decided that the U.S. violated due process by involuntarily committing a criminal defendant for an indefinite period of time due to incompetency to stand trial.¹²

In *Lessard v. Schmidt*, a class action was brought challenging the grounds by which the state was committing people, as well as the procedures that were used.¹³ In its decision, the court concluded that those determined to be incompetent still deserve due process of the law.¹⁴

O'Connor v. Donaldson led to a conclusion that ruled the state cannot constitutionally confine a non-dangerous person who can survive safely in freedom by themselves or with assistance from others.¹⁵ Although these

⁴ Frank Johns, *A Modern History of Guardianship Law*, COMPARATIVE PERSPECTIVES ON ADULT GUARDIANSHIP, 17, 19 (A. Kimberley Dayton ed., 2014).

⁵ See *id.* at 17-19.

⁶ See *id.* at 20.

⁷ See *id.* at 22.

⁸ See *id.* at 17, 19.

⁹ See Johns, *supra* note 3, at 21.

¹⁰ See Johns, *supra* note 3, at 21.

¹¹ See *id.* at 1847.

¹² See *id.* at 1858-1859.

¹³ See 349 F. Supp. 1078 (E.D. Wis. 1972), vacated, 414 U.S. 473 (1974).

¹⁴ See *id.* at 1103-1104.

¹⁵ 95 S.Ct. 2486, 2494 (1975).

decisions were very prevalent, involving only those within the criminal mental health community, they led to an important review of procedural and substantive rights involving those with disabilities.¹⁶

At around this time, guardianship (which remained unchanged in statute) became a popular alternative to civil commitment. Families could care for their loved ones in the comfort of their own homes and the government would not be overburdened caring for those with disabilities.¹⁷ Although positive, this shift toward the privatization of guardianship was not without problems: at this time guardianship had no procedural process protections and could leave a ward of the state in danger of being taken advantage of.¹⁸

Around 1968, the American Bar Association began to develop a model guardianship statute.¹⁹ The purpose of the model statute was to provide more protections and create a uniform standard from state to state.²⁰ Many states took this into consideration when examining their own guardianship statutes, but the change was not discernable.²¹

In 1982, the Uniform Law Commissions came out with a document referred to as the Uniform Guardianship and Protective Proceedings Act (“UGPPA”).²² This document was created as a suggestion to states as to what standards are important when reforming guardianship.²³ The UGPPA “requires a guardian to use substituted judgment, but also requires all acts by a guardian be in the best interest of the ward.”²⁴ This document kicked off the movement to change guardianship as it provided a set standard for appointment of guardianship and required procedural steps to be taken before appointment.²⁵

In 1987, Associated Press published an exposé called *Guardianship: Few Safeguards* and ignited a firestorm putting guardianship systems under great scrutiny.²⁶ This article exposed the fact that the elderly going under

¹⁶ See Johns, *supra* note 3, at 22.

¹⁷ See *id.* at 21-23.

¹⁸ A. Kimberly Dayton, *Guardianship in the U.S.: Themes and Commonalities Across the States*, in *COMPARATIVE PERSPECTIVES ON ADULT GUARDIANSHIP*, 231, 240 (A. Kimberley Dayton ed., 2014).

¹⁹ See Johns, *supra* note 3, at 26.

²⁰ *Id.* at 26.

²¹ *Id.* at 23.

²² Uniform Guardianship and Protective Proceedings Act, NAT. CON. COM. (1997).

²³ Lawrence Frolik, *Standards for Decision Making*, in *COMPARATIVE PERSPECTIVES ON ADULT GUARDIANSHIP*, 47, 52 (A. Kimberley Dayton ed., 2014).

²⁴ See *id.* at 52.

²⁵ See Johns, *supra* note 3, at 27.

²⁶ Fred Bayles & Scott McCartney, *Guardianship: Few Safeguards*, L.A. TIMES (Sep. 27, 1987). http://articles.latimes.com/1987-09-27/news/mn-10389_1_guardianship-petitions.

guardianship had fewer rights than criminals.²⁷ It uncovered some of the greatest issues people were often overlooking. The article got people talking and awakened society to the need for a change.²⁸ As a result of the article, many states not originally incorporating the UGPPA changes followed the example of their predecessors and updated their statutes.²⁹

With these procedural changes, Article 26 of the Guardianship Act proclaims that the court must hear a potential ward's opinion before making a decision in a guardianship case.³⁰ This can lead to challenges because the ward may not be forthcoming or informed to know they do not want guardianship. In some counties, courts do not have the resources to appoint a court appointed attorney, furthering this disconnect between education and knowledge of the process.³¹ It can also be argued that the ward's due process is violated based upon the fact that they are not provided the right to an attorney. Most states have made efforts to establish a court process to prevent this, but with a lack of public resources and court appointed attorneys, this can seem nearly impossible.³²

The changes in the 1960s, 1970s, and 1980s throughout the nation likely improved the process of guardianship from what it originally was, but these small changes did not do enough to make guardianship a model practice. To this day, guardianship is controlled only by state law and legislation approved by the states, so procedures and processes vary.³³ This makes guardianship hard to regulate because of its variations across state lines.³⁴ Guardianship in the United States, in turn, can be described as "a body of distinct systems, each reflecting a slightly different historical evolution and each consisting of somewhat different procedural and substantive components."³⁵

Due to the variation of guardianship laws across the nation, the misconceptions based upon state statute can tend to diverge. In Minnesota, there are many assumptions that are made by both attorneys and loved ones of those with disabilities.

²⁷ *Id.*

²⁸ See Johns, *supra* note 3, at 27.

²⁹ *Id.*

³⁰ Uniform Guardianship and Protective Proceedings Act (1997).

³¹ Elizabeth Calhoun, *Right to Counsel in Guardianship Proceedings: Where do we Stand?*, BIFOCAL (CLPE, N.J.), Fall 1998 at 1-2, 8-10.

³² Kristin Booth Glen, *The Perils of Guardianship and the Promise of Supported Decision Making*, Clearinghouse Review 48 J. POV. L. & POL'Y vol. 1-2 (May 2014).

³³ See Dayton, *supra* note 17, at 238-239.

³⁴ *Id.*

³⁵ See *id.* at 231

III. MISCONCEPTIONS ABOUT GUARDIANSHIP IN MINNESOTA

Pursuing guardianship is complicated, and beginning the process of court procedure can lead to a plethora of mistakes and misconceptions. It can be a challenge to educate attorneys, wards, and their families on everything that guardianship entails and what both the ward and guardian are entitled to. Guardianship requires an in-depth analysis of the statutes and an understanding of how the district court operates. Some courts provide a manual of how to petition for guardianship and information a pro se petitioner will need to consider.³⁶ Regardless, it is easy to misunderstand the roles and powers of a guardian, even with proper education.

A. Powers of Guardians

In Minnesota, there are seven powers and duties that can be granted to a guardian.³⁷ They are: the “power to have custody of the ward and the power to establish a place of abode...”; the “duty to provide for the ward’s care, comfort, and, maintenance needs...”; the “duty to take reasonable care of the ward’s clothing, furniture, vehicles, and other personal effects..”; the “power to give any necessary consent to enable the ward to receive necessary medical or other professional care, counsel, treatment, or service...”; “power to approve or withhold approval of any contract”; the “duty and power to exercise supervisory authority over the ward”; and, “the power to apply on behalf of the ward for any assistance, services, or benefits available to the ward...”³⁸ One of the exceptions to the duties and powers of a guardian is “electroshock, sterilization, or experimental treatment of any kind.”³⁹ If these treatments are completely necessary, then the guardian can obtain the authority by court order.⁴⁰

The seven powers and duties enable the guardian to provide a level of support and care for the ward. They are standards set forth to be abided by. The most important aspect of laying out the powers in statute is that it justifies the court’s intervention if these powers were to be abused.⁴¹

While a layout of powers is beneficial to both petitioners and attorneys, there often fails to be an attempt to limit the powers of the guardianship. This leads to overly broad petitions and the removal of rights that may have

³⁶ *Conservatorship and Guardianship in Minnesota*, MINNESOTA CONFERENCE OF CHIEF JUDGES (2016).

³⁷ MINN. STAT. §524.5-313 (2018).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at (4i).

⁴¹ MINN. STAT. §524.5-316 (2018).

otherwise been safely maintained by the ward.⁴² One of the most common powers that may be beneficial for the ward to keep is the power over personal property.⁴³ This means the ward would have the ability to control the property that they may hold dear.⁴⁴ An overly broad petition can hinder the ward's self-actualization and personal autonomy.⁴⁵

B. Limited Guardianships

The duties and powers of a guardian are easily misconstrued and misunderstood. In most states, it is unclear the powers that a guardian actually has.⁴⁶ For instance, most people believe it includes the power to control money, but it does not. A guardian has "no legal right to act in the ward's behalf as to matters that are not explicitly or implicitly addressed in the letters of guardianship."⁴⁷ It also becomes a challenge because not all states have standards articulated for decision making.⁴⁸

Most often, potential guardians will petition for complete powers rather than focusing on obtaining a limited guardianship.⁴⁹ A limited guardianship can be in time or based upon powers.⁵⁰ The most common limited guardianship includes the ward maintaining the power of their personal property.⁵¹ Courts fail to take advantage of limited guardianships, meaning that even if an individual has the capacity to make decisions pertaining to one power, that usually gets taken away.⁵² The powers of guardianship that are granted end up becoming too broad.⁵³

Some believe that the granting of guardianship will allow them the opportunity to force the ward into making good decisions or decisions that

⁴² Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 164 (2009) (discussing the importance of rethinking guardianship and encouraging substituted decision making in accordance with the ADA).

⁴³ MINN. STAT. §524.5-315 (2018).

⁴⁴ MINN. STAT. §524.5-120(4) (2018).

⁴⁵ Nat'l Couns. on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination*, 104-105 (March 22, 2018).

⁴⁶ Dayton, *supra* note 17, at 240-42.

⁴⁷ *See id.* at 240.

⁴⁸ *See id.* at 241.

⁴⁹ *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination*, *supra* note 47 at 104.

⁵⁰ *See id.*

⁵¹ These facts come from this author's personal experience practicing and observing guardianship proceedings in Hennepin County, Minnesota.

⁵² Ted Knutson, *Courts Fail to Protect 1.3 Million Vulnerable Americans In Guardianship Charges Senate Report*, FORBES (Nov. 28, 2018), <https://www.forbes.com/sites/tedknutson/2018/11/28/senate-report-faults-courts-for-failing-to-protect-1-3-million-vulnerable-americans/#770546c11690>.

⁵³ Salzman, *supra* note 41, at 164.

lie in their best interest.⁵⁴ This is not so. One of the most important considerations about guardianship is that it is just a paper power. In most cases, it does not give the authority to force anyone to do anything.⁵⁵

C. Competency and Termination of Guardianships

Competency is solely determined and dictated by the judiciary.⁵⁶ Because guardianship is an everlasting order, guardianship does not take into account the change of conditions that may occur for individuals with disabilities. Judges also simplify the idea of capacity and it becomes routine to deem someone incapacitated.

In Minnesota, in order to terminate a guardianship, one has to prove that the circumstances that necessitated the guardianship has changed or the ward has gained capacity.⁵⁷ Even proving that circumstances have changed, sometimes is not enough for the judge to determine that all rights and powers should be restored.

It is clear that there are many misconceptions within Minnesota alone, begging the question of whether there is confusion nationwide. Due to the negative affect guardianship imposes, many other countries across the world have made it clear that they do not believe in the process of guardianship at all.⁵⁸ This has been accomplished with the adoption of the Convention on the Rights of Persons with Disabilities.⁵⁹

IV. EXAMINING GUARDIANSHIP WITH THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Human Rights can be explained as “...statements of the standards of behavior that we should be able to expect between individuals and groups. Because they are *human* rights and not *citizens’* rights, they apply to everyone everywhere...”⁶⁰ This would mean that “[t]he same human rights

⁵⁴ EDITH + EDDIE (Kartemquin Films 2018).

⁵⁵ Meghan Apshaga & Michael Smith, *How to Avoid Guardianship Pitfalls*, DISABILITY RIGHTS WASHINGTON (September 2017), https://www.disabilityrightswa.org/wp-content/uploads/2017/12/HowtoAvoidGuardianshipPitfalls_Oct2017.pdf.

⁵⁶ Glen, *supra* note 31.

⁵⁷ *In re Guardianship of the Person of Meyer*, No. A10-407, 2010 WL 3463710, at *3 (Minn. Ct. App. Sept. 7, 2010).

⁵⁸ Smith, *supra* note 2, at 248.

⁵⁹ *See id.*

⁶⁰ *Id.* at 247 (quoting Peter Hamilton Bailey, *Bringing Human Rights to Life viii-ix* (Federation Press 1993)).

exist for a person with a disability whether or not he or she has the capacity to understand those rights or to assert them.”⁶¹

The Convention on the Rights of Persons with Disabilities (CRPD) was created with three main purposes.⁶² The first is to move people away from treating those with disabilities as objects of management or care and shift toward treating others as subjects capable of their own decisions and equal protection of the law.⁶³ The second purpose is to recognize that a disability is a result of barriers in the person’s life and with help, that person can assimilate into society.⁶⁴ The third purpose of the convention is to take away the idea of legal capacity, which has been recognized throughout history and encourage the “right to recognition everywhere as persons before the law.”⁶⁵

Although guardianship may be referenced in a variety of different terms over a variety of countries, the 2006 passage of Article 12, has removed whatever system of guardianship was in place in many countries and replaced it with supported decision-making.⁶⁶ Article 12 of the CRPD reaffirms equal recognition before the law for those with disabilities.⁶⁷ A number of European Countries have either done away with guardianship, called for others to do the same, or greatly reformed their guardianship system in accordance with the standards of the CRPD.⁶⁸

Twenty-eight member states have ratified the CRPD.⁶⁹ Among those are countries like Austria, Belgium, Croatia, France, Germany, Greece, and the United Kingdom.⁷⁰ In 2009, the United States signed the CRPD and in 2012, ratification of the CRPD went before the Senate.⁷¹ The ratification fell short by five votes in order to have reached the two-thirds consensus with the Senate.⁷² Although this was a major loss to the CRPD Senate Leader, the disability community, and their many allies, there are still plans

⁶¹ *Id.* at 247.

⁶² G.A. Res. 61/106, annex, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Johns, *supra* note 3, at 29-30.

⁶⁷ G.A. Res. 61/106, *supra* note 61.

⁶⁸ Smith, *supra* note 2, at 268-270.

⁶⁹ European Union Agency for Fundamental Rights, *Has your country accepted the CRPD?*, <http://fra.europa.eu/en/theme/people-disabilities/ratified-crpd>.

⁷⁰ *Id.*

⁷¹ PBS, *What prevents the U.S. from signing the U.N. disabilities treaty?*, PBS NEWSHOUR (Mar. 13, 2014, 8:16PM), <http://www.pbs.org/newshour/show/prevents-u-s-signing-u-n-disabilities-treaty>.

⁷² G.A. Res. 61/106, *supra* note 61.

to bring the CRPD before Senate again.⁷³ Some of the pushback for passage of the CRPD in the United States is due to a belief that the United States should create and enact such a law for itself.⁷⁴ International law and treaty should not be the standard used for controlling domestic policy such as this.⁷⁵ There are also issues in ratifying the document in its entirety. An example of such an issue can be seen in reviewing Article 7 of the treaty. In the United States, parental authority is presumed in the best interest of the child, but in Article 7, the parental authority shifts to the government as the decision maker for children.⁷⁶

Some believe that the United States already has enough laws in place protecting those with disabilities.⁷⁷ They do not see the need to expand these laws to incorporate the broad provisions of the CRPD. Although these arguments hold some foundational basis, an adoption of the CRPD would change how our governmental system views those with disabilities.

Even if the United States does not adopt the CRPD, analysis of current laws is vital. America has been the front-runner of the movement towards rights of those with disabilities, but as a country, we have failed to completely understand the philosophies and idealisms that the CRPD is trying to create.⁷⁸ Many of the systems in place fail to treat those with disabilities as subjects capable of their own decisions.

In the guardianship context, removing remaining rights to prevent a future unknown situation underestimates the powers and capabilities of the ward going before the court. Often, when a ward is forced into the court system, he or she has not made life-altering mistakes. His or her capability to make decisions is based upon the potential to make those mistakes. Embracing the existence of the CRPD would encourage equal treatment of those with disabilities and may even encourage our culture to create programs that will better assist assimilation into society.

While the United States has failed to adopt the CRPD like many other various countries, those advocating for less restrictive alternatives believe structuring guardianship law in accordance with the ADA may evoke a great change to the mindset and procedures of Americans.

⁷³ *Id.*

⁷⁴ PBS, *supra* note 70.

⁷⁵ G.A. Res. 61/106, *supra* note 61.

⁷⁶ *Id.*

⁷⁷ Steven Groves, *Ratification of the Disabilities Convention Would Erode American Sovereignty*, THE HERITAGE FOUNDATION (Apr. 26, 2010), <https://www.heritage.org/global-politics/report/ratification-the-disabilities-convention-would-erode-american-sovereignty>.

⁷⁸ PBS, *supra* note 70.

V. GUARDIANSHIP AND THE INTERSECTION WITH THE AMERICANS WITH DISABILITIES ACT

Olmstead v. L.C. has been pivotal in rethinking guardianship in correlation with the ADA.⁷⁹ The *Olmstead* decision arose when two mentally disabled women were confined to psychiatric treatment.⁸⁰ Evaluations from doctors determined that the women could both be cared for in community based programming, yet the women remained segregated and institutionalized.⁸¹ The Supreme Court determined that those with mental disabilities should be placed in community settings when it is appropriate: where the placement can be reasonably accommodated and there are resources available to meet those needs.⁸²

While this ruling directly impacts those with disabilities, it did not directly address guardianship. The conclusion that leads toward guardianship can be inferred through the court's interpretation of Title II of the ADA.⁸³ Undue guardianship may even be equated to an *Olmstead* violation because if someone is unable to live where they want or do what they want, the effect is isolating.⁸⁴

Title II of the ADA prohibits discrimination based on a disability for services, programs, and activities provided to the public by both state and local governments.⁸⁵ Programs need to be provided in the most integrated and least restrictive setting suited to individual needs.⁸⁶ The argument lies in the fact that guardianship is a "disability-based discrimination" and that other less restrictive alternatives would suit the needs of those with disabilities better.⁸⁷ It can be argued that the courts are a governmental program, they need to ensure that the least restrictive means is being established.

Of the twenty ADA cases that have come before the Supreme Court, *Olmstead* is important because it was the first to recognize the rights of those with disabilities.⁸⁸ The recognition of those rights, makes it vital that

⁷⁹ Salzman, *supra* note 41, at 280.

⁸⁰ *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999).

⁸¹ *Id.* at 593.

⁸² *Id.*

⁸³ Jonathan Martinis, *From Justice for Jenny to Justice for All: EVERYONE Has the Right to Make Choices*, NATIONAL RESOURCE CENTER FOR SUPPORTED DECISION-MAKING (Jan. 10, 2019), <http://supporteddecisionmaking.org/blogs/jonathan-martinis>.

⁸⁴ *Id.*

⁸⁵ Americans with Disabilities Act, 42 U.S.C. §12132 (1990) [hereinafter ADA].

⁸⁶ Salzman, *supra* note 41, at 157.

⁸⁷ *See id.* at 168.

⁸⁸ Robert Dinerstein, *The Olmstead Imperative: The Right to Live in the Community and Beyond*, 4 AM. U. L. REV. 16, 16-20 (2015).

the nation begins to acknowledge and associate *Olmstead* with guardianship.⁸⁹ Guardianship is the systematic stripping of rights from those with disabilities to provide them to someone else.⁹⁰ Even though no case law exists surrounding the rights of those under guardianship in the intersection of the ADA, *Olmstead* may be the decision that spurs discussion surrounding the process of guardianship. This decision and the changing views of society may be the revolution necessary to improve guardianship procedures and processes.

Since less restrictive alternatives exist, the *Olmstead* decision presents possibilities in the future for reform and improving the way of life for adults with disabilities.⁹¹ It is imperative that alternatives are explored to improve lifestyle by promoting autonomy of those with disabilities and providing them with the necessary resources to assimilate into society. By granting guardianships in excess, a disservice is done to the development of those disabled.⁹²

Often, guardianship leaves those with disabilities feeling isolated and unable to make decisions that would integrate them into society. A person with medical issues may be overlooked when it comes to creating a plan for their own care. The physician may only consult with the guardian about future options. Leaving the ward out of key life decisions has the potential to segregate them. It creates the problem that the ward will not have the option to join support groups, organizations, etc., because they were not given the ability to make that decision. In large part, the exclusion of individuals with disabilities harms them from developing life skills that will allow them to better interact with the public, economy, and society as a whole.

With the granting of broad powers to someone petitioning for guardianship, an additional harm is created because those with disabilities do not have the opportunity to seek support from other networks they may create.⁹³ The

⁸⁹ *Id.* at 18-19.

⁹⁰ Emily Gurnon, *Guardianship in the U.S.: Protection or Exploitation?* FORBES (May 23, 2016, 10:47 AM), <https://www.forbes.com/sites/nextavenue/2016/05/23/guardianship-in-the-u-s-protection-or-exploitation/#74b944473b49>.

⁹¹ Dinnerstein, *supra* note 90, at 18-19.

⁹² *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination*, *supra* note 47, at 103.

⁹³ Samantha Crane, *How Supported Decision Making can Promote Integration of People with Disabilities*, ASAN, https://www.eiseverywhere.com/file_uploads/e8134a8e17353cf950a18788527d719a_2015-09-01HowSupportedDecision-MakingCanPromoteIntegrationofPeoplewithDisabilities_SamanthaCrane.pdf (last visited May 1, 2019).

infrastructure of networks is known as a support network and can include anyone working with the individual with a disability.⁹⁴

In creating the ADA, Congress set forth a national goal “[t]o assure equality of opportunity, full participation, independent living, and economic self-sufficiency...” for those with disabilities.⁹⁵ The *Olmstead* decision furthered this prerogative concluding that “[u]njustified isolation of people with disabilities in institutions constitutes disability-based discrimination.”⁹⁶ It can be argued that guardianship goes against major pieces of the *Olmstead* decision.⁹⁷

It can be reasoned that granting guardianship enhances segregation and isolation of those with disabilities creating irreparable harm.⁹⁸ In order to do anything or join a part of the community, the guardian must provide permission.⁹⁹

Granting a guardianship also perpetuates the assumption that those with disabilities are incapable of participating in societal functions.¹⁰⁰ In a survey conducted, many guardians reported that they did not make all the ward’s decisions for them, which is great when it comes to their powers under guardianship.¹⁰¹ Some guardians were already enacting some form of supported decision-making while the ward was under guardianship.¹⁰² Of those that were already using supported decision-making, sixty-seven percent stated that those with a disability could do more things.¹⁰³ Without having the restriction of guardianship weighing over their heads, their independence increased.¹⁰⁴ They were also more willing to try more things that would benefit them and integrate them into society.¹⁰⁵

When it comes to disabilities, the decision of *Olmstead* fundamentally changed the nation. Communities everywhere are beginning to focus on the

⁹⁴ See generally NATIONAL RESOURCE CENTER FOR SUPPORTED DECISION MAKING, <http://www.supporteddecisionmaking.org/>.

⁹⁵ ADA, 42 U.S.C. §12101(a)(7) (1990).

⁹⁶ Salzman, *supra* note 41, at 168.

⁹⁷ See *id.*

⁹⁸ See *id.* at 159.

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ *Survey on Supported Decision-Making in Practice*, THE NATIONAL CENTER FOR SUPPORTED DECISION-MAKING, 1, 6 (Mar. 31, 2016),

http://www.supporteddecisionmaking.org/sites/default/files/Final_Report-Survey_on_Supported_Decision-Making.pdf.

¹⁰² *Id.*

¹⁰³ *Id.* at 8.

¹⁰⁴ *Id.* at 13.

¹⁰⁵ *Id.* at 8.

concept of “person centered thinking” due to the decision in *Olmstead*.¹⁰⁶ The decision drew its focus to the segregation of those with disabilities from society, creating an obligation to integrate individuals into “social, economic and political life, to the greatest extent possible.”¹⁰⁷ This leads to the idea of whether *Olmstead* can be extended beyond deinstitutionalization. Perhaps the integration of *Olmstead* can provide a basis for challenging guardianships as violating the ADA because guardianship segregates those with disabilities from the community.

Plenary guardianships grant powers for guardians to determine living situations.¹⁰⁸ In certain situations, this leads to guardians “allowing wards to remain in segregated settings while arguing that such placement was in the wards’ best interest as the safest option available.”¹⁰⁹ A guardian does not have the power through the granting of a petition to force a ward to do something that they do not want to do. This often goes unknown and guardians take advantage of their positions. This leads to a greater divide of those with disabilities and their integration with society.

Guardianship fails to apply the integration mandate of the ADA, which serves “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹¹⁰ This means that, along with the segregation created by guardians, public entities should modify the culmination of procedures, policies, and practices when it comes to avoiding ADA violation.¹¹¹ Since most guardianship laws have remained unchanged and court procedures untouched, many governmental entities likely have procedures in place that violate this integration.

Title II of the ADA states that there cannot be discrimination based upon a disability by state and government agencies.¹¹² Some believe there are procedural issues that violate Title II of the ADA.¹¹³ Most courts routinely waive the presence of the potential ward or protected person when they are unable to come to the courthouse.¹¹⁴ When the court does not move the

¹⁰⁶ Salzman, *supra* note 41, at 170.

¹⁰⁷ *Id.*

¹⁰⁸ Dayton, *supra* note 17, at 233.

¹⁰⁹ 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 WM. MITCHELL L. REV. 873, 877 (2016) (discussing person-centered thinking and the impact it can have on guardianship).

¹¹⁰ *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.*, (June 22, 2011), U.S. Department of Justice, https://www.ada.gov/olmstead/q&a_olmstead.htm

¹¹¹ Salzman, *supra* note 41, at 179.

¹¹² ADA, 42 U.S.C. §12101 (1990).

¹¹³ *Id.*

¹¹⁴ *Guardianship and Supported Decision-Making*, AMERICAN BAR ASSOCIATION (Aug. 7, 2018), https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartconduct.pdf.

hearing where the respondent can attend or fails to conduct the hearing to a time when the person can participate, there is discrimination.¹¹⁵

In Texas, a complaint was filed in 2018 with the Texas Supreme Court claiming that the Court system violates the ADA by pursuing guardianships through court appointed attorneys.¹¹⁶ While this complaint does not rely on *Olmstead*, it does take into account the ADA, which was brought to light through its interpretation in the *Olmstead* decision.¹¹⁷ The Spectrum Institute argues that court appointed attorneys operate under a conflict of interest and thus, potentially are not actually looking out for the best interest of their clients.¹¹⁸ The complaint states that, since the court pays court appointed attorneys, they will try to achieve the outcome of where their paycheck is coming from, rather than looking out for those with disabilities.¹¹⁹

Guardianship procedures assume that a person will be able to advocate for themselves in some way and express an opinion.¹²⁰ The fact that a court appointed attorney may fail to remain completely unbiased violates Article II with discrimination by governmental agencies. Going to court can be a nerve racking, overwhelming, and damaging, due to past experience with either the law or the court process. This is true even if someone does not have a disability. It is the court's responsibility to ensure that those with disabilities have an opportunity to have equal treatment under the protections of the law.

Cases dealing with the violation of the ADA in reference to guardianship are slowly beginning to percolate throughout the nation. A challenge is posed when those under guardianship do not even know they have the ability to advocate for themselves. With the movement toward considering the ADA in conjunction with guardianship, those close to being affected by guardianship have the opportunity to seek out less restrictive alternatives.

VI. ALTERNATIVES TO CONSIDER BEFORE GUARDIANSHIP

¹¹⁵ *Id.*

¹¹⁶ David Yates, *New study says rights of Texans being violated, SC allowing guardianship system to violate ADA*, SE TEXAS RECORD (Apr. 10, 2018), <https://setexasrecord.com/stories/511387039-new-study-says-rights-of-texans-being-violated-sc-allowing-guardianship-system-to-violate-ada>.

¹¹⁷ *Id.*

¹¹⁸ Thomas Coleman, *ADA Complaint to the Supreme Court of Texas*, SPECTRUM INSTITUTE, <http://spectruminstitute.org/Texas/> (last visited May 1, 2019).

¹¹⁹ Yates, *supra* note 115.

¹²⁰ Eleanor B. Cashmore, *Guarding the Golden Years: How Public Guardianship for Elders Can Help States Meet the Mandates of Olmstead*, 55 B.C. L. REV. 1217, 1234 (2014).

Learning about less restrictive alternatives for someone about to undergo guardianship can be a challenge. Most often attorneys do not question whether guardianship is the last option when a new guardianship client calls.

A. Health Care Directives

Health care directives are a feasible alternative to guardianship because they allow the person with a disability to designate someone to have chosen powers, such as access to medical records, have the ability to attend doctor's appointments, or even schedule doctor's appointments, if necessary.¹²¹ A health care directive ultimately serves the same role as guardianship, except it enables the person with a disability to make decisions for themselves with the help of someone they trust.¹²²

An argument in favor of guardianship is that someone can revoke a health care directive.¹²³ When putting guardianship into perspective, the greatest analogy is that we as a society do not lock criminals up because we "think" they are going to do something bad. The idea that we have to prevent something from happening when that something may never happen is treating them as guilty until proven innocent.

B. Supported Decision-Making

Currently, there is a movement to seriously consider alternatives to guardianship ahead of time.¹²⁴ Using a health care directive – or in some states, a supported decision-making agreement – promotes autonomy and independence while providing a network the person with a disability can depend on.¹²⁵

With supports put into place to help someone make the proper decision, guardianship should not be the first option to help someone. When guardianship is necessary, there should be more checks in the court system

¹²¹ MINN. STAT. § 145C.02 (2018).

¹²² *Alternative to Guardianship: A Health Care Proxy*, MASSACHUSETTS GUARDIANSHIP ASSOCIATION (2012), <http://www.massguardianshipassociation.org/information/alternatives-to-guardianship-and-conservatorship/alternative-to-guardianship-a-health-care-proxy-and-an-advanced-care-directive/>.

¹²³ These facts come from this author's personal experience practicing and observing guardianship proceedings in Hennepin County, Minnesota.

¹²⁴ Dayton, *supra* note 17, at 244.

¹²⁵ *Autonomy, Decision-Making Supports, and Guardianship*, THE ARC, (2016) <https://www.thearc.org/who-we-are/position-statements/rights/Autonomy-Decision-Making-Supports-and-Guardianship>.

to make guardianship more effective. The courts are overburdened with guardianship cases, which makes monitoring the status of cases difficult.¹²⁶

i. What is supported decision-making?

Supported decision-making is a person-centered way of thinking.¹²⁷ It focuses on providing those with disabilities the autonomy to make their own decisions, while establishing a network of supporters.¹²⁸ States are making a calculated effort to define what supported decision-making should encompass.¹²⁹

Instead of families having to go through the court process, supported decision-making provides the disabled person with a network of people.¹³⁰ It enables a development of skills toward their future, and allows a person with a disability to feel as though their thoughts, wishes, and needs matter.¹³¹ Currently, in the United States, a number of states have passed Acts incorporating supported decision-making as a less restrictive alternative (some include Wisconsin, Delaware, and Texas).¹³² Many other states have launched pilot programs, trying to obtain data to show just how useful supported decision-making is when put into action.¹³³

ii. Why is Supported Decision-Making important?

It is not every day that the phrase, “I am my own guardian,” takes meaning. For most of us, this is an inherent right. It is a piece of our human dignity and shapes us into who we are. “We are the creative force of our life, and through our own decisions rather than our conditions, if we carefully learn

¹²⁶ Brenda K. Uekert & Richard Y. Schouffler, *The Need for Improved Adult Guardianship Data*, 93 JUDICATURE 201 (Mar. 2010).

¹²⁷ *Person Centered Planning: A Tool for Transition*, NATIONAL RESOURCE CENTER FOR SUPPORTED DECISION-MAKING (Feb. 2004), http://supporteddecisionmaking.org/sites/default/files/ncset_person_centered_planning_toolkit_0.pdf.

¹²⁸ *Supported Decision-Making*, CENTER FOR PUBLIC REPRESENTATION (Nov. 20, 2018), <http://supporteddecisions.org/about-sdm/>.

¹²⁹ *See generally* NATIONAL RESOURCE CENTER FOR SUPPORTED DECISION MAKING, *supra* note 96.

¹³⁰ *Id.*

¹³¹ *See generally* Margo Izzo & Peg Lamb, *Self-Determination and Career Development: Skills for Successful Transitions to Postsecondary Education and Employment*, NATIONAL RESOURCE CENTER FOR SUPPORTED DECISION-MAKING, http://www.supporteddecisionmaking.org/sites/default/files/self-determination_career_development_skills_transitions.pdf (last visited May 1, 2019).

¹³² *Id.*

¹³³ *See generally* SUPPORTED DECISION-MAKING NEW YORK, <https://sdmny.org/pilot-program-site-coordination-materials/> (last visited May 1, 2019).

to do certain things, we can accomplish those goals.”¹³⁴ Instead of making decisions and deeming those with disabilities incompetent, supported decision-making will foster an opportunity for those to gain competencies to be successful in society, while providing a safety net of supporters to act as guides through the journey.¹³⁵

Some assume that a disabled person is incapable of developing the skills for success in the real world. It is important that this mindset changes to a presumption of capability. In Delaware, “all adults are presumed capable of managing affairs and to have capacity unless otherwise determined by the court.”¹³⁶ Often, we underestimate the power that a support system can provide when making positive impactful decisions.

There have been strides all across the world to provide those with disabilities the right to make their own decisions.¹³⁷ The importance of this boils down to human rights and, according to the Universal Declaration of Human Rights, the right for anyone and everyone to be recognized as a person before the law.¹³⁸ Slowly, the United States is picking up pace and providing opportunities for supported decision-making to positively impact the lives of many.¹³⁹

In order for supported decision-making to become a successful movement, we as a society need to change the way that individuals with disabilities are viewed. It is assumed that someone with a disability is deemed unable to make a choice, but choices are what make us who we are, how we learn, and become better.¹⁴⁰ Without this opportunity of choice, there runs the risk of a lack of identity, a lack of pride, and a lack of wanting to do well for yourself.¹⁴¹ By providing those with disabilities the chance to run their life, we encourage successful decision making, and in turn create successful people.¹⁴² Supported decision-making is not important just as law, but is important as a mindset.

iii. *The Role Others Play in Supported Decision-Making*

¹³⁴ Interview with Stephen Covey, CNN LARRY KING LIVE TRANSCRIPTS (Jan. 9, 2003, 2:37 PM), <http://www.cnn.com/TRANSCRIPTS/0301/09/lo1.02.html>.

¹³⁵ Izzo & Lamb, *supra* note 133.

¹³⁶ 16 Del. C. § 9404A(a) (2016).

¹³⁷ Smith, *supra* note 2, at 247.

¹³⁸ G.A. Res. 61/106, *supra* note 61.

¹³⁹ *Reports from the National Resource Center's 2015-2016 State Partners*, NATIONAL RESOURCE CENTER FOR SUPPORTED DECISION MAKING (Nov. 3, 2016), <http://www.supporteddecisionmaking.org/node/425>.

¹⁴⁰ Martinis, *supra* note 85.

¹⁴¹ *Id.*

¹⁴² *Id.*

The network that a person decides to surround themselves with is individualized to what that person may need, who that person prefers, and what support that person may need in his or her day to day life.¹⁴³ Typically, one person is designated as a supporter that will provide resources, advice, and help the person make decisions on a daily basis.¹⁴⁴ A support system is not limited to that one person and may include, but is not limited to: family, a job coach, a social worker, friends, support group members, teachers, and case managers.¹⁴⁵

The person that is making the decision can be referred to as a “decider,” and they get the ability to decide who their support network is going to be.¹⁴⁶ The network should be people that the decider trusts and agrees to. By creating a network and allowing the decider to choose who they may go to for help with certain tasks, a dialogue is created and expectations of what may be needed from the supporter may now be clarified.¹⁴⁷

Schools and other agencies will have the opportunity to create a “culture of coordinated support.”¹⁴⁸ It involves schools and agencies coordinating with others to bring outside resources that will provide complimentary supplementation of the work that they are doing.¹⁴⁹ Plans and processes will be developed to meet the needs of the individual with a disability.¹⁵⁰ In order to maintain something like this, it requires the support network to check in with each other and assess whether everything is working.¹⁵¹ This will not only validate the disabled person, but it will provide a network for that person to always fall back on and learn from.¹⁵²

C. How to Determine if a Less Restrictive Alternative is Appropriate

When a client comes in to the office under the belief that guardianship is necessary, it is the attorney’s job to educate and counsel that person in a

¹⁴³ *Id.*

¹⁴⁴ *Supported Decision-Making*, TEXAS COUNCIL FOR DEVELOPMENTAL DISABILITIES, <http://www.tccd.texas.gov/resources/guardianship-alternatives/supported-decision-making/> (last visited May 1, 2019).

¹⁴⁵ NATIONAL CENTER FOR SUPPORTED DECISION-MAKING, *supra* note 63.

¹⁴⁶ *How to Make a Supported-Decision Making Agreement*, U. C. DAVIS (Nov. 11, 2018), <https://www.ucdmc.ucdavis.edu/mindinstitute/centers/cedd/pdf/sdm-how-to-make-aclu.pdf>.

¹⁴⁷ Peter Blanck & Jonathan G. Martinis, “The Right to Make Choices”: The National Resource Center for Supported Decision Making, 3 INCLUSION 24, 26-27 (2015).

¹⁴⁸ Jessalyn Gustin & Jonathan Martinis, *Vermont to change the culture of disabilities*, APOSTROPHE MAG., (Nov. 6, 2018), <http://apostrophemagazine.com/vermont-change-culture-disabilities/>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

way that puts their best interest first. Like mentioned earlier, most do not know there are other alternatives to be explored. Health care directives and supported decision-making can put the person with a disability first, while exploring and developing ways to encourage independence and self-sufficiency.

Some of the things to consider are whether the person has had a support system their entire life. If that support system is still willing to be there to provide support to the individual, a health care directive or supported decision-making agreement is a viable option. If the individual does not have a family network, but has an outside support system like those in the community, some extra diligence needs to be made by the attorney to ensure that naming someone as an agent is not putting the person in a vulnerable position. With health care directives, this is less of a worry unlike a power of attorney, because that easily opens the door for financial exploitation. Typically, the people that are already helping the ward or incapacitated person would be willing to formally support them as an agent.

If the person with a disability does not have a support system, which typically tends to happen in older populations, some professional agencies that typically serve as guardians are willing to serve as health care agents for a small fee.¹⁵³ This is a fairly new prospect and will require more agencies to provide these kinds of services.

VII. CONCLUSION

Guardianship is not to be avoided at all costs. It was established to help people in an effort to avoid exploitation and harm. In some cases, guardianship is necessary and will best sustain the person with a disability. However, there is a necessity for reform in this legal arena. The ideology needs to shift towards the person and providing them with an opportunity to thrive within the community.

Many are told that guardianship is necessary. For most, this is not true. It is important to first deeply examine the alternatives that can be put in place to best support the individual. This can be done in accordance with the ADA, rather than reaching the alternative of solitude, like many guardianships have fostered.

Rather than taking away all the rights of proposed wards, society needs to look toward exploring as many options as possible before bringing guardianship petitions before the court. In the instance that a guardianship

¹⁵³ *Health Care Agency*, LUTHERAN SOCIAL SERVICE OF MINN. (Nov. 20, 2018), <https://www.lssmn.org/services/older-adults/finances/estate-planning/health-care-agency>.

petition is necessary, attorneys should look to limiting the powers to only what is necessary or limiting the duration to revisit the guardianship at a later date. There are reasonable alternatives to be considered that will alleviate the court's burden and provide the same, if not better results.

Guardianship is a paper power. In most cases, it cannot force the protected person to do anything unless there is a court order.¹⁵⁴ Providing personal autonomy to those with disabilities will increase their functionality in society and create a better way of life. Having all powers to make decisions taken away sends the message that disabilities lead to incapability. The current reform efforts for guardianship brings the new alternative, supported decision-making. Many states across the country are beginning to consider supported decision-making in legislation as a viable alternative.

The only way the United States will be capable of invoking a change will be to recognize that the ideologies and beliefs of those with disabilities need to change. By pursuing other alternatives, parents have the capability of working with their children to better assimilate them into society.

Through recognition of various intersections guardianship has with disability rights, it is simple to discern that public policy needs to change. For too long, the focus has been on protection. Society needs to begin thinking about humanity and the importance of equality for every single person, regardless of their abilities. According to Hubert Humphrey, "the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life, the sick, the needy and handicapped."¹⁵⁵ Based upon the guardianship system that has been created today, the nation has failed that test.

By understanding the history of guardianship, the misconceptions that may have been made about guardianship, how guardianship is seen across the world, the pitfall to guardianship in accordance with the ADA, and what alternatives reasonably exist, attorneys and families of those with disabilities can shape their ideologies around guardianship to consider alternatives in order to support personal autonomy. With education and the view that those with disabilities deserve the same treatment, the idea of pursuing guardianships can change for the better.

¹⁵⁴ *Guardian Health Care Decision-Making Authority and Statutory Restrictions*, ABA COMMISSION ON LAW AND AGING (Apr. 11, 2014), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_HealthCareDecisionMakingAuthorityofGuardiansChart.pdf.

¹⁵⁵ 123 Cong. Rec. p. 37287 (Nov. 5 1977) (Statement of Senator Hubert Humphrey).