From: AGO - Info
To: [redacted]
Subject: Public Records Request
Date: Tuesday, June 25, 2024 10:40:37 AM
Attachments: 2024-06-25 Jandl PRA Response to Searles.pdf
2024-06-25 Searles Responsive Docs.pdf

Hello, David Searles,

Attached please find correspondence related to your public records request.

Best,

Lauren Jandl
Chief of Staff

Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609

CHARITY R. CLARK
ATTORNEY GENERAL

TEL: (802) 828-3171

www.ago.vermont.gov

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

June 25, 2024

Via email to: [redacted]

Re: Public Records Request

Dear Mr. Searles:

I write in response to your Public Records Act request received by the Attorney General's Office on June 20, 2024, in which you requested:

> "On July 25, 2022, Timothy Connors of the A.G's office wrote a letter to Senator Collamore regarding various criticisms by me about Vermont's two-court system of adult guardianship.
>
> This is to request pdf copies by email of the emails and letters by me that Mr. Connors was referring to in his letter, and other correspondence received by the A.G.'s office concerning that matter."

Enclosed you will find records that are responsive to your Public Records Act request from the Attorney General's Office. Personal information has been redacted pursuant to 1 V.S.A. § 317(c)(7).

To the extent you feel information has been withheld in error, you may appeal to the Deputy Attorney General, Robert McDougall. Such appeal should be in writing to:
Attorney General's Office, Attn: Robert McDougall, 109 State Street, Montpelier, VT 05609-1001 or ago.publicrecordsrequests@vermont.gov.

Sincerely,

/s/ Lauren Jandl

Lauren Jandl
Chief of Staff

RE: I am still waiting for DAIL's answer to the Governor's Office

From: White, Monica (monica.white@vermont.gov)
To: [redacted]; ben.chater@vermont.gov; jennifer.garabedian@vermont.gov; jackie.rogers@vermont.gov; susanne.young@vermont.gov; ago.info@vermont.gov; timothy.connors@vermont.gov; jenney.samuelson@vermont.gov; stuart.schurr@vermont.gov; bart.gengler@vermont.gov
Date: Wednesday, August 3, 2022 at 12:59 PM EDT

Dear Mr. Searles,

Mr. Connors' letter to you accurately represents DAIL's perspective on your inquiry; we have nothing further to add.

Thank you,
Monica

Monica White, B.S., M.B.A., Commissioner
Vermont Department of Disabilities, Aging, and Independent Living (DAIL)

280 State Drive, HC2 South, Waterbury VT 05671-2020

802.398.5024 (Mobile)

Monica.White@vermont.gov | www.dail.vermont.gov | https://www.facebook.com/dailvt

From: david searles <[redacted]>
Sent: Wednesday, August 3, 2022 12:51 PM
To: White, Monica <Monica.White@vermont.gov>; Chater, Ben <Ben.Chater@vermont.gov>; Garabedian, Jennifer <Jennifer.Garabedian@vermont.gov>; Rogers, Jackie <Jackie.Rogers@vermont.gov>; Young, Susanne <Susanne.Young@vermont.gov>; AGO - Info <AGO.Info@vermont.gov>; Connors, Timothy <Timothy.Connors@vermont.gov>; Samuelson, Jenney <Jenney.Samuelson@vermont.gov>
Subject: I am still waiting for DAIL's answer to the Governor's Office

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.

Just to let you know I am still waiting for DAIL's answer to the Governor's Office on whether the state has a reasonable and just basis for the continued inferior options and protections afforded to developmentally disabled who do not have a suitable person to sere as their guardian as opposed to all other adults who either need or desire the appointment of a guardian.

Dave Searles

Recently a group of 4 legislators asked the State Attorney General's Office to explain why the differences in treatment were not prohibited discrimination. For example under the Vermont Constitution statutory exclusions of benefits or protections afforded to one group but denied another may only occur if there is reasonable and just basis for continued exclusion. Baker v. State (1999) If the Attorney General's Office had in fact acknowledged disparate treatment between the two groups, it would have been required to identify the state's justification for its continued existence.

When confronted with the list of differences of statutory treatment of the two groups State Attorney General's office did what all lawyers do when backed into a corner. Mr. Timothy Connors, chief of the Attorney General's Human Services Division simply stated in both the introduction and conclusion of his letter of July 25, 2022 that there is no disparate treatment in the statutes concerning the two groups, and filled in everything in between those two statements with misrepresentation and obfuscation.

Two groups: 'Group A,' adults (some with developmental disabilities) who need appointment of a guardian to protect their interests, who have appropriate private individuals willing to serve as their guardians; and 'Group B,' adults with developmental disabilities who need appointment of a guardian to protect their interests who do not have appropriate private individuals willing to serve as their guardians.

Disparate treatment under the guardianship statutes:

#1 Group A: guardianship proceedings by statute occur in the probate division in public proceedings (except for the contents of the guardianship evaluation). Group B: guardianship proceedings by statute occur in a different court where the entire proceeding is confidential, where a person's rights over their person and property are severely curtailed in a closed proceeding.

#2 Group A: voluntary guardianship, essentially a court supervised power of attorney program without any determination of mental incompetency is an available option for any adult in the group A category who meets the relaxed criteria of being able to understand the nature of the guardianship proposed. Group B: by statutory omission voluntary guardianship is not an available option. All "guardianships" for group B individuals are based upon a finding of mental incompetency of the person involved.

#3 Group A: there is an available re-trial of disputed guardianship creations in the probate division to the civil division. Group B: by statutory omission there is not an available re-trial of disputed guardianship creations.

#4 Group A: the guardian is required to file an annual report with the court "on the progress and condition of the person under guardianship and the manner in which the guardian carried out his or her duties." (14 V.S.A. § 3076) Group B: by statutory omission no such reports are required.

#5 Group A: the court is required to mail a copy of the annual report from #4 above as well as a statement of the person's rights to seek modification and even revocation of the guardianship. (14 V.S.A. § 3078) Group B: by statutory omission no such notice is required to be sent.

#6 Group A: a court order is required for a guardianship evaluation to be conducted. [14 V.S.A. § 3067(a)] Group B: no such court order is required.

#7 Group A: a showing must be made in the proceedings that the alleged incapacity in a subchapter 12 guardianship be caused by the purported disability [§ 3061(1)(B)]. Group B: by statutory omission this is not required.

#8 Group A: the determination of a person being "in need" of a guardianship in a subchapter 12 guardianship must be based upon evidence of recent behavior [§ 3061(2 & 3)] Group B by statutory omission this is not required.

#9 Group A: the evaluation to determine a person to be "in need of guardianship" in a subchapter 12 guardianship must specify the aspects of the person's affairs that he or she can self-manage without additional aids and services [§ 3067(c)(2)(A)] Group B: by statutory omission this is not required.

#10 Group A: the guardianship evaluation to determine a person to be in need of a guardianship in a subchapter 12 guardianship must specify the aspects of the person's affairs that he or she would be able to self-manage with additional aids and services. [§ 3067(c)(2)(B)]. Group B: by statutory omission this is not required.

#11 Group A: under subchapter 12 the evaluation to determine a person to be in need of guardianship must contain a statement of what programs and services the guardian ought to provide to the person under the proposed guardianship . §3067(c)(2)(D) Group B: by statutory omission this is not required.

Rutland, Vt. 05702

August 4, 2022

I note that the Timothy Connors (of the AGO) letter of July 25, 2022 (copy attached) states that there is no disparate treatment in the two-court system of adult guardianship.

Then I will ask it this way:

Introduction:

The Vermont Supreme Court in Baker v. State (1999) stated of its decision in Ludlow Supermarket (1982):

> Vermont courts -- having "access to specific legislative history and all other proper resources" to evaluate the object and effect of State laws -- would engage in a meaningful, case-specific analysis to ensure that any exclusion from the general benefit and protection of the law would bear a just and reasonable relation to the legislative goals.

Because of that it struck down Vermont's statutory denial of the benefits of a marriage license from same sex couples, stating:

> ... none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law.

There are two groups under Vermont statute regarding adult guardianship:

'Group A,' adults (some with developmental disabilities) who require appointment of a guardian to protect their interests, who have appropriate private individuals willing to serve as their guardians; and

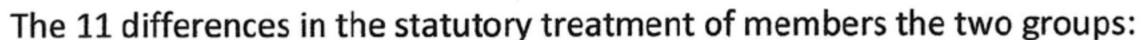
'Group B,' adults with developmental disabilities who require appointment of a guardian to protect their interests who do not have appropriate private individuals willing to serve as their guardians.

Question:

Given the 11 specific differences in procedural protections and options listed below in the courts' creation of guardianships for the members of the two groups, what reasonable and just bases does Vermont assert would allow for the lower set of procedural protections and options for individuals in group 'B' as compared to individuals in group 'A'?

Thank you,

David Searles



The 11 differences in the statutory treatment of members the two groups:

#1 Group A: guardianship proceedings by statute occur in the probate division in public proceedings (except for the contents of the guardianship evaluation). Group B: guardianship proceedings by statute occur in a different court where the entire proceeding is confidential, where a person's rights over their person and property are severely curtailed in a closed proceeding.

#2 Group A: voluntary guardianship, essentially a court supervised power of attorney program without any determination of mental incompetency is an available option for any adult in the group A category who meets the relaxed criteria of being able to understand the nature of the guardianship proposed. Group B: by statutory omission voluntary guardianship is not an available option. All "guardianships" for group B individuals are based upon a finding of mental incompetency of the person involved.

#3 Group A: there is an available re-trial of disputed guardianship creations in the probate division to the civil division. Group B: by statutory omission there is not an available re-trial of disputed guardianship creations.

#4 Group A: the guardian is required to file an annual report with the court "on the progress and condition of the person under guardianship and the manner in which the guardian carried out his or her duties." (14 V.S.A. § 3076) Group B: by statutory omission no such reports are required.

#5 Group A: the court is required to mail a copy of the annual report from #4 above as well as a statement of the person's rights to seek modification and even revocation of the guardianship. (14 V.S.A. § 3078) Group B: by statutory omission no such notice is required to be sent.

#6 Group A: a court order is required for a guardianship evaluation to be conducted. [14 V.S.A. § 3067(a)] Group B: no such court order is required.

#7 Group A: a showing must be made in the proceedings that the alleged incapacity in a subchapter 12 guardianship be caused by the purported disability [§ 3061(1)(B)]. Group B: by statutory omission this is not required.

#8 Group A: the determination of a person being "in need" of a guardianship in a subchapter 12 guardianship must be based upon evidence of recent behavior [§ 3061(2 & 3)] Group B by statutory omission this is not required.

#9 Group A: the evaluation to determine a person to be "in need of guardianship" in a subchapter 12 guardianship must specify the aspects of the person's affairs that he or she can self-manage without additional aids and services [§ 3067(c)(2)(A)] Group B: by statutory omission this is not required.

#10 Group A: the guardianship evaluation to determine a person to be in need of a guardianship in a subchapter 12 guardianship must specify the aspects of the person's affairs that he or she would be able to self-manage with additional aids and services. [§ 3067(c)(2)(B)]. Group B: by statutory omission this is not required.

#11 Group A: under subchapter 12 the evaluation to determine a person to be in need of guardianship must contain a statement of what programs and services the guardian ought to provide to the person under the proposed guardianship . §3067(c)(2)(D) Group B: by statutory omission this is not required.

A statement by Vermonters Against Discrimination in Guardianship:

The legislature ought not treat men and women with developmental who have no private individual to help them protect their rights disabilities as second class citizens

There are two adult guardianship groups under Vermont statute:

'Group A,' adults who require appointment of a guardian to protect their interests, who have appropriate private individuals willing to serve as their guardians; and

'Group B,' adults with developmental disabilities who require appointment of a guardian to protect their interests who do not have an appropriate private individual to serve as their guardian.

There are 12 differences in the statutory treatment of the two groups:

#1 Group A: guardianship proceedings by statute occur in the probate division in public proceedings (except for the contents of the guardianship evaluation). Group B: guardianship proceedings by statute occur in a different court where rights over person and property are severely curtailed in a closed proceeding.

#2 Group A: voluntary guardianship, a court supervised power of attorney program, without a determination of mental incompetency, is an available option for any adult in the group A category who simply understands the nature of the guardianship being proposed. Group B: guardianships for all group B individuals must be based upon a judicial finding of mental incompetency simply because of the statutory omission of the availability of voluntary guardianship for that group.

#3 Group A: there is an available re-trial of disputed incompetency findings in the probate division. Group B: only a straight appeal with deference to the factual findings below is available.

#4 Group A: the guardian must file an annual report with the court "on the progress and condition of the person under guardianship and the manner in which the guardian carried out his or her duties." (14 V.S.A. § 3076) Group B: no report is required.

#5 Group A: the court must mail a copy of the annual report from #4 above as well as a statement of the person's right to seek modification or revocation of the guardianship. (14 V.S.A. § 3078) Group B: there are no such requirements.

#6 Group A: a court order is required for a guardianship evaluation to be conducted. [14 V.S.A. § 3067(a)] Group B: no order is required.

#7 Group A: a showing must be made in the proceedings that an alleged incapacity is caused by the purported disability [§ 3061(1)(B)]. Group B: this is not required.

#8 Group A: determination of a person being "in need" of a guardianship must be based upon evidence of recent behavior [§ 3061(2 & 3)] Group B: this is not required.

#9 Group A: evaluation to determine a person to be "in need of guardianship" must specify the aspects of the person's affairs that he or she can self-manage without additional aids and services [§ 3067(c)(2)(A)] Group B: this is not required.

#10 Group A: evaluation to determine a person to be in need of a guardianship must specify the aspects of the person's affairs that he or she would be able to self-manage with additional aids and services. [§ 3067(c)(2)(B)]. Group B: this is not required.

#11 Group A: evaluation to determine a person to be in need of guardianship must contain a statement of what programs and services the guardian ought to provide. §3067(c)(2)(D) Group B: this is not required.

#12 Group A: Statute requires "the guardian shall always serve the interests of the person under guardianship and shall bring any potential conflicts of interest to the attention of the court." Group B: there is no such statement or requirement.

There would be a 13th difference except the Vermont Supreme Court intervened. Statutes in the probate system provide for a "close friend" of a person under guardianship to petition for modification. There is no specific provision for that in the family court system. The Vermont Supreme Court in *Guardianship of CH*

(2018) overruled a determination that the Family Court provisions did not include a close friend in general as being an interested person.

Dated: August 11, 2018

David Searles – member VtADIG

Eighteen Discriminatory Differences In Vermont's Adult Guardianship Statutes

Vermont lacks a unified system of adult guardianship. There are major unjustifiable differences as to how statute treats the rights of people in different categories. There are also major gaps in the protection of all, such as the lack of the right to a trial by jury before a person may be determined to be mentally incompetent. This paper focuses on the unjustifiable differences within the two-court system of adult guardianship under Vermont statute:

A major division exists in statute concerning two groups, people who have a suitable private individual to serve as their guardian, and those who don't. You will see later in this paper there is an additional division of those who do not have a suitable private person to serve as their guardian, with unjustifiable differences in procedural protections between them as well.

Differences between guardianships for adults who have a suitable person to serve as their guardian (group A) and "guardianships" for developmentally disable adults who do not (group B).

#1 **Group A**: guardianship proceedings by statute occur in the probate division in public proceedings (except for the contents of the guardianship evaluation). **Group B**: guardianship proceedings by statute occur in a different court, where rights over person and property are severely curtailed in a closed proceeding without even a public list of the adults whose personal and property interest the family division has affected.

#2 **Group A**: voluntary guardianship, a court supervised power of attorney program, without a determination of mental incompetency, is an available option for any adult in the group A category who simply understands the nature of the guardianship being proposed. **Group B**: guardianships for all group B individuals must be based upon a judicial finding of mental incompetency simply because of the statutory omission of the availability of voluntary guardianships for that group.

#3 **Group A**: Under 14 V.S.A. Chapter 111, Subchapter 12 by motion of an interested person or its own, the court "may appoint a guardian ad litem if it finds the respondent or person under guardianship is unable to communicate with or advise counsel." .There is no provision for the appointment of a guardian ad litem in the **Group B** system.

#4 **Group A**: there is an available re-trial in the civil division of disputed incompetency findings by the probate division. **Group B**: only a straight appeal with deference to the factual findings below is available. (This difference alone has elsewhere been found to violate equal protection.)

#5 **Group A**: the guardian must file an annual report with the court "on the progress and condition of the person under guardianship and the manner in which the guardian carried out his or her duties." (14 V.S.A. § 3076(a & b)) **Group B**: no annual report is required.

#6 **Group A**: the residential placement of the person under guardianship may only be changed upon an order of the guardian court made after a motion and hearing. (14 V.S.A. § 3073) **Group B** no court permission is required for a change in residential placement of the person under guardianship.

#7 **Group A**: the court must mail a copy of the annual report from #5 above, as well as a statement of the person's right to seek modification or revocation of the guardianship. (14 V.S.A. § 3078) **Group B**: there are no such requirements.

#8 **Group A**: the guardian must file a final financial accounting with the court at the termination of the guardianship. (14 V.S.A. § 3076(c)) **Group B**: no final accounting is required.

#9 **Group A**: a court order is required for a guardianship evaluation to be conducted. [14 V.S.A. § 3067(a)] **Group B**: no order is required.

#10 **Group A**: a showing must be made in the proceedings that an alleged incapacity is caused by the purported disability [§ 3061(1)(B)]. **Group B**: this is not required.

#11 **Group A**: determination of a person being "in need" of a guardianship must be based upon evidence of recent behavior [§ 3061(2 & 3)] **Group B**: this is not required.

#12 **Group A**: evaluation to determine a person to be "in need of guardianship" must specify the aspects of the person's affairs that he or she can self-manage without additional aids and services [§ 3067(c)(2)(A)] **Group B**: this is not required.

#13 **Group A**: evaluation to determine a person to be in need of a guardianship must specify the aspects of the person's affairs that he or she would be able to self-

manage with additional aids and services. [§ 3067(c)(2)(B)]. **Group B**: this is not required.

#14 **Group A**: evaluation to determine a person to be in need of guardianship must contain a statement of what programs and services the guardian ought to provide. §3067(c)(2)(D) **Group B**: this is not required.

#15 **Group A**: 14 V.S.A. § 3071(c) requires "the guardian shall always serve the interests of the person under guardianship and shall bring any potential conflicts of interest to the attention of the court." **Group B**: there is no such statement or requirement.

The presumption of incompetence for persons at least 60 years of age:

In addition to the differences discussed above:

#16 Until 2010 state law presumed that all persons with "mental retardation" or "mental illness" simply lacked the capacity to consent to the establishment of a non-incompetency based voluntary guardianship. When that was changed, the legislature failed to fix the provision with the same effect in the statutes which created the Office of Public Guardian. (Title 14, Chap 111, Subchap 13) The probate court can appoint the state as guardian for a person at least 60 years of age, but only in an incompetency based involuntary guardianship at Title 14, Chapter 111, subchapter 12, not a voluntary guardianship in subchapter 2.

Two more unwarranted procedural protection differences:

#17 For the group of individuals 60 years of age and older for whom a guardianship of the individual by the state through the Office of Public Guardian is established in the probate court, 14 V.S.A. § 3094 requires the state to make a reasonable effort to locate an appropriate private person to serve as guardian rather than the state. The section further provides that if there is such an available private person, essentially, that the state would no longer be considered a suitable guardian, and that once a year the state is required to report on such efforts with regard to that particular individual under guardianship to the probate court. There is no parallel requirement for the approximately 600 developmentally disabled adults under state guardianship in the family court.

#18 Finally for those aged 60 plus under state guardianship, 14 V.S.A. § 3095 requires the state to maintain statistics on the number of persons for whom the office of Public Guardian was appointed guardian, showing all of the dates of

when such guardianships were created and/or terminated. There is no parallel requirement for the 600+ developmentally disabled adults under state guardianship in the family court. (There ae over 600 adults where the state has been appointed their guardian either through the family division under Title 18, Chapter 215 or the probate division under Title 14, Chapter 111, Subchapter 13.)

Common Benefits Clause:

The Vermont Supreme Court over a wide range of cases has consistently required that disparate treatment concerning public benefits or protections are valid ONLY if predicated in fact upon a current "reasonable and just" basis for exclusion of one group relative to the other. See *Baker v. State* (1999) and cited cases.

Also:

> Classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. *McLaughlin v. Florida*, 379 US 184 – U.S. Supreme Court 1964

Where the legislature has enacted a set of protections and options for persons who have a suitable private person to serve as their guardian, it is constitutionally improper, indeed it is an ongoing perversity for the legislature to afford an inferior set of protections and options to persons similarly situated but who have no suitable private person to serve as their guardian. There is nothing at all inherent in that distinction that would allow ANY of the 18 disparate statutory treatments discussed above to be considered reasonable or just.

Revised: August, 2023

David Searles

Rutland, Vt.05701

From: Brian Collamore <BCollamore@leg.state.vt.us>
Sent: Thursday, July 14, 2022 12:07 PM
To: Diamond, Joshua <Joshua.Diamond@vermont.gov>
Subject: Fw: New information as to equal protection violation in the two court system of adult guardianship

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.

Hello Josh,

I received this email just moments ago. I had earlier, back in June, asked for help with this issue but never heard anything back from the AG's office. Hoping you can help.

Regards,

Sen Collamore

From: david searles <[redacted]>
Sent: Thursday, July 14, 2022 11:51 AM
To: Cheryl Hooker <CHooker@leg.state.vt.us>; Mary Howard <MHoward@leg.state.vt.us>; Brian Collamore <BCollamore@leg.state.vt.us>; William Notte <WNotte@leg.state.vt.us>
Subject: New information as to equal protection violation in the two court system of adult guardianship

Sen Hooker, Sen Collamore, Rep Howard and Rep Notte:

Yesterday I happened to come upon a US Supreme Court case which indicates that the two-court setup of adult guardianship in Vermont violates not only the Vermont Constitution's common benefits clause, but also the U.S. Constitution's, more restricted in application, equal protection clause. An appeal from a family division determination that an involuntary guardianship be created is taken on direct appeal to the Vermont Supreme

Court where deference is given to the factual findings made below. Factual determinations of a court below, unless there is a law that has clearly been misapplied are only rarely overturned.
An appeal of a factual matter in the probate system goes to the civil division on what is called de novo appeal, where the factual determinations of the court below are simply disregarded and the matter tried again in a new proceeding in the civil division.
In New York State there was a similar dichotomy, where appeals from civil commitment proceedings for one group of people were subject to a straight appeal procedure (with deference to the factual determinations made below), and where for another group of people, a de novo appeal was afforded. The U.S. Supreme Court held in Baxstrom v. Herold, 383 U.S. 107 (1966) that arrangement violated the U.S. Constitution's equal protection clause.
And yes Cheryl, I understand that the A.G.'s office and OLC apparently gave both you and Sen. Ballint a song and a dance that there was not a problem with the arrangement. Do you understand that that is not acceptable? You should have demanded that they give you a detailed formal statement that explains why the myriad of disparate and inferior statutory provisions regarding adults with developmental disabilities who do not have a suitable private person to serve as their guardian, when compared to the provisions in the probate division in all other adult guardianships, are not in violation of the law.
Senators and representatives take an oath to in all things, conduct themselves as a faithful, honest representative and guardians of the people. How can it be said that anyone is doing their job in the legislature if they allow these apparent constitutional violations concerning the two court system to exist without demanding a detailed explanation from OLC and the A.G.s office as to how the two court system is not in violation?
Where do we go from here?
Dave Searles

From: david searles <[redacted]>
Sent: Friday, August 12, 2022 8:36 AM
To: White, Monica <Monica.White@vermont.gov>; Jackie Rogers <jackie.rogers@vermont.gov>; Garabedian, Jennifer <Jennifer.Garabedian@vermont.gov>; Connors, Timothy <Timothy.Connors@vermont.gov>; Young, Susanne <Susanne.Young@vermont.gov>; Samuelson, Jenney <Jenney.Samuelson@vermont.gov>; Governor CSO <GovernorCSO@vermont.gov>
Subject: Fw: State Attorney General's unprincipled defense of Vermont's discriminatory adult guardianship statutes

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FYI copy of my letter to Rutland Herald

----- Forwarded Message -----
From: david searles <[redacted]>
To: letters@rutlandherald.com <letters@rutlandherald.com>
Sent: Friday, August 12, 2022 at 08:03:07 AM EDT
Subject: State Attorney General's unprincipled defense of Vermont's discriminatory adult guardianship statutes

The state attorney general's office wrote to State Senator Brian Collamore, there is no disparate treatment in Vermont statutes concerning adult guardianship. The statutes in fact show 12 ways in which men and women with developmental disabilities who have no private person to serve as their guardian are treated as second-class citizens. The attorney general, good or bad, is required to defend statutes as written - it is beyond the pale however for it to out and out lie to a state legislator diligently trying to look into the matter. As a result of the attorney general's misrepresentation the commissioner of DAIL who is the appointed guardian of over 600 adults with developmental disabilities under the system has decided to not attempt to explain the state's rationale for the disparate treatment. With the attorney general's letter she can now pretend in spite of the truth there is no disparate treatment. However, the truth will out. It always does.

I am attaching to this letter a copy of the attorney general's letter, the commissioner's statement and an analysis of the statutes.

From: White, Monica <Monica.White@vermont.gov>
Sent: Saturday, July 23, 2022 10:12 AM
To: david searles <[redacted]>
Cc: Chater, Ben <Ben.Chater@vermont.gov>; Garabedian, Jennifer <Jennifer.Garabedian@vermont.gov>; Rogers, Jackie <Jackie.Rogers@vermont.gov>
Subject: Re: Response from the Governor's Office [ref:_00Dt0LBWY._500t010iR47:ref]

Dear Mr Searles,

Your inquiry has been received and will receive a response. I/we appreciate your patience in awaiting a reply.

Regards,
Monica

Sent via iPhone

From: david searles <[redacted]>
Sent: Saturday, July 23, 2022 10:00:58 AM
To: White, Monica <Monica.White@vermont.gov>
Cc: Chater, Ben <Ben.Chater@vermont.gov>; Garabedian, Jennifer <Jennifer.Garabedian@vermont.gov>; Rogers, Jackie <Jackie.Rogers@vermont.gov>
Subject: Response from the Governor's Office [ref:_00Dt0LBWY._500t010iR47:ref]

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.

Just to let you know, the governor's office said that a representative of DAIL would be reaching out to me directly to answer my questions. It's been a week and no one from DAIL has yet to acknowledge the inquiry. I understand the question of the constitutionality of a state statute seems like it ought not have been fielded out to the agency charged with at least partial implementation of the law but that's what the office of constituent services decided to do, so for now, we'll go through that process.

However one possible answer from DAIL might be, that DAIL lacks the ability

to offer a definitive answer.

I'm from New York State, and I know the procedure there would be for the governor or some official to ask the state Attorney General to issue an written opinion as to what the state's official opinion would be on such a question.

Anyway, I have re-written my presentation about the unconstitutionality of the two court system of adult guardianship and have appended it below.

Again, I wish to inform you, that I do not wish to speak to anyone on the telephone about this, so that we can keep everything in black and white. If anyone has any questions for me, I will be happy to be respond in writing to written questions.

Thanks,

David Searles

++++++++++++++++

Unconstitutionality of the Two-Court System of Adult Guardianship

There are two distinct statutory sources for the creation of adult "guardianships" in Vermont, the probate division under Title 14, Chapter 111, and the family division under Title 18, Chapter 215. The family division system, established by statute in 1977, is not actually guardianship.

> "A guardian appointed by a court ... is always under the court's control and is subject to its directions and supervision." Vermont Supreme Court, *Boisvert v. Harrington* (2002)

In the family division proceedings, the state of Vermont is appointed "guardian" but the law provides for no reports to the court by the state so that the court can monitor whether the state is actually fulfilling its obligations under the arrangement, or to determine whether it would be in the person's best interests for it to continue in the same form, or whether the arrangement should be terminated.

> "In reality the court is the guardian; an individual who is given that title is
> merely an agent or arm of that tribunal in carrying out its sacred responsibility." Boisvert v. Harrington (2002)

In the current family division arrangement, the court does not supervise what the state does after the court gives it authority to manage the personal and property affairs of the 606 individuals (2021 Annual Report, Vermont

Office of Public Guardian) currently under this setup. (It is a system of executive branch tutelage rather than judicial guardianship.) Moreover, the procedural protections and available options under the family court arrangement are decidedly inferior to those in the probate division system. So much so that the differences appear to violate the common benefits clause of the Vermont Constitution and likely the equal protection clause of the U.S. Constitution.

For example, the probate court guardianship statutes require:

(a) a court order for a guardianship evaluation [14 V.S.A. § 3067(a)],

(b) a showing that the alleged incapacity be caused by the purported disability [§ 3061(1)(B)],

(c) that the determination of a person being in need of a guardianship be based upon evidence of recent behavior [§ 3061(2 & 3)],

(d) the evaluation specify the aspects of the person's affairs that he or she can self-manage without additional aids and services [§ 3067(c)(2)(A)],

(e) the guardianship evaluation specify the aspects of the person's affairs that he or she would be able to self-manage with additional aids and services. [§ 3067(c)(2)(B)].

(f) a statement in the guardianship evaluation of what programs and services the guardian ought to provide to the person under guardianship. § 3067(c)(2)(D).

The family court guardianship statutes require none of these.

Additionally voluntary guardianship is not an option in the family division system. Also an appellant from a probate guardianship determination is entitled to a new trial on the factual determinations in the civil division, where the appellant from a family court determination is only entitled to a straight appeal where the facts found below are given deference by the appellate court.

Why do the statutes which establish the two-court system appear to violate the Vermont and possibly the U.S. Constitution? Because they treat two groups significantly differently in the provision of public benefits and protections.

> Vermont case law has consistently demanded in practice that statutory exclusions from publicly-conferred benefits and protections must be "premised on an appropriate and overriding public interest." Vermont

Supreme Court, *Baker v. State* (1999)

The family division proceedings are for adults with developmental disabilities "in need of guardianship," according to the statute, unable to personally exercise "some or all of the powers and responsibilities" such as choosing or changing the residence, care, habilitation, education, and employment, the power to contract, and initiation and continuation of medical and dental treatment, and who have no suitable private person to serve as their guardian. (18 V.S.A. §§ 9302, 9310)

The probate division proceedings are for any other adult, including adults with developmental disabilities who ether require or merely desire the appointment of a guardian to assist them with their personal and property affairs. (14 V.S.A. Chapter 111). For example, under this system, an adult may have a guardianship created without the stigma of a socially debilitating mental incompetency determination.

Under statute, the sole determinant of whether an adult with a developmental disability becomes subject to the family division system as opposed to the probate system like everyone else, is whether or not there is a an available private individual suitable to serve as their guardian. That is the determinant it in its entirety.

This is not a sufficient difference upon which to predicate a supposed overriding state interest in treating a group of adults with developmental disabilities differently from all other adults who either require or desire the assistance of a guardian concerning the management of their day-to-day affairs.

The Vermont Supreme Court in *Choquette v. Perrault* (1989) acknowledged that under some circumstances a statutory arrangement which was once constitutional, can, because of societal changes, become unconstitutional. (In that case it determined that the changes in the prevailing land use patterns in fact rendered Vermont's 19th century requirement that adjoining property owners share in the expense of building and maintaining fences unconstitutional.)

While in 1977 the two-court system of adult guardianship might have passed constitutional muster, there have been tectonic shifts in the last 45 years in how society realizes it must more equally treat persons with differences in dozens of categories, especially including persons with developmental disabilities. For instance, it wasn't all that long ago when the parents of a child with anything more than a mild form of developmental disability were advised by the mental health "professionals" to simply have their child institutionalized and pretend they didn't exist. My own grandfather's brother fell into this category. The best man at my wedding was also in that category. Luckily his parents put little stock in the opinions of mental health professionals, while my great-uncle spent his entire life in a state

“developmental “school.” Even until the late 1960s, residents of such schools were referred to by the professionals as idiots who could be “trained” and imbeciles who couldn’t be.

Since the time of the creation of the current family division system In 1977, the Americans with Disabilities Act has made many routine disparate treatments and failure to provide reasonable accommodations of persons with disabilities by state and local governments, violations of federal law. In 2010 the legislature removed the bar against persons with mental retardation from being able to obtain voluntary guardianships in the probate division. And if there was some reason in 1977 that our county probate courts may have been ill-equipped to handle the “guardianship” proceedings which are now assigned to the family division, that rationale disappeared in the spring of 2011 when the various probate districts and their courts were unified into a single division of the superior court under common administration with the other three court divisions.

Dave Searles
July 23, 2022

From:	david searles
To:	White, Monica; Chater, Ben; Garabedian, Jennifer; Rogers, Jackie; Young, Susanne; AGO - Info; Connors, Timothy; Samuelson, Jenney
Subject:	I am still waiting for DAIL"s answer to the Governor"s Office
Date:	Wednesday, August 3, 2022 12:52:05 PM

EXTERNAL SENDER: Do not open attachments or click on links unless you recognize and trust the sender.

Just to let you know I am still waiting for DAIL's answer to the Governor's Office on whether the state has a reasonable and just basis for the continued inferior options and protections afforded to developmentally disabled who do not have a suitable person to sere as their guardian as opposed to all other adults who either need or desire the appointment of a guardian.

Dave Searles

Recently a group of 4 legislators asked the State Attorney General's Office to explain why the differences in treatment were not prohibited discrimination. For example under the Vermont Constitution statutory exclusions of benefits or protections afforded to one group but denied another may only occur if there is reasonable and just basis for continued exclusion. Baker v. State (1999) If the Attorney General's Office had in fact acknowledged disparate treatment between the two groups, it would have been required to identify the state's justification for its continued existence.

When confronted with the list of differences of statutory treatment of the two groups State Attorney General's office did what all lawyers do when backed into a corner. Mr. Timothy Connors, chief of the Attorney General's Human Services Division simply stated in both the introduction and conclusion of his letter of July 25, 2022 that there is no disparate treatment in the statutes concerning the two groups, and filled in everything in between those two statements with misrepresentation and obfuscation.

Two groups: 'Group A,' adults (some with developmental disabilities) who need appointment of a guardian to protect their interests, who have appropriate private individuals willing to serve as their guardians; and 'Group B,' adults with developmental disabilities who need appointment of a guardian to protect their interests who do not have appropriate private individuals willing to serve as their guardians.

Disparate treatment under the guardianship statutes:

#1 Group A: guardianship proceedings by statute occur in the probate division in public proceedings (except for the contents of the guardianship evaluation). Group B: guardianship proceedings by statute occur in a different court where the entire proceeding is confidential, where a person's rights over their person and property are severely curtailed in a closed proceeding.

#2 Group A: voluntary guardianship, essentially a court supervised power of attorney program without any determination of mental incompetency is an available option for any adult in the group A category who meets the relaxed criteria of being able to understand the nature of the guardianship proposed. Group B: by statutory omission voluntary guardianship is not an available option. All "guardianships" for group B individuals are based upon a finding of mental incompetency of the person involved.

#3 Group A: there is an available re-trial of disputed guardianship creations in the probate division to the civil division. Group B: by statutory omission there is not an available re-trial of disputed guardianship creations.

#4 Group A: the guardian is required to file an annual report with the court "on the progress and condition of the person under guardianship and the manner in which the guardian carried out his or her duties." (14 V.S.A. § 3076) Group B: by statutory omission no such reports are required.

#5 Group A: the court is required to mail a copy of the annual report from #4 above as well as a statement of the person's rights to seek modification and even revocation of the guardianship. (14 V.S.A. § 3078) Group B: by statutory omission no such notice is required to be sent.

#6 Group A: a court order is required for a guardianship evaluation to be conducted. [14 V.S.A. § 3067(a)] Group B: no such court order is required.

#7 Group A: a showing must be made in the proceedings that the alleged incapacity in a subchapter 12 guardianship be caused by the purported disability [§ 3061(1)(B)]. Group B: by statutory omission this is not required.

#8 Group A: the determination of a person being "in need" of a guardianship in a subchapter 12 guardianship must be based upon evidence of recent behavior [§ 3061(2 & 3)] Group B by statutory omission this is not required.

#9 Group A: the evaluation to determine a person to be "in need of guardianship" in a subchapter 12 guardianship must specify the aspects of the person's affairs that he or she can self-manage without additional aids and services [§ 3067(c)(2)(A)] Group B: by statutory omission this is not required.

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#11 Group A: under subchapter 12 the evaluation to determine a person to be in need of guardianship must contain a statement of what programs and services the guardian ought to provide to the person under the proposed guardianship . §3067(c)(2)(D) Group B: by statutory omission this is not required.

From:	david searles
To:	Governor CSO
Cc:	White, Monica; Connors, Timothy
Subject:	RE: [ref:_00Dt0LBWY._500t010iR47:ref]
Date:	Wednesday, August 3, 2022 1:47:01 PM
Attachments:	image001.png

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Dear Governor Scott:

As to my prior question to you, about what the state's justification is for the inferior protections and options for one group compared to the other in adult guardianship, your office wrote to me on July 15 and told me that I would be contacted by DAIL which would answer the question.

Independently, in response to an inquiry by 4 members of the legislature, Mr. Timothy Connors, chief of the Attorney General's Human Services Division wrote a letter of July 25, 2022 to one of the legislators which stated in both its introduction and conclusion that there is no "disparate treatment."

Except in the actual world but there are 11 differences in how members of one group are treated in an inferior manner by Vermont statute concerning adult guardianship.

Today I received an email from the DAIL Commissioner simply starting that July 25, 2022 letter by Mr. Connor accurately represents DAIL's perspective on my inquiry.

Now that we know the Commissioner of DAIL's response, I would like to know what is your answer to the question.

I would like to be informed by you, do you believe that Vermont has "a reasonable and just basis" for the continuation of the system where such differences exist? If you do believe that, I would like to know what you thing Vermont's reasonable and just basis is?

(Just to remind you that I have been writing to your office about this since March 22, 2022)

Thank you,

David Searles

Eleven Differences

Two groups: 'Group A,' adults (some with developmental disabilities) who need appointment of a guardian to protect their interests, who have appropriate private individuals willing to serve as their guardians; and 'Group B,' adults with developmental disabilities who need appointment of a guardian to protect their interests who do not have appropriate private individuals willing to serve as their guardians.

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guardianship proposed. Group B: by statutory omission voluntary guardianship is not an available option. All "guardianships" for group B individuals are based upon a finding of mental incompetency of the person involved.

#3 Group A: there is an available re-trial of disputed guardianship creations in the probate division to the civil division. Group B: by statutory omission there is not an available re-trial of disputed guardianship creations.

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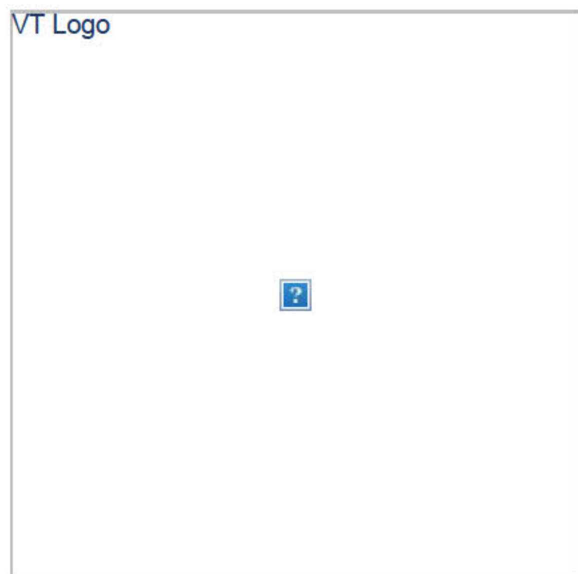
----- Forwarded Message -----
From: White, Monica <monica.white@vermont.gov>
To: david searles <   >; Chater, Ben <ben.chater@vermont.gov>; Garabedian, Jennifer <jennifer.garabedian@vermont.gov>; Rogers, Jackie <jackie.rogers@vermont.gov>; Young, Susanne <susanne.young@vermont.gov>; AGO - Info <ago.info@vermont.gov>; Connors, Timothy <timothy.connors@vermont.gov>; Samuelson, Jenney <jenney.samuelson@vermont.gov>; Schurr, Stuart <stuart.schurr@vermont.gov>; Gengler, Bart <bart.gengler@vermont.gov>
Sent: Wednesday, August 3, 2022 at 12:59:39 PM EDT
Subject: RE: I am still waiting for DAIL's answer to the Governor's Office

Dear Mr. Searles,

Mr. Connors' letter to you accurately represents DAIL's perspective on your inquiry; we have nothing further to add.

Thank you,
Monica



Monica White, B.S., M.B.A., Commissioner
Vermont Department of Disabilities, Aging, and Independent Living (DAIL)

280 State Drive, HC2 South, Waterbury VT 05671-2020

802.398.5024 (Mobile)

Monica.White@vermont.gov | www.dail.vermont.gov | https://www.facebook.com/dailvt

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From: david searles [redacted]
Sent: Wednesday, August 3, 2022 12:51 PM
To: White, Monica <Monica.White@vermont.gov>; Chater, Ben <Ben.Chater@vermont.gov>; Garabedian, Jennifer <Jennifer.Garabedian@vermont.gov>; Rogers, Jackie <Jackie.Rogers@vermont.gov>; Young, Susanne <Susanne.Young@vermont.gov>; AGO - Info <AGO.Info@vermont.gov>; Connors, Timothy <Timothy.Connors@vermont.gov>; Samuelson, Jenney <Jenney.Samuelson@vermont.gov>
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From: Brian Collamore <BCollamore@leg.state.vt.us>
Sent: Monday, July 25, 2022 6:11 PM
To: Connors, Timothy <Timothy.Connors@vermont.gov>
Cc: cheryl hooker <chooker@leg.state.vt.us>; Mary Howard <MHoward@leg.state.vt.us>; William Notte <WNotte@leg.state.vt.us>
Subject: Re: DAVID SEARLES RESPONSE

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Thanks Tim.

From: david searles
To: Connors, Timothy
Cc: Cheryl Hooker; Chater, Ben; Brian Collamore; Young, Susanne; William Notte; Mary Howard; White, Monica; Garabedian, Jennifer; Rogers, Jackie; Samuelson, Jenney; Richard Sears; Representative Maxine Grad
Subject: Re: the determinant in the two court system is unconstitutional
Date: Wednesday, July 27, 2022 1:24:03 PM

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Mr. Timothy Connors

Vermont Attorney General's Office:

follow-up to my previous email today:

Title 18 Section 9302 establishes whether a person goes into the state's guardianship system in the family court system:

> "Person in need of guardianship" means a person who:
>
> (A) has developmental disabilities within the meaning of this chapter;
>
> (B) is unable to personally exercise some or all of the powers and responsibilities described in section 9310 of this title; and
>
> (C) is not receiving the active assistance of a responsible adult to carry out the powers and responsibilities described in section 9310 of this title.

subsection c is the ringer.

If such person meeting subsections A and B has a responsible adult to carry out the responsibilities consonant with guardianship, they do not go into the family court system.

If they do nor have such person available, they go into the family court system with its inferior procedural protections and options.

You don't seem to understand that.

I must note that throughout your letter, you referred to supposedly what my position was, but you never once quoted me.

For example you wrote:

"contrary to Mr. Searles' implications, any adult can petition the court for a voluntary guardian in the Probate Division, regardless of their disability status."

You can go through the entire body of my writings and you will never find even a hint of such implication. Perhaps if you didn't take time to understand what I wrote you may have inferred it - but that's on you, not me.

But as to what you wrote:

"any adult can petition the court for a voluntary guardian in the Probate Division, regardless of their disability status."

A voluntary guardianship petition must contain the name of the person being nominated as guardian.

The court can only name a person that the proposed ward has nominated. If they do not have a suitable person to serve as voluntary guardian, that person cannot obtain a voluntary guardianship. The court certainly would not be able to designate the Office of Public Guardian as it could under subchapter 13 of chapter 11, Title 12 because there is no provision in subchapter 13 for it, even if the person was developmentally disabled and 60 years of age. (Subchapter 13 limits appointment of OPG as guardian to persons who are developmentally disabled, 60 years of age and older, and to that of a guardianship under subchapter 12 - which does not include voluntary guardianship.)

Sincerely,

David Searles

On Wednesday, July 27, 2022 at 10:52:19 AM EDT, david searles <davidasearles@yahoo.com> wrote:

Mr. Timothy Connors

Vermont Attorney General's Office:

I read your July 25, 2022 letter saying there was no disparate treatment in Vermont's two court system of adult guardianship.

You seem to have missed the singular determinant of whether an adult with a developmental disability has a guardianship established under the probate division system (title 14) or the family division system (title 18).

If there is an available appropriate private individual to serve as guardian they go into the probate division system (title 14) with its available options and procedural protections.

If there is no appropriate private individual to serve as guardian they go into the family division system (title 18) with its set of inferior options and protections.

This is what your July 25, 2022 letter did not address.

I am not privy to what information from me was before you when you wrote your letter, but one of my several comments on the split system of guardianship stated:

Under statute, the sole determinant of whether an adult with a developmental disability becomes subject to the family division system as opposed to the probate system like everyone else, is whether there is no available private individual suitable to serve as their guardian. That is the determinant in its entirety. This is not a sufficient difference upon which to predicate a supposed overriding state interest in treating a group of adults with developmental disabilities differently from all other adults who either require or desire the assistance of a guardian concerning the management of their day-to-day affairs.

Would you please now address that part of my criticism?

Thank you,

David Searles

P.S. Just to clarify what you wrote regarding the 1966 US Supreme Court case of Baxstrom v. Herold.

In that case the Supreme court stated:

"In order to accord to petitioner the equal protection of the laws, he was and is entitled to a review of the determination as to his sanity in conformity with proceedings granted all others civilly committed under 74 of the New York Mental Hygiene Law."

The Supreme Court specifically noted that under chapter 74 the person would be entitled to a trial de novo:

“All persons civilly committed, however, other than those

committed at the expiration of a penal term, are expressly granted the right to de novo review by jury trial of the question of their sanity under chapter 74 of the Mental Hygiene Law."

The disparate or unequal treatment under Vermont statute is similar. Under title 14 there is the availability of de novo review from a determination below that the person is subject to guardianship. Under title 18 there is not.

Sincerely,

David Searles

From: david searles
To: Connors, Timothy
Cc: Cheryl Hooker; Chater, Ben; Brian Collamore; Young, Susanne; William Notte; Mary Howard; White, Monica; Garabedian, Jennifer; Rogers, Jackie; Samuelson, Jenney; Richard Sears; Representative Maxine Grad
Subject: the determinant in the two court system is unconstitutional
Date: Wednesday, July 27, 2022 10:54:11 AM

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Mr. Timothy Connors

Vermont Attorney General's Office:

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Sincerely,

David Searles

From:	david searles
To:	Brian Collamore
Cc:	Connors, Timothy
Subject:	the state"s rationale for setting a two-court, two procedure system of adult guardianship
Date:	Tuesday, September 5, 2023 1:45:13 PM
Attachments:	Exhibit 1 20227725 Connors denial of disparate treatment.pdf Exhibit 2 Eighteen Dicrimnatory Differences In Vermont's Adult Guardianship Statutes (1).pdf

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Dear Senator Collamore:

Last year I asked if you could find out from the governor's office the state's rationale for the two-court, two procedure system of adult guardianship. As you may recall, the governor's office referred the question to the DAIL commissioner, who in turn referred the question to Mr. Tim Connors, head of the A.G.'s developmental services division. I have attached a copy of Mr Connors letter to this email as exhibit 1.

Mr. Connors opined that comparing the family court guardianship system to the probate court guardianship system, that there was no disparate treatment. Because he concluded there was no disparate treatment, Mr. Connor's offered no state justification for the disparate treatment that plainly does exist.

Subsequent to Mr. Connors letter, I did a side by side comparison of the two systems and found 18 specific instances in which the statutes which establish the family division system of adult guardianship provide for inferior procedural protections and options as compared to the statutes which establish the probate division system of adult guardianship. I have attached a copy of that analysis as exhibit 2.

Could you please refine your previous request for an explanation from the governor's office in light of the more detailed analysis of the differences between the two systems I am attaching to this email? Could you please ask the governor for an explanation, if the governor's has one, of the state's legal justification for the disparate treatments which are described in the attached analysis?

I can imagine the Senate Judiciary Committee in light of S.97's proposal to create a unified guardianship system will at least be interested to know what the state's rationale would be for any proposed continuation of the apparently disparate system. It would be good to elicit any such explanation, if one exists, sooner, rather than waiting for the session to begin in January.

Thanks,

Dave Searles