VOR

Toll free
877-399-4VOR

www.vor.net

Executive Director
Julie M. Huso
836 S. Arlington Heights Rd, #351
Elk Grove Village, IL 60007
605-370-4652 Voice
605-271-0445 Fax
jhuso@vor.net

Dir. of Govt. Relations & Advocacy
Tamie Hopp
PO Box 1208
Rapid City, SD 57709
605-399-1624 Voice
605-399-1631 Fax
thopp@vor.net

Washington, D.C.
Larry Innis
529 Bay Dale Court
Arnold, MD 21012-2312
410-751-1VOR Voice/Fax
LarryInnis@aol.com

The Olmstead "choice" provision and guardianship rights

Patricia G. Williams, Esq.
897 S. Los Robles Avenue
Pasadena, CA 91106

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The Court's conclusion, expressed in a 3-prong standard which has become known as the "Olmstead Rule," requires community placement "when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Some clarification is still necessary, however, in determining whether the decision in Olmstead impacts upon who is qualified to object on behalf of an individual with developmental disability where that individual lacks the capacity to make an objection to placement. The Olmstead case is completely silent on surrogate decisionmaking. The Supreme Court was not asked, so did not address, the question of what decisions guardians, conservators, or parents can make on behalf of persons with mental retardation (Note that the only place the word "guardian" appears in Olmstead is in the case heading. The case was filed, not by the two persons with mental retardation themselves, but by a guardian ad litem, exercising their rights and choices on their behalf. The guardian ad litem was appointed because the court determined the individuals were not competent to act in their own best interests without assistance).

We must then, as is common and correct practice in interpreting court decisions, go beyond the four walls of the decision to use other existing law to answer this question. If the Court were to say that persons with mental retardation were entitled to choose their own physician from those available in their geographic area, we would combine that principle with other existing law regarding health care decisionmaking and conclude that a conservator who has the power to make health care decisions on behalf of an adult with mental retardation is authorized to make the choice of an appropriate physician. If an adult with mental retardation has authorized an agent through a durable power of attorney to make such decisions, the agent would also have authority to make that decision.

There is no indication in Olmstead that the Court intended to redefine settled statutory mechanisms for decisionmaking found in state law in every state of the United State, evolved over hundreds of years from their origins in common law. Absent some clear direction from the U.S. Supreme Court to the contrary, we must conclude that the laws pertaining to guardianship, conservatorship, durable powers of attorney and advance directives remain intact. Where a court has exercised its judgment through judicial proceedings to authorize an individual to make decisions on behalf of a person with a disability, that individual's authority must necessarily carry greater legal weight than any other individual purporting to speak on behalf of the person with a disability. California law pertaining to the involvement of parents, guardians and conservators in decision making pertaining to institutional and community residential placement of individuals with developmental disabilities is undisturbed by the Olmstead decision.

It is not so long ago that the U.S. Supreme Court expressed its opinion on the importance of family participation in decisionmaking on these issues in the case of Heller v. Doe (509 U.S. 312). Reviewing statutory provisions for involuntary commitment of persons with mental retardation in the State of Kentucky which provided for participation of family members in commitment proceedings, the Court found a rational basis for the participation of families, arguing "Kentucky might have concluded that close relatives and guardians had valuable insights which ought to be considered during the commitment process." The Court specifically noted that such participation "increased the accuracy of the proceedings" . . . "without undermining the liberty interest of the person facing commitment." Respect for the importance of such familial participation is echoed in the Bear [Pennsylvania] case.

Although there has been much discussion within the disability community of the meaning of "choice" and how "choice" can be exercised by persons with severe developmental disabilities, there has been no genuine legal challenge to the authority of parents of minor children and guardians or conservators of adults with developmental disabilities to be primary decisionmakers in those areas recognized by competent courts of jurisdiction. **V**