Volume 14 | Fall 2023

Journal of Aging Law & Policy

STETSON LAW

Stetson University College of Law

JOURNAL OF AGING LAW & POLICY

VOLUME 14 FALL 2023

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ISSN: 1947-7392

SPECIAL NEEDS PLANNING & THE RISE OF DIRECTED TRUSTS: MODERN DAY PROBLEMS REQUIRE MODERN DAY SOLUTIONS IN TRUST ADMINISTRATION

Jennifer M. Tindell, J.D.[1]

I. Introduction

In a world with increasing complexities around asset and trust administration, the usage of directed trusts is becoming a common solution to modern day problems perplexing trustees in the Special Needs Trust (SNT) space. This article will begin by reviewing the origins of directed trusts, concentrating on the Restatements of Trusts (Second) and (Third), the Uniform Trust Code (UTC), and the Uniform Directed Trust Act (UDTA). This brief history will establish a foundation, outlining the differences in liability for fiduciaries within each, and noting the changes the UDTA made to create a more practical approach to administration. From there, an overview of recent state adoptions showing how the UDTA was enacted will be explored with a concentration on the different versions in Florida and Arkansas. Moving from state variations to a review of the common powerholders of directed trusts in Special Needs Planning, the importance of relying on the appropriate expertise when managing both standard and unusual assets, as well

[1] Jennifer M. Tindell, J.D., is originally from Pensacola, Florida, and holds a B.A. in English Literature from the University of West Florida. She earned her J.D. along with a Certificate of Concentration in Elder Law in 2015 from Stetson University College of Law, where she was the Editor-in-Chief of the *Journal of International Aging Law & Policy*. Jennifer currently resides in Atlanta, Georgia, and joined Raymond James Trust, N.A., in March of 2022 as the Special Needs Trust Manager. She has held progressive roles in the Estate Settlement and Special Needs Trust field since 2010, and currently oversees $1.3 billion in directed and traditional SNT business. She is very passionate about her work helping families navigate the public benefits system and finding a better quality of life for beneficiaries.

as ways to leverage a directed trust to allow for efficiencies in administration will be discussed. The final comments will explore the ever-pressing question of what happens when things go awry, and drafting tips, and compensation considerations.

II. Origin Story

The Uniform Directed Trust Act is a relatively new act to the scene of estate planning. One article noted that "there have been more changes in trust law in the last 20 years than the last two centuries"[2] and that "these changes have been tectonic in scope"[3] as they impact nearly all aspects of traditional trust administration. Considering the changes in the SNT world from OBRA'93,[4] True Link Cards,[5] Self-Settled First Party SNTs,[6] to ABLE accounts[7] to

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[2] Wealth Advisors Trust Company, *Definitive Guide to Directed Trusts*, WEALTH ADVISORS TR. CO., https://www.wealthadvisorstrust.com/blog/directed-trusts-made-simple (last visited Sept. 12, 2022) [hereinafter *Definitive Guide*].

[3] *Id.*

[4] Omnibus Budget Reconciliation Act (OBRA) of 1993, Pub. L. No. 103–66, § 1, 107, Stat. 312, "The purpose of the OBRA '93 Trust or a Supplemental Needs Trust is to allow the disabled beneficiary to benefit from the funds in the trust without losing his or her eligibility for government benefits including, but not limited to: SSI, SSDI, and Medicaid coverage." M. Varnet, Esq., *Memo to Trustees of OBRA '93 Supplemental Needs Trusts*, FLETCHER TILTON, https://www.fletchertilton.com/1C2194/assets/files/Documents/Memo%20to%20Trustees%20of%20OBRA%20'93.pdf.

[5] *True Link*, https://www.truelinkfinancial.com/prepaid-card (last visited Sept. 12, 2022); approved by the Social Security Administration: "Administrator-managed prepaid cards, such as True Link cards, are a type of restricted debit card that can be customized to block the cardholder's access to cash, specific merchants, or entire categories of spending. Typically, the trustee is the account owner and administrator, and the trust beneficiary is the cardholder. To evaluate the income and resource implications of trust disbursements to administrator-managed prepaid cards, we must determine who owns the prepaid card account." *Program Operations Manual System (POMS) – SI 01120.201 Trusts Established with the Assets of an Individual on or after 01/01/00*, SOC. SEC. ADMIN., https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120201 (last visited Sept. 12, 2022).

[6] "There are two types of Special Needs Trusts (SNTs), commonly designated as first-party and third-party SNTs. It is important to determine which type of SNT you have or need. This depends upon whose property is funding the SNT. If the property funding the SNT originates with the SNT beneficiary, then it is a first-party SNT. However, if the property funding the SNT always belonged to someone other than the SNT beneficiary, then it must be drafted as a third-party SNT." *Two Different Types of Special Needs Trusts*, THE VOICE Vol. 11, Issue 6 (Sept. 2017), https://www.specialneedsalliance.org/the-voice/two-different-types-of-special-needs-trusts/ (last visited Sept. 13, 2022).

[7] "ABLE Accounts, which are tax-advantaged savings accounts for individuals with disabilities and their families, were created as a result of the passage of the Stephen Beck Jr. Achieving a Better Life Experience Act of 2014 or better known as the ABLE Act. The beneficiary of the account is the account owner, and income earned by the accounts will not be taxed. Contributions to the account, which can be made by any person (the account beneficiary, family, friends Special Needs Trust or Pooled Trust), must be made using post-taxed dollars and will not be tax deductible for purposes of federal taxes; however, some states may allow for state income tax deductions for contributions made to an ABLE account." *What Are ABLE*

name a few, this claim may not be too far off target. It also begs the question of what is on the horizon.

The UDTA came about to add uniformity to the approach of directing fiduciary responsibility as well as outlay a framework for common questions on administration and guidance should something go wrong. Prior to this, trustees would commonly delegate investments and other authority where possible, but they were not absolved of the requirement to monitor the actions of those delegated parties. Some have likened this tied liability relationship to that of a subcontractor[8] or co-trustee. However, with a directed trust, the appointed party and the trustee have the same fiduciary standard, and depending on the state's directed trust statute, the trustee's liability for acts of the delegated party can be formally reduced. The primary policy challenge with directed trusts is how to successfully bifurcate the role of trustee with that of the trust director[9] and making sure that all parties are clear on their role or responsibility to the beneficiary. Many trustees have found this route of administration more attractive, as it has considerably less liability exposure and overhead with only a slight reduction in their administration fee.[10]

As a practitioner or trustee, it is important to know what your state allows for and to be aware of potential adoptions of new laws concerning directed trusts. Current state treatment of directed trusts can be classified as one of the following: states using the Restatements of Trusts (Second) and (Third),[11] states applying the

Accounts, ABLE NAT'L. RES. CTR., https://www.ablenrc.org/what-is-able/what-are-able-acounts/ (last visited Sept. 12, 2022).

[8] *Definitive Guide*, *supra* note 2.

[9] John D. Morley & Robert H. Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Act*, 44 ACTEC L.J. 1, 6 (2019).

[10] Mike Flinn, *Directed Versus Delegated Trusts: What Advisors Should Know*, ADVISOR PERSPECTIVES (May 14, 2018), https://www.advisorperspectives.com/articles/2018/05/14/directed-versus-delegated-trusts-what-advisors-should-know (last visited Sept. 13, 2022).

[11] States using the Restatements of Trusts (Second) & (Third) as of Dec. 13, 2021, are Indiana & Iowa. David A. Diamond & Todd A. Flubacher, *The Trustee's Role in Directed Trusts*, 149 J. WEALTH MGT. TR. & ESTS., no. 11, 2010, at 26, 32 n, 8.

UTC,[12] states that have enacted the UDTA[13] in part or all, and states without any provision regarding third-party advisors or noting limited protections for those parties.[14] This article will focus on the Restatements of Trusts (Second) & (Third), the UTC, and the UDTA.

A. Restatement (Second) of Trusts & Restatement (Third) of Trusts

In 1959, Section 185 of the Restatement (Second) of Trusts noted that a trustee could direct another party:[15]

> If under the terms of a trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power.[16]

Due to this link of responsibility, the trustee is not fully absolved of the acts of this other party and must determine if the direction is appropriate to follow, making this approach "the most

[12] States using the UTC as of Feb. 11, 2023, are Alabama, Arizona, Arkansas, Colorado. Connecticut, D.C., Florida, Hawaii, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *Trust Code*, UNIF. L. COMM'N., https://www.uniformlaws.org/committees/community-home?communitykey=193ff839-7955-4846-8f3c-ce74ac23938d#LegBillTrackingAnchor (last visited Feb. 11, 2023).

[13] States using the UTDA as of Feb. 11, 2023, are Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Maine, Michigan, Montana, Nebraska, New Mexico, New York (legislation introduced; previously no statute), Rhode Island (legislation introduced; previously no statute), Utah, Virginia, Washington, and West Virginia. *Directed Trust Act*, UNIF. L. COMM'N., https://www.uniformlaws.org/committees/community-home?communitykey=ca4d8a5a-55d7-4c43-b494-5f8858885dd8 (last visited Feb. 11, 2023).

[14] Jocelyn M. Borowsky & Jill C. Beier, *The More Trustees the Merrier? All About Directed Trusts*, N.Y. ST. BAR, https://nysba.org/NYSBA/Meetings%20Department/Section%20Meetings/Trusts%20and%20Estates/TRUSSP18Materials/Panel%204%20-%20The%20morre%20Trustees.pdf.

[15] RESTATEMENT (SECOND) OF TR. § 185 (AM. L. INST. 1959); R. Hugh Magill, *Allocating Fiduciary Responsibility*, J. WEALTH MGT. TR. & ESTS., May 2015, at 36, 36; *see also* RESTATEMENT (THIRD) OF TR. § 75 (AM. L. INST. 2003).

[16] RESTATEMENT (SECOND) OF TR. § 185; Magill, *supra* note 15, at 36.

conservative"[17] regarding directed trusts. The weight of continued "fiduciary responsibility and liability"[18] creates a complicated environment in administering a relationship where a trustee is looking to direct versus maintain complete control.

The Restatement (Third) of Trusts did little to add clarity or absolve the trustee's liability with Section 75:

> …if the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, unless the attempted exercise is contrary to the terms of the trust or power or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries.[19]

Under both sections, the trustee is held to the same version of analysis, with the distinction that under Section 75 the trustee must refuse to carry out the direction if they know or have reason to suspect it is in violation of a fiduciary duty.[20] Rather than bifurcating the role, the trustee must question the direction and be sure that it is sound prior to executing, and they could be found liable for breach if there was sufficient cause to suspect wrongdoing or a lack of research by the trustee prior to acting.

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[17] Magill, *supra* note 15, at 37.
[18] Borowsky & Beier, *supra* note 14, at 6.
[19] William D. Lucius, Esq. & Shirley B. Whitenack, Esq., *Directed Trusts: A Primer on the Bifurcation of Trust Powers, Duties, and Liabilities in Special Needs Planning*, 15 NAELA J. (Fall 2019), https://www.naela.org/NewsJournalOnline/NewsJournalOnline/OnlineJournalArticles/OnlineAugust2019/DirectedTrusts.aspx?subid=1093 (last visited Sept. 14, 2022), *quoting* 3rd restatement; RESTATEMENT (THIRD) OF TRS. § 75.
[20] Lucius & Whitenack, *supra* note 19.

B. Uniform Trust Code

While slightly clearer in terminology and limitations on liability as compared to the Restatements of Trusts (Second) and (Third), this solution does not completely remove the oversight and liability elements from a directed trust relationship. UTC Section 808(b) provided:

> If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.[21]

The directed trustee can "only refuse to act as directed if the directed trustee believes that the directed action would contravene the trust terms or would cause a serious breach of fiduciary duty."[22] In the comments to this section of the UTC, it is noted that the powers to direct are "most effective when the trustee is not deterred from exercising the power by fear of possible liability"[23] while balancing the responsibility of the trustee to see that the terms of the trust are upheld.[24] This imposition of a "minimal oversight responsibility on the trustee"[25] resulted in the making of a fiduciary duty, which created potential liability concerning their decision to follow the direction of the advisor.[26]

In 2010, Section 808 was removed from the UTC, and it was noted that a UDTA state should repeal and revise Section 808 and

[21] UNIF. TR. CODE § 808 (UNIF. L. COMM'N 2003); Magill, *supra* note 15, at 37.
[22] Borowsky & Beier, *supra* note 14, at 5.
[23] *Id.*; UNIF. TR. CODE, § 808 cmt.
[24] UNIF. TR. CODE § 808 cmt.; Borowsky & Beier, *supra* note 14, at 5.
[25] Borowsky & Beier, *supra* note 14, at 5.
[26] *Id.*

other provisions of the UTC as per the legislative notes in the UDTA.[27] In an article by James P. Spica, a possible solution to strengthen Section 808 of the UTC is offered by recommending that a UTC state should delete Sections 808(b) through (d), and add the citations for Sections 9, 11, and 12 of the UDTA to the beginning of Subsection 105(b)(2), which states the mandatory minimum fiduciary duty of a trustee and is superseded concerning a directed UDTA trustee.[28] Several UTC states still have trust laws based on Section 808(b) and have further amended their statutes to add specific language about directed trusts to clarify roles, responsibilities, and powers.[29] While not the focus of this article, it will be interesting to see the future developments and changes at the state level to strengthen UTC protections for a directed trustee.

C. Uniform Directed Trust Act

The purpose of the UDTA is to clearly define the roles of directed parties and provide a more practical solution to the questions around administering a directed trust effectively. According to the Uniform Law Commission (ULC),[30] the purpose of this Act is meant to address the increase in usage of directed trust agreements, proper division of fiduciary power and duty, to provide functionality in allowing a settlor to have flexibility in creating a directed trust while maintaining safeguards for beneficiaries, and allow for sensible default rules for items that may not have been contemplated when drafting the trust.[31] Items such as sharing of information, compensation, succession, administrative components, and appointment of the directed roles are also discussed.[32] The scope

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[27] Lucius & Whitenack, *supra* note 19.
[28] James P. Spica, *Settlor-Authorized Fiduciary Indifference to Trust Purposes and the Interests of Beneficiaries Under the Uniform Trust Code*, 55 REAL PROP. TR. & EST. L.J. 123, 124 (Spring 2020).
[29] Lucius & Whitenack, *supra* note 19.
[30] *Directed Trust Act*, *supra* note 13.
[31] *A Few Facts About the Uniform Directed Trust Act*, UNIF. L. COMM'N., https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=44e4c984-670c-5c92-c6df-14bdd7319d63&forceDialog=0 (last visited Sept. 14, 2022).
[32] *The Uniform Directed Trust Act: A Summary*, UNIF. L. COMM'N., https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ffe1fdd5-29a0-a311-375d-aa1330c77ae7&forceDialog=0 (last visited Sept. 14, 2022).

of the directed party is typically more narrow than that of the trustee and is limited to only the acts specified in their role.[33] There are practical matters that arise in trust administration that are not as clearly defined, and the UDTA sought to dispel some of that ambiguity and to fill in gaps not previously addressed in the Restatements or UTC.

In Section 5 of the UDTA, there are powers noted that are excluded such as the power of appointment, the power to appoint or remove a trustee or trust director, the power of a grantor to revoke the trust, the power a beneficiary exercises or chooses not to exercise which affects the beneficial interest of the beneficiary or another beneficiary represented by the beneficiary, and any power for which the terms of the trust state that it is held in a nonfiduciary capacity solely to achieve the grantor's tax objectives.[34] The UDTA also left specific powers of the trust director to be defined by the terms of the trust rather than narrowing the scope with their own definition.[35] The ULC drafting committee notes that examples of potential powers this role could possess are the power to "direct investments; modify, reform, terminate or decant a trust; change the principal place of administration; determine the capacity of a trustee, grantor, director or beneficiary; determine trustee's compensation; release a trustee from liability, etc."[36] In an effort to address potential conflict in administration, the UDTA follows the majority decision of the trust directors with joint powers.[37] In consideration of SNTs, the UDTA "imposed all the same rules that would apply to a trustee in a like position such as where a state would require a trustee to give notice to a state Attorney General before taking certain actions with respect to a charitable trust or with respect to payback provisions meant to comply with Medicaid law."[38] The UDTA also notes that

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[33] Charles D. Rubin & Jenna G. Rubin, *Protectors and Directors and Advisors: Oh My! The New Florida Unif. Directed Trust Act*, 96 NO. 2 FL BAR J. 9, Mar./Apr. 2022, https://www.floridabar.org/the-florida-bar-journal/protectors-and-directors-and-advisers-oh-mythe-new-florida-uniform-directed-trust-act/#:~:text=In%20July%202021%2C%20Florida%20adopted,aspect%20of%20the%20trust's%20administration (last visited Sept. 14, 2022).

[34] UNIF. DIRECTED TR. ACT § 5 (UNIF. L. COMM'N 2021); Borowsky & Beier, *supra* note 14, at 10.

[35] Borowsky & Beier, *supra* note 14, at 11.

[36] *Id.* at 11. *See* UDTA § 6 cmt.

[37] UNIF. DIRECTED TR. ACT § 6(b)(2); Borowsky & Beier, *supra* note 14, at 1.

[38] UNIF. DIRECTED TR. ACT § 7; Borowsky & Beier, *supra* note 14, at 11.

if a health care professional "is acting as a trust director and the terms of the trust require a health care professional to determine the capacity of a beneficiary or the grantor…the health care professional would not be subject to a fiduciary duty or liability under the Act."[39]

The ULC has a publication titled "*Why Your State Should Adopt the UDTA*,"[40] wherein it lists three main reasons: "The UDTA balances settlor autonomy and beneficiary safeguards" is comprehensive, "offers many technical innovations."[41] Within this rationale, items are addressed that make a compelling argument for states with weaker directed trust language to consider enacting the UDTA. Allowing for the balance of a "settlor's freedom of disposition with a beneficiary's need for fiduciary protections,"[42] and noting Delaware's success in pioneering the division of fiduciary duties and how other states can be more attractive trust situses with this enactment.[43] The drafting philosophy expands state trustee laws to that of trust directors and touches on information sharing, succession, removal, and compensation.[44] In regard to technical innovations, the UDTA offers solutions that improve upon current state statutes and treats "all trust directors similarly, thereby avoiding the artificial and overly rigid categories of trust directors that make many existing statutes difficult to work with."[45]

III. Recent State Adoptions

The first state to enact the UDTA was Georgia in 2018, and at present there are sixteen states[46] that have enacted the UDTA and

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[39] UNIF. DIRECTED TR. ACT § 8(b); Borowsky & Beier, *supra* note 14, at 12.
[40] *Why Your State Should Adopt the Uniform Directed Trust Act*, UNIF. L. COMM'N., https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=5e8e6a2a-a538-c6e9-de70-48152dcf72e9&forceDialog=0 (last visited Sept. 14, 2022).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] For a brief history lesson on the UDTA's enactment: Georgia led the way in 2018 with New Mexico also adopting the law that year; followed by Utah, Nebraska, Michigan, Maine, Indiana, Connecticut, Colorado, and Arkansas in 2019; West Virginia, Washington, and Virginia in 2020; Montana and Florida in 2021, and Kansas so far in 2022. *Directed Trust Act*, *supra* note 13.

two that have it pending for consideration.[47] The UDTA was written to absorb current state trust laws in an effort to avoid duplication and allow for "diversity across the states in the particulars of a trustee's default and mandatory fiduciary duties."[48] While this Act is gaining traction, there have been slight variations in how states have adopted the Act, and notably Florida has made several substantive and stylistic changes.

A. Florida

Florida enacted the Florida Uniform Directed Trust Act (FUDTA) effective as of July 1, 2021, in the new part of the Florida Trust Code Section XIV,[49] which became applicable to acts or decisions after this date even for trusts executed prior.[50] This allows for any person that has power to direct even under a different name, such as Trust Advisor, to direct the trustee to act or not act in trust related matters.[51] Florida § 736.0808[52] narrowly addressed the distinctions between trustees and a directed party. By enacting the UDTA in this method FUDTA is able to "obtain the benefits of close coordination with a uniform act and avoids the undue complexity of specifically excluding provisions throughout the Florida Trust Code that may not be of relevance to trusts that are not directed trusts."[53]

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[47] *Id.*; with New York and Rhode Island having introduced the act for consideration for adoption.
[48] Borowsky & Beier, *supra* note 14, at 11–12.
[49] FLA. STAT. §§ 736.1401–736.1416 (2021) (added by 2021 Fla. Laws Ch. 183, § 14, eff. July 1, 2021); Rubin & Rubin, supra note 33.
[50] Miranda Weiss, *The New Florida Directed Trust Act*, JD SUPRA (Aug. 17, 2021), https://www.jdsupra.com/legalnews/the-new-florida-directed-trust-act-8864771/ (last visited Sept. 14, 2022).
[51] *Id.*
[52] FLA. STAT. § 736.0808 ("(1) Subject to ss. 736.0403(2) and 736.0602(3)(a), the trustee may follow a direction of the settlor that is contrary to the terms of the trust while a trust is revocable.; (2) If the terms of a trust confer on a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.; (3) The terms of a trust may confer on a trustee or other person a power to direct the modification or termination of the trust.; (4) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.").
[53] Rubin & Rubin, *supra* note 33, at 9–10.

When reviewing the Florida Trust Code, the merger of the UDTA and FUDTA has references to the Uniform Act in the last two digits of each section.[54] Previous sections of the Florida Trust Code were modified to include directed trusts, such as: F.S. § 736.0105(2)(b) to acknowledge that certain features of directed trusts are not subject to this mandatory rule;[55] F.S. § 736.1008 to "provide that a trust discloser document and a limitation notice may now be issued by a trust director;"[56] and F.S. §736.1017 to "include the existence, scope, and exercise of powers of direction, as well as the identity of current trust directors in the certification, since such items will often be relevant to the purpose of the certification."[57]

Newer provisions in the code are focused on principal place of administration.[58] Notably, in F.S. § 736.1403(1), if the principal place of administration is moved to Florida, Part XIV is only applicable to "decisions or actions occurring after such a move."[59] There is also an expansion of rules regarding this to allow for a trust protector residing in Florida to be sufficient to allow for Florida to be the principal place of administration.[60] Certain powers are excluded from the FUDTA as it relates to the,

> [P]ower of appointment, power to appoint or remove a trustee or trust director, a power of a settlor of a revocable trust, certain powers of a beneficiary over a trust, certain powers over a trust related to taxes, and a power to add or release a power under a trust if the power subject to addition or release causes grantor trust status.[61]

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[54] *Id.* at 12.
[55] *Id.*.
[56] *Id.*.
[57] *Id.*
[58] *Id.* at 13.
[59] *Id.*
[60] *Id.*
[61] Michael A. Sneeringer & Jordan D. Veurink, *Directions to Trust Directors of Directed Trusts*, PROBATE & PROP., May/June 2022, at 31, https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2022/may-june/directions-trust-directors-directed-trusts/ (last visited Sept. 14, 2022) (noting "further differences are: The FUDTA differs from the UDTA, as the UDTA does not contain language addressing the 'power to add or to release a power under the trust instrument if the power subject to

Also noted are limitations around the powers of a trust director as to what is granted in the trust document, and "any further powers not expressly granted that are appropriate to the exercise or non-exercise of the power that is granted."[62] FUDTA includes the term "qualified beneficiary" as someone who can request information from the trust director as well.[63]

B. Connecticut & Washington

In Connecticut, new trust laws were made effective as of January 1, 2020, to modernize existing law, make the state more attractive to retain businesses, and have a competitive edge on nearby states.[64] The multipart Act consists of Connecticut's version of the UTC, UDTA, and Qualified Dispositions in Trust Act (QDTA).[65] Before this change, the state lacked a solution in common law or in its statutes to allow for the successful implementation of a directed trust, but now with the new laws Connecticut could be an alternative to Delaware for nearby states.[66] Namely, New York and Rhode Island have historically been without a directed trust statute but have recently presented the UDTA for possible enactment in their respective states.[67] Other states have enacted the UDTA to replace existing law in favor of the practical advantages offered. In 2020, Washington went in favor of the UDTA and repealed its previous Uniform Directed Trust Act of 2015.[68] The UDTA held that provisions regarding communications

addition or release causes the settlor to be treated as the owner of all or any portion of the trust for federal income tax purposes"); Fla. Stat. § 736.1405(2)(f). The Uniform Directed Trust Act does not address a trust director's ability to 'pay the income tax liabilities of a settlor attributable to the grantor trust status free of a conflicting duty to trust beneficiaries.'" § 5.

[62] Rubin & Rubin, *supra* note 33, at 13.

[63] Sneering & Veurink, *supra* note 61.

[64] Edward A. Vergara, Sarah Constantine & Ashley C. Slisz, *Connecticut: Newly Attractive State for Trusts, The Advisor: Helping You Manage Your Life and Legacy in Today's Complex World*, (Dec. 19, 2019), https://www.arnoldporter.com/en/perspectives/publications/2019/12/the-advisor.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] S. Bill Rep. SB 5302, at 3 (2015), https://app.leg.wa.gov/documents/billdocs/2015-16/Pdf/Bill%20Reports/Senate/5302%20SBA%20FI%2015.pdf.

between a trustee and directed advisor promoted better partnership and efficiencies in administration.[69]

C. Arkansas

Similar to Michigan's approach in enacting the UDTA without the willful misconduct standard,[70] Arkansas enacted the UDTA in 2019 with that major change and two minor variations.[71] The first item modified is in Section 3, in which Arkansas chose to remove the safe harbors for trust directors found in UDTA Section 3(b). This section notes these as "objective facts that, when added to a trust stating its principal place of administration, conclusively establish that principal place of administration."[72] The substantive difference is found in Section 9, where Arkansas declined to adopt the willful misconduct standard and unless the drafting instrument provides otherwise the directed trustee is not liable for:[73]

> 1. Any loss that results directly or indirectly from any act taken or omitted as a result of the reasonable action of the directed trustee to comply with the direction of the trust director or the failure of the trust director to provide consent; and
> 2. Whenever a directed trust reserves to a trust director the authority to direct the making or retention of any investment, to the exclusion of the directed trustee, […] any loss resulting from

[69] Stacey Romberg, *Is Using a Directed Trust a Step in the Right Direction?*, (Aug. 3, 2021), https://staceyromberg.com/blog/is-using-a-directed-trust-a-step-in-the-right-direction/ (Sept. 14, 2022).
[70] Judy Grace, J.D., *Recent Michigan Legislation Regarding Directed Trusts*, 28 Issue 5 Perspectives (May 2019), https://greenleaftrust.com/wp-content/uploads/07-0519_Recent_Michigan_Legislation_Regarding_Directed_Trusts_Judy_Grace.pdf#:~:text=A%20growing%20trend%20in%20estate,under%20section%207703(a). (last visited Sept. 14, 2022).
[71] David Bingham, *Arkansas Enacts a Version of the Uniform Directed Trust Act: Relief for "Directed Trustees" begins in 2020*, 55 No. 1 ARK. BAR J. at 16, (Winter 2020).
[72] *Id.* at 17; UNIF. DIRECTED TR. ACT § 3(b).
[73] *Id.* at 18.

> the making or retention of any investment under such direction.[74]

Section 109(b) added protection to administrative actions. This section reads: "Unless the terms of the trust provide otherwise, any actions the directed trustee takes to comply with the directions of a trust director, if those directions are within the scope of that trust director's powers, are considered administrative actions."[75] This approach significantly reduces liability exposure for trustees unless the trust document includes contradictory language. The final change Arkansas made was omitting the willful misconduct standard as it appears in Section 10 concerning information sharing.[76]

IV. Usage of Directed Trusts

The UDTA utilizes the term "power of direction,"[77] and the powerholder is called the "trust director."[78] Common nomenclature for these roles in directed trust relationships are Trust Director, Trust Advisor, Trust Protector, Distribution Director, Directed Trustee, or Administrative Trustee.[79] Anyone that has worked in Special Needs Planning or administration knows that no two beneficiaries and families are the same, so why should their trusts be? For some, the traditional one-party trustee may be suitable, but for others it may not be. That same logic applies to trustees. Some trustees are able to fully administer all powerholding roles, and others would benefit from partnering with third parties.

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[74] *Id.*, *quoting* AR Code § 28-76-109(b) (2019).
[75] Bingham, *supra* note 71, at 18.
[76] *Id.*
[77] UNIF. DIRECTED TR. ACT § 2(5), defining a Power of Direction as "a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee. The term includes a power over the investment, management, or distribution of trust property or other matters of trust administration. The term excludes the powers described in Section 5(b)."
[78] UNIF. DIRECTED TR. ACT § 2(9) (defining a Trust Protector as "a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust"); Borowsky & Beier, *supra* note 14, at 10; UNIF. DIRECTED TR. ACT § 6 cmt.
[79] Morley & Sitkoff, *supra* note 9, at 6.

Depending on the trustee's ability to administer the trust or meet the needs of the beneficiary, there are a host of options available in drafting to come up with a solution that works for all parties involved. This is especially beneficial in managing SNTs, as the trustee may be a solo practitioner law firm, or there may be a concentration of assets involved that would be problematic to administer for a corporate fiduciary. As with any bifurcation of duties scenario, the question arises of who is responsible for which aspect and in the end who can be held accountable. The UDTA addresses this by shifting the fiduciary responsibly to the director, who is seen as the powerholder, instead of the trustee, who is more of a facilitator of the action.[80] In an effort to add concrete and practical elements to this discussion, here are several ways in which a directed trust can be beneficial for Special Needs Trust administration.

A. Non-Standard Assets & Investment Powerholders

Investment management is always a tricky aspect of trust administration when weighing various influences of risk tolerance, hot real estate markets, value of oil and gas interests, family portfolios, and the constant changing landscape of high risk, high reward options such as blockchain assets. This will only continue to grow in complexity as technology evolves and currency changes. A Directed Investment Advisor or Special Holdings Advisor[81] is an option to alleviate the trustee from managing investments either completely or in part if there is a risk concern. One example is a situation where there is a concentration of assets that would be problematic for some institutions to hold,[82] as it could create an exposure to liability for a failure to diversify the portfolio or meet its duty of prudence and care.[83] If there is a Third Party Special Needs Trust with family or legacy investments and stock

[80] Morley & Sitkoff, *supra* note 9, at 7.
[81] Michael M. Gordon, *Directed Trusts: Slicing and Dicing Trustee's Duties and Responsibilities*, MID-ATLANTIC FELLOWS INST. (Nov. 7, 2019), at 7–8.
[82] Sneering & Veurink, *supra* note 61, at 31.
[83] Borowsky & Beier, *supra* note 14, at 31.

concentrations that the Grantor intended to pass down to their family member, a corporate or individual trustee may balk at taking on that risk or it may go against a company policy. Rather than force a sell or upset the family, this could be a directed investment arrangement where the duty to manage the assets is housed with a firm or individual who is willing to assume the responsibilities associated with such an asset.

While not many institutions are championing the use of cryptocurrency, assets such as NFTs and Bitcoin are likely going to become more common in the years to come. A trust director could be appointed in a state that recognizes directed trusts under circumstances where a cryptocurrency asset is present. Housing this asset with a group that has requisite experience is significant as they would know efficiencies like the need to maintain "cryptoassets in a single vault or wallet, [thus] pooling the beneficiaries' interests rather than maintaining separate wallets for each beneficiary."[84] In response to this wave of new currency, there are trust companies and investment management firms building businesses centered around managing this type of asset. This is an emerging market as most trust companies and corporate trustees avoid volatile assets such as Bitcoin, NFTs, and cannabis or psychedelic related stocks. While this is not nearly as prevalent in current portfolios, who can speak to what the future holds? Should a practitioner be met with a trust that will inherit or hold one of these assets, a directed investment management relationship would be highly favorable to all parties. Another item to contemplate in administering non-standard assets is how to value them at the passing of the beneficiary and what alternate valuation dates are available.[85] For Estate Planning

[84] Matthew T. McClintock, Vanessa L. Kanaga and Jonathan G. Blattmachr, *Estate Planning in the Era of Digital Wealth*, 49 EST. PLAN 04, at 16 (May 2022). For more information on cryptocurrencies, *see* Investopedia.com, *Cryptocurrency Explained with Pros and Cons for Investment*, (updated May 28, 2022), https://www.investopedia.com/terms/c/cryptocurrency.asp (last visited Sept. 14, 2022) & Investopedia.com, *Blockchain Facts: What is it, How it Works, and How can it be Used*, (updated June 24, 2022), https://www.investopedia.com/terms/b/blockchain.asp (last visited Sept. 14, 2022).

[85] *Id.* at 16-17, *noting* "The value of these items may fluctuate so greatly that the assets in the estate (or trust) may be insufficient to pay creditors, including the government for taxes owed on pre-tax income and for estate taxes. Of course, an executor might be able to elect alternate valuation if the value of the assets drops on the alternate valuation date (not more than six months after death) but the retention of the assets may not stop other creditors from complaining (keeping in mind that a fiduciary not only owes a duty to the

attorneys or those who represent fiduciaries, considerations such as "fiduciary duties of care and loyalty, including obligations relating to trust investments under the Uniform Principal and Income Act, Prudent Investor Act, and other applicable rules" come into play and due to the newness, these Acts provide more questions than answers.[86]

Also employing expertise in managing real estate, closely held businesses, and other specialty assets can limit the liability for the trustee and allow them to focus on discretionary requests or benefits related matters. Utilizing this strategy "eliminates the trustee's duty to monitor or supervise investments,"[87] and allows for a family's investment advisor or financial planner to still have an active role in the trust. A client may have a preference to keep the administrative components of a trust with a professional or corporate fiduciary to ensure accountings and tax filings are appropriately handled, while also wanting someone who understands the family dynamics or history in charge of the investment management.[88] Finding a financial advisor who knows the complexities around benefits, the Social Security Administration, and state Medicaid agencies is not impossible, but it is rare. Further, even if an individual had the expertise around those items of administration and investments, they would likely not be willing to take on the liability involved in fully administering a SNT or potentially would not have the staffing in place to manage a large book of high-touch SNTs.

This bridge for advisors to manage the trust assets and maintain a previously established role with the current or future beneficiaries[89] is a very attractive solution for businesses as well. Many stand-alone trust companies or registered investment advisory firms do not typically have the expertise in house to serve in both

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beneficiaries but also to certain creditors). And, of course, there is no alternate valuation for gift tax purposes. One option a fiduciary may have is to hedge the assets. Another may be for the transferor to form an entity (such as a partnership) to hold or acquire such assets and transfer to the fiduciary an interest which the fiduciary cannot control (and which is extremely difficult to sell). At least under the law of some states, a court cannot order the liquidation of a partnership unless the court having jurisdiction over it finds it can no longer operate."

[86] *Id.* at 18.

[87] *Definitive Guide*, *supra* note 2, at 5.

[88] Borowsky & Beier, *supra* note 14, at 31.

[89] Flinn, *supra* note 10, at 1.

roles or allow for this undertaking from a policy stance. Even corporate trustees are trending towards employing experts to manage non-standard assets,[90]; advisors are more inclined to work within this dynamic as they are not hindered by administrative hurdles to approve investment strategies or decisions, creating an arrangement that lessens the fear of losing the client.[91] Allowing the trustee to work within "an open architecture"[92] forum for investment products and offerings alleviates possible institutional limitations and avoids future conflict of interest allegations.[93] In many relationships, it is common for the investment advisor to maintain primary client contact and work with the trustee more behind the scenes to create less confusion or stress for the client.

Depending on the expertise and size of an organization, assets such as closely held businesses (CHBs), limited liability companies (LLCs), or real estate may create too much of an administrative burden on the trustee to manage efficiently. CHBs and LLCs are not the most common in SNT administration, but it is not outside of the realm of reason that one may present itself in a Third Party SNT. A scenario where a trust holds a CHB that is approaching an initial public offering or is in discussions with a venture capital or private equity firm to be purchased would be problematic for a trustee not well-versed in those areas, and it could cause the trust to incur the legal fees to have outside counsel involved.[94] In the article *Class Action Liability for Trustees After Banks v. Northern Trust*, compensation was addressed regarding closely held businesses, noting that "a standard percentage fee based on the value of the underlying CHB asset may be difficult, given the trustee's unique duties in holding a minority interest as opposed to a majority interest."[95] It observed that even if a trustee held a majority interest, they would not be involved in the direct management of the day-to-

[90] Paul Chmielewski & Courtney Kelley, *Class Action Liability for Trustees After* Banks v. Northern Trust, 50 Dec Colo. Law. 38, 42–43 (2021).
[91] Flinn, *supra* note 10.
[92] Chmielewski & Kelley, *supra* note 90, at 43.
[93] *Id.* at 43.
[94] Todd A. Flubacher, *Directed Trusts: Panacea or Plague?*, 22 NAEPC J. Est. Tax Plan. 1, 1 (Oct. 2015) http://www.naepcjournal.org/journal/issue22i.pdf.
[95] Chmielewski & Kelley, *supra* note 90, at 42; Banks v. N. Trust Corp., 929 F.3d 1046 (9th Cir. 2019).

day business,[96] and any fees charged should be comparable to a business management firm, so that the trust is not bearing the burden of consultant fees for a trustee who does not have the standard background to administer such an asset.[97] Colorado law relieves the administrative trustee from all liability related to the duties granted to the trust director,"[98] but using outside experts and directed trusts is greatly encouraged.[99]

By finding harmony in trust administration and investment management, there is potential for significant amounts of trust assets to be "successfully captured across dozens of advisor-friendly trust companies."[100] This is a growing market for partnership and that market is projected to continue to increase in prevalence. . Rather than a single offering or "one-stop, in-house model for all investment and management responsibilities,"[101] trustees are invited to reconsider this approach in a way that still limits liability while decreasing potential scrutiny or exposure. Trustees are also aware of many court rulings that seem to "treat deep-pocketed trustees as guarantors of trust performance."[102] While larger fiduciaries are certainly focused on stability and growth in portfolios to minimize risk, there is only so much that can be done in a down market. Trustees should consider this as well in case a client may have unrealistic expectations for growth or prefer an investment model that is outside of what the trustee is comfortable with implementing. By having an unrelated business party as the investment advisor, it can limit the scope of recovery for the beneficiaries should they make a claim due to losses or investment performance.[103] Clients also appreciate the flexibility and custom-crafted solutions as a selling point on why one trustee firm over another, since it is more and more common for families or attorneys to shop around before selecting their trustee.

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[96] Chmielewski & Kelley, *supra* note 90, at 42.
[97] *Id.*
[98] *Id.* at 43.
[99] *Id.*
[100] Flinn, *supra* note 10, at 2.
[101] Chmielewski & Kelley, *supra* note 90, at 43.
[102] Flubacher, *supra* note 94, at 1.
[103] *Id.* at 2.

B. Benefits of Trust Protectors or Trust Committees

A trust protector that has the ability to direct distributions or advise on beneficiary requests is another useful tool for trustees and would make the trust protector fall under the fiduciary category. The trust protector role can be ambiguous depending on the powers associated within the document and the state enactment of directed trust law. If the role only consists of administrative functions, such as the power to remove or replace the trustee, negotiate trustee compensation, change situs, or approve accountings it is unlikely this would be considered a directed fiduciary.[104] Powers of this role that fall more in line with that of a directed fiduciary are: the power to modify the document for drafting errors and tax items, advise on discretionary distributions, and direct or veto the sale of certain assets.[105] Trust protectors are also often given the ability to sign off on amendments to a trust should benefits rules change or a drafting error be present. This allows for savings of court costs and a faster remedy if an allowable item needs to be changed or a requirement for revision is identified.

As an application to Special Needs Planning, there may be a distribution request for something that is a higher percentage of the trust corpus that would be problematic for a trustee to approve, or a distribution for items spent during the settlement process that a trustee may have a policy around to limit the timeframe of what can be submitted. In these circumstances, the trust protector could use their power of direction to direct the distribution from the trust if appropriate. Additionally, trust protector role is usually viewed quite favorably by family members who may be unsure of a corporate trustee being appointed by a court. The ability to remove and appoint trustees or other powerholders allows the parties to all collectively agree on trust decisions or know that changes can be made, which is often a relief to settlors.[106] Many families find comfort knowing they

[104] Yahne Miorni, LL.M., *Trust Protectors and the Uniform Directed Trust Act* (Working Paper), https://static1.squarespace.com/static/5807a480d482e9eb1f5d9c54/t/5c11303b40ec9a2a073cc023/1544630331945/Trust+Protector+1.pdf at 3.

[105] *Id.*

[106] Sneering & Veurink, *supra* note 61, at 31.

have standing in the document in this role since they have no direct access to the assets in the trust. Commonly, First Party SNT beneficiaries and their families are not familiar with investments or financial matters involved in managing a multimillion-dollar trust. Frequently, they are upset by the introduction of a trustee entity whether that be a corporation or an individual trustee, finding the additional party confusing after a catastrophic event and years of court filings leading to a settlement. Anyone could appreciate that hesitancy and concern, so using a directed advisor allows for a family member or attorney to be named and to have an ability to watch over the statements and find comfort in the transparency offered.

A trust committee can also be appointed in the document to have the powers to vote on and direct the trustee regarding distributions or other matters in relation to the beneficiary. Similar to an expanded trust protector role, this allows for security by the family or grantor in knowing those who interact with the beneficiary on a daily basis can be involved in the decision making and speak on behalf of that individual. This committee can be comprised of relatives, an attorney, investment advisor, CPA, care manager, case manager, advocate, or health care professional, for example.[107] The powers associated with serving on a trust committee come with a high level of responsibility, so advising the family on appropriate parties to fill the role is crucial. In the same way one evaluates a potential power of attorney candidate, the family would want to consider who makes the most sense and has the time to be placed in the position.

C. Administration Efficiencies with Distribution Directors

Naming a Distribution Director in your document allows for a trustee to utilize a "boots on the ground" approach and work with that institution to meet the needs of the beneficiary. The distribution director can review requests for distribution, direct the trustee to make distributions, purchase homes or vehicles, hold the

[107] Lucius & Whitenack, *supra* note 19, at 5.

responsibility to meet with the beneficiary on a specified calendar frequency, and be the primary contact for communication. This relationship parses out the typical role of the trustee while still allowing for the proper expertise to be in place. A distribution director can be required to maintain distribution receipts and proper documentation, which is a great relief to anyone serving in the role of trustee who may lack the proper technology to save years and years' worth of receipts. Should there be a catastrophic event, having a distribution director would allow for the documentation to be stored securely and would reduce the risk of data loss. Further this relationship could relieve the trustee of a large portion of the trust administration and allow them to serve in more of a behind the scenes role should they not have the bandwidth in their practice or look to have this setup as a value add to their organization.

V. Importance of Relying on Expertise

While the UDTA certainly limits liability exposure for the trustee by allowing a trust director to assume a fiduciary role, it still must address what happens if something goes counter to plan. Historically, the guidance has been the "classic equity doctrine that a directed trustee, no matter how expansive the exculpatory language, at least owes the trust beneficiary a duty not to knowingly participate in a breach of trust, particularly as even a non-party to the trust relationship would owe the beneficiary such a duty."[108] This standard seems to be in line with the UTC, but the UDTA utilizes the "willful misconduct standard"[109] influenced by Delaware's directed trust statute.[110]

[108] Charles E. Rounds, Jr., *The Uniform Directed Trust Act*, 156 J. WEALTH MGT. TRUST & ESTS. 24, 26 (May 2015).
[109] *Id.* at 26.
[110] Todd A. Flubacher & Cynthia D.M. Brown, *If You Can't Beat 'Em, Join 'Em*, J. WEALTH MGT. TRUST & ESTS., (Nov. 2018); 12 Dec. C. § 3301(g) & 12 Dec. C. § 3301(h)(4).

A. Willful Misconduct Standard

The UDTA does not define "willful misconduct" and leaves the application and definition (or absence of a definition) of this standard to the states, which is mostly found in common law[111] and creates a "base level of responsibility for a fiduciary."[112] As the UDTA is still new to the world of trusts, there is not an overwhelming amount of case law concerning how courts hold those in a fiduciary capacity at fault. Todd A. Flubacher summarized in his article *Directed Trusts: Panacea or Plague?*,[113] that in the case of "*R. Leigh Duemler v. Wilmington Trust Company*,[114] the Delaware Court of Chancery ordered that the trustee wasn't liable for trust investments in the absence of willful misconduct."[115] The background of this matter involved an investment professional that invested in a high-risk investment portfolio that required heavy monitoring.[116] Per the court, 12 Del. C. Section 3313 requires the investment advisor to execute the investment decisions independently, absent trustee input, to avoid a circular discussion that would delay executing the necessary trades in such a portfolio.[117] Placing liability on the trustee to review or instructing the investment advisor would in essence "gut the statute."[118] However, under the UDTA there could be liability for a potential breach of fiduciary duty if the trustee failed to share information that would have allowed the investment advisor to make a more informed decision, as there is a duty to provide information if it is reasonably related to both powerholder roles.[119]

Shelton v. Tamposi[120] in New Hampshire followed the same line of reasoning regarding directed trusts and the fiduciary

[111] UNIF. DIRECTED TR. ACT § 9; Flubacher & Brown, *supra* note 110, at 37.
[112] Flubacher & Brown, *supra* note 110, at 38.
[113] Flubacher, *supra* note 94.
[114] R. Leigh Duemler v. Wilmington Trust Co., C.A. 20033, V.C. Strine (Del. Ch. Oct. 28, 2004) (Trans).
[115] Flubacher, *supra* note 94, at 2.
[116] *Id.* at 2.
[117] Flubacher, *supra* note 94, at 2.
[118] *Id*.
[119] UNIF. DIRECTED TR. ACT § 10; Flubacher & Brown, *supra* note 110, at 38.
[120] Shelton v. Tamposi, 164 N.H. 499 (Jan. 11, 2013).

responsibility being placed on the investment manager.[121] The individual trustee in this matter thought she maintained the power to direct the sale of illiquid investments to raise funds for a distribution, but the investment advisors stated the trustee did not have this authority.[122] The New Hampshire Supreme Court affirmed the lower court's decision that the trustee did not have this authority.[123] This case is an example of how important clarity is when drafting directed trust arrangements to clearly state which party is in charge of distribution decisions and investments.[124]

In the case of *Rollins v. Branch Banking & Trust Company of Virginia*,[125] the trustee was found to have a duty to warn the beneficiaries of the risks associated with holding a large concentration of a position in a closely held stock.[126] While the court held that the beneficiaries independently had the power to direct investment decisions, it found that the trustee was not absolved of the duty to warn them when the stock value significantly decreased by $25 million per the beneficiaries' claims.[127] Due to this decision, many states have added language to their statutes expounding upon the existing directed language to include that the trustee has "no duty to monitor the actions of the advisor or to advise or warn the beneficiaries when an advisor's actions are contrary to how the trustee would act."[128] Had Virginia been a UTDA state at that time, or had there been a professional investment advisor named rather than the children, this duty to warn could have potentially been avoided as well. While often grantors will want their family to serve in a powerholder capacity, a dialogue needs to take place with the drafting attorney about whether that individual has the requisite expertise to serve in that role. Advisors who have potential conflicts

[121] Flubacher, *supra* note 94, at 2.
[122] Richard W. Nenno, *Directed Trusts: Making Them Work*, 45 EGTJ 05, 23 (Sept. 2, 2020).
[123] Shelton v. Tamposi, *supra* note 120.
[124] Nenno, *supra* note 122, at 23.
[125] Rollins v. Branch Banking & Trust Co. of Virginia, 2001 WL 34037931 (Va. Cir. Ct. April 30, 2001).
[126] Flubacher, *supra* note 94, at 4.
[127] *Id.*
[128] Flubacher & Brown, *supra* note 110, at 34.

of interest with beneficiaries should not serve in this capacity as there could be issues later with impartiality.[129]

In *The Matter of the Joan T. Goetzinger Living Trust Dated May 30, 2014*, the grantor established a trust that upon her death was "expressly designed to benefit [her] mother" and upon her mother's death benefit six named remainder beneficiaries.[130] The successor trustee named Gail Miller was also one of the remainder beneficiaries, and once appointed she began refusing to purchase items for the benefit of the grantor's elderly mother, Gladys Goetzinger-Strachan, such as "hearing aids, a lift chair, or a stair lift, which was necessary . . . to get to the bathroom on the second floor of her residence."[131] This turned into quite a kerfuffle, as Gladys believed Gail was more concerned about preserving the trust for her remainder interest, so Gladys filed suit.[132] The District Court instructed Gail to purchase these items, and she refused to do so, but notably seemed "to spare no expense in fighting Gladys on nearly every issue."[133] Gladys ultimately received these items a year and a half later after "court orders and threats of contempt sanctions."[134]

While this trust was not a directed instrument, think of how the proceedings would have been different had a Trust Protector, a neutral Distribution Director, or a Trust Committee been named. In Iowa, which follows the Restatement approach concerning directed trusts, there still would have been protections in place for an elderly adult beneficiary and for a successor trustee who was also a remainder beneficiary had this trust included directed language. This matter did not have overly complex assets as they were mainly in "liquid investment or bank accounts,"[135] but it did have complex

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[129] Borowsky & Beier, *supra* note 14, at 39.
[130] *In the Matter of the Joan T. Goetzinger Living Trust Dated May 30, 2014,* No. 19-1342, at 2 (Iowa Ct. App. 2020), https://www.courtlistener.com/opinion/4769851/in-the-matter-of-the-joan-t-goetzinger-living-trust-dated-may-30-2014/ (last visited Sept. 14, 2022).
[131] *Id.*
[132] *Id.*
[133] *Id.* at 3 (noting "Miller claimed trustee fees and expenses of $42,059.81, and Miller's attorneys claimed fees and expenses of $73,989.83 (later reduced to $62,958.83)"). The district court ruled that Miller was only entitled to reimbursement of $8,505.20 and attorney's fees of $3,745.50 from the trust, which was later upheld by the appellate court.
[134] *Goetzinger, supra* note 130.
[135] *Id.*

interpersonal dynamics at play which could reasonably have been foreseen at drafting to create this circumstance. Directed trusts are not just a tool for absolving liability from a trustee, but they are also useful to protect vulnerable beneficiary classes such as elderly or special needs individuals. The element of protections regarding all parties should be pondered at drafting to create an environment that executes the purpose of the trust or wishes of the grantor while providing safety should someone look to take advantage in their role as a powerholder.

B. Drafting Considerations & Compensation

One of the most crucial elements of a strong directed trust document is specificity on the roles and powers associated with each party. A trustee cannot bifurcate their role with that of the investment advisor if both roles and respective powers are not clearly distinguished in the document. A few drafting considerations are to clearly explain that the trustee shall act upon direction concerning investments or other directed items in the trust, what exact powers each entity named has in their role, and that the investment powers section covers any and all possible investment-related powers necessary to effectuate the investment management of the trust.[136] Also important when drafting is clearly stating what trustee powers are directed instead of generally noting "'investment decisions' or 'distribution decisions.'"[137] Also allowing the appropriate powerholder to rely on informal valuations for non-marketable assets and describing in detail "the procedure for directing the trustee to make any representations or warranties in connection with acquiring certain assets and signing documents without substantive review."[138]

Further, for administrative purposes, the trustee should act on written direction from the investment advisor to thoroughly

[136] Flubacher, *supra* note 94, at 3; Borowsky & Beier, *supra* note 14, at 38.
[137] Borowsky & Beier, *supra* note 14, at 38.
[138] *Id.*

document the instructions and timing.[139] This written requirement could include email, PDF, signed letter, shared platform messaging, or fax with a caveat for changes in technology that is mutually agreed upon by both parties.[140] Many directed trusts note that "the investment advisor may direct the trustee to exercise certain powers but don't clearly state that the trustee may exercise those powers only on written direction"[141] or "act 'solely' or 'exclusively'" on this direction.[142] As a best practice, any directed action should be in writing, specific as to avoid confusion, and it should leave zero discretionary powers remaining with the trustee, such as language stating that the trustee can "take any other actions that are necessary or appropriate."[143] For example, if the document is unclear on when a trustee has the ability to exercise certain powers relating to investments, the argument could be made that the trustee can independently exercise investment powers.[144] Ambiguous or generic language in drafting can establish the ability for a beneficiary to claim that: "(1) the trustee possessed independent power that could have been exercised to mitigate investment losses, or (2) the powers the trustee exercised weren't clearly covered by the investment advisor language in the governing instrument."[145] As shown in *Mennen v. Wilmington Trust Company, et al.*,[146] if the

[139] Flubacher, *supra* note 94, at 3.
[140] Flubacher & Brown, *supra* note 110, at 39.
[141] Flubacher, *supra* note 94, at 3.
[142] Flubacher & Brown, *supra* note 110, at 39.
[143] Flubacher, *supra* note 94, at 4.
[144] *Id.* at 3.
[145] Flubacher, *supra* note 94, at 3.
[146] *Mennen v. Wilmington Trust Co.*, George Jeffrey Mennen and Owen J. Roberts as Trustees, C.A. No. 8432-ML, and *Mennen v. Wilmington Trust Co.*, George Jeffrey Mennen and Owen J. Roberts as Trustees, C.A. No. 8432-ML, Master LeGrow (Del. Ch. Dec. 8, 2014) (Master's Final Report); Flubacher, *supra* note 94, at 3, *summarizes* "The trustee operated under the belief that it acted solely at direction with respect to investments. The beneficiaries alleged that the investment advisor directed the trustee to invest substantially all of the trust's assets in disastrous investments in which the investment advisor was personally interested, resulting in a drop in value from over $100 million to $25 million over a period of approximately 20 years. The trustee became increasingly concerned that the beneficiaries would bring claims against it and filed a petition with the Chancery Court to remove the individual trustee who served as direction advisor, for the appointment of a successor and to access certain investment information that the direction advisor was allegedly withholding. Shortly thereafter, the beneficiaries brought claims for breach of trust against both the trustee and direction advisor (who was the primary beneficiary's brother) and brought a claim against the trust that was established for the direction advisor by the same settlor, seeking a transfer of its assets to their trust on equitable grounds. The trustee also filed a cross-claim against the investment advisor for indemnification and contribution, and the direction advisor filed identical counterclaims against the trustee. The claims brought against the trustee

directed trustee powers are not thoroughly cross-referenced in the document and with the governing statute, there could be a claim the act granted the trustee an independent power to act.[147] The argument was made that "the trustee possessed powers granted in the trust agreement, which weren't cross-referenced by the investment advisor provision and were outside of the scope of powers exercised at direction,"[148] and that the trustee could have acted in regard to the investment losses.[149] In an effort to avoid this scenario, the drafting attorney could have reviewed both the powers granted in the trust document and state statute to clarify the distinction of roles between trustee and directed investment advisor and include any necessary provisions to avoid potential ambiguities.[150]

Should the trustee want to request information or have insight into a role occupied by another powerholder, it is advised that they make this request in writing stating:

> (1) the trustee is only acting in a limited role as a trustee;
> (2) the trustee doesn't waive any protection available under the governing instrument or applicable law; and
> (3) the communication may not be relied on by the investment advisor or any beneficiary and shall be deemed to merely constitute administrative steps taken for the trustee to carry out its limited role as a directed trustee.[151]

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were ultimately settled out of court. In a Draft Master's Report issued on Dec. 8, 2014, the court entered a judgment against the direction advisor in the amount of $72,448,299 plus interest, finding that he engaged in a pattern of bad faith. The parties in Mennen have taken exceptions and the orders are subject to appeal . . . . [T]he Chancery Court entered a separate summary judgment order holding that as creditors, the beneficiaries were prohibited from attaching the assets of the direction advisor's trust under that trust's spendthrift clause and Delaware's spendthrift statute, 12 Del. C. Section 3536."

[147] Flubacher, *supra* note 94, at 4.

[148] *Id.* at 4.

[149] *Id.*

[150] Flubacher, *supra* note 94, at 4.

[151] Flubacher, *supra* note 94, at 5.

This is especially important for a state that has not adopted the UDTA, as the other alternatives do not directly address information sharing. Practical administrative items should also be part of the drafting language where possible to give guidance on those circumstances without creating hurdles for any of the powerholders. Examples of additional items to consider are which party is in charge of taxes and filings, making those payments, cash and liquidity, and court filings such as fee schedules or annual accountings due.[152]

Another important consideration is what a trustee should do if they receive direction that they believe to be contrary to the terms of the trust. For example, if a distribution director requests the trustee to pay for health insurance for the family members of a beneficiary in a SNT, the trustee does not have that ability per the document and sole benefit or primary benefit requirement.[153] The trustee does not have the power to make this distribution, so it can refuse to do so[154] as it "should not comply with a direction that is outside of the scope of the director's power of direction."[155] As always, should there be an impasse or something the trustee believes to be contrary to the term and would potentially expose them to liability for executing that direction, they can seek court approval to confirm the request or obtain consent from all beneficiaries depending on capacity and other details concerning the situation. Section 9(d) of the UDTA authorizes powerholders to petition the court for instruction if necessary should this happen in a UDTA state.[156] If modifying a trust to allow for a directed powerholder is being considered, one would have to review the language in the current document or state

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[152] Borowsky & Beier, *supra* note 14, at 40.

[153] POMS F(3)(a) notes that "The key to evaluating this provision is that, when the trust makes a payment to a third party for goods or services, the goods or services must be for the primary benefit of the trust beneficiary. You should not read this so strictly as to prevent any collateral benefit to anyone else. For example, if the trust buys a house for the beneficiary to live in, that does not mean that no one else can live there, or if the trust purchases a television, that no one else can watch it. On the other hand, it would violate the sole benefit rule if the trust purchased a car for the beneficiary's grandson to take her to her doctor's appointments twice a month, but he was also driving it to work every day." *See* Social Security Administration, *Program Operations Manual System (POMS) – SI 01120.201 Trusts Established with the Assets of an Individual on or after 01/01/00,* https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120201 (last visited Sept. 14, 2022).

[154] Flubacher, *supra* note 94, at 6.

[155] Borowsky & Beier, *supra* note 14, at 12.

[156] UNIF. DIRECTED TR. ACT § 9(d).

law. If the governing state does not allow for this modification, options for allowing more flexibility would be a situs change, decanting, amending the trust, a Non-Judicial Settlement Agreement, or Non-Judicial Modification.[157]

The UDTA touches on reasonable compensation for a trust director in § 16(3).[158] While the non-fiduciary trust protector role is not compensated, its powers are only administrative such as to remove and appoint a trustee, as compared to a distribution director who has a more active role in the trust and takes on much more liability. Compensation would reflect the involvement and exposure for both roles. In the comments and legislative note regarding this section of the UDTA, "the drafting committee strongly urged that a state that provides statutory commissions for a trustee should refrain from using the same commission formula for a trust director and should instead use a rule of reasonable compensation."[159] In many directed trust arrangements, the traditional trustee compensation is parsed out as opposed to a trustee who manages all aspects of administration. This compensation element is one to be considered when drafting a directed trust to perhaps limit or deny compensation for an administrative role that is not actively participating in the day-to-day administration.

VI. Conclusion

By rethinking what was foundationally a one-party role, the trustee can have flexibility, leverage expertise, and widen their business opportunities without exposing the trustee to increased liability or causing a negative impact to the beneficiary. Thus, a modern solution and approach is created to the problems and complexities that arise in Special Needs Trust administration. In this arrangement, the beneficiary has several skilled professionals on their team who collectively administer their trust. The "new generation of grantors and beneficiaries have higher customer

[157] Borowsky & Beier, *supra* note 14, at 33–34.
[158] UNIF. DIRECTED TR. ACT § 16(3); Morley & Sitkoff, *supra* note 9, at 55.
[159] Morley & Sitkoff, *supra* note 9, at 55.

service expectations, more complex asset management needs, and an increased desire to control their financial destiny,"[160] which will absolutely permeate the Special Needs Trust realm in both First Party and Third Party SNTs. Regarding SNT beneficiaries, there are typically a host of parties involved in the day-to-day care to provide the best quality of life for that individual. This level of multiparticipant involvement also makes sense when applied to Special Needs Trust administration, so that the beneficiary has the right parties in the right roles to allow for the highest level of service and expertise.

[160] *Definitive Guide*, *supra* note 2.

BOOK REVIEW

THE DAY I DIE: THE UNTOLD STORY OF ASSISTED DYING IN AMERICA

By Anita Hannig. Naperville, I.L.: Sourcebooks. 2022. Pp. 1–297. $27.99.

Reviewed by Kyle Ridgeway[1]

I. Introduction

In her new book, *The Day I Die*, Professor Anita Hannig provides a deeply personal and human look into the complex policies that surround assisted dying in the United States. Professor Hannig is an associate professor of Anthropology at Brandis University and has focused her teaching and research on the cultural dimensions of medicine and the end of life. *The Day I Die* is a work of narrative nonfiction that presents accounts of individuals who sought out medically assisted death in their home states as told by the author. To protect the privacy of the patients Professor Hannig changed the names of patients and their families, but that all events took place exactly as described. *The Day I Die* tackles one of the most challenging issues of our time: "how to restore dignity and meaning to the dying process in the age of high-tech medicine" (p. 25).

* Kyle Ridgeway is a third-year law student at the Stetson University College of Law, Research Editor for the *Journal of Aging Law and Policy*, and Editor-in-Chief of the *Stetson Business Law Review*.

The book is written for a non-academic audience. Hannig's style of writing is approachable and easy to digest while providing thought-provoking accounts of individuals seeking assisted death. As the author wrote this book for a generalist audience, it shies away from wading through the complex policy heavy arguments typical of a work of academic focus, however it does provide an appropriate history of the development of assisted dying laws throughout the United States and globally. This context is beneficial to the reader and gives insight into the societal changes which have occurred in the past several decades regarding assisted dying.

Anyone interested in better understanding the arguments surrounding assisted dying in America should consider reading this book, as it provides an efficient and engaging discussion of lived experience and collective history of the movement. The author also provides a reading group guide (p. 279–282) for those interested in utilizing the book as part of a book club or who find guided questions helpful in their personal processing.

Following an introductory chapter, the book is divided into four parts. Part I focuses on the decline in personal agency that is experienced by individuals who receive terminal diagnoses. Part II dives into the complicated series of obstacles that exist for assisted dying. (This is likely to be the most valuable section of the book for legal professionals seeking to understand the laws which surround assisted dying in states in which medically assisted death is legal). Part III presents arguments in support of regaining agency in the process of death through assisted dying. In Part IV, Hannig argues for new policies that should be adopted in the field and provides insight into her personal connection to the assisted death movement.

This review will focus on three arguments presented by Hannig throughout the book: one, that assisted dying policies are unfairly restrictive; two, that death has become unjustly isolated in American culture; lastly, that there is a need for greater access to assisted dying throughout the United States.

II. Assisted Dying Policies are Unfairly Restrictive

The first chapter begins with the assisted dying of Ken in Portland, whose death Hannig was present for. It is a jarring and gripping account of medically assisted death. Throughout the book there are over a dozen other accounts of individuals pursuing assisted dying, some with more success than others. Each individual's account provides a glimpse into the complex legal framework that surrounds assisted dying in states where the practice has been legalized (primarily Washington and Oregon). There are, however, several obstacles which slow or inhibit access to medically assisted death—primarily restrictive laws (Ch. 3), a bureaucratic maze (Ch. 5), and medical gatekeepers (Ch. 6).

A. Restrictive Laws

Hannig spends the third chapter of the book highlighting the complex series of laws which have developed in states where medically assisted death is legal. In this chapter, Hannig provides a snapshot of the legislative history, the progress of the movement, and the work done by advocates for medically assisted death. For those interested in understanding the history and the current legal framework, this chapter is of utmost importance.

Hannig also utilizes this chapter to shed light on the frustrating process that patients seeking assisted dying care can run into.

> Every year, hundreds of eligible patients who apply for an assisted death are so close to the end of their life, they die during the mandated waiting period that kicks in after their first oral request. Many wade through the dense bureaucracy of these laws while their energy and health are fast declining. Patients with open-ended degenerative diseases, like Parkinson's or ALS, cannot qualify unless they are

> within imminent reach of their death. And those at risk of losing their ability to self-administer the lethal medication worry constantly that they might miss the precious window when they are able to take the drugs (p. 80).

She goes on to point out that many terminally ill patients seek out medically assisted death because of the involvement of medical professionals (p. 92). Citing the "measure of social and moral legitimacy—a quality absent in cases where terminally ill people use 'do it yourself' methods outside the law to end their own lives" that is associated with medically assisted death (p. 92). The legitimacy that comes with a medically assisted death does not mean that "anyone can access these laws or that an assisted death can happen out in the open." (p. 92). "Twenty-plus years into the legalization of assisted dying in America, the cultural stigma around these laws remains potent." (p. 92). By result, many who seek out medically assisted death are often unable to obtain that care.

B. A Bureaucratic Maze

Obtaining approval for a medically assisted death begins long before the individual ingests the fatal mixture which will end their life. There are complex layers of bureaucratic red tape which inhibit receiving permission for assisted death. Opponents to the procedure argue that these are necessary roadblocks to ensure that the patient actually desires to end their life through medical assistance. However, Hannig suggests that these procedures and processes prove unduly burdensome to terminally ill patients.

She traces the story of Henry, an eighty-nine-year-old patient seeking to initiate his application for assisted death as an example of the process (p. 111). In order to obtain medically assisted death, a patient has to submit a formal verbal request followed up by a written request signed by two witnesses (p. 115). They must then find two physicians to "independently examine them and certify that their terminal conditions give them a reasonable life expectancy of

no more than six months" (p. 115–116). If a patient can make it through all those hurdles, they must then reiterate to their physician their desire to move forward with an assisted death (p. 116).

Hannig rightly points out that "[m]ost people who are caught in the turmoil of terminal illness have little bandwidth to take on the logistical and emotional cost of figuring out how to qualify for assisted dying" (p. 120). In response to the complex bureaucratic maze, a network of volunteers has developed across the Pacific Northwest to accompany dying patients and their families on their chosen day. (p. 120–121). The volunteers are highly valuable and aid in the process of the medically assisted death, which alleviates the burden for patients and families. However, the complexity of obtaining a medically assisted death does not end with the bureaucracy—often the greatest hurdle is finding physicians who are willing and able to sign off on the assisted death request.

C. Medical Gatekeepers

Americans have become dependent upon hospice and palliative care in the final stages of terminal illness, however Hannig argues that hospice often fails to address the needs of the seriously ill.

> Hospice and palliative care have no doubt transformed how we think about and manage the process of dying. Palliative care is an umbrella term for specialized, noncurative medical care that focuses on relieving a seriously ill patient's symptoms through comfort care—symptoms from their disease as well as its treatment. Palliative care specialists begin working with patients in a hospital setting at any stage of their illness, often alongside curative treatment. Once a patient stops treatment and is faced with a finite life expectancy, hospice takes over. As a form of palliative medicine, hospice

> uses palliative care techniques to reduce suffering at the end of life (p. 61).

Since hospice is limited to palliative care, it is limited in the type of affirmative steps which can occur to hasten the death of a terminally ill patient (p. 62–63). This is where assisted dying care can come in to fill the gap.

However, not all medical professionals are comfortable aiding in legal medically assisted death. "[E]ven if a doctor is comfortable talking about death [with a patient], they often run into logistical constraints . . . Physicians with no previous exposure to assisted dying fear having to deal with a mountain of bureaucracy . . . Others worry about losing their license if they make a mistake or being shamed by colleagues for showing support for a law that remains controversial, even among physicians" (p. 138). This presents a significant obstacle to those seeking assisted dying care as a medical professional is required to decide which patients meet the conditions of the law and which do not (p. 135). This medical gatekeeping can result in patients spending months seeking a professional that is willing to see them, and once they find one, then that physicians has to determine if the patient meets the "six-month time frame for terminality" (p. 145), and if the patient has the "mental capacity to make a fully informed, rational decision about their health" (p. 149–150). The end result is that very few who start the process of seeking assisted dying care ever receive that care; far more die, often in agonizing pain, attempting to navigate all the hurdles in front of them.

Hannig identifies new efforts by assisted dying advocates that desire amendments to existing laws that shorten or waive the waiting period and expand the prescribing and consulting roles from physicians to other clinicians, as a potential solution to this medical gatekeeper obstacle (p. 257). She cites a New Mexico law signed in 2021 that provides no two-week waiting period, allows for nurse practitioners and physician assistants to act as the prescribing provider in certain instances, and if a patient is already in hospice care, allows for only one provider to sign off on their request (p.

257). Perhaps policy innovations similar to this will help alleviate some of the burden experienced by those seeking medically assisted death.

III. Death Should Not Occur Alone

Hannig powerfully argues that death in the modern Western world has become unduly isolated. This draws upon her professional experience in the study of anthropology, medicine, and the end of life. In particular, Chapter 8 and Part III provide compelling arguments in favor of death occurring in controlled, familiar, and connected spaces—a benefit which is not afforded to those dying in the isolated and sterile environments of a hospital room.

Hannig draws upon her research in anthropology to argue that death in the modern Western world has become unhealthily isolated. She describes the result of modern medical advances as resulting in "death [] becom[ing] almost invisible—sequestered in hospitals and mortuaries, outsourced to professionals, muzzled in everyday conversation. Caitlin Doughty, the mortician and author, calls this phenomenon 'death dystopia'—the silence, denial, and repression that shroud American society's contemporary engagement with death" (p. 93). According to a Stanford School of Medicine study, "60 percent of Americans die in hospitals,[2] frequently in intensive care units, with very little say about anything" (p. 60). This is a grim statistical look into the average American death.

In contrast, Hannig provides dozens of examples of assisted death patients who were able to exert control over the time, place, and setting of their deaths; often surrounded by family, friends, and loved ones in comfortable, familiar places—this is a sharp contrast to the experience that far too many Americans have of dying in

[2] Anand Avati et al., *Improving Palliative Care with Deep Learning?*, STAN. SCH. OF MED. (last visited September 26, 2022), https://ai.stanford.edu/~avati/bibm17.pdf/.

relative isolation in health care facilities. This is one of the greatest arguments in favor of assisted death for terminally ill patients—although they are unable to avoid death, this final exertion of agency provides for a gentler and more peaceful transition out of this world (p. 215–247).

IV. The Way Forward

The policy arguments contained within the book are subtle. There is not a section of lengthy prose arguing in favor or against assisted dying, rather the author utilizes nonfiction narrative to provide the readers the opportunity to draw their own conclusions and make their own decisions. By crafting a deeply personal and human story that is accessible to the everyday reader, the author allows for greater discourse to develop regarding the topic. Perhaps one of its greatest strengths is its ability to engage the reader in the topic without requiring the reader to have taken a stance prior to reading.

As previously discussed in this review, Hannig identifies the need to improve the options for patients seeking assisted dying (p. 257). She also suggests that assisted dying needs to move "out of the shadows and into the public eye" (p. 257). Hannig asserts that this could occur by ending the practice of referring to assisted dying as "suicide," and widely recognizing it as a medical practice (p. 257). Hannig also suggests that increased education, training, and cooperation between palliative care providers will better serve patients (p. 257–258). Other improvements can be made in the science of dying, clarification to legal grey by law makers, and increased dialogue regarding patients' desires as they near the end of their life (p. 259–261).[3]

[3] Emphasizing the benefit of tools like living wills, health care surrogate designees, and advanced directives can provide opportunity for individuals to consider their wishes for the end of their life before the moment is upon them. This is particularly true in states where medically assisted death is not legal, such as Florida. Affirmative steps taken by individuals prior to being hospitalized can alleviate the pressure of decision making for loved ones and ensure that the patient receives the kind of care that they desire even when unable to speak for themselves. *See generally* The Patient's Right to Decide, Consumer

In the modern legal landscape, there is little likelihood for federal protections for assisted dying care to be upheld on substantive due process or equal protection grounds.[4] Similarly, it is unlikely that the Congress would pass sweeping protections on the national level. However, there is much work that can be done at the state level. Almost all the policy proposals highlighted by Hannig focus on state and local government action (p. 257–262). It will be interesting to see how states continue to divide themselves along ideological lines in this fight for bodily autonomy and agency rights.

V. Conclusion

The book ends with an epilogue in which Hannig provides insight into her own experience with death. In the summer of 2020, her grandmother took her own life (p. 270). She had "an array of health issues, but she never talked about any of them—she thought it unseemly" (p. 270). This sudden loss in the middle of her research on assisted dying changed Hannig's "willingness and capacity to engage with death" (p. 271). In many ways, that is the central achievement of *The Day I Die*; it opens the reader's eyes to death—not as a subject to fear or recoil at the thought of, but as a foundational part of the human experience.

Guides Health Care Advanced Directives, FLORIDAHEALTHFINDER.GOV https://www.floridahealthfinder.gov/reports-guides/advance-directives.aspx (last visited September 26, 2022).

[4] *Dobbs* states as follows:

> *Timbs* and *McDonald* concerned the question whether the Fourteenth Amendment protects rights that are expressly set out in the Bill of Rights, and it would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution. Thus, in *Glucksberg*, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of "Anglo-American common law tradition," and made clear that a fundamental right must be '"objectively, deeply rooted in this Nation's history and tradition[.]"

Dobbs v. Jackson Women's Health Org. 142 S. Ct. 2228, 2247 (2022) 1, 13 (quoting Washington v. Glucksberg, 521 U.S. 702, 711, 720–721 (1997)).

Considering the tragic loss of life across the globe during the COVID-19 pandemic and the continuing legal fight for bodily autonomy and agency rights, this is a timely book that provides its reader with an ultimately liberating take on our own mortality. While not a work of legal scholarship, *The Day I Die* is a thought-provoking and beneficial read for all those who practice in the field of elder law, as it presents significant arguments in favor of increased personal agency and bodily autonomy for those with terminal diagnoses.

VALUE OF LEGISLATION PROVIDING SUPPORT AND PROTECTION TO VULNERABLE ADULTS: CONSIDERATION FOR A CORE AGENCY AND SUPPORTED DECISION-MAKING

Yukio Sakurai[1]

I. Introduction

We face a seriously aging society. The population of older adults[2] with dementia[3] is sharply increasing as adults live longer.[4] We thus need effective law and public policy to protect older adults with dementia from the risk of abuse. In Japan, legal protection for adults with insufficient mental capacity is provided through the adult guardianship system in the Civil Code and relevant laws.[5] However,

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[1] Doctor of Laws (Yokohama National University, Japan). The author would like to thank Professor Fusako Seki and relevant professors in the Yokohama National University, Japan for their advice. The author would appreciate advice from Professor Emeritus Terry Carney and Dr. John Chesterman in Australia.

[2] The American Psychological Association (APA) recommends using the term "older adults," which is the same as the term "the elderly," "elderly people," or "the aged."

[3] The term "dementia" is used in this article. Dementia is an umbrella term for a number of neurological conditions of which the major symptom is the decline in brain function and is categorized as a Neurocognitive Disorder (NCD) in the Diagnostic and Statistical Manual of Mental Disorder (DSM-5-TR). *The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5-TR)*, the American Psychiatric Association (May 12, 2023), https://www.psychiatry.org/psychiatrists/practice/dsm.

[4] *Global Issues: Ageing*, UNITED NATIONS (September 19, 2022), https://www.un.org/en/global-issues/ageing

[5] THE CIVIL CODE (Japan) §§7-21, 838, 848-876-10 (1999); ACT ON VOLUNTARY GUARDIANSHIP CONTRACT (Japan) (1999); *see also* SOCIAL WELFARE ACT 1951 §§2-3(xii) (1951). In Japan, the number of adult guardianship users as of December 2022 was 245,087 while the number of welfare programs (i.e., Support Program for Self-Reliance in Daily Life) users as of December 2020 was 56,761.; *See Overview of Adult Guardianship Cases,* the Courts of Japan at 13 (May 12, 2023) https://www.courts.go.jp/vc-files/courts/2023/20230317koukengaikyou-r4.pdf (in Japanese) (hereinafter "the Courts of Japan"); *See also Overview of the Support Program*

most Japanese people opt for informal support from relatives, close friends, or nursing home managers. Principals[6] who live with informal support, where the risk of abuse may exist, do not receive legal protection provided by the adult guardianship system. To respect human rights and the right to self-determination in an aged society, older adults should be presented multiple options to make their own choices. There are growing numbers of older adults with insufficient mental capacity who have no relatives or close friends to support them, no financial assets, or who may be abused by their relatives or close friends. Such difficult cases become prevalent nationwide, and local governments and communities face challenges in how to cope with these difficult cases.[7] Emergency responses from public agencies are sometimes required, and preventive measures to avoid these difficult cases, such as abuse prevention laws and policies, must be considered. Difficult cases also need multiple measures depending on the characteristics of a specific case and social resources available in the local government and community.

Section 12 of the United Nations ("U.N.") Convention on the Rights of Persons with Disability[8] ("CRPD") combined with its General Comment No.1 recommends that state parties should proceed with a paradigm shift from substituted decision-making to supported decision-making ("SDM") to respect the "rights, will and

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for Self-Reliance in Daily Life, the National Council of Social Welfare of Japan at 9-10, (May 12, 2023). https://www.mhlw.go.jp/content/12000000/000769824.pdf (in Japanese).

[6] "The principal" in this article refers to "the represented person" or "the person who is supported by others."

[7] Difficult cases include five categories: 1) financial problem, 2) the need for living supports, 3) family problems, 4) service usage problems, and 5) community and workplace problems, which are further clarified by empirical research. This empirical research is based on the analysis of 79 difficult cases handled by social welfare councils nationwide as of April 2020. Individual support, parallel support, collaborative support, intermediation, and formation support have been implemented. Noriharu Unuma & Kaoru Sekine, *A Study of Difficult Cases in Adult Guardianship: Analyses the Contents and Support Methods through Corporate Guardianship by the Council of Social Welfare,* 12 KOGAKKAN U. JAPANESE STUD. 7 (2022).

[8] The CRPD Committee adopted General Comment 1 in April 2014, which clarifies states parties' general obligations under § 12 of the CRPD to ensure persons with disabilities' equal recognition before the law.

preferences of the person" (§ 12, paragraph 4 of the CRPD). Since then, state parties have considered how to accommodate the values of the CRPD in their laws and policies. They have adopted different models by way of law reforms, legislation, or establishing guidelines. Some states, such as Switzerland and Austria, renamed their adult protection law and no longer use the term "guardian/guardianship."[9] In some developed countries similar to Japan, laws crafted by legislators, amendments to the civil code, or guardianship laws provide support and protect vulnerable adults.[10]

The kind of legal system that supports and protects vulnerable adults is referred to as "adult support and protection legislation."[11] Adult support and protection legislation is a complex body of law in the adult guardianship system, SDM, and other safeguards for elder abuse. It focuses on the vulnerability of the principal and provides the support and protection needed by an individual. This legislation may minimize the restrictions of a principal's rights and encourages the least restrictive alternative measures that can be used to achieve its goal. Although comparative law analyses of the adult guardianship system and the safeguards for elder abuse exist in common law jurisdictions, such as Montgomery et al (2016)[12] and Donnelly et al (2018),[13] studies on the legal concept of adult support and protection legislation are limited. Therefore, this article focuses

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[9] *See The New Adult Protection Law*, AUSTRIAN FEDERAL MINISTRY OF CONSTITUTIONAL AFFAIRS, REFORMS, DEREGULATION AND JUSTICE (2018).

[10] The civil code was partly amended in Switzerland (2013), Austria (2017), Peru (2018), and Germany (2021). The new act was legislated in Ireland (2015) and the State of Victoria (2019) in Australia. Some U.S. states have taken relevant actions, including the States of Texas (2015) and Delaware (2016).

[11] An adult support and protection legislative system refers to a comprehensive package of laws that aim to protect vulnerable adults through the least restrictive measures, for as long as is necessary, by taking their will and preferences into consideration. *See* Yukio Sakurai, *The Ageing and Adult Protection Legislative System: A Comparative Law Study*, 9(1) INT'L J. AGING & SOC. CHANGE 53 (2019). https://doi.org/10.18848/2576-5310/CGP/v09i01/53-69.

[12] Lorna Montgomery et al., *Implications of Divergences in Adult Protection Legislation*, 18(3) J. ADULT PROTECTION 1 (2016), https://doi.org/10.1108/JAP-10-2015-0032.

[13] Sarah Donnelly et al, *Adult Safeguarding Legislation and Policy Rapid Realist Literature Review,* DUBLIN: HEALTH SVCS. EXEC., (2018), http://hdl.handle.net/10197/9183.

on adult support and protection legislation, illustrates how adult support and protection legislation in Japan can be designed, and reviews the principles behind the relevant legislation and policy to the adult support and protection framework.

This article examines what legislative idea will be feasible for Japan's adult support and protection legislation, referring to the implications of law reform and legislation of developed countries as well as a comparison of other international agreements. The primary limitation of this research is that Japan, a civil law jurisdiction, may be restricted by the legal system to accept an idea available in common law jurisdictions. This limitation, however, does not negate the importance analyzing this research. In this article, older adults with dementia are considered the main subject of adult support and protection. For this reason, consideration is given from the perspectives of both civil law and welfare law related to older adults.[14]

Two essential legal devices, which have not been explicitly framed in Japan, must be considered to adapt them to Japan's adult support and protection legislation. Then, this article further discusses adult support and protection legislation from the perspective of comparative guardianship law and supported decision-making.[15] One such device has to do with the roles and legal status of a core agency. According to the Basic Plan for Promoting the Adult Guardianship System ("Basic Plan"), a core agency is a focal point in a community that plays a central role for advocacy.[16] The Basic Plan refers to a five-year policy plan, which

[14] Adult support and protection legislation is assumed to be part of Elder Law. Elder law however is not established as a discipline of law in Japan although some researchers study elder law in the Elder Law Society of Japan. The civil law and welfare law are part of the laws to regulate matters for older adults. *See* ElderLaw Japan.jp, https://elderlawjapan.jp/.

[15] Yukio Sakurai, *The Idea of Adult Support and Protection Legislation in Japan: Multiple Options for Vulnerable Adults to Make Their Own Choices*, 12(1) J. AGING & SOCIAL CHANGE 31 at 31-45 (2021).

[16] *See Regarding the Basic Plan for Promoting the Adult Guardianship System*, Ministry of Health, Labour, and Welfare of Japan at 13 (September 19, 2022), https://www.mhlw.go.jp/file/06-Seisakujouhou-12000000-Shakaiengokyoku-Shakai/keikaku1.pdf; *See also* the updated Basic Plan 2022 to 2027 (December 21,

was drafted based on deliberations by experts and decided by the Cabinet of Japan. It provides legal protections through the adult guardianship system to adults with insufficient mental capacity. The Basic Plan aims to establish a regional collaboration network nationwide with a core agency as a regional focal point. In this article, a core agency is a multi-functional agency offering legal advocacy for community support, in addition to the role that is stipulated in the Basic Plan—to promote the adult guardianship system. A core agency has the potential to empower the role of community support if people in the community want it to do so.

The other device is the legal status and basic principles of SDM. It must be clarified how SDM can be placed and framed in Japan's legislation for the middle and long term such that the values of the CRPD are respected. Both a core agency and SDM are essential legal devices that can be used to frame Japan's adult support and protection legislative system. Upon consideration of both a core agency and SDM, Japan's adult support and protection framework and its values will be reviewed.

The research method is an interdisciplinary literature review in English and Japanese. This discussion mainly takes place in Japan but can be applied globally. Australian law is examined because in May 2019, the State of Victoria legislated the Guardianship and Administration Act 2019, which incorporates SDM in their guardianship law, in response to the request of the Attorney-General of Victoria in May 2009 to the Victorian Law Reform Commission ("VLRC"). It took a decade to legislate and pass this law while simultaneously piloting SDM projects in communities. Currently, Australia is also in the process of legislating state law to prevent elder abuse under the national policy where guardianship and SDM are being used as legal devices to combat elder abuse. Thus, the significance and purpose of adult support and protection legislation can be clarified by analyzing such Australian legislative projects, which are ongoing.

2022), https://www.mhlw.go.jp/content/000917303.pdf (in Japanese).

II. Roles and Legal Status of a Core Agency for Community Support

A. Roles of a Core Agency

A core agency is the focal point in a community that plays a leading role for advocacy support in line with the Basic Plan. The Act on Promotion of the Adult Guardianship System of 2016 ("Promotion Act") requires the 1,741 municipalities and 47 prefectures in Japan to formulate their own basic plans within their regional welfare plans under the national Basic Plan and formulate efforts for necessary assistance (§23 and §24 of the Promotion Act). This requires uniformly formulating core agencies nationwide with flexibility in scale and form. The authority of a core agency is based on the needs of the adult guardianship system within the municipality or larger jurisdiction.

As of October 2021, 31.9% of the 1,741 municipalities have established core agencies while 16.7% of the municipalities have other existing agencies, such as advocacy centers or adult guardianship support centers.[17] Cities with lower populations tend to have a smaller ratio of established core agencies to other existing agencies. Although the Basic Plan has the goal of establishing the collaboration network nationwide, it is not being realized. To accomplish this, particularly in cities with smaller populations, some reforms can be undertaken so that the existing agencies, such as advocacy centers, adult guardianship support centers, or community-based general support centers, may have core agency functions. Alternatively, a prefecture, which is the governmental entity of Japan that is larger than a municipality, can locally establish a public guardian agency, delegating municipalities to run core agencies when necessary.

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[17] Currently, three types of entities of core agencies are available: those directly managed by the municipalities (19.3%), those outsourced to the Council of Social Welfare, NPOs, etc. (62.7%), and a combination of these two types (18.0%). *See Results of a Survey on the Status of Measures Related to the Promotion of the Adult Guardianship System,* the Ministry of Health, Labour, and Welfare of Japan (September 19, 2022).

It is important to consider the multiple roles of a core agency within the community in dealing with Japan's adult support and protection legislative system. This would enable core agencies to implement access to legal advocacy called a "community support" to people in the community. Once it is established, a core agency is accessible to vulnerable adults with insufficient mental capacity, the family court, and the municipality. This policy design enables civil society, the family court, and the municipality to maintain a relationship within the central coordination of a core agency. This is the foundation of the regional collaboration network. A core agency has three main roles of community support, according to the Basic Plan.[18] Namely, the control tower, whose role is to design the overall concept of community support for legal advocacy and manage the promotion of the adult support and protection system; the secretariat, whose role is to supervise the "local council"[19] in the community for community support; and the management, whose role is to provide data analysis in the community.

In Japan, investigations are conducted by family court investigators in compliance with § 58 of the Domestic Relations Case Procedure Act of 2011. According to § 62 of the Act, the family court can commission the necessary investigations directly to a core agency.[20] The practical details must be clarified on site, but a core agency may contribute to the family courts as an outsourced investigator by law.

When the specific authority of the local government is delegated to the core agency, the core agency will engage in such additional

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[18] The Ministry of Health, Labour, and Welfare of Japan, *supra* at 16.

[19] Based on the provisions of the Local Autonomy Law, ordinary local governments can set up a "local council" by establishing agreements through consultation in order to jointly manage and execute a part of the affairs. Concerning the consultation of the regulations, the resolution of the parliament of the relevant local governments is required. *See Chapter 2: Roles of Core Agencies,* the Ministry of Health, Labour, and Welfare of Japan at 15-16https://www.mhlw.go.jp/file/06-Seisakujouhou-12000000-Shakaiengokyoku-Shakai/0000203641.pdf (May 12, 2023).

[20] Section 62 of the Domestic Relations Case Procedure Act of 2011 stipulates that "a family court may commission the necessary investigations to government agencies, public offices or other persons deemed appropriate, and (…) request the necessary reports." *See* Domestic Relations Case Procedure Act §62 (2011).

duties on top of its normal duties. Each municipality may decide which of its specific authorities it delegates to the core agency at the proper time and according to the local needs in the jurisdiction. How much a municipality can outsource its duties is limited by law under § 72 of the Attorney Act of 1949 and § 73 of the Judicial Scrivener Act of 1950 which prohibit unqualified people from performing certain professional legal tasks. Such duties cannot be outsourced by a municipality to a core agency.

One example of such additional delegation would be a "clearing" function, which is carried out in Austria.[21] A core agency with a clearing function would consult with an applicant seeking to petition the family court for adult guardianship, examine whether the adult guardianship system would suit the principal, and, if the system is deemed unsuitable, suggest that the applicant not make a petition for adult guardianship but instead use a less restrictive and more suitable alternative measure. This "clearing" function would help people in the community make the best law or policy measure selection while reducing the burden on the family courts.[22]

Another example of additional delegation would be a municipal mayor's petition for the adult guardianship system.[23] The mayor of a municipality lodges a petition to the family court to appoint a guardian of an adult who has no relatives for support in the community if it is deemed necessary. This system, under § 32 of the Act on Social Welfare for the Elderly of 1963, is an administrative process prescribed by law. The municipality will be able to outsource part of the clerical work to a core agency through a delegation agreement. Through such work, a core agency and a

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[21] In Austria, the Adult Protection Association oversees clearing function, delegating from the Federal Ministry of Justice by delegation contracts. See VertretungsNetz.at (December 21, 2022).

[22] Interview with a manager at the Adult Protection Assocation (*VertretungsNetz)*, in Vienna, Austria (September 17, 2019) (on file with Yukio Sakurai).

[23] The use of a municipal mayor's petition for the adult guardianship system is increasing year by year, and as at December 2022, it exceeded 23% of all petitions for the appointment of adult guardians and became the largest category for petition. *See* the Courts of Japan, *supra* note 5, at 4.

municipality may share information on an adult who has no relatives to support in the community.

B. Legal Status of a Core Agency

A core agency is not always a public entity. The legal authority in a core agency is not always the same as that of an Office of the Public Advocate ("OPA") or Office of the Public Guardian ("OPG"), which are public entities under the Attorney-General of the state or special territory in Australia. A core agency, however, has a duty to share personal information with the family court. Thus, a core agency must be either a public entity under the municipality's supervision or a private entity that has a delegation agreement with the municipality to perform public duties. In other words, the core agency must functionally work as a public agency for public duties and keep any personal information strictly confidential with the family court and the municipality, regardless of its legal authority. Therefore, a core agency is a quasi-public institution accountable to the public.

To cope with difficult guardianship cases in which the principal has been abused or neglected, the local government has the option to establish a public guardian agency to directly take care of these vulnerable people. This method does involve a not-for-profit organization ("NPO") or a subsidy-receiving welfare corporation. This type of guardianship is referred to as administrative direct control public guardianship, and is among the Suga-classified public guardianship types.[24] Under the current legal framework, the local government has discretion to use this method.[25] If such a public

[24] Fumie Suga classified five public guardianship types by focusing on the entities that implement guardianship and their relationship with public authority: 1) judicial direct intervention type, 2) administrative direct control (public guardianship) type, 3) public sector type, 4) private organization formation (corporate guardianship) type, and 5) individual type. *See* Fumie Suga*, The Doctrine of Autonomous Support in the English Adult Guardianship System: Towards a Society Pursuing the Best Interests*, TOKYO: MINERVA SHOBO at 258 (2010).

[25] Makoto Arai stated the following: "I am proposing that local governments may establish public guardians, and I think it is possible to establish them within the current

guardian agency is established in an area where principals are frequently abused or neglected, the agency may act as a public guardian for these vulnerable people, appointed by the family court and petitioned by the mayor. A public guardian should collaborate with the core agency in the community, the police, and the municipality that oversees abuse and social welfare assistance. Areas that are good candidates for the establishment of a public guardian agency is limited to some specific downtown areas of large cities, such as Tokyo and Osaka, where difficult cases frequently happen far beyond the national average. Collaborating with a public guardian agency will further empower the roles of a core agency.

C. Characteristics of a Core Agency

From the users' point of view, a core agency should explicitly provide information on community support, such as support for monitoring watch, informal arrangements, welfare assistance, SDM, and adult guardianship. Thus, a core agency is a multi-functional shop that serves more than the adult guardianship system. In this respect, a core agency differs from the existing "guardianship support center" which is a monofunctional agency that provides assistance to the adult guardianship system.

A core agency also differs from a "community-based general support center" ("general support center"), which is an agency of the community-based integrated care system of the welfare policy. Most general support centers are operated by welfare corporations or NPOs via a delegation agreement with the municipality.[26] A general support center is a welfare agency established by a municipality that is required to manage the health of older adults in the community

law system," at the 11th Expert Commission meeting. Expert Commission Meeting for Promotion of Adult Guardianship, Minutes of the 11th Session*,* Ministry of Health, Labour, and Welfare of Japan*,* at 20, https://www.mhlw.go.jp/content/12000000/000870232.pdf (in Japanese).

[26] *See Establishing the Community-Based Integrated Care System,* Ministry of Health, Labour, and Welfare of Japan (September 19, 2022), https://www.mhlw.go.jp/english/policy/care-welfare/care-welfare-elderly/dl/establish_e.pdf.

through a team approach with three kinds of practitioners: public health nurses, national-licensed social workers, and care support specialists.[27] The purpose of a general support center is to comprehensively support the health care, aged care (long-term care), and welfare of older adults by providing such assistance based on Paragraph 1, § 115—46 of the Long-Term Care Insurance Act of 1997. Through the amendments to the Social Welfare Act in 2020, the methods of a general support center were renewed to offer "consultation assistance" in welfare measures to citizens with disabilities in the community.[28] A general support center works together with the municipality but not with the family court. Therefore, a core agency facilitates the judicial relationship with the family court and legal practitioners in a community.[29]

Since a core agency and a general support center may "aim at realizing a diverse society where citizens cohabit in [the] community," [30] they can collaborate with each other to develop a community support system under the same goal. A possible merger or sharing of offices by these two agencies in the community would be an option if there is no obstacle with the subsidy system in each proper scheme and no conflicts of interest.[31] Such collaboration of these two agencies may assumed to be eligible on a prefecture and/or a municipality basis if this plan is properly authorized and incorporated in both the basic plan and welfare plan of the prefecture and/or the municipality. [32] This will establish a "one-stop shop"

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[27] *Id.*

[28] Section 4 (community-based welfare) was added to the Social Welfare Act 2020, which states that the "[p]romotion of community-based welfare must be carried out with the aim of realizing a community where residents can participate and coexist while mutually respecting personality and individuality." *See* SOCIAL WELFARE ACT §4 (2020).

[29] *See* Michihiro Oosawa, *Cooperation of the Judiciary, Welfare Administration, and the Civil Society in Adult Guardianship System Promotion Project*, 15 STUD. SOC. WELL-BEING & DEV. 21, 28 (2020) (January 26, 2023, AM 09:00) http://id.nii.ac.jp/1274/00003268/ (in Japanese).

[30] *See* THE MINISTRY OF HEALTH, LAB., & WELFARE OF JAPAN., *supra* note 26.

[31] Online Interview with Toshihiko Mizushima, a lawyer and expert commission member (Sept. 7, 2020) (on file with the Author).

[32] "Municipal welfare plans" and "prefectural plans for supporting community welfare" are regulated in accordance with § 107 and § 108 of the Social Welfare Act of Japan. *See* SOCIAL WELFARE ACT No. 45 arts. 107, 108 (Mar. 29, 1951) (as last amended by Law No.

with multiple functions to support and protect vulnerable adults in the community.[33]

D. Registration of Informal Arrangement with a Core Agency

In Asia the family is a social unit, and even without a legal system in place, it is customary for people to help one another based on their kinship.[34] In Japan, most adults who do not use the adult guardianship system, including voluntary guardianship, instead rely on informal arrangements with relatives, close friends, or nursing home managers for assistance relating to their personal affairs and property management.[35] In fact the number of adult guardianship users is estimated to be from 2% to 3% of the potential users with insufficient mental capacity, and the remaining 97% to 98% of people are estimated to be supported by informal arrangements in Japan.[36] Those who are in informal arrangements may be at risk for abuse, particularly financial abuse or financial exploitation. Elder abuse is regulated by elder abuse prevention laws, and annual statistics reveal a significant amount of elder abuse occurs. However, the statistics do not grasp the whole picture but instead

12 of 2022).

[33] From an application-based, field-specific support, comprehensive support principles with an emphasis on prevention will be attempted. *See* Masaki Harada, *Comprehensive Support System and Community–Based Welfare Plan: Conversion to Community–Based Welfare Administration*, Japan Community Welfare Society Public Research Forum, at 70-77 (2018). http://jracd.jp/file/2017/2018forum_report.pdf; Shoichi Ogano, *The Role of Adult Guardianship System and Community Comprehensive Care: Community Symbiosis Society*, 12 REV. SOC. SECURITY L. 23 (2020).

[34] *See generally* Stella Quah, *Families in Asia: Home and Kin,* 2nd Edition (2008).

[35] Carry and Singer assume three different types of support models to deal with people with intellectual disabilities: a legalistic model (guardianship), a welfare model, and a developmental model. An informal arrangement is another type of development support model. *See* Terry Carney & Peter Singer, *Ethical and Legal Issues in Guardianship Options for Intellectually Disadvantaged People* at 113–117 (1986) https://humanrights.gov.au/sites/default/files/Guardianship_for_intellectually_disadvantaged_people.pdf.

[36] Regional Guardianship Promotion Project, *Current Status and Issues of the Adult Guardianship System,* KOUKEN-PJ, https://kouken-pj.org/about/current-status/ (last visited Dec. 21, 2022).

only recognizing the limited number of elder abuse that are reported by public agencies.[37]

In Australia, informal arrangements do not need to be altered if they work well per § 31 of the Victorian Act. Informal arrangements, including family agreements,[38] are common, but enduring powers of attorney ("EPAs"),[39] SDM, or guardianships are also used when necessary. Australia is a contract-based society, and even family members use SDM or guardianships that contain a one year or less self-revocation term for a crucial legal decision of the principal.[40] In contrast, most Japanese people simply rely on informal arrangements and do not use the law system, such as guardianship, in part because Japan's adult guardianship system has no guardianship with a one year or less self-revocation term.

Guardianships that self-terminate within a year should be introduced in Japan, and stakeholders, including principals and their relatives or nursing-home managers, should register any informal arrangement with the core agency. Adults with insufficient mental capacity who have no relatives or close friends and no financial

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[37] In 2020, there were 595 elder abuse cases attributable to nursing home care workers compared to 621 in 2018. Additionally, in 2020, there were 17,281 elder abuse cases attributable to caregivers compared to 17,249 in 2018. *See Survey Results on the Status of Response Based on the 2020 Act on Prevention of Elderly Abuse and Support for Elderly Caregivers*, MINISTRY OF HEALTH, LAB., & WELFARE OF JAP. (2020) https://www.mhlw.go.jp/stf/houdou/0000196989_00008.html (in Japanese).

[38] Family agreements are not typically put in writing between the principal and their relatives, and the relatives take care of the principals in exchange for the principal's property or the like. Such agreements are fragile, and the principal's interests are not guaranteed by law. The ALRC recommends that the tribunal be given jurisdiction over disputes within families, but access to the tribunal is another challenge for vulnerable adults. *See National Legal Response Final Report*, AUSTL. L. REFORM COMM'N, ELDER ABUSE No. 131, 203–4 (2017) https://www.alrc.gov.au/publications/elder-abuse-report.

[39] An enduring power of attorney (EPA) is a legal document that lets the principal appoint one or more people in register to help make decisions or to make decisions on their behalf about their property or money. GOV. UK, *Make, Register or End a Lasting Power of Attorney,* (September 19, 2022, 10:55 AM), https://www.gov.uk/power-of-attorney. *Enduring Power of Attorney: Acting as an Attorney*, U.K. GOV'T., https://www.gov.uk/enduring-power-attorney-duties (last visited Feb. 1, 2023).

[40] Email from a VCAT member to Yukio Sakurai, Author, Information About Guardian and Supportive Guardian Remuneration in Australia (Sept. 2, 2021) (copy on file with Yukio Sakurai).

assets may consult with the core agency to seek measures for his/her support, including welfare assistance from the municipality. The core agency may then give advice accordingly.

III. Combined Models of Guardianship and Supported Decision-Making

A. Combined Models of Guardianship and SDM in Australia, Europe, and Japan

This part reviews three types of combined models of guardianship and supported decision-making ("SDM") in Australia, Europe, and Japan.[41] This section is going to explain how the countries integrate guardianship and SDM into their laws, policies, or reports and compares similarities and differences between the models. With this conceptual comparison, the stance of the Government of Japan regarding SDM will be reconfirmed. Australian law is examined because its guardianship legislation is helpful in considering Japan's adult support and protection legislative system. Comparing the European system is relevant because Europe has both civil and common law systems, while Australia has a common law system, and Japan has a civil law system, thus, Europe's legal systems can be balanced among the

[41] This part is an updated version of the previously published article by the author: Yukio Sakurai, *The Idea of Adult Support and Protection Legislation in Japan: Multiple Options for Vulnerable Adults to Make Their Own Choices,* 12 J. AGING & SOC. CHANGE 31, 32–45 (2021).

three models.[42] Below, the three combined models of guardianship and SDM in Australia, Europe, and Japan are examined.[43]

1. *Victorian Model*

The State of Victoria has the most advanced guardianship laws and policies in Australia. The Guardianship and Administration Act of 2019 ("Victorian Act") incorporates SDM by using a supportive guardian and supportive administrator framework while keeping the guardianship system as a last resort.[44] The Victorian Act was enacted in May 2019 and came into force in March 2020.[45] It is sometimes referred to as the "Victorian model." The CRPD was ratified by Australia with a declaration of reservation in July 2008,[46] Uniform national legislation that respects the autonomy and right to self-determination of persons with disabilities is required under the

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[42] PARLIAMENT OF AUSTL., INFOSHEET 23 BASIC LEGAL EXPRESSIONS 1 (Sept. 2019), https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets; THE ROBBINS COLLECTION, THE COMMON LAW AND CIVIL LAW TRADITIONS 5 (2010), https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf; Major *Differences Between the Japanese and American Legal Systems*, WASH. UNIV. IN ST. LOUIS SCH. OF L. (Nov. 20, 2013), https://onlinelaw.wustl.edu/blog/major-differences-between-the-japanese-and-american-legal-systems/.

[43] In addition to three types of combined models of guardianship and SDM, the Peruvian model is also eligible, which incorporates "support" functions in their civil code while staying status quo of the adult guardianship system. *See Peru: Milestone Disability Reforms Lead the Way for Other States, says UN*, OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUM. RIGHTS (Sept. 4, 2018), https://www.ohchr.org/en/press-releases/2018/09/peru-milestone-disability-reforms-lead-way-other-states-says-un-expert.

[44] GUARDIANSHIP AND ADMINISTRATION ACT §§ 79–98 (2019).

[45] GUARDIANSHIP AND ADMINISTRATION ACT §2 (2019); *Guardianship Reform Laws Pass Parliament*, PREMIER OF VICTORIA THE HON DANIEL ANDREW (May 28, 2019) https://www.premier.vic.gov.au/guardianship-reform-laws-pass-parliament/.

[46] The Government of Australia declared its understanding of several points at the ratification of the CRPD on July 17, 2008, including that the CRPD allows for substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only when such arrangements are necessary, that is, as a last resort and subject to safeguards. Convention on the Rights of Persons with Disabilities, Chapter IV Human Rights. May 3, 2008, U.N.T.S. 3 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4#EndDec (last visited Sept. 19, 2022).

CRPD.[47] Australian legislative projects are being carried out by states and special territories to improve domestic legislation in compliance with the values of the CRPD.[48] Australian legislative projects by states and special territories other than the State of Victoria are ongoing.[49]

Australia recognizes that its current guardianship law may partially be in conflict with § 12 of the CRPD.[50] Consequently, its legislative reforms position substituted decision-making as a last resort and, instead, encourage SDM.[51] Thus, SDM may replace substituted decision-making with some limitation. Substituted decision-making will be used only when tribunals acknowledge with evidence that the principal has no capacity to make decisions.[52] Australians think highly of relationships with others, a concept known as "mateship."[53] Rather than relying on lawyers to protect their interests, Australians help those in their community, their relatives, and people with similar cultural backgrounds, however, they utilize public institutions when necessary.

The summary of the Victorian Act is as follows:

(i) The Victorian Act indicates that "a person is presumed to have decision-making capacity unless there is evidence to the contrary" (§ 5(2)) and recognizes that "a person has capacity to

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[47] John Chesterman, *The Future of Adult Guardianship in Federal Australia*, 66(1) AUST. SOC. WORK 26 (2013).

[48] Piers Gooding & Terry Carney, *Australia: Lessons from a Reformist Path to Supported Decision-Making* SSRN (2021) http://dx.doi.org/10.2139/ssrn.3928342.

[49] *Id*.

[50] *Id.*

[51] Christine Bigby et al, *Delivering Decision Making Support to People with Cognitive Disability — What Has Been Learned from Pilot Programs in Australia from 2010 to 2015*, 52 AUST. J. SOC. ISSUES 222 (2017). Australian welfare practitioners have practiced SDM in pilot programs since 2010. This article summarizes the results of these SDM pilot practices conducted between 2010 and 2015.

[52] Victorian Act § 30 (2019). (is the Guardianship and Administration Act?)

[53] Merriam-Webster.com, https://www.merriam-webster.com/dictionary/mateship. (last visited September 19, 2022). (Mate ship is "an Australian code of conduct that emphasizes egalitarianism and fellowship.")

make a decision in relation to a matter (decision-making capacity)" (§ 5(1)).)).

(ii) The purpose of the Victorian Act is "to promote the personal and social wellbeing of a person" (§ 4). For that reason, "the will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person" (§ 8).

(iii) Even when some support is needed for the principal, it is not always the case that the supportive guardian and the supportive administrator are appointed by the Victorian Civil and Administrative Tribunal (VCAT). If a close relative plays such a role properly, there is no need to change (§ 31).

(iv) The appointment of adult guardians will be limited by the VCAT as a last resort. Thus, the adult guardian and the administrator must respect the will and preferences of the principal, substitute the principal's decision as far as necessary, and explain the substituted decision so that the principal can understand the content (§ 41, § 46).

(v) SDM is incorporated into the legislative system (§ 79 to § 98, Part 4—supportive guardianship orders and supportive administration orders). The principal can appoint a supportive attorney who has the legal authority to make supportive decisions on personal affairs or financial management (Part 7—power of attorney appointments, the Power of Attorney Act of 2014). Also, on behalf of the principal, the VCAT may appoint the supportive guardian and supportive administrator (§ 87). A supportive guardian and a supportive administrator are not entitled to any remuneration for acting in that role (§ 95).[54]

2. *Alzheimer Europe Model*

In Europe, there are no unified guardianship and SDM laws or policies other than the European Union (EU) recommendations to member countries regarding adult protection.[55] European countries

[54] Non-remuneration policy is applied to guardianship laws over Australia except where the law permits remuneration to specific institutions for financial management.

[55] *See* European Parliamentary Research Service, *Protection Vulnerable*

individually consider where and how they accommodate the values of the CRPD in their laws and policies.[56] Currently, the Mental Capacity Act of 2005[57] of England and Wales and Ireland's Assisted Decision-Making (Capacity) Act of 2015[58] incorporate SDM in their respective country's laws while other European countries still need to consider where and how to accommodate SDM.[59]

Alzheimer Europe,[60] a European non-profit, non-governmental organization ("NGO"), published a report in December 2020 entitled *"Legal Capacity and Decision Making: The Ethical Implications of Lack of Legal Capacity on the Lives of People with Dementia."*[61] It summarizes a study funded under an operating grant from the EU's Health Programme (2014–2020).[62] The 2020 Alzheimer Europe Report was drafted by experts and proposes the combined SDM model developed by Scholten and Gather in 2018.[63]

Adults—European Added Value Assessment: Accompanying the European Parliament's Legislative Initiative Report 2016 at 4, https://www.europarl.europa.eu/RegData/etudes/STUD/2016/581388/EPRS_STU(2016)581388_EN.pdf. (In the EU, Article 25 (the rights of the elderly) and Article 26 (integration of persons with disabilities) of the Charter of Fundamental Rights of the European Union (2000/C 364/01) recognize and respect human rights of the elderly and persons with disabilities.) https://www.europarl.europa.eu/RegData/etudes/STUD/2016/581388/EPRS_STU(2016)581388_EN.pdf.

[56] *Id.*

[57] MENTAL CAPACITY ACT (2005), https://www.legislation.gov.uk/ukpga/2005/9/contents

[58] *See* ASSISTED DECISION-MAKING (CAPACITY) ACT, Law No. 64 of 2015, (Ireland) https://www.irishstatutebook.ie/eli/2015/act/64/enacted/en/html.

[59] *See* Dianne Gove et al., *Legal Capacity and Decision Making: The Ethical Implications of Lack of Legal Capacity on the Lives of People with Dementia 2020,* ALZHEIMER EUROPE at 17-18 (September 20, 2022) (hereinafter "Alzheimer Europe"), https://www.alzheimer-europe.org/resources/publications/2020-alzheimer-europe-report-legal-capacity-and-decision-making-ethical.

[60] Alzheimer Europe is an NGO that aims to be a voice of people with dementia and their carers, makes dementia a European priority, promotes a rights-based approach to dementia, supports dementia research, and strengthens the European dementia movement. *See We are Alzheimer Europe,* ALZHEIMER EUROPE, https://www.alzheimer-europe.org/.

[61] Alzheimer Europe, *supra* note 59.

[62] European Commission, *Q&A on the third Health Programme 2014 – 2020*, EUROPA NU (Feb. 26, 2014) https://www.europa-nu.nl/id/vjhmja8lmpz6/nieuws/q_a_on_the_third_health_programme_2014?ctx=vj8mhjz7suzr .

[63] Scholten and Gather predict "adverse consequences of CRPD § 12 for the persons with

In this article, it will be referred to as the "Alzheimer Europe model."

The Alzheimer Europe model combines SDM with a competence and assessment component; it is "based on the view that it is sometimes permissible to deny people the right to make their decisions, but that this should only be the case for people whose functional decision-making capacity is substantially impaired and if all resources of SDM have been exhausted."[64]

The Alzheimer Europe model has not become the law or policy in any European country. This model has ethical implications based on the understanding that "[t]he main role of ethics is to question the most important practices and procedures and to open the way to finding better solutions."[65] Thus, it is worthwhile to consider the Alzheimer Europe model as an ethical framework for guardianship and SDM in Europe, regardless of whether it falls into a civil law or common law jurisdiction.

The Alzheimer Europe model consists of the following six steps addressed in the 2020 Alzheimer Europe Report:[66] (i) presumption of decision-making capacity, (ii) rebuttal of this presumption, (iii) assessment of decision-making capacity, (iv) SDM, (v) monitoring, and (vi) substitute decision-making as a last resort.[67] On one hand, this model, which agrees with the CRPD's general principles of equality and non-discrimination,[68] promotes autonomy of people with dementia. On the other hand, it protects vulnerable people due to insufficient mental capacity against abuse and undue influence..[69] Through law reform, legislation, or establishing guidelines, in

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mental disabilities" and propose the combined SDM model. Matthé Scholten & Jakov Gather, *Adverse Consequences of § 12 of the UN Convention on the Rights of Persons with Disabilities for Persons with Mental Disabilities and an Alternative Way Forward*, 44 J. MED. ETHICS 226, 230-232 (2018).

[64] Alzheimer Europe, *supra* note 59, at 22.

[65] *Id.* at 3.

[66] *Id.* at 22–23.

[67] *Id. See* also Matthé Scholten & Jakov Gather, *supra* note 63.

[68] *Id.* at 7–8; Matthé Scholten et al, *Equality in the Informed Consent Process: Competence to Consent, Substitute Decision Making, and Discrimination of Persons with Mental Disorders,* 46(1) J. MED. & PHIL. 108 (2021).

[69] *Id.* at 9–13.

accordance with the country's legislative intention, this model can be utilized.[70]

3. *Japanese Model*

Unlike other developed countries, Japan promotes the adult guardianship system by establishing a regional collaboration network and improving guardianship practices in accordance with the Basic Plan, while providing guidelines for implementing SDM.[71] This system will be referred to as the "Japanese model." As mentioned before, in Japan, the adult guardianship system is underutilized. The Japanese model includes a voluntary guardianship system—which is similar to the lasting power of attorney ("LPA") which involves the family courts appointing the voluntary guardian's supervisor — but few people use this system.[72] In most cases, relatives, close friends, or nursing-home managers of the principal provide informal arrangements for the principal.[73] Older Japanese adults rely on relatives, close friends, or nursing home managers. Principals in informal arrangements, where the risk of abuse may exist, do not receive legal protections provided by the adult guardianship system as elder abuse may be regulated best under an actual legal scheme that prevents such abuse. The annual statistics show how much elder abuse occurs; however, these statistics do not capture the whole picture as only a few cases of elder abuse are reported.[74]

The guidelines encourage adult guardians to go through the process of SDM based on § 858 (respect for intention and personal

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[70] *Id*. at 17.

[71] *See Guidelines for Adult Guardians Based on Supported Decision-Making,* THE MINISTRY OF HEALTH, LABOUR, AND WELFARE OF JAPAN, (September 19, 2022) (hereinafter "Guidelines Based on Supported Decision-Making") https://www.mhlw.go.jp/content/000750502.pdf.

[72] The number of the users in the voluntary guardianship system was equivalent to approximately 1% of all adult guardianship users as of December 2022. *See* the Courts of Japan, *supra* note 5 at 13.).

[73] Regional Guardianship Promotion Project, *supra* note 36.

[74] The Ministry of Health, Labour, and Welfare of Japan, *supra* note 37.

consideration of adult ward) of the Civil Code even in limited cases.[75] Namely, an adult guardian is required to participate in SDM for legal acts of the principal that will have a significant impact on the principal (i.e., decisions on the principal's residence, sale of the principal's assets, and gifts and expenses of the principal to a third party) and incidental factual acts associated with legal acts.[76] Municipality staff and core agencies have begun online training programs on basic SDM practices since December 2020.[77] In Japan, there is a tendency to rely on guidelines instead of law, especially when related to a bioethical issue.[78] Positive aspects of relying on guidelines are from being non-rigid, flexible, and easy to amend as necessary.[79] On the other hand, SDM guidelines have unclear legal effects, little to no effective safeguards, no standardized practices, and are more of a support method rather than a legal system.[80]

The SDM guidelines for adult guardians reveal the confusing relationship between guardianship and SDM. The SDM guidelines suggest that adult guardians should practice SDM with principals as their priority, only opting for substituted decision-making if SDM does not work.[81] However, this suggestion cannot be enforced, and thus it is unclear how much the guidelines will be respected and implemented by adult guardians on site.[82] In this sense, adult

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[75] Guidelines based on Supported Decision-Making, *supra* note 71.
[76] *Id.*
[77] One Mizuho, *Decision-making support training for guardians, etc.,* THE MINISTRY OF HEALTH, LABOUR, AND WELFARE OF JAPAN,(hereinafter "One Mizuho") https://www.mhlw.go.jp/content/12000000/000790685.pdf.
[78] Norio Higuchi, *Legal Issues on Medical Interventions in Terminally Ill Patients*, 25 MED. CARE & SOC. 21, 34 (2015); Norio Higuchi, *Current Status and Challenges of End-of-Life Care Legal Issue*s, 2 GERIATRICS 579 (2020).
[79] *Id.*
[80] Japan Federation of Bar Association, *Declaration Calling for the Establishment of a System for Comprehensive Supported Decision-Making*, JFBA (October 2, 2015) (hereinafter "Japanese Federation of Bar Associations"), https://www.nichibenren.or.jp/document/civil_liberties/year/2015/2015_1.html.
[81] Guidelines Based on Supported Decision-Making, *supra* note 71.
[82] No empirical SDM activity data is available in the Courts of Japan on how many SDM cases were practiced by adult guardians in line with the SDM guidelines, and they are assumed to be few cases because few articles with empirical SDM data are found in Japan.

guardians have discretion whether to follow SDM guidelines, which cannot guarantee that principals receive standardized SDM and guardianship services equally.[83] Furthermore, the SDM guidelines may increase the risk of undue influence by adult guardians on the principals if the Government leaves the situation as it is.[84] Therefore, the SDM guidelines can be useful for the time being; however, legislation will offer more standardized operation and better protection of the principal's rights.

A. Comparison of the Three Models

1. *Similarities Between the Three Models*

The three models share similar principles and values, all of which combine guardianship and SDM to deal with adults lacking sufficient mental capacity. The Victorian model is based on the VLRC report, *Guardianship: Final Report No. 24* ("VLRC Report 24") at the state level,[85] and the Australian Law Reform Commission ("ALRC") report, *Equality, Capacity and Disability in Commonwealth Laws: Final Report No. 124* ("ALRC Report 124") at the national level.[86] The former state report proposed reforms that included a total of 440 items in 2012 before General Comment No.1 was adopted by the UN CRPD Committee.[87] The latter national report examined in 2014 "equal recognition before the law" and "legal capacity" in § 12 of the CRPD and provides the four *National Decision-Making Principles*, namely: (1) *the equal right to make decisions;*(2) *support;* (3) *will, preferences and rights;* and (4)

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[83] Guidelines Based on Supported Decision-Making, *supra* note 71.
[84] Japan Federation of Bar Associations, *supra* note 80.
[85] *See* Neil Rees et al., *Guardianship: Final Report No. 24,* VICTORIAN LAW REFORM COMMISSION, (2012) (hereinafter "VLRC Report 24") https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/Guardianship_FinalReport_Full-text.pdf.
[86] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws Final Report* No. 124, (2014) (hereinafter "ALRC") https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_whole_pdf_file.pdf .
[87] VLRC Report 24, *supra* note 85.

safeguards.[88] The Victorian model is based on the above state and national reform reports, including the *National Decision-Making Principles*.[89]

The Alzheimer Europe model is based on the combined SDM model developed by Scholten and Gather in their 2018 bioethics studies.[90] The 2020 Alzheimer Europe Report emphasized non-discrimination, respect for individual autonomy, and the values of the CRPD, including reasonable accommodation.[91] These principles and values in the Report form the basis of the Alzheimer Europe model.[92] The Japanese model is based on the Promotion Act and the Basic Plan, which emphasize the values of the adult guardianship system, namely: the respect for the right to self-determination, emphasis on personal protection, and normalization to attain a diverse society where people cohabit in the community.[93] All three models share a similar purpose of respecting the will and preferences of vulnerable people.

Another similarity is within the legal concept of decision-making capacity. It is important to note that the Victorian and Alzheimer Europe models share a presumption of decision-making capacity, such that according to § 5(2) of the Victorian Act "a person is assumed to have decision-making capacity unless there is evidence to the contrary." The presumption of decision-making capacity is adopted in common law jurisdictions, but this legal concept can be used in civil law jurisdictions, as the Alzheimer Europe model suggests.[94] With this presumption of decision-making capacity, SDM with a third party's assistance can co-exist.[95]

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[88] ALRC, *supra* note 86.
[89] *Id.* at 63-90.
[90] Matthé Scholten & Jakov Gather, *supra* note 63.
[91] Alzheimer Europe, *supra* note 59, at 6-13.
[92] *Id.*
[93] A "diverse society" refers to a society in which the community and various local actors participate, and the people are connected to other people and social resources across generations and fields for better living and purpose. *Toward the Realization of a "Diverse Society in Community*, MINISTRY OF HEALTH, LABOUR, AND WELFARE OF JAPAN*,"* (2022) https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000184346.html.
[94] Alzheimer Europe, *supra* note 59, at 22-23.
[95] *Id.*

In the Japanese model, the guardianship system adopts the capacity doctrine of the Civil Code, which is a doctrine that legal acts performed by persons with mental capacity are valid. While the SDM guidelines for adult guardians include the term "decision-making capacity" and suggest that adult guardians should adopt SDM in the decision-making process of principals and apply substituted decision-making as a last resort.[96] The SDM guidelines state that, "decision-making capacity is not a concept stipulated by law and is different from mental capacity and capacity to act [in the Civil Code]."[97] The SDM guidelines adopt the idea that decision-making capacity is not an alternative to having or not having capacity, rather that decision-making capacity varies according to the presence or absence and degree of support."[98] In this respect, the SDM guidelines for adult guardians require additional duties of the adult guardians than does the Civil Code of Japan. Consequently, all three models more or less adopt the legal concept of decision-making capacity.

2. *Core Differences Between the Three Models*

The three models' bases are different. The Victorian model is enshrined in the Victorian Act while the Japanese model is based on a combination of existing guardianship laws and separate SDM guidelines. The Alzheimer Europe model is an ethical framework based on the 2020 Alzheimer Europe Report.

The core difference between the three models lie in where and how they accommodate SDM in their laws and policies. The Victorian model accommodates SDM via the supportive guardian and supportive administrator systems of the Victorian Act.[99] The

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[96] Guidelines Based on Supported Decision-Making, *supra* note 71.

[97] *Id.*at 3.

[98] *Id.*at 3. (It is understood that the SDM Guidelines were drafted by the SDM-WG based on the Mental Capacity Act of 2005 of England and Wales and the CRPD.)

[99] Guardianship and Administration Act, Law No. 13 of 2019§79-98 Part 4, as last amended by Law No. 7 of 2023 (Victoria, Australia) [hereinafter the Victorian Act 2019]. (Upon a petition of the principal or stakeholders, the Victorian Civil and Administrative Tribunal (VCAT) issues an order to appoint a supportive guardian and/or supportive

principal can appoint a supportive attorney who has the legal authority to make supportive decisions on personal affairs or financial management.[100] Also on behalf of the principal, the tribunals may appoint the supportive guardian and/or supportive administrator with the appointment of an adult guardian as a last resort.[101] Many people use EPAs unlike in Japan. The Alzheimer Europe model, like the Victorian model, comprises the six steps in the guardianship and SDM framework as mentioned before.[102] Both the Victorian and Alzheimer Europe models similarly combine SDM and guardianship. In the Victorian and Alzheimer Europe's models, SDM is positioned as a "legal system" that will in part replace substituted decision-making.[103] In other words, SDM and guardianship are theoretically independent, and SDM is prioritized over guardianship.

The Japanese model applies SDM guidelines to change the way that adult guardians are encouraged to go about discharging their responsibilities.[104] Yasushi Kamiyama states that there are two theoretical views on the relationship between adult guardianship and SDM in Japan. One view is that guardianship and SDM are

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administrator among relatives in charge of SDM through a hearing.)

[100] Powers of Attorney Act, Law No. 57 of 2014, Part 7—power of attorney appointments, as last amended by Law No. 7 of 2021 (Victoria, Australia). (The principal can appoint a supportive attorney by designated form of contract, giving power to the person to access information from organizations (such as banks, utility providers), to communicate the decisions and to give effect to the decisions. A supportive attorney cannot handle medical matters and has no proxy right to the principal).

[101] The Victorian Act 2019, § 87. (VCAT may make a supportive guardianship order or supportive administration order after considering—(a) an application under Division 1 (for guardian or administrator); or (b) an application for a guardianship order or an administration order for a proposed represented person).

[102] Email from John Chesterman Victorian Deputy Public Guardian, to Yukio Sakurai, *Information About Alzheimer Europe Model*, (June 21.2021), (copy on file with Yukio Sakurai).

[103] The Victorian Act 2019, § 90-94 (Under Division 3, powers and duties of supportive guardians and supportive administrators regulate separately from those of guardians and administrators. The Alzheimer Europe model also separates SDM and substituted decision-making in their six steps at (iv) and (vi) as mentioned before).

[104] Guidance Based on Supported Decision-Making, *supra* note 71, at 1-4.

independent, while the other view is that they are interlinked.[105][106] In the former view, SDM is regarded as a "legal system" that will replace the adult guardianship system.[107] In the latter view, SDM is regarded as a "support method" for substituted decision-making.[108] As far as the SDM guidelines for adult guardians are concerned, SDM is regarded as a "support method" to § 858 (respect for intention and personal consideration of adult ward) of the Civil Code.[109] In other words, SDM as a support method is not theoretically independent but is subordinate to § 858 of the Civil Code under the SDM guidelines.

Another difference between the Victorian and Japanese models is that the Victorian model does not recognize remuneration for SDM or guardianship except in cases involving Victorian State Trustees Ltd (STL) and other professional administrators.[110] The Victorian model expects that principals' supportive guardians, supportive administrators, guardians, or administrators to be relatives, close friends, or public advocates, and not legal/welfare practitioners receiving remuneration.[111] This non-remuneration policy was established in the Victorian Act of 1986 based on the Cocks Report 1982[112] and has been applied to other jurisdictions in Australia. Its purpose is to avoid the conflict of interest associated

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[105] Yasushi Kamiyama, *Recent Policy Trends regarding Supported Decision-Making in Japan*, 72 DOSHISHA L. REV. 445, 447–448, (2020).
[106] *Id*. at 447-448.
[107] *Id.* at 447.
[108] *Id.* at 447-448.
[109] *Id.* at 463-465.
[110] The Victorian Act 2019, § 175. (Remuneration of administrators must be determined by the VCAT as an exception for non-remuneration principle for guardians/administrators).
[111] The Victorian Act 2019, § 95 (A supportive guardian or supportive administrator is not entitled to receive any remuneration for acting in that role).
[112] The Cocks Report 1982 is the final report made by the Victorian Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons headed by Errol Cocks. Victorian Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons & Errol Cocks, Report of The Minister's Committee on Rights & Protective Legislation for Intellectually Handicapped Persons (Victorian State Government, 1982).

with payment.[113] The Victorian model recognizes that principals' supportive guardians and supportive administrators are "supporters for decision-making" or "decision-makers" of the principals, so they do not need to have specialized skills.[114] Instead, principals' supportive guardians and supportive administrators must have sufficient skills to seek advice or arrange care by specialists.[115] The staff in the Office of the Public Advocate (OPA) has a social welfare background, such as social work, law, or nursing, and assist supportive guardians, show them where to seek advice, and how to evaluate that advice in making their decisions.[116]

The Japanese model relies on remuneration for acting guardians, which is decided by the family courts on a case by case basis and paid by the principal.[117] In fact, the ratio of non-relative guardian cases in 2022 was approximately 80%, with most non-relative guardians and legal/welfare practitioners receiving remuneration.[118] The Alzheimer Europe model does not deal with remuneration, thus allowing individual European countries to decide themselves.[119] Remuneration determines "who will function as supporters or guardians and for what purpose."[120] The Victorian model uses relatives, close friends (private), public advocates or STL/professional administrators (public) as supporters for decision-

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[113] Email from Terry Carney, Professor Emeritus, The Univ. of Sydney, to Yukio Sakurai, *Information About Non-Remuneration Principle*, (December 6, 2021), (copy on file with Yukio Sakurai).
[114] Email from an anonymous VCAT Member to Yukio Sakurai, *Information About Non-Remuneration Principle*, (September 2, 2021), (copy on file with Yukio Sakurai).
[115] *Id.*
[116] *Id.*
[117] Civil Code of Japan (Minpo),§862.
[118] *See* Courts of Japan at 10, *supra* note 5.
[119] Alzheimer Europe *supra* note 59 at 22-23 (2020).
[120] Currently, the Victorian model relies on private supporters and adult guardians at approximately 60 % while the Japanese model relies on private guardians at a significantly smaller rate. *See* John Chesterman, *Australian Adult Guardianship Orders 2021/22*, AUSTL. GUARDIANSHIP & ADMIN. COUNCIL, https://www.agac.org.au/assets/images/AGAC-Guardianship-orders-Report-2021-2022-final.pdf(last visited May 13, 2023); Regional Guardianship Promotion Project, *supra* note 36.

making or decision-makers of principals.[121] The Japanese model provides payment to adult guardians acting as legal/welfare practitioners.[122] Without remuneration, legal/welfare practitioners will not accept guardianship in Japan.

3. *Discussion*

By examining the three types of models, we have reviewed how countries opt for a combination of guardianship and SDM to deal with adults with insufficient mental capacity. The comparison of the three types of models is summarized by Table 1. These three models imply possible legislation combining guardianship and SDM laws and policies. There is a diversity of laws and policies in countries or reports that share the same values of the CRPD and democratic procedures.[123] The difference between the Japanese, the Victorian, and the Alzheimer Europe models is how they prioritize the requirements of § 12 of the CRPD, including an understanding of whether the current guardianship law meets these requirements and how seriously they understand the necessity to legislate or reform the law.[124] In fact, the Basic Plan, which was decided by the Cabinet of Japan as the adult guardianship promotion policy, does not refer to the CRPD.[125] In contrast, the 2020 Alzheimer Europe report supports the CRPD's general principles of equality and non-

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[121] *See* Mairia Fan, Andrix Lim and David Tedhams, *Guide to the Guardianship and Administration Act 2019 (VIC)*, JUDICIAL COLLEGE OF VICTORIA (Nov. 17, 2022) https://www.judicialcollege.vic.edu.au/resources/guide-guardianship-and-administration-act-2019-vic.

[122] *Adult Guardianship System for People Considering Adult Guardianship,* COURTS IN JAPAN at 12–13, https://www.courts.go.jp/english/vc-files/courts-en/Brochures/English/5_Adult_Guardianship_System.pdf.

[123] The three model countries and region are member states of the CRPD and adopt a democratic system of government.

[124] ALRC Report No. 124 (Australia) refers to the CRPD requirements in their law reform's Terms and Condition while the Basic Plan (Japan) does not directly refer to the CRPD requirements.

[125]Written Opinion on Items to be Included in the Draft Basic Plan for Promoting the Adult Guardianship System, JAPANESE FEDERATION ON BAR ASSOCIATIONS 1 (2017) https://www.nichibenren.or.jp/library/ja/opinion/report/data/2017/opinion_170119_2.pdf (in Japanese)

discrimination.[126] The ALRC Report 124, which demonstrates the basic principles of guardianship and SDM in Australia, is based on the Terms of Reference in the CRPD.[127] Japan's Ministry of Justice expresses the view that Japan's adult guardianship system does not conflict with § 12 of the CRPD.[128] Based on this interpretation, the Expert Commission is deliberating adult guardianship laws. The Ministry's interpretation makes the Japanese model less developed in legislation and reform.

The UN CRPD Committee review of the Japan Report in 2022 may end up triggering a fundamental review of the Japanese model.[129] The Japanese model has room for legislative reform compared to the Victorian and Alzheimer Europe models, particularly regarding the lack of enforcement of the SDM guidelines and judicial norms for dispute solutions.

Table 1: Comparisons of the Three Types of Models

	Japanese Model	***Alzheimer Europe Model***	***Victorian Model***
Basis of the statutory guardianship law, policy, or report	The Civil Code, the Promotion Act, and the Basic Plan	Alzheimer Europe 2020 Report	The Victorian Act 2019 (incorporating SDM)
Status of the statutory guardianship	To promote guardianship for advocacy support	Guardianship as a last resort	Guardianship as a last resort

[126] Alzheimer's Europe *supra* note 59, at 6–13.
[127] ARLC *supra* note 86, at 5.
[128] The Points of Discussions—Issues Based on the Implementation Status of the Third Basic Plan for Persons with Disabilities, POLICY COMMISSION FOR PERS. WITH DISABILITIES OF JAP. (Sept. 2015), https://www.mofa.go.jp/mofaj/files/000171084.pdf (in Japanese).
[129] *See* 'Draft Bill on Supported Decision-Making for Vulnerable Adults' in Japanese in the previously published article: Yukio Sakurai, *An Essay on the Adult Protection System in Japan: Referring to Delaware State Law and the Revision of European Law*, 8 Q. COMPAR. GUARDIANSHIP L. 3 (2018) (hereinafter "Sakurai") (in Japanese).

Principles and Values	Values of the Promotion Act: Self-determination, personal protection, and normalization	Non-discrimination, respect for autonomy, and values of the CRPD	National Decision-Making Principles in the ALRC Report 124
Capacity	Capacity doctrine (Civil Code), presumption of decision-making capacity (SDM guidelines)	Presumption of decision-making capacity	Presumption of decision-making capacity
Guardians	Legal/welfare practitioners, welfare corporations/NPOs, or relatives	--------	Guardians: Relatives, friends, or public advocates Administrators: Relatives, friends, or Victorian STL and other professionals
Remuneration	The family courts decide yearly remuneration ex. post case by case	-------	No remuneration except for cases involving Victorian STL and other professional administrators
Lasting or Enduring Power of Attorney or Voluntary guardianship	Voluntary Guardianship System based on the Act on Voluntary Guardianship Contract 1999	LPA/EPA based on an individual European state law or common law	EPA based on the Power of Attorney Act 2014
Basis of SDM law, policy, or report	Guidelines, the welfare laws, or § 858 of the Civil Code	Alzheimer Europe 2020 Report	The Victorian Act 2019 (incorporating SDM)

The purpose of SDM	To respect the will and preferences of a person	To respect the will and preferences of a person	To promote social and personal wellbeing of a person
The Role of SDM	A support method based on the welfare laws or § 858 of the Civil Code	A legal system that will in part replace substituted decision-making	A legal system that will in part replace substituted decision-making
Supporter	Nursing-home manager, social worker, and adult guardian	Any supporter appointed by the mutual agreement	Supportive guardian and/or supportive administrator appointed by the tribunals or by the mutual agreement, supportive attorney appointed by the mutual agreement

Source: Made by the author

IV. A Preliminary Idea of Supported Decision-Making Legislation

A. Main Contents of SDM Legislation

The main contents of the SDM legislation that have been discussed in this article are summarized as potential future legislation below.[130]

(i) The core agency, regardless of whether it is a public or private entity, should be established in the community as directed by the Basic Plan. It should be responsible for multiple functions

[130] Sakurai *supra* note 129.

stipulated in the Basic Plan, including confidentiality of individual information and privacy. Some public functions may be delegated to the core agency based on ordinances or regulations created by the relevant local parliament or local government.

(ii) The scope of SDM legislation at the initial stage will be narrowed to the legal acts and its associated non-legal activities, as defined by the SDM guidelines for adult guardians, and be further narrowed to personal protection only (i.e., to conclude a contract but excluding property management) in an agreement between the principal and the supporter. This is because the remaining areas, including property management and welfare activities, need further consideration in following the guidelines before being reformed.

(iii) To simplify this discussion, an example of a specific law regulating SDM will be used. In such a case, SDM can be based on a mutual agreement between a principal and a supporter.[131] In this scheme, a principal needs the capacity to understand the contents of the agreement.

(iv) Principals and supporters in the community are recommended to get an SDM agreement prepared by a notary public and register it at the core agency. Stakeholders, including principals and supporters, may consult with the core agency, and the core agency may give advice and commence a local council meeting with experts if necessary.[132]

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[131] *See* Del. Code Ann. tit. 16, ch. 94A (2022), https://delcode.delaware.gov/title16/Title16.pdf.

[132] The Ministry of Health, Labour, and Welfare of Japan, *Chapter 2: Roles of Core Agencies,* 15 (September 19, 2022), https://www.mhlw.go.jp/content/000503191.pdf (in Japanese). Regardless of before or after the commencement of adult guardianship, the practitioners' institutions and related associations in each community should cooperate each other so that legal and welfare practitioners' institutions and related associations can provide necessary support to the 'team.' This is a local committee that promotes the system in which each practitioners' institution and each related association cooperate voluntarily. For the functions and roles of the 'regional collaboration network' to be properly demonstrated and developed, local parties, such as practitioners' institutions, should collaborate and formulate a place for series of discussions regarding the examination, coordination, and resolution of community issues. The core agency serves

(v) It is recommended that people in the community register any informal arrangements with the core agency. Stakeholders, including principals and their relatives, close friends, or nursing-home managers, may consult with the core agency, and the core agency may give advice accordingly.
(vi) The target of SDM is vulnerable adults who do not need an adult guardian or other substitute decision-maker for their activities but will benefit from SDM. SDM and the adult guardianship system can theoretically co-exist without any legal conflict.
(vii) SDM legislation must be part of a collaboration effort between people in the community and municipality and based on people's voluntary participation in the policy. A violation of individualism and privacy norms may be permitted if the user gives consent.

B. Issues of SDM Legislation

Four issues need to be reformed to empower SDM legislation in the future. First, the core agency should extend its role to monitoring and supervision in addition to providing consultation and advice if the municipality delegates any specific authority via an ordinance or regulation. Having a core agency empowered by a local ordinance or a regulation would be a strong justification as it would be based on the consensus of the jurisdiction's local citizens. The monitoring and supervisory functions of the core agency will prevent fraudulent acts by supporters and adult guardians in the jurisdiction and effectively respond to fraudulent acts. In such a case, the core agency's power will expand, which may restrict the freedom of community members. Thus, core agency oversight must be improved to ensure accountability, transparency, and social responsibility for stakeholders.[133] Any performance inspection by a third party, such as ad hoc auditing and community monitoring, should be implemented by the municipality or its delegates.

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as the secretariat and are responsible for monitoring the community activities.
[133] Terry Carney et al, *Paternalism to Empowerment: All in the Eye of the Beholder?* DISABILITY AND SOC. 1, 2–3 (2021), https://doi.org/10.1080/09687599.2021.1941781.

Second, if SDM covers legal acts and their associated non-legal activities for personal protection only, the societal impacts of the legislation will not be significant. Theoretically, empowering the societal influence at the next stage of SDM legislation could expand the scope of support and protection for vulnerable adults. For example, if the scope of SDM legislation covered all legal activities, including property management, then safeguarding the principal's interests will be another required consideration. Safeguarding measures may include regulations of supporter's fiduciary obligation, and a code of practice to guide the supporter's procedures in detail.[134] Any performance inspection by a third party should be implemented by the municipality or its delegates. SDM pilot projects include developing important practices on site where issues of SDM property management are clarified by examining accrued empirical data. SDM pilot projects, including that of Toyota City, must be promoted.[135]

Third, the Ministry of Health, Labour, and Welfare of Japan started online SDM trainings in December 2020 to provide both municipality officers and staff and nationwide core agencies with basic knowledge and skills about SDM.[136] These trainings offer important information and skills to relevant parties, including

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[134] Office of the Public Guardian, *Mental Capacity Act Code of Practice*, GOV.UK (September 19, 2022), https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice. (The Mental Capacity Act 2005 has the 'Code of Practice' giving guidance for decision in detail under the MCA 2005. The Code of Practice can be updated flexibly to meet the needs of people and show the best practice).

[135] *See* Toyota City (Aichi prefecture), *The Promotion of Advocacy Support and Supported Decision-Making in the Toyota City,* (September 19, 2022), https://www.mhlw.go.jp/content/12000000/000790684.pdf (in Japanese). Toyota City has developed as an automobile manufacturing town, so many citizens start living in Toyota City when they get a job there. As a result, there are many adults who have live alone with no relatives. The "Toyota City Local Life Decision-Making Support Project" supports businesses that provide "life-based services" such as daily financial management and the "decision-making" of individuals. Both followers are involved in support as a mechanism. It is also envisioned that the Advocacy Support Committee will respond (such as dispatching specialists who consistently stand from the person's point of view) when regularly checking financial management and providing crucial decision-making support for the person.

[136] One Mizuho, *supra* note 77.

medical care institutions, aged care institutions, and financial institutions. These training improve the overall understanding of SDM throughout Japan. SDM-skilled practitioners called "supported decision-making counselors" will be trained through a national qualification system because day-to-day assistance from knowledgeable and skilled professionals will help prepare them for these types of cases.[137] SDM training programs should be modified to offer higher-level skills and knowledge based on data analysis regarding SDM pilot projects' practices.[138] After three years of enactment, SDM legislation should be re-examined, including its legal framework and SDM methods. The re-examination will provide an opportunity to improve the legal framework and practice of SDM with policymakers, lawmakers, and practitioners at the proper time.

Fourth, whether SDM will be incorporated into the Civil Code or the other law of Japan will need to be decided in the future. In such a case, family courts or some alternative will be required appoint supporters. The issue will be whether the family courts are suitable to appoint supporters to vulnerable adults for personal protection considering that this personal protection involves those not familiar with the family courts. The Japanese tribunal system could refer to the State of Victoria and how its tribunal is in part made of former practitioners in the support system.[139]

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[137] One of the impressive things in SDM facilitation training program (eight-days course), conducted by Cher Nicholson (ASSET SA) in Adelaide (South Australia) on February 23 to March 4, 2016, was that professional practitioners voluntarily taught social workers and helpers in the community. That human relationship is essential for social workers to maintain the quality of advocacy activities.

[138] Makiko Okamoto and Kanae Sawamura, *Investigative research project on contact building informationtechnology to support decision-making in the elderly* THE JAPANESE RESEARCH INSTITUTE, LIMITED (2021) https://www.jri.co.jp/page.jsp?id=38656. (The commissioned research on how to organize the decision-making support system, focusing on information technology: The Japan Research Institute Limited, Research Report on Contact-Building by Using Information Technology to Support Decision-Making of Older People).

[139] In the State of Victoria (Australia), the tribunal members with practitioners' background issue the supportive guardian and supportive administrator orders. This mechanism based on practitioners' experience leads to an administrative arrangement rather than a judicial decision.

Reorganization of the family courts or reform of the judicial system is required to deal with the procedures of SDM, including appointment, monitoring and supervision, and dismissal of supporters. The Civil Code can be amended during the legislative debates of the National Diet of Japan after deliberations by the Legislative Council as ordered by the Minister of Justice. As a legislative policy, it may be possible, to transform the adult guardianship system into adult protection law, as Teruaki Tayama (2020) suggests (referring to recent adult protection legislation in European countries),[140] or to maintain the status quo based on the capacity doctrine in the Civil Code. In any case, balancing the legal status of common law "decision-making capacity" supplanted by the SDM guidelines with the statutory capacity doctrine under the Civil Code of Japan will be an issue. Specifically, lawmakers must deliberate how to accommodate the legal concept of "decision-making capacity" in the Civil Code where the capacity doctrine stays as a basic principle.

C. Step-by-Step Approach

Legislation on the development of SDM may require a step-by-step approach as addressed in Table 2. Of these options, Japan is positioned at Option A, where the current legal framework has an enhanced focus on the SDM guidelines and is anticipated to move into Option B the functional approach to legal capacity, where some law and policy recognize the role of SDM in practice. It will be a challenge for Japan to jump from Option A to Option C where SDM is fully inclusive and phased-in to the guardianship and welfare laws to recognize the role of SDM because SDM is not a complete legal

[140] Teruaki Tayama, *Current Status, and Future of the Adult Guardianship System in Japan*, 18 ADULT GUARDIANSHIP STUD. 18 (in Japanese) (2020). (Tayama's views suggest, referring to recent adult protection legislation in European countries, a future direction to transform the adult guardianship system into an adult protection law. This idea implies an alternative legal architecture rather than the Basic Plan based on the Promotion Act. It can be assumed that the direction to transform the adult guardianship system into an adult protection law meets that of English-speaking countries' law reform policy such as Australia, Ireland, Scotland, England, and Wales).

system and requires further review in practice. Namely, practice and experiential-based review of SDM guidelines is required to improve the unified SDM definition, standardize SDM methods, and develop adequate safeguards against the risk faced by principals.

Table 2: Step-by-Step Approach

• **Option A—The current legal framework with an enhanced focus on SDM guidelines:** This will not change the capacity doctrine of the Civil Code, but will introduce SDM guidelines, information resources, and training to maximize provision of SDM to meet the requirements necessary for the exercise of legal capacity within the current framework of the welfare laws and the Civil Code. SDM guidelines for adult guardians suggest that the adult guardians should practice SDM with principals as a priority, only opting for substituted decision-making if SDM does not function.
• **Option B—Functional approach to legal capacity, where some law and policy recognize the role of SDM in practice:** This will establish consistent functional assessments for legal capacity, for dementia tests, across main statutes in decision-making capacity and recognize SDM, making it possible for people to exercise legal capacity on that basis. Some laws, regulations, ordinances, policy, and guidelines will be developed to support SDM implementation. Review of SDM guidelines based on practices and experiences in support is required to improve the unified SDM definition, standardize SDM methods, and develop adequate safeguards for risk of the principals.
• **Option C—Phased-in fully inclusive SDM in the guardianship and welfare laws to recognize the role of SDM:** A comprehensive approach to legally recognize SDM in a specific law or in the Civil Code, with supports as required, will

be adopted. Policy, guidelines, training, and community support system will also be developed. The legal status of 'decision-making capacity' and the capacity doctrine in the Civil Code will be one of the issues to be deliberated on by the Legislative Council.

Source: Made by the author, referring to Bach & Kerzner (2021)[141]

The SDM guidelines as soft law would be a practical and ethical regulation on SDM at the initial stage because regulating SDM through hard law might be unworkable when an SDM method has not yet been clearly fixed.[142] This process would gradually form the social norms that encourage the use of SDM through guidelines and legislation, with adult guardianship being used as a last resort. In such a law system, SDM may coexist with and complement the adult guardianship system and both may prevent vulnerable adults from abuse.

Japan may refer to the decade-long legislative process that took place in Victoria which incorporated SDM into guardianship law while carrying out SDM projects in communities. Specifically, reaching a consensus on legislation and social norms regarding SDM stemmed from accumulating empirical research on SDM conducted by universities and NPOs in various parts of Australia since 2010.[143] Bach and Kerzner state that, "this re-balancing [of autonomy and safeguarding] will not be accomplished without substantial legislative and institutional reform in legal capacity law, adult protection law and mental health law."[144] Indeed, legislation

[141] Michael Bach & Lana Kerzner, *Supported Decision Making: A Roadmap for Reform in Newfoundland & Labrador Final Report*, IRIS 43-46 (2021), https://irisinstitute.ca/resource/supported-decision-making-a-roadmap-for-reform-in-newfoundland-labrador-final-report/.

[142] Yukio Sakurai, *The Role of Soft Law in the Ageing Society of the Twenty-First Century*, 13(1) INT'L J. INTERDISC. GLOBAL STUD. 1, 7 (2018).

[143] Piers Michael Gooding & Terry Carney, *supra* note 48; Shigeaki Tanaka, CONTEMPORARY JURISPRUDENCE, YUHIKAKU PUBLISHING CO., LTD., 442 (2011) (in Japanese). (This is the reason Gooding and Carney address that Australia has adopted 'a *reformist* and *incrementalist* reform approach to legal capacity, equality and disability,' following global standard.)

[144] Michael Bach & Lana Kerzner, *A New Paradigm for Protecting Autonomy, and the*

or law reform is vital to pave a way forward for Japan's adult support and protection.

V. The Idea of Adult Support and Protection in Japan

A. Illustration of Adult Support and Protection Legislation and Framework

1. *Adult Support and Protection Legislation*

The legislative framework of adult support and protection for vulnerable adults is summarized in Table 3. It is understood that adult support and protection framework in Japan refers to a combination of multiple laws and policies, such as the adult guardianship system, SDM, abuse prevention law, and relevant policy measures for adults with insufficient mental capacity. Is it important the community support built around a core agency explains what choices consumers have under this framework and that it will safeguard vulnerable adults.

As a fundamental principle, it is essential that a comprehensive package of adult support and protection measures be provided so that people may make their own decisions when choosing whatever is suitable and necessary. These measures should aim at protecting vulnerable adults by including the least restrictive measures wherever possible, taking the will and preferences of the adults into consideration. It is also important to strike a balance between state responsibility and people's rights. State responsibility, including police power, should exist if clear evidence-based procedures are provided and the human rights of people are not violated.

Right to Legal Capacity: Advancing Substantive Equality for Persons with Disabilities through Law, Policy, and Practice, The Law Commission of Ontario. 2010, at 183, https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities-commissioned-paper-bach-kerzner.pdf.

Table 3: Legislation and Policy of Adult Support and Protection

First, there are five laws related to the adult guardianship system enacted in Japan.

- Act for the Partial Revision of the Civil Code, No. 149, Acts of the National Diet, 1999 (Japan).
- Act on Voluntary Guardianship Contract, No. 150, Acts of the National Diet, 1999 (Japan).
- Act on Coordination, No. 151, Acts of the National Diet, 1999 (Japan).
- Act of Guardianship Registration, No. 152, Acts of the National Diet, 1999 (Japan).
- Act on Promotion of the Adult Guardian System, No. 29, Acts of the National Diet, 2016 (Japan).

Second, we have the SDM guidelines and an idea on SDM legislation.

- The Guidelines for SDM for Nursing-Home Managers, Managers for the Elderly with Dementia, and Adult Guardians, which will be unified into single guidelines.
- One Preliminary Idea on SDM Legislation.

Third, we have two laws related to elder abuse and abuse of people with disabilities.

- Act on the Prevention of Elder Abuse, Support for Caregivers of Elderly Persons and Other Related Matters, No. 124, Acts of the National Diet, 2005 (Japan).
- Act on the Prevention of Abuse of Persons with Disabilities and Support for Caregivers, No. 79, Acts of the National Diet, 2011 (Japan).

Fourth, we have three public policy measures for adults with insufficient mental capacity.

- 'Subsidies for Expenses Related to Use of the Adult Guardianship System' is granted by the local government.
- 'Voluntary Watch Service' conducted by volunteers based on an ordinance or local regulation.
- 'Support Program for Self-Reliance in Daily Life' conducted by the Councils of Social Welfare.

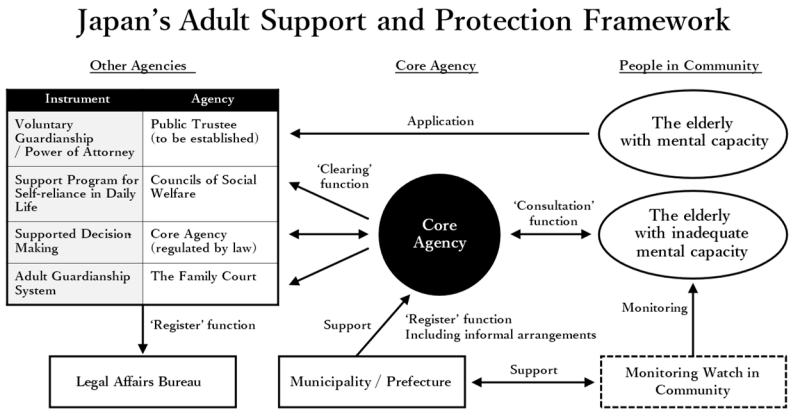
Fifth, relevant legal advocacy policies in the social security law.

Source: Summarized by the Author

2. *Adult Support and Protection Framework*

Figure 1 is an illustration of the relevant agencies and their interrelations with adult support and protection applicants and the core agency tasked with responding to these applicants. This is an attempt to show a conceptual illustration, simplifying the mechanism and interrelations between relevant agencies and people in the community. Some comments on this illustration follow.

Figure 1: Illustration of the Japan's Adult Support and Protection Framework



Source: Made by the Author

First, a core agency will offer a "clearing" function in a community to sort the guardianship applicants before petitioning. This is an attempt to fairly distribute the relevant individuals to less restrictive support measures that best suits the situation among the multi-optional laws and policies in community support, and consequently reduce the number of adult guardianship users rather than promoting the adult guardianship system. This policy may meet the international standard to use adult guardianship as a last resort and encourages the use of SDM or less restrictive support measures, while reducing the burden on the family courts.

Second, as illustrated in Figure 1, a public trustee is a public corporation, which is not presently available in Japan but can be established by the government in the future, takes care of financial management for some fees. People may conclude an LPA more easily because a public trustee may be regarded as a corporate voluntary guardian if the principal has no conflict of interest with the public trustee. These functions of the public trustee will contribute to the value of autonomy and right to self-determination of people in financial management and estate planning. Having a public trustee available in the community will prevent a shortage of adult guardian candidates in financial management. If the relevant law permits, using a delegation agreement will allow a public trustee to assist the family court with office work, such as evaluating and reporting annual reports of adult guardians to the family court.

Third, people in the community may consult with the core agency and other relevant agencies to choose the measure that best suits the situation among the multiple legal and policy options in community support. Even people in informal arrangements may consult with such agencies for advice and registration at a core agency. To develop a community support system, a core agency and a community-based general support center may further collaborate to realize a diverse society where people cohabit in [the] community. Even in cases of disputes, the principal and relevant persons may use alternative dispute resolution provided by the core agency or a corresponding agency outside the court. The core agency and other relevant agencies may provide for local jobs and the development of relevant social enterprises over Japan. Civil society may be better able to contribute positively to their community. There is a view proposing to create a "cooperative society" in each region where people in a community participate and collaborate by empowering people's autonomy through consultations among them.[145] The key is how to create the mechanism for "consultations among people in a community."

[145] Keiji Shimada, *Participation and Coproduction*, 42(457) MONTHLY REV. LOCAL GOVERNMENT 1, 31-33 (in Japanese) (2016).

Fourth, welfare measures are not prepared enough for advocacy support, so they need reconsideration. There are contemporary issues that cannot be solved by the existing legal measures of welfare law (i.e., community-based integrated care system, support program for self-reliance in daily life, etc.), and revisions of current legal measures should be examined. These measures are not only within the framework of advocacy in a broad sense (i.e., an auditing and self-inspection/third-party evaluation system, and a complaint resolution system), but also within the scope of human rights institutions (i.e., the ombudsman that deals with any complaint or claim outside the courts,[146] a national human rights institution[147]). This is an issue that needs to be further studied in the future.

B. Values of Adult Support and Protection to Global Application

Now that the legislation and operational mechanisms have been clarified, the discussion turns to the framework of values that needs to be established for adult support and protection. The framework of values related to the adult support and protection legislation system is shown in Figure 2. This is the modified multi-dimensional model of elder law ("modified multi-dimensional model"). It is adapted from the multi-dimensional model created by Israel Doron.[148] A

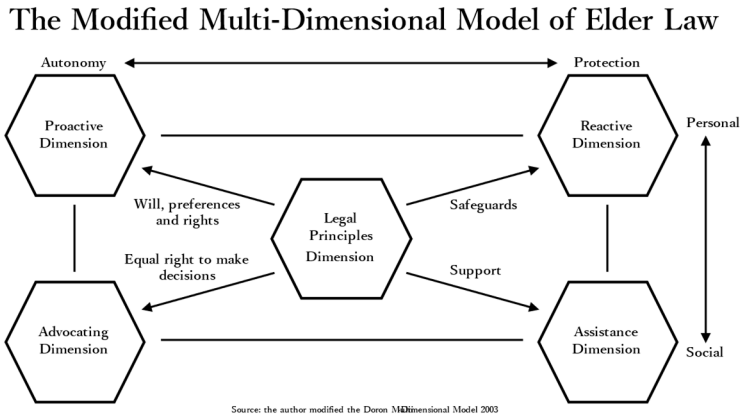
[146] The ombudsman has diversity in the scope, such as the ombudsman that oversees the parliament, the administration (central and local), or the courts. Any complaint or claim can be dealt with outside the courts. Kiyohide Yamatani, *A Reconsideration of the Ombudsman System in Administrative Control Theory*, 173 PUB. ADMIN. REV. Q. 37 (in Japanese) (2021).

[147] A national human rights institution that advocates for human rights where people in the community can file a direct claim would be an idea. Theresia Degener, the former chair of the UN CRPD Committee, made a proposal at a public lecture in Tokyo (December 9, 2019), urging Japan to establish a national human rights authority, an independent body from the Government, in accordance with the *Paris Principles*. UN, Human Rights Office of the High Commissioner, *Principles Relating to the Status of National Institutions (The Paris Principles),* (September 19, 2022, 00:30 PM), https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx.

[148] The multi-dimensional model of elder law was originally introduced in the 2003 article with some amendments afterward. This is an open model that anyone can comment and modify by his/her own responsibility, which was confirmed by Israel

discussion on principle values, indicators, and dimensions as seen on the model are provided below.

Figure 2: The Modified Multi-Dimensional Model of Elder Law



Source: Partly modified by the Author based on the Model of Doron 2003/2009

1. Principal Values of the Legal Principles Dimension

The adult guardianship system's principal values in Japan uphold respect to the right to self-determination, an emphasis on personal protection, the normalization in statutory guardianship, and autonomy and the right to self-determination in voluntary guardianship. The Promotion Act was implemented with the following key values: *support, diverse society* (§1), *equality, dignity of an individual,* and *will and preferences* (§3). The Basic Plan, which is based on the Promotion Act, has policy objectives aimed at improving systems and practices that enable the users to realize benefits, create a regional collaboration network for the advocacy of

Doron in his online lecture at the Elder Law Society Japan meeting held on February 26, 2022. Israel Doron, *A Multi-Dimensional Model of Elder Law: An Israeli Example*, 28(3) AGEING INT'L 242 (2003); Israel Doron, *A Multi-Dimensional Model of Elder Law,* In Israel Doron (ed) THEORIES ON LAW AND AGEING 59-74 (Springer 2009).

human rights, prevent fraud, and maintain social harmony through easy access to the core agency in the community. The second term Basic Plan, which was inaugurated in April 2022, emphasizes "advocacy support" as the main principle in a community support system. The term "advocacy support" is defined as "support activities which have a common foundation for support and activities centered on the person, which includes support for exercising their rights through SDM and support for recovering from infringement of their rights in dealing with abuse and unfair property transactions, for adults with insufficient mental capacity to participate in the community and live independent lives."[149]

The legal principles dimension in Australia refers to the four principles, namely: (1) *equal right to make decisions*; (2) *support*; (3) *will, preferences and rights*; and (4) *safeguards*. These principles are as suggested by the *National Decision-Making Principles* addressed in the ALRC Report 124.[150] The ALRC Report 124 also states five framing principles to guide recommendations for reform, namely: *dignity*, *equality*, *autonomy*, *inclusion and participation*, and *accountability*. There has been wide support by stakeholders for these principles, which are reflected in a Commonwealth decision-making model developed in the Report. The said values have been adopted in Australia, which may correspond to the universal values stipulated in §12 (equal recognition before the law) of the CRPD.[151]

It can be observed from the examples of both Japan and Australia that international consensus has almost been reached on the CRPD, which 185 States have ratified as of May 2022. The Australian National Decision-Making Principles clearly reflect some principal values—namely, (1) *the equal right to make decisions*; (2) *support*; (3) *will, preferences and rights*; and (4)

[149] *See* the Ministry of Health, Labour, and Welfare of Japan, *The Second Term Basic Plan for Promoting the Adult Guardianship System,* (September 19, 2022, 00:35 PM), (in Japanese) https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000202622_00017.html.
[150] The ALRC, *supra* note 86, at 12.
[151] From the interviews of Terry Carney and Victorian OPA by the author (March 14 and March 5, 2019).

safeguards—that could be applied to the legal principles dimension of other countries, including Japan.

2. Indicators' Matrix

What does it mean to have the indicators' matrix of *autonomy* and *protection* on a horizontal level and that of *personal* and *social* on a vertical level? First, the indicators' matrix of *autonomy* and *protection* on a horizontal level is reviewed. Regarding the necessity of protection for vulnerable adults or adults at risk of harm, there is a general view that these adults must be protected by law and public policy from abuse.[152] This general view may change people's perceptions of the vulnerability approach as a criterion for the adult protection system—since vulnerability is a human characteristic regardless of mental capacity—and, instead, encourage respect for human rights as a universal value that affects the law and public policy. Thus, there is the need to have legal safeguards as a reactive dimension to *protect* vulnerable adults or adults at risk of harm. Regarding the two universal values *autonomy* and *right to self-determination* that need to be respected, the capability approach is valued for its respect for individual autonomy and right to self-determination and the freedom given to the person to choose a process. This notion respects the diversity of people and gives them the opportunity to think about a way of life that suits their individual characteristics. This idea, as a *proactive* dimension, leads further to respect for a person's will and preferences, and promotes the right to *individual autonomy*. The vulnerability approach and autonomy are the foundation of the indicator's matrix of *autonomy* and *protection* on a horizontal level.

Second, the discussions so far have focused on the internal motives of human beings because humans have been the main player in modern philosophical studies. This is due to the *personal* value. We live in an aged society with diverse people and cultures.

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[152] Yukio Sakurai, *Vulnerability Approach and Adult Support and Protection: Based on Safeguarding Law for Adults at Risk*, 11(1) J. AGING & SOC. CHANGE 19 (2021).

Regarding human relations around a person, the notion of *relational autonomy* is assumed to be particularly important in practice because one's pattern of human conduct and decision-making is influenced by one's family, community, and society. This suggests that the *social* aspect must be considered in addition to the *personal*. For example, a diverse society is considered as the objective by §1 (purpose) of the Promotion Act. This shows the importance of interdependent relationship between various agencies, such as people, institutions, government, and other relevant players, with mutual assistance on an equal footing. The *social* aspect includes not only an equal and horizontal transactions between the parties in private autonomy, but also an imbalanced relationship between the parties where vertical intervention by public agencies to private autonomy as necessary is designed by law. As an *assistance* dimension, this marrying of the *social* with the *personal* aspects leads to support for vulnerable adults or adults at risk of harm. Legislative and policy measures in *reactive* and *proactive* dimensions are utilized to support and protect their interests, according to their personal needs, and as an *advocating* dimension, vigorously emphasizes not only their right to make decisions but also protection of their safety.

3. The Four Dimensions

Reactive Dimension: The term *reactive* refers to a response to properly react to a vulnerable adult when he/she is identified or deserved a suspect.[153] Depending on the awareness of commissioned welfare volunteers, social workers, and helpers, a *reactive* system for reporting concerns to the community-based general support center, the municipality, and the police may be utilized. For this, an immediate response system is needed to promptly resolve issues in the local community. By law, the adult guardianship system provides protective measures to principals with

[153] The term reactive refers to "reacting to events or situations rather than acting first to change or prevent something." Cambridge Dictionary, *Reactive,* (September 19, 2022, 00:50 PM), https://dictionary.cambridge.org/ja/dictionary/english/reactive.

insufficient mental capacity. The municipality intervenes in abuse cases for vulnerable adults at risk of harm with the assistance of a core agency. The community support for watching activities in the community and the adult guardianship system are *reactive* legal instruments, based on the vulnerability approach, which function as *safeguards* to protect vulnerable adults. They also ensure that the least restrictive alternative measures are taken. This is to avoid excess paternalism, which may violate the human rights of the principal. Agencies involved in the activities include the core agency, the family court, a public trustee (to be established), and other relevant agencies concerned with elder abuse, give careful attention to misconduct by supporters and other relevant persons.

Proactive Dimension: The term *proactive* refers to a response not only to properly react to a vulnerable adult when he/she is identified as a suspect, but also to prevent the risks by some measures.[154] Day-to-day voluntary activities to monitor the community are basic and *proactive* and are based on an ordinance or local regulation. SDM and other relevant instruments, as well as an LPA and the adult guardianship system, provide *proactive* measures such as estate planning and/or protection of the interests, to vulnerable adults at risk of abuse. Abuse includes financial exploitation involving family members, relatives, or close friends of the principal. It is desirable that the adults use these *proactive* measures at their own accord, including estate planning and advanced directive measures. In preparation for a future decline in cognitive capacity, it is possible for older adults to designate a relative (within two degree) as an agent of himself/herself for the deposit account of a financial institution.[155] This is to ensure that the autonomy and right to self-determination of the principal, as well as their *will, preferences, and rights*, are respected. Agencies, such as the core agency, the family court, the public trustee (to be

[154] The term proactive refers to "taking action by causing change and not only reacting to change when it happens." Cambridge Dictionary, *Proactive,* (September 19, 2022, 00:55 PM), https://dictionary.cambridge.org/ja/dictionary/english/proactive.

[155] Financial institutions in Japan provide bank deposit services in which relatives (within two degree) can function as agents for managing the principals' deposit accounts.

established), and other relevant agencies concerned with elder abuse, give careful attention to misconduct by supporters and other relevant persons. The core agency may serve as "consultation and advice" activities to the community people, which may contribute to *proactive* effects.

Assistance Dimension: The term *assistance* refers to any kind of support by relatives or third parties, whom they are assumed appropriate to vulnerable adults.[156] Support programs for self-reliance in daily life conducted by the social welfare council and other welfare programs may *support* the principal by providing them with *assistance* in using welfare and other related services in community support. This is to ensure that the principal may live as independently in the community as possible. SDM and relevant measures are offered through some guidelines or legislation, such as the preliminary idea of SDM legislation that is advocated. They are offered to principals with insufficient mental capacity, vulnerable adults on an agreement basis, or through informal arrangements if the principal is satisfied with the *assistance*. Agencies such as the core agency, the family court, the public trustee (to be established), and other relevant ones provide community support with people in the community. They are not always involved in SDM activities but can indirectly assist it. The core agency serves as "consultation and advice" to the community people. The local government may establish its own public guardian agency, if it is deemed necessary, to directly take care of vulnerable adults in difficult cases.

Advocating Dimension: The term *advocacy* refers to any action by an individual or a corporation, or any public policy to empower vulnerable adults on minimum conflict of interests between people or between people and society.[157] Vulnerable adults should be *advocated* for and empowered to use, of their own accord, SDM and

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[156] The term assistance refers to "help, especially money or resources that are given to people, countries, etc. when they have experienced a difficult situation." Cambridge Dictionary, *Assistance,* (September 19, 2022, 00:57 PM), https://dictionary.cambridge.org/ja/dictionary/english/assistance.

[157] Errol Cocks & Gordon Duffy, *The Nature and Purposes of Advocacy for People with Disabilities* 121 EDITH COWAN UNIVERSITY PUBLICATIONS (1993) https://ro.ecu.edu.au/ecuworks/7172.

other relevant measures, including an LPA. It is desirable that the adults use these *self-advocating* measures at their own accord, including estate planning and advanced directive measures. This is to respect the autonomy and right to self-determination of the principal by *advocating* the *equal right to making decisions,* focusing on his/her uniqueness as an individual. By the dignity of risk as a process of positively taking risk within established safeguards, people with disability seek a possibility to overcome certain risk factors by *advocating* the risk. Recall that the ALRC Report 124 considers an approach to autonomy as empowerment of people with disability (Paragraph 1.38). It can be assumed that the ALRC Report 124 includes the notion of relational autonomy.[158] Even in dispute cases, the principal and stakeholders may use alternative dispute resolution provided by the core agency or another relevant agency besides the court, which refers to the section on the response system in the state of Victoria. People may choose the solution that best suits their circumstances in community support. The core agency may be empowered to serve as "monitoring and supervision" activities, in addition to "consultation and advice," to the community people if any delegation agreement is concluded. The idea of establishing a public guardian agency by a prefecture, which delegates municipalities to run core agencies, is worth considering.

4. Japanese National Identity and Global Application

The previous section described the value framework of Japan's adult support and protection legislation and policy system based on the modified multi-dimensional model. There are two cultural views on the principle of autonomy: "the Western principle of autonomy demands self-determination, assumes a subjective conception of the

[158] Regarding "autonomy," Paragraph 1.37 of the ALRC Report 124 states that "This Inquiry has been informed by autonomy in the sense of 'empowerment,' not just 'non-interference.' This involves seeing an individual in relation to others, in a 'relational' or 'social' sense and understanding that connects with respect for the family as the 'natural and fundamental group unit of society' that is entitled to protection by State Parties."

good and promotes the value of individual independence, whilst the East Asian principle of autonomy requires family-determination, presupposes an objective conception of the good, and upholds the value of harmonious dependence."[159] Although this may be a stereotypical argument to contrast the Western principle of autonomy with the East Asian principle of autonomy, such argument demonstrates the different approaches to autonomy in two diverse jurisdictions.[160]

From a Japanese viewpoint, it would be ideal to establish an adult support and protection framework based on the Japanese people's national identity. How can we achieve such a goal? Japanese people must consider how the relationship between vulnerability and autonomy can be balanced in the Japanese context by adopting some measures related to the advocating dimension of the modified multi-dimensional model, taking the Japanese principle of autonomy into consideration. In other words, Japanese people should consider by their own accord which measures will be good for them, informal arrangement, law and policy measures, or the combination of these two. They should also consider what law and policy measures will be adopted, to which extent vulnerable adults will be protected, and to which extent individual autonomy of vulnerable adults will be secured. In the process of taking such steps, the Japanese principle of autonomy can be clarified.[161] In any case, the balancing point between vulnerability and autonomy in the

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[159] Ruiping Fan, *Self-determination vs. Family-determination: Two Incommensurable Principles of Autonomy*, 11(3&4) BIOETHICS 309, 309 (1997).

[160] Emiko Ochiai, *Why Does the "Japanese-style Welfare Regime" Remain Familial? 4. Comments on the Report*, 27(1) JAPANESE J. FAM. SOC. 61 (in Japanese) (2015).

[161] Hang Wu Tang, a scholar in Singapore, raises a question whether the Singapore's *Mental Capacity Act 2008*, respecting individual autonomy, suits to Singaporeans, considering their local culture, namely 'the family functions as the primary unit of care for persons who lack capacity and vulnerable persons.' The article reviews the process of how Singapore's *Mental Capacity Act 2008* was adapted and fine-tuned to operate in a jurisdiction with different culture conditions, religions, familial norms, and social institutions. Hang Wu Tang states that 'adult guardianship law is a particularly complex and challenging area of law to transport from a foreign jurisdiction because it operates at the crossroads of familial, social, cultural, and religious context.' Hang Wu Tang, *Singapore's Adult Guardianship law and the Role of the Family in Medical Decision-Making*, 36(1) INT'L J. L. POL'Y & THE FAM. 1–21, 3. (2022).

Japanese context will be a point of further discussion. No one general principle can be found regarding the balancing point between vulnerability and autonomy, and this point of discussion must be examined case by case for a specific person or institution in a specific situation. Another point of discussion may concern how relational autonomy will complement individual autonomy in the Japanese context.

It is natural that there would be a variety of differences in legislative developments by country. During the opening address at the fourth World Congress of Adult Guardianship in Berlin in 2016, Adrian D. Ward of Scotland addressed that, "We should not start with a concept which is at best one answer, and an uncertain one, until we have formulated the question, and the destination for which – for each individual – we may want to find the most appropriate vehicle."[162] The important viewpoint is not law as a vehicle but rather to have an effective law framework that relevant citizens are satisfied with in practice. It can be assumed that this viewpoint for the adult guardianship law is applicable to the adult support and protection legislation. Behind legislation, value framework exists, which is not visible but would suit the needs of Japanese people.

In this article, the universal values related to the Australian and the CRPD frameworks have been discussed on the ground of Japan's adult support and protection framework. From analyzing the value frameworks of both Japan and Australia, international consensus on the legal principles dimension has almost matched universal values of the CRPD. In this regard, it can be said that Japan's adult support and protection legislation system are based on a combination of the universal values, which are stipulated in the Australian and the CRPD value frameworks, and the law and policy measures that would suit the needs of Japanese people. Therefore, the focus of discussion on the modified multi-dimensional model, particularly

[162] Adrian D. Ward, *Legal Protection of Adults – An International Comparison*, (Opening Address to the fourth World Congress on Adult Guardianship held at Berlin on September 14-17, 2016) THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND 61(10) https://www.lawscot.org.uk/members/journal/issues/vol-61-issue-10/legal-protection-of-adults-an-international-comparison/.

regarding support and protection measures in community support, is on Japan, nevertheless the essence of discussion would be relevant to global application, sharing the universal values.

VI. Conclusion

This article explored the possibilities of Japan's adult support and protection legislation, based on the principles and implications of Australian law and policy. First, the roles and legal status of a core agency are reviewed. A core agency is accessible to elderly people with insufficient mental capacity, the family court, and the municipality. A core agency must work as a public institution regardless of its entity and keep confidential any personal information to be shared with the family court and the municipality. From users' viewpoint, a core agency should explicitly provide information on community support to people in the community, such as support for monitoring watch, informal arrangements, welfare assistances, SDM, and adult guardianship. Thus, a core agency is a multi-functional shop that serves in community support. Second, by examining the three types of models in Australia, Europe, and Japan, we have reviewed how state parties go for a combination of guardianship and SDM to deal with adults with insufficient mental capacity. It can be understood that there is a diversity of laws and policies in countries that share the same values of the CRPD and democratic procedures. This is because the Japanese model has room for legislative improvements, comparing with the Victorian and Alzheimer Europe models. SDM must be secured by safeguards because SDM might be involved in undue influence due to its characteristic. Third, to create a legal architecture of Japan's adult support and protection, a preliminary idea of SDM has been proposed. It can be assumed that an SDM law is the specific law to be applied to the relevant parties. The SDM will provide support and protection for vulnerable adults whose SDM agreement or even an informal arrangement will be voluntarily registered at the core agency. The significance of the study lies in having clarified the path that review of SDM guidelines based on practices and experiences

in support is required to improve the unified SDM definition, standardize SDM methods, and develop adequate safeguards for risk of the principals, referring to the legislative experience of the State of Victoria for a decade. Fourth, this article illustrates how an adult support and protection framework can be designed and reviews the principles behind the relevant legislation and policy. It addresses the framework of the legislation and the functional transactions between a core agency and people in a community. The significant momentum needed to implement a regime of community support is people's participation and assistance in the architecture. Fifth, the value framework of Japan's adult support and protection legislation system, based on the modified multi-dimensional model, has been described. The model comprises four dimensions, namely, *reactive, proactive, assistance,* and *advocating*—and a legal principles dimension at the center to connect with each of the four other dimensions. The focus of discussion on the modified multi-dimensional model, particularly regarding support and protection measures in community support, is on Japan, nevertheless the essence of discussion would be relevant to global application, sharing the universal values. Through the article, it can be understood that countries seek the best possible measures to deal with a seriously aging populations and Japan's adult support and protection system is one of the legislative policies which are considered in light of their own socio-culture and balanced the systems with the existing law systems. Within this framework, multiple options should be presented to older adults in the community for them to make their own choices.

INTERNATIONAL ELDER LAW RESEARCH: AN UPDATED BIBLIOGRAPHY

This bibliography is an update of the work published in Volume 10 of the *Journal of International Again Law and Policy.* This bibliography is aimed at elder law practitioners and policy makers. As an update, this bibliography focuses on material published within recent years in an attempt to supplement the information gathered in Volume 10.

Elder law, internationally, encompasses the differences in socio-legal systems, the levels of development, and the economic stability, all of which are reflected in a country's policies regarding issues related to aging.

A wide variety of search terms may be used to locate international elder law resources including the following:

- Aged-legal status
- Elder abuse
- Elder law or elderlaw
- Geriatrics
- Gerontology
- Guardians
- Legal assistance to the aged
- Long-term care
- Nursing homes
- Older people
- Retirement
- Retirement Communities
- Senior Law

For country specific resources, the name of the country was added to the search term, or the word "international" was added with various search terms to locate more broadly focused materials.

Materials in this bibliography are arranged in the following categories:

Agencies and Organizations that focus on international elder law issues.

Conventions, Documents, and Reports relating to international elder law.

Web Sites, Studies, and Databases with a specific international elder law focus.

Web Bibliographies that provide additional resources related to elder law.

Journal Articles that provide references to articles and titles focusing on international elder law.

Cases that provide emerging case law from areas within elder law such as benefits eligibility, probate law, and legal issue related to COVID-19.

It should be noted that this is a selective bibliography, and no attempt has been made to include every agency, organization, convention, document, report, database, web site, article, or book relating to international elder law. Given the tremendous growth in resources in the area of international elder law, such an undertaking is beyond the scope of this bibliography. Rather, this bibliography is intended to serve as an overview of materials published in this field and to provide a starting point for further research in international elder law. The Authors welcome your comments and suggestions regarding this project.

Agencies and Organizations

AARP
https://www.aarp.org/

A nonprofit organization that advocates for the rights and well-being of people over 50. They provide resources and services focused on health, finances, and advocacy, and also offer a range of discounts and benefits to members.

601 E Street, NW, Washington DC 20049
Phone: 1-888-OUR-AARP (1-888-687-2277)
Email: member@aarp.org

AGENCY FOR HEALTHCARE RESEARCH AND QUALITY (AHRQ)
https://www.ahrq.gov/

The Agency for Healthcare Research and Quality's (AHRQ) mission is to produce evidence to make healthcare safer, higher quality, more accessible, equitable, and affordable, and to work within the U.S. Department of Health and Human Services and with other partners to ensure that the evidence is understood and used.

600 Fishers Lane, Rockvile, MD 20857
Telephone: (301) 427-1364

NATIONAL ACADEMY OF ELDER LAW ATTORNEYS (NAELA)
https://www.naela.org/

A professional association of attorneys dedicated to improving the quality of legal services for seniors and people

with special needs. They provide education, networking opportunities, and advocacy on elder law and policy issues.

1577 Spring Hill Rd Ste 310, Vienna, VA 22812
Phone: 703-942-5711
Email: simmolunas@naela.org

NATIONAL COUNCIL ON AGING (NCOA)
https://www.ncoa.org/

A nonprofit organization that aims to improve the lives of older adults by providing resources, advocacy, and services. They offer programs focused on health and wellness, economic security, policy, and advocacy.
251 18th Street South, Suite 500, Arlington, VA 22202
Phone: 571-527-3900
Email: info@ncoa.org

NATIONAL ELDER LAW FOUNDATION (NELF)
https://nelf.org/

The National Elder Law Foundation is a nonprofit organization dedicated to the development and improvement of the professional competence of lawyers practicing elder law. NELF's Certified Elder Law Attorney (CELA) designation represents confirmation of a lawyer's exceptional expertise in the practice of elder and special needs law. There are over 500 CELAs across the country, and their numbers are growing continually.

6336 N. Oracle Rd., Ste. 326, #136 Tucson, AZ 85704
Phone: (520) 881-1076
Email: Meg@nelf.org

THE CENTER FOR MEDICARE ADVOCACY
https://medicareadvocacy.org/

A nonprofit organization that provides legal assistance and education on Medicare-related issues. They advocate for access to affordable and comprehensive healthcare for older adults and people with disabilities and offer resources and training on Medicare policies and regulations.

1025 Connecticut Avenue, NW, Suite 709, Washington, DC 20036
Phone: (202) 293-5760
Email: info@medicareadvocacy.org

THE GLOBAL ALLIANCE FOR THE RIGHTS OF OLDER PEOPLE
https://rightsofolderpeople.org/

Established in 2011, the Global Alliance for the Rights of Older People (GAROP) was born out of the need to strengthen the rights and voice of older people globally. Today, GAROP is a network of over 400 members worldwide, united in work to strengthen and promote the rights of older persons. Their mission is to support and enhance civil society engagement with Member States and National Human Rights Institutions at national, regional and international levels around a convention on the rights of older persons.

Email: infor@rightsofolderpeople.org
Secretariat Coordinator: Ellen Graham

THE NATIONAL CONSUMER VOICE FOR QUALITY LONG-TERM CARE
https://theconsumervoice.org/

A nonprofit organization that advocates for quality care and quality of life for people receiving long-term care services. They offer resources, training, and advocacy on a range of issues related to elder care, including nursing home and assisted living regulations.
1001 Connecticut Ave, NW, Suite 632, Washington, DC 20036
Phone: (202) 332-2275
Email: info@theconsumervoice.org.

SPANISH CONFEDERATION OF OLDER PEOPLE'S ORGANIZATIONS (CEOMA)
https://ceoma.org/

CEOMA develops numerous projects in response to needs affecting older people in Spain, covering fundamental areas of interest - entertainment, education, social issues, health - in order to address their primary concerns and make proposals for improving quality of life in older age. CEOMA has confederated 23 organizations of older people, representing more than 350,000 individual members, and approximately 1,000 associations all over Spain.

C/ Fernando el Católico, 10. Local 7. 28015 – Madrid, Spain
Email: ceoma@ceoma.org
Phone: +34 91 557 25 56

Conventions, Documents, and Reports

Conventions

CONVENTION ON THE INTERNATIONAL PROTECTION OF ADULTS
https://assets.hcch.net/upload/expl35e.pdf

> The Convention on the International Protection of Adults applies to the protection of adults in international situations who, due to impairments or insufficiencies of their personal faculties, are not in a position to protect their own interests. One objective of this Convention is to establish co-operation between the authorities of the Contracting States as may be necessary to achieve the protective purposes of the Convention.

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES
https://www.un.org/development/desa/disabilities/disability-and-ageing.html

> The Convention on the Rights of Persons with Disabilities (CRPD) sets out the legal obligations of States to promote and protect the rights of persons with disabilities in society and development.

HAGUE PROTECTION OF ADULTS CONVENTION
https://www.hcch.net/en/instruments/conventions/specialised-sections/adults

> The Hague Protection of Adults Convention provides for the protection in international situations of adults who, by

reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.

HUMAN RIGHTS OF OLDER PERSONS: INTERNATIONAL HUMAN RIGHTS PRINCIPLES AND STANDARDS
https://www.ohchr.org/Documents/Issues/OlderPersons/OHCHRPaperHROlderPersons30062010.pdf

Human Rights of Older Persons: International Human Rights Principles and Standards is a paper that reviews existing international human rights norms as they apply to older persons. It summarizes relevant work of some international human rights mechanisms (treaty bodies and special procedures) in addressing substantive human rights issues in all regions of the world.

INTER-AMERICAN CONVENTION ON PROTECTING THE HUMAN RIGHTS OF OLDER PERSONS:
https://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-70_human_rights_older_persons.pdf

The purpose of this Convention is to promote, protect and ensure the recognition and the full enjoyment and exercise, on an equal basis, of all human rights and fundamental freedoms of older persons, to contribute to their full inclusion, integration, and participation in society.

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW: CONVENTION ON INTERNATIONAL WILLS
https://www.unidroit.org/english/conventions/1973wills/convention-succession1973.pdf

The Convention on International Wills seeks to provide for greater recognition of last wills on an international level by establishing an additional form of will called an "international will" which, if employed, would dispense, to

some extent, with the need to search for the applicable law surrounding last wills.

UNITED NATIONS PRINCIPLES FOR OLDER PERSONS
https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-principles-older-persons

The UN Principles are a set of guidelines adopted by the United Nations General Assembly in 1991 to promote the well-being, rights, and dignity of older persons worldwide. The principles aim to address the specific needs and rights of older persons and provide a framework for action by governments, organizations, and individuals to ensure that older persons can enjoy their human rights, participate fully in society, and age with dignity.

VIENNA INTERNATIONAL PLAN OF ACTION OF AGING
https://www.un.org/esa/socdev/ageing/documents/Resources/VIPEE-English.pdf

The Vienna International Plan of Action on Aging is the first international instrument on ageing, guiding thinking and the formulation of policies and programs on ageing. It aims to strengthen the capacities of Governments and civil society to deal effectively with the ageing of populations and to address the developmental, potential, and dependency needs of older persons.

Documents and Reports

ADMINISTRATION FOR COMMUNITY LIVING: DATA, RESEARCH & ISSUES
https://acl.gov/aging-and-disability-in-america/data-and-research

The Administration for Community Living ("ACL") ensures older adults and people with disabilities have the opportunities to live independently and fully participate in their communities. The ACL releases reports through data collection and research projects funded by ACL, and data compilation performed by ACL.

AUSTRALIAN INSTITUTE OF FAMILY STUDIES: EXAMINING THE NATURE AND PREVALENCE OF ELDER ABUSE IN AUSTRALIA, AND WAYS TO COMBAT IT
https://aifs.gov.au/research/research-reports/national-elder-abuse-prevalence-study-final-report

As part of the National Plan to Respond to the Abuse of Older Australians, the Attorney-General's Department commissioned the most extensive empirical examination of elder abuse in Australia to date, the National Elder Abuse Prevalence Study. This report presents the findings of that research program.

CAN SEX DIFFERENCES IN OLD AGE DISABILITIES BE ATTRIBUTED TO SOCIOECONOMIC CONDITIONS? EVIDENCE FROM A MAPPING REVIEW OF THE LITERATURE (2022).
https://link.springer.com/article/10.1007/s12062-022-09395-1

The European Centre for Social Welfare Policy and Research conducted a mapping review of the literature on whether sex differences in old age disabilities can be attributed to socioeconomic conditions.

GENDER DIFFERENCES IN ACCESS TO COMMUNITY-BASED CARE: A LONGITUDINAL ANALYSIS OF WIDOWHOOD AND LIVING ARRANGEMENTS (2022).

https://link.springer.com/content/pdf/10.1007/s10433-022-00717-y.pdf

> The European Centre for Social Welfare Policy and Research conducted a longitudinal analysis on gender differences in access to community-based care for widows and those living alone.

HARVARD UNIVERSITY: HARVARD JOINT CENTER FOR HOUSING STUDIES
https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_housing_growing_population_2016_chapter_3.pdf

> This report examines current disability rates, trends in health that may alter these rates in the future, and projections of the number and type of households which one or more members are likely to have disability to better understand the housing health care needs for the older population through 2035.

REPORT: WHAT INFORMAL CARERS SAY ABOUT LONG-TERM CARE SERVICES' ACCESSIBILITY, AFFORDABILITY, AND QUALITY & HOW CARE PLANS SHOULD RESPOND (2022)
https://www.euro.centre.org/publications/detail/4597

> The European Centre for Social Welfare Policy and Research wrote this report which focuses on the feedback of informal careers regarding the accessibility, affordability, and quality of long-term care services, and suggests ways in which care plans can respond to these concerns.

UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER: REPORT ON THE RIGHTS OF OLDER PERSONS WITH DISABILITIES:

https://www.ohchr.org/en/calls-for-input/report-rights-older-persons-disabilities

This report examines the situation of older persons with disabilities, and provides guidance to States on how to promote, protect and ensure their human rights and fundamental freedoms, paying particular attention to the intersection between ageing and disability.

Websites, Studies, and Databases

Websites

ADMINISTRATION FOR COMMUNITY LIVING
Home Page | ACL Administration for Community Living

This federal agency's website provides resources and support for older adults and people with disabilities, including funding for programs such as Meals on Wheels and the National Family Caregiver Support Program.

AGING AND DISABILITY RESOURCE CENTERS
Aging and Disability Resource Centers | ACL Administration for Community Living

These centers provide information and support for seniors and people with disabilities and their families, including information on long-term care options, health care benefits, and community resources.

ALZHEIMER'S ASSOCIATION
Alzheimer's Association | Alzheimer's Disease & Dementia Help

The Alzheimer's Association's website provides resources and support for people with Alzheimer's disease and their

families, including information on diagnosis, treatment, and caregiving. It also advocates for policies and funding to address Alzheimer's disease.

CALIFORNIA CREATES NEW "ANTI-ISOLATION" RESTRAINING ORDERS FOR ELDERS AND DEPENDENT ADULTS (OCTOBER 21, 2021).
California Creates New "Anti-Isolation" Restraining Orders for Elders and Dependent Adults | Holland & Knight LLP - JDSupra

The author explains the new Assembly Bill (AB 1243), where for the first time, family members and friends will be able to bring a petition seeking an order to enjoin the alleged isolation of an elder or dependent adult under the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act).

COURT OF APPEAL CAPS PRETRIAL ATTACHMENT IN FINANCIAL ELDER ABUSE CASES (AUGUST 23, 2022).
Court of Appeal Caps Pretrial Attachment in Financial Elder Abuse Cases | Downey Brand LLP - JDSupra

In 2007, the Legislature strengthened the Elder Abuse Act by authorizing plaintiffs to seek prejudgment attachment to preserve the elder's assets wrongfully held by defendant until judgment is rendered. Jeffery Galvin discussed a court of appeal decision in *Royals v. Lu*, capping pretrial attachment in financial elder abuse cases. The court addressed the importance of California's Elder Abuse Act and Attachment Law.

ELDER LAW ANSWERS
Elder Law, Medicaid, Estate Planning and Long-Term Care (elderlawanswers.com)

This website provides information on a range of legal issues facing seniors, including estate planning, Medicare and Medicaid, and Social Security. It offers a directory of elder law attorneys and a forum for asking legal questions.

MEDICAID.GOV
Medicaid.gov: the official U.S. government site for Medicare | Medicaid

This website provides information on Medicaid, the joint federal-state program that provides health coverage to low-income individuals and families. It includes information on eligibility requirements, benefits, and how to apply.

MEDICARE.GOV
Welcome to Medicare | Medicare

This website provides information on Medicare, the federal health insurance program for people over 65 and those with certain disabilities. It includes information on benefits, coverage options, and costs.

NATIONAL CENTER ON ELDER ABUSE
NCEA - Home (acl.gov)

This organization's website provides information and resources for addressing elder abuse, including training materials for professionals, policy recommendations, and data on the prevalence of elder abuse.

NATIONAL INSTITUTE ON AGING
National Institute on Aging (nih.gov)

This government agency conducts research on aging and age-related diseases, with a focus on improving the health and well-being of older adults. Its website provides

information on healthy aging, caregiving, and research opportunities.

NATIONAL SENIOR CITIZENS LAW CENTER
National Senior Citizens Law Center (nsclcarchives.org)

This organization's website focuses on legal advocacy for low-income seniors, with a particular focus on issues related to Social Security, Medicare, and Medicaid. It offers resources for advocates and policymakers, as well as legal services for seniors.

SOCIAL SECURITY ADMINISTRATION
Social Security Administration | USAGov

The Social Security Administration's website provides retirement, disability, and survivor benefits to eligible individuals. It provides information on eligibility requirements, benefit calculators, and application procedures.

Databases

GERONTOLOGY RESEARCH CENTRE
https://www.sfu.ca/grc/about.html

This database provides serves as a focal point for research, education, and information on individual and population aging, specifically in the following areas: Aging and the Built Environment, Population Health and Aging, Exploitation of Older Persons, and more.

PEW RESEARCH CENTER
Pew Research Center | Pew Research Center

This organization conducts research on a range of social issues, including demographics, technology, and politics. Its website includes data and analysis on the aging of the population and related issues such as retirement and health care.

Studies

COHORT TRAJECTORIES BY AGE AND GENDER FOR INFORMAL CAREGIVING IN EUROPE ADJUSTED FOR SOCIODEMOGRAPHIC CHANGES, 2004 AND 2015 (2023).
Cohort Trajectories by Age and Gender for Informal Caregiving in Europe Adjusted for Sociodemographic Changes, 2004 and 2015 | The Journals of Gerontology: Series B | Oxford Academic (oup.com)

The European Centre for Social Welfare Policy and Research has conducted a study on informal caregiving in Europe, comparing data from 2004 and 2015 and adjusting for sociodemographic changes. The study analyzed cohort trajectories by age and gender and the results have been published in The Journals of Gerontology: Series B, by Oxford Academic.

Web Bibliographies

AMERICAN BAR ASSOCIATION (ABA) COMMISSION ON LAW AND AGING
Published by the American Bar Association
https://www.americanbar.org/groups/senior_lawyers/resources/elder-law/

COVID-19 WEB BIBLIOGRAPHY

Published by the Australasian Legal Information Institute
https://ntlawhandbook.org/foswiki/COVID19/Bibliography/ElderLaw

ELDER LAW RESOURCES
Published by the University of Illinois College of Law
https://theelderlawjournal.com/resources-links/

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Published by Pace University Elisabeth Haub School of Law
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GUARDIANSHIP RESOURCES
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https://bioethics.miami.edu/education/ethics-curricula/guardianship-and-ethics/guardianship-and-elder-law-bibliography/index.html

NANCY LEVIT, ELDER LAW: AN ANNOTATED BIBLIOGRAPHY 2011-2016
Published by University of Missouri – Kansas City, School of Law
https://irlaw.umkc.edu/faculty_works/313/

Journal Articles

THE JOURNAL OF HEALTH CARE ORGANIZATION, PROVISION, AND FINANCING: MAKES THE CARE FOR CENTRALIZED DEMENTIA CARE THROUGH ADAPTIVE REUSE IN THE TIME OF COVID-19
https://journals.sagepub.com/doi/pdf/10.1177/0046958020969305

The article examines the need for centralized dementia care due to the demand for memory care housing and services in the wake of the COVID-19 pandemic.

Cases

Hawaii

In re Kalei Hope Bulwinkle, 245 P.3d 961 (Haw. 2011)
Bulwinkle, a young adult at the time, suffers from Asperger's syndrome. The judge issued a series of rulings in the case that were invalidated only after Bulwinkle's family fought them, including restricting her right to vote. Georgia is one of at least six states that permit probate judges and other public officials who are not lawyers to issue adult guardianship orders. The probate judge responsible for deciding Bulwinkle's fate had taken the bench without a law degree. Legal experts opine that can lead to questionable oversight in an already restrictive system.

Indiana

In Biggs v. Renner (Ind. Ct. App., No. 22A-GU-2042, March 3, 2023)
The Court of Appeals of Indiana held that the trial court was correct when it appointed a daughter as her mother's guardian, as they had mended their previously estranged relationship. The trial court appropriately revoked the mother's power of attorney naming her son as her agent because the son was still estranged from her. (This opinion is not a binding precedent.)
Massachusetts

Barbetti v. Stempniewicz, (Mass. No. SJC-13149 (June 28, 2022)
The Supreme Judicial Court of Massachusetts reversed in part the Superior Court's grant of summary judgment to children who sued

their uncle, the creator of a trust in their family matriarch's name that they claimed was invalid.

Minnesota

Hammerberg v. Harpstead (Minn. Ct. App., No. A21-1106, April 11, 2022)
A Minnesota appeals court held that a lower court did not have subject matter jurisdiction over a case brought by the trustee of a trust who was arguing the state had no right to recover Medicaid benefits, because the trustee did not exhaust his administrative remedies.

New Jersey

A.V. v. Division of Medical Assistance and Health Services and Cumberland County Board of Social Services (OAL Dkt No. HMA 08575-2021, August 19, 2022)
A New Jersey administrative division found that a married couple applying for Medicaid made an annuity irrevocable and could therefore qualify for Medicaid on an earlier date. However, it also determines that the applicant and her spouse failed to rebut the presumption that gifts made in the five-year lookback period were exclusively for a purpose other than qualifying for Medicaid.

New York

Hall v. Zucker (N.Y. Sup. Ct., App. Div., 4th Dept., No. TP 20-01235, Feb. 4, 2022)
A New York appeals court held that a Medicaid applicant found to be ineligible to Medicaid due to a transfer of assets is not entitled to an undue hardship waiver because she could not prove she would be unable to obtain medical care without Medicaid.

Ohio

Chamberlain v. Ohio Department of Job and Family Services, 2022 Ohio 2309 (Ohio Ct. App. 2022, AC-210145, July 1, 2022)
The Ohio Court of Appeals affirmed the denial of retroactive Medicaid benefits where the applicant owned real property listed for sale but was unable to sell it, concluding the property was "available" as a countable resource.

Gardner v. Ohio Dept. of Job and Family Services (Ohio Ct. App., 1st Dist., No. C-210376, June 15, 2022)
An Ohio appeals court ruled that the Medicaid agency must apply the reasonable-efforts exclusion from Social Security law to Medicaid recipients and must determine whether an applicant is making a reasonable effort to sell a resource before counting it.

Laurels of Huber Hts. v. Taylor (Ohio Ct. App., 2nd Dist., No. 29223, April 29, 2022)
Reversing a lower court, an Ohio appeals court held that a nursing home's lawsuit against the spouse of a resident who signed a promissory note agreeing to pay his wife's unpaid balance does not violate federal and state law prohibitions against third-party liability because the payment agreement was not related to his wife's admission to the nursing home.

Oregon

Dept. of Human Services v. Hobart (Or. Ct. App., No. A170712, March 2, 2022)
Holding that state law does not conflict with federal Medicaid law, an Oregon appeals court ruled that a court may set aside a Medicaid recipient's transfer of her house to her husband for no consideration to allow the state to recover Medicaid benefits from the property.

Rhode Island

Saint Elizabeth Home v. Gorham (R.I., No. 2021-27-Appeal, Jan. 13, 2022)
Rhode Island's highest court grants summary judgment to a nursing home in a case against a resident's daughter who agreed to be personally liable for the resident's care in the admission agreement.

Texas

Texas Health and Human Services Commission v. Estate of Burt (Tex. Ct. App., 3rd Dist., No.03-20-00462-CV, April 21, 2022)
A Texas appeals court ruled that a couple who purchased a half interest in their daughter's home after they moved into a nursing home were eligible for Medicaid, and the house is not a countable resource for Medicaid eligibility purposes because they intended to move there if they were discharged.

Journal of Aging Law & Policy

STETSON LAW

Stetson University College of Law
1401 61st Street South | Gulfport, Florida 33707
(727) 562-7800