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Supported Decision-Making

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I. Introduction

Supported Decision-Making has become a focus of many advocates for people with disabilities and seniors, typically with the goal of reducing the need for guardianships or conservatorships in favor of the person with a disability or senior making their own decision with assistance. The Supported Decision-Making process allows the senior or person with a disability (commonly referred to as the “Decider”) to select friends, family, or professionals (commonly referred to as “Supporters”) to assist with gathering information in order to assist the Decider in making informed decisions about their own lives. While Supported Decision-Making Agreements may be new to many practitioners, the concept has been in practice for decades in Australia, Canada, Ireland, Israel, Sweden, Bulgaria, Croatia and Peru¹. In particular, Canada is internationally recognized for its leadership in legislated Supported Decision-Making. British Columbia’s *Representation Agreement Act*² is considered pioneer legislation, as it was one of the very first self-contained Supported Decision-Making (SDM) statutes in the world. Additionally, although British Columbia’s *Representation Agreement Act* was primarily developed to support people with developmental disabilities, the act is completely disability-neutral and assists all people with cognitive limitations or diminished capacity.

SDM certainly has its challenges for the Elder Law or Special Needs Trust practitioner. This presentation will focus not only on attorneys, but also fiduciaries, financial planners and other professionals involved in a Decider’s life. The history and scope of SDM will be provided, addressing the challenges that professionals may encounter with SDM. Incorporating the concept of Supported Decision-Making in drafting and administration of Special Needs Trusts (SNTs) will be reviewed, stressing beneficiary empowerment and settlor intent. Even in states that lack a SDM statute, it is prudent for all professionals to be familiar with its principles.

II. Supported-Decision Making: Goals

Putting the Decider at the helm of the decision-making process is a crucial and commendable goal. Understandably, one of the primary objectives of SDM advocates is the empowerment of Deciders, who, in addition to potentially having diminished capacity, may also be vulnerable to undue influence, fraud, or poor decision-making. SDM assists a person with a disability or senior with a cognitive challenge to assess all information about decisions that affect their lives, and have the information gathered by a Supporter whom they trust. In addition to information gathering, Supporters are tasked with communicating the relevant information effectively to the Decider in a manner they can understand. This translation and communication role is pivotal in empowering a Decider to make a fully informed decision, making SDM an effective tool for Deciders to have more control over their lives. For example, some persons with cerebral palsy may have severe challenges in mobility or communication, but be fully capable cognitively.

¹ <https://supporteddecisions.org/about-supported-decision-making/sdm-as-an-international-movement/>

² *Representation Agreement Act*, RSBC 1996, c 405

Therefore, having Supporters involved with medical or legal matters may assist the person to better gather information and express their true wishes.

An additional objective of SDM advocates is to encourage less reliance on conservatorships and guardianships (or even agencies under a power of attorney), due to their highly constrictive nature. To support this goal and assist in Decider empowerment, practitioners may consider reducing or limiting the full scope of conservatorship or guardianship arrangements by utilizing Supported Decision-Making agreements. In appropriate situations, an SDM agreement is an effective and less restrictive alternative, and is less costly than a court order or professional review. Dealing with capacity issues is nothing new to most Elder Law or Special Needs Trust practitioners. In fact, most such practitioners commonly provide counsel on estate planning, guardianships, conservatorships, powers of attorney, and health care directives while determining a client's legal or testamentary capacity. Additionally, planners need to be hyper-vigilant in such cases for issues concerning undue influence. Despite the challenges that the Supported Decision-Making process presents, SDM presents practitioners with a myriad of options to better serve their clients and communities.

III. Scope

The American Civil Liberties Union (ACLU) defines Supported Decision-Making as:

“Supported decision making (SDM) is a tool that allows people with disabilities to retain their decision-making capacity by choosing supporters to help them make choices. A person using SDM selects trusted advisors, such as friends, family members, or professionals, to serve as supporters. The supporters agree to help the person with a disability understand, consider, and communicate decisions, giving the person with a disability the tools to make her own, informed, decisions.”³

Historically, many people with disabilities and seniors with cognitive challenges would be forced to rely on guardians or conservators to make decisions about their lives. With SDM, this population may now be able to make their own determinations about what is best for them with the proper support in place. While many states do not have SDM statutes, the concept and process of SDM Agreements may assist in providing guidelines to further empower Deciders.

Internationally, the United Nations Convention on the Rights of Persons with Disabilities has endorsed the concept of Supported Decision-Making designed “to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and promote respect for their inherent dignity.” In the United States, there are a growing group of advocacy organizations that have endorsed the concept of Supported Decision-Making. For example, the National Guardianship Association (NGA) enacted the following

³ https://www.aclu.org/wp-content/uploads/legal-documents/faq_about_supported_decision_making.pdf

position statement on Guardianship, Surrogate Decision-Making and Supported Decision-Making: ⁴

OUR POSITION:

- The National Guardianship Association supports ongoing research to determine the effectiveness of supported decision-making models as alternatives to guardianship.
- Guardianship should be utilized only when lesser restrictive supports are not available. Alternatives to guardianship, including supported decision making, should always be identified and considered whenever possible prior to the commencement of guardianship proceedings.
- Whenever guardianship is necessary to assist a person, the guardianship must be limited, allow the maximum retention of individual rights, and be customized to the individual needs of the person under guardianship. NGA supports policies that help maximize the participation of the person and provide the person under guardianship with every opportunity to exercise those individual rights that the person might be capable of exercising.
- Under all circumstances, efforts should be made to encourage every person under guardianship to exercise his/her individual rights retained and participate, to the maximum extent of the person's abilities, in all decisions that affect him or her, to act on his or her own behalf in all matters in which the person is able to do so, and to develop or regain his or her own capacity to the maximum extent possible.
- Supported decision making should be considered for the person before guardianship, and the supported decision-making process should be incorporated as a part of the guardianship if guardianship is necessary.
- Supported decision making has been described as occurring when an individual with cognitive challenges is the ultimate decision maker but is provided support from one or more persons who explain issues to the individual and, where necessary, interpret the individual's words and behavior to determine his or her goals and preferences.
- Every guardianship should be focused on the person and grounded in demonstrating respect for the dignity of all involved.
- A guardian must understand and protect the rights of the person and utilize all the tools available to maximize the participation of the person and enable self-determination.

There are currently more than 20 states that have passed SDM statutes, and the list is expected to grow. Texas was the first state to enact a statute in 2015. To locate legislation in other states, visit [Access to Information Under Supported Decision-Making Statutes](#) ⁵, maintained by the American Bar Association (ABA). This ABA chart highlights four key elements of each piece of legislation, including Access to Information, Authorization or Obligation of Third Parties to Share Information, Third Party Reliance and Limitation of Liability. For brevity's sake, this presentation will only review SDM statutes in California, Texas and New York.

⁴ <https://www.guardianship.org/wp-content/uploads/2017/07/SDM-Position-Statement-9-20-17.pdf>

⁵ https://www.americanbar.org/content/dam/aba/administrative/law_aging/2022-accss-infmtn-sdm.pdf

In states that have enacted such statutes, practitioners, fiduciaries and trusted advisors should familiarize themselves with these statutes and resources. Even if practicing in a jurisdiction where SDM statutes have not been enacted, it is prudent that professionals become familiar with other states' statutes and strive to incorporate SDM elements into their planning, if appropriate. In addition, should a client or beneficiary move to a state with formalized SDM, it is prudent for the practitioner to understand the SDM regulations to assist clients in making thoughtful and prudent decisions.

IV. Supporters

SDM is a practical tool to use when incorporating person-centered planning. It allows the Decider to select Supporters that they trust, whether that be a friend, family member, or professional. Supporters agree to assist the Decider in understanding and considering the decision, as well as assisting them communicate the decision. To effectively relay such information, Supporters will often use different methods to assist the Decider such as:

- plain language
- visual or audio communication tools
- extra time to discuss decisions
- creating a list of pros and cons
- role-playing activities
- attending important meetings and taking notes for future reference

While the list of who can serve as a Supporter is extensive, there are some prohibitions on who may not. Full detail on Who Can Be a Supporter in Texas, California and New York may be found in **Appendix A**.

Statutes in California and New York list persons who are ineligible to serve as a Supporter and forbid a Supporter to serve if the Decider has been the subject of a protective order or restraining order against the Supporter. California further forbids someone to serve as a Supporter if they have been removed as the conservator of the Decider based upon a finding that they did not act in the conservatee's best interest. Additionally in California, a Supporter may not serve if they have been found criminally, civilly, or administratively liable for abuse, neglect, mistreatment, coercion, or fraud.

New York forbids someone to serve as a supporter if the local department of social services has found that the Supporter has committed abuse, neglect, financial exploitation, or physical coercion against the decision-maker.

Texas does not have a list of who can serve, but does require the SDM agreement to be terminated if "the Department of Family and Protective Services finds that the adult with a disability has been abused, neglected, or exploited by the supporter; the supporter is found

criminally liable for abuse, neglect or exploitation of the decider, or a temporary or permanent guardian of the person or estate appointed for the decider.”⁶

Both California and New York have specific limitations for the Supporter’s authority. The key principle in these restrictions is the role of the Supporter as an information gatherer rather than a surrogate decision-maker for the Decider. In fact, California forbids coercion, as well as obtaining any information not related to the matter for which the Decider has requested assistance. California statute also forbids disclosure of information for any purpose other than supporting the Decider. California law also disallows the Supporter from making any decisions or signing any documents on behalf of the Decider unless the Supporter has specific legal authorization to do so (and the action is within the scope of their authority). Of course, this principle does not apply if a Supporter also serves as an agent under a power of attorney for the Decider. More information on Limits on a Supporters Authority may be found in **Appendix D**.

V. Inventory System

A Supported Decision-Making Inventory System (SDMIS) is a robust assessment tool used to best assist the needs of the Decider. The SDMIS essentially establishes a holistic view of the Decider’s support needs, providing the Supporter a reference tool that assists with framing decision-making concepts in a manner that is easy to understand.

Developed in 2014, the Shogren and Wehmeyer SDMIS model (**Shogren, Wehmeyer, Palmer, Forber-Platt, et al. (2014b). *Self-Determination Inventory: Student-report [Pilot Version]*. Lawrence: Kansas University Center on Developmental Disabilities**) is completed in an interview process with the Decider and may be used by the Supporter throughout the Decider’s lifetime. As with any tool for people with disabilities, it is designed to be flexible and change as the Decider’s needs and circumstances change. The Shogren and Wehmeyer model consists of three main inventories that focus on the Decider’s support needs:

- SDM Personal Factors Inventory: assesses a Decider’s personal aspects that influence decision-making including a Decider’s competency, communication preferences, and goals.
- SDM Environmental Demands Inventory: evaluates the complexity and relative nature of decisions in five key life areas (Health, Legal, Financial, Social, and Independent/Community Living) and assesses whether there are opportunities or supports available for such.
- SDM Autonomy Inventory: measures a Decider’s current level of autonomy in making their own decisions.

Put simply, a SDMIS is a tool designed to identify and customize a plan for support for a Decider. It helps identify which decisions or specific areas wherein a Decider may need assistance, and then assists in creating short- or long-term plans detailing what kind of assistance Supporters will provide. A SDMIS may also outline and provide a guide for multiple Supporters as different types of decisions may require different Supporters. A SDMIS may also track

⁶ TX Est Code, § 1357.053

decisions and their ultimate outcomes as decision-making is a skill that takes practice. Recording and assessing decisions in a SDMIS can be a useful tool for both the Supporter(s) and Decider. Finally, a SDMIS can be used to periodically re-evaluate a Decider's evolving needs and adjust the level of support necessary.

VI. SDM Agreements

It is generally a recommended best practice to have a Supported Decision-Making agreement formalized in writing. A SDM agreement is not a contract; rather, it is an authorization for the Supporter to assist the Decider. Of note, a SDM agreement is different from a durable power of attorney in that it goes into effect immediately after execution; whereas a durable power of attorney typically identifies the person who becomes a substitute decision-maker if the Decider becomes incapacitated.

All three states have similar language as far as the scope of the agreement. In New York, for example:

“If a decision-maker voluntarily enters into a supported decision-making agreement with one or more supporters, the decision-maker may, in the agreement, authorize the supporter to provide support to them in making their own decisions in areas they choose, including, but not limited to: gathering information, understanding and interpreting information, weighing options and alternatives to a decision, considering the consequences of making a decision or not making it, participating in conversations with third parties if the decision-maker is present and requests their participation, communicating the decision-maker's decision to third parties if the decision-maker is present and requests their participation, and providing the decision-maker support in implementing the decision-maker's decision.”⁷

Most statutes focus on gathering information to assist the Decider to interpret the information, as well as subsequently facilitating implementation of the decision. A chart illustrating the Scope of Agreement for all three states' SDM agreements may be found in **Appendix B**.

Essential Elements of a Supported Decision-Making Agreement:

Texas and New York have sample Supported Decision-Making Agreements drafted into their legislation. While neither state limits SDM agreements to the statutory examples, Texas law does state that a supported decision-making agreement is valid only if it is substantially similar to the form provided. While California does not have such a statutory agreement, the ACLU has supplied a sample agreement which has been the form widely accepted by most state agencies. For the Elder Law or Special Needs Trust practitioner, it may be prudent to either use the forms as provided or minimally modify them as needed to maximize acceptance. A sample Supported Decision-Making Agreement graciously provided by The Arc of Texas may be found online⁸.

⁷ State of New York Senate Bill S7107B, Cal. No. 540, 2021-2022 Sessions, June 1, 2021

⁸ www.thearcoftexas.org/wp-content/uploads/Blank_SDMA_2016-06.pdf

Of note, New York requires that certain powers of the SDM agreement be reviewed by a “facilitator”:

"Supported decision-making agreements can be an informal arrangement between the decision-maker and his or her supporter or supporters, or one that is in accordance with section 82.11 of this article, which has been reviewed and signed by a facilitator.

A "facilitator" means an individual or entity authorized by the office for people with developmental disabilities that works with and educates the decision-maker and his or her supporter or supporters about supported decision-making and supported decision-making agreements authorized under this article.”⁹

The Essential Elements of a Supported Decision-Making Agreement may be found in **Appendix C**. To summarize, a SDM Agreement should:

- Be written in plain language and in a manner the Decider can understand (to include the use of illustrations when appropriate).
- Identify who will serve as a Supporter and outline their duties or expectations.
- Identify which areas wherein a Decider requests support including education, financial matters, health care, and domicile.
- Identify the kind of support the Decider is seeking. This might involve gathering information, assisting the Decider to weigh alternatives or potential consequences of their actions, communicating decisions to others, or to assist with financial decisions.
- Be executed consistent with the formalities required in the applicable state. For example, California requires the document execution to be in the presence of two witnesses or a notary public.
- Identify when the agreement needs to be reviewed and how it is terminated.

Many states do not require that a SDM Agreement be in writing. However, and as noted above, if the SDM Agreement is informal and verbal (e.g., not written), it is recommended best practice that the SDM Agreement be converted to a written and properly executed document. A written agreement provides a level of assurance to third parties that the Decider’s decisions are informed and supported. Additionally, having the SDM Agreement in writing will protect both the practitioner and third-party (e.g., doctor, trustee, financial planner, etc.) from malpractice and/or liability.

VII. Undue Influence, Conflict of Interest

In general, even if so shielded in a trust instrument, applicable statute, or SDM agreement, fiduciaries cannot be excused from their ethical duties of loyalty and fidelity to their client. Nor may exculpations relieve fiduciaries from liability related to conflict of interest or self-dealing. These same concepts apply to Supporters.

⁹ State of New York Senate Bill S7107B, Cal. No. 540, 2021-2022 Sessions, June 1, 2021

In common law, there are three generally agreed upon key elements of fiduciary responsibility; namely, the duty of loyalty, the duty of care and the duty of full disclosure. At its core, the duty of loyalty requires any fiduciary to act in the best interest of the parties they serve. A fiduciary should never act in their own self-interest or in the interests of parties other than their beneficiaries. For example, it is concluded quite concisely in *Ramsey v. Boatmen's First Nat'l Bank of K.C., N.A.*, 914 S.W.2d 384, 387 (Mo.App. W.D.1996) that trustees are fiduciaries “of the highest order” and are required to exercise “a high standard of conduct and loyalty in administration of [a] trust.” This case goes on to illustrate that this duty of loyalty “precludes self-dealing” which in most cases would be considered a “breach of fiduciary duty.” Self-dealing is the conduct of a trustee or other fiduciary that takes advantage of their fiduciary position in a transaction in which they act in their own interests, oftentimes to the detriment of the person they are serving. Similar definitions of Supporter conflict of interest may be found in state statutes in New York, California and Texas:

California:

“A supporter shall not participate in any life decision in which they have a conflict of interest. This includes, but is not limited to, any decision in which the supporter has a financial or other tangible stake in the outcome.”¹⁰

Texas:

“In order to prevent a conflict of interest, if a determination is made by an adult with a disability that the supporter with whom the adult entered into a supported decision-making agreement is the most appropriate person to provide to the adult supports and services for which the supporter will be compensated, the adult may amend the supported decision-making agreement to designate an alternate person to act as the adult's supporter for the limited purpose of participating in person-centered planning as it relates to the provision of those supports and services.”¹¹

New York:

“if the supporter chosen by the decision-maker is an employee of a provider from whom the decision-maker receives services, the employee and the provider shall follow the requirements set out in regulations promulgated by the office for people with developmental disabilities, or other appropriate regulatory body which address those circumstances, with attention paid to relative labor law and employment obligations and possible conflicts of interest or the appearance of a conflict of interest.”¹²

Additionally, all aforementioned states make it clear that supporters may be held civilly or criminally liable for a breach of duty of a supporter. California section states:

¹⁰ CA Welf. and Inst. Code § 21002(4)

¹¹ TX Est Code, § 1357.0525

¹² State of New York Senate Bill S7107B, Cal. No. 540, 2021-2022 Sessions, June 1, 2021

“This division does not limit a supporter’s civil or criminal liability for prohibited conduct against the adult with a disability, including liability for fraud, abuse, neglect, breach of fiduciary duty, if any exists, coercion, or mistreatment, including liability under the Elder Abuse and Dependent Adult Civil Protection Act.”¹³

VIII. Multidisciplinary Issues

Assisting people with disabilities or seniors inevitably involves a multidisciplinary approach. Specialized knowledge across multiple disciplines such as social work, finance, psychology, and fiduciary administration is crucial to properly serve these individuals. Supporters will inevitably have to plan, educate, and advocate for their Decider and, in order to do so, may require the combined services of several professionals. This will most likely involve interaction by the Supporter and Decider with geriatric care managers, case managers, discharge planners, financial advisors, CPAs, agents under power of attorney, physicians, home health care or respite providers, and the family members and friends of the Decider. All parties in these situations must be aware of inherent ethical issues like the unauthorized practice of law and beneficiary/client confidentiality.

California’s statute specifically addresses when a Supporter has a right to attend such meetings:

“A third party may only refuse the presence of one of more adults, including supporters, if the third party reasonably believes that there is fraud, coercion, abuse, or other action by the individuals requested to be included that the third party is required to report pursuant to the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9).”¹⁴ [emphasis added]

While the Texas and New York statutes do not specifically address the Supporter’s right to be present in meetings, that right could be implied as essential to the Supporter’s role in gathering information to assist the Decider to make an informed decision. As such, planners and their staff should be familiar with state statute and reporting requirements should they suspect that a Supporter has breached their duty to the Decider and where such concern should be filed.

The interplay between such divergent parties can be challenging. Conflict will inevitably arise when a Supporter and Decider disagree with an SNT trustee, for example. In these situations, addressing the discretion and responsibilities of each party is critical. Explaining how well delineated each role is to a non-professional or family member Supporter may prove difficult during times of conflict. Example:

- Adult with a disability (Decider) resides in a trust-owned home.
- Decider requires care support over and above what their Medicaid and waiver programs will furnish. Shortfall is being funded by the SNT.
- Trust is being rapidly depleted (wasting).

¹³ CA Welf. and Inst. Code § 21002(a)

¹⁴ CA Welf. and Inst. Code § 21004(c)

- SNT trustee is forced to look at alternative housing solutions for the Decider and must sell the home to protect the beneficiary's long-term financial interests.
- Decider and Supporter(s) are adamant that Decider remains in the home in consideration of the Decider's health, comfort and well-being.

The trustee is stuck in an untenable position even while properly advocating for the Decider's long-term financial stability. While the trustee's position over the trust's longevity is justifiable, the family member guardian's position to maintain the beneficiary at home in a safe, known environment is extremely valid as well.

In order to solve this issue, the parties have several options at their disposal. The first and most obvious answer would be to simply petition the court for instruction. While this method best protects each party from future liability, it is the costliest. Alternative Dispute Resolution through a qualified arbitrator could also assist in achieving an agreeable outcome. Lastly, the use of other outside professionals throughout the discussions can be a crucial tool in achieving the best outcome for the Decider, and is at the crux of the SDM process. Either party in this scenario would benefit from an opinion letter or recommendation from any of the following:

- Medical professional
- Long Term Care placement advisor
- Social Worker
- Case or Care Manager
- Trust Protector or Trust Advisory Committee (discussed later)
- Investment Advisor (via a trust longevity projection)

However, in pursuing this avenue, all parties must be careful with sensitive or protected information regarding the Decider. For example, ethical rules provide in part that an attorney may not reveal a client's information without that client's consent. The ABA Model Rules of Professional Conduct (2020) (the Model Rules) Model Rule 1.6(c) states that "a lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Confidentiality may be lost for any information conveyed by the Decider to the attorney in the presence of any third person not connected with the representation or issue at hand. Whether the Decider (or Supporter) will know when the confidentiality privilege applies is an area of concern - especially where multiple professionals are providing a Decider with information. The Decider may believe their communications with persons in these processes are protected when, in fact, they are not. In these situations, the highest standard of fiduciary care, prudence, and oversight must be practiced. It is crucial to always obtain Decider consent before divulging private or protected information to third parties, especially Health Insurance Portability and Accountability Act ("HIPAA") protected information.

Of note, however, is that many states recognize an exception to the presumption that a third-party presence invalidates the attorney-client privilege when a third person is present. Rather, the attorney-client privilege continues to apply if that third person is there in order to assist the client in the legal process and furthers a defendant's legal representation. Certainly, this exception could apply to a Supporter. In determining if the presence of the Supporter compromises the

attorney-client privilege, courts generally consider whether the defendant intended the communications to remain secret and the role of the third party.

Liability of Third Parties:

Texas' statute imposes a good faith standard on third parties and states that "a person who receives the original or a copy of a supported decision-making agreement shall rely on the agreement" and "... is not subject to criminal or civil liability and has not engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a supported decision-making agreement."¹⁵

New York states:

"A person shall not be subject to criminal or civil liability and shall not be determined to have engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a decision made by a decision-maker pursuant to a duly executed supported decision-making agreement created in accordance with this article."¹⁶

As mentioned previously, New York's statute does require that the Supported Decision-Making Agreement must be "signed by a facilitator and following a recognized supported decision-making facilitation or education process, as prescribed by regulations governing the facilitation and education processes promulgated by the office for people with developmental disabilities" in order for the third party to avoid criminal or civil liability. More information on Liability of 3rd Parties may be found in **Appendix E**.

IX. Conservatorships / Guardianships

Conservatorship and guardianship laws have been enacted in all states, with evolving standards over the past half century. This became particularly relevant as deinstitutionalization began across the country. In the past, many states allowed for a person to be conserved and held against their will in an institution without notice or an opportunity to contest the imposition of the conservatorship.

As civil rights groups furiously advocated for due process to occur before a court limited the civil rights of people with mental illness or a developmental disability, most states adopted a "least restrictive alternative" as a standard for courts to follow when contemplating a guardianship or conservatorship. In 1975, the U.S. Supreme Court decision in *O'Connor v. Donaldson* held that "a State cannot constitutionally confine, without more, a non dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends..."¹⁷

¹⁵ TX Est Code § 1357.101

¹⁶ State of New York Senate Bill S7107B, Cal. No. 540, 2021-2022 Sessions, June 1, 2021

¹⁷ *O'Connor v. Donaldson*, 422 U.S. 563 (1975)

The Elder Law or Special Needs Trust practitioner should research their state law to determine if changes have been made to their state's statutes concerning the utilization of Supported Decision-Making as a method to achieve the least restrictive alternative. For example, California's Supported Decision-Making statute, amended Section 416.7 of the California Health and Safety Code¹⁸, stating that a guardian or conservator must work collaboratively with the conservatee (and Regional Centers) as much as possible to develop and implement less restrictive alternatives to conservatorship.

Section 1800.3(c) of the California Probate Code was also amended to state:

“In determining whether a conservatorship is the least restrictive alternative available, and whether to grant or deny a conservatorship petition, the court shall consider the person's abilities and capacities with current and possible supports, including, but not limited to, supported decisionmaking agreements, as defined in Section 21001 of the Welfare and Institutions Code, powers of attorney, designation of a health care surrogate as set forth in Section 4711, and advance health care directives.”

X. Fiduciary Duty

A fiduciary is charged with many responsibilities, but above all else, a fiduciary has the duty of loyalty to those they serve. This duty of loyalty and advocacy is especially relevant in Supported Decision-Making and the population it assists. The duty of loyalty has been referred to as “the essence of the fiduciary relationship” (J.C. Shepherd, *The Law of Fiduciaries* 481 (1981)) and is widely considered to be the most fundamental duty of a trustee. Put simply, this duty requires the fiduciary/Supporter to avoid any self-dealing practices and act in the best interests of those whom they serve.

Fiduciaries also have the duty of care to the people they serve. The duty of care is oftentimes referred to as the duty of prudence. Essentially, this duty requires all fiduciaries to act reasonably, or as any prudent person would. Prudence may be defined as follows:

- *Harvard College v. Amory* 26 Mass. ((9 Pick.) 446 (1830)) - “Observe how [people] of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.”
- *Uniform Probate Code* § 7-302¹⁹ - “The trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent [person] dealing with the property of another....”
- *Uniform Prudent Investor Act* §2(a)²⁰ - “A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements,

¹⁸ CA Health & Safety Code § 416.7 (2022)

¹⁹ Uniform Probate Code, National Conference of Commissioners on Uniform Laws © 1969

²⁰ Uniform Prudent Investor Act, National Conference of Commissioners on Uniform Laws © 1995

and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”

The fiduciary duty of full disclosure requires fiduciaries to appropriately inform those they serve. In fact, the Model Rules require “full disclosure of material facts.” Most states have their own specific requirements in regards to clear and accurate accountings, which may apply to Supporters as well. The frequency of such accountings vary from state to state, as does the expiration of liability after such accountings are provided to the beneficiaries.

Financial accountings are especially relevant when a Supporter is dealing or assisting with the assets of the Decider (investable or otherwise). Additionally, an agent of the Decider may have the duty to act in good faith and invest trust assets prudently.

Supporters may not necessarily consider themselves to be acting in a fiduciary capacity. That said, a Supporter almost certainly has fiduciary liability. Even though the Supporter is only assisting the Decider in making a decision, they hold a heightened influence over the lens through which a Decider views the information provided. A Supporter is almost acting as an agent for the Decider in that they stand in a special relation of trust, confidence and responsibility. And, because they are human, there is always a risk that a Supporter could misinterpret their role by omitting certain information, or coloring their translation of information to guide the Decider to a conclusion that is more inline with the Supporter’s desired outcome or value system. Leading a Decider to a Supporter’s predetermined outcome through issue framing or inaccurate assessment of the Decider’s preferences could open up the Supporter to fiduciary liability. This issue can further be complicated as the Decider’s capacity changes over time.

XI. Drafting

Incorporating SDM concepts into an SNT may prove challenging. Precise drafting is required to reconcile what may be viewed as two diametrically opposed convictions. In essence, an SNT is essentially a spendthrift trust as the trustee has sole and absolute discretion about all distributions and the beneficiary has no authority. Conversely, Supported Decision-Making promotes the person with a disability or senior as the Decider to control their own decisions about their lives with assistance from the Supporter. In many cases, it could be that the primary objective of the settlor is to never allow the beneficiary to control the trust funds or have input into their use. However, a settlor’s objective may instead be to allow the beneficiary to have as much control over their lives as possible. The challenge becomes how to grant some measure of beneficiary control or input without jeopardizing the beneficiary’s eligibility for public benefits. As such, incorporating Supported Decision-Making concepts in planning can be challenging for the SNT practitioner.

Much of this difficulty comes from the need to incorporate the nature of needs-based public benefits such as Supplemental Security Income (SSI) and Medicaid. SNT trustees are tasked with preserving a beneficiary’s vital public benefits. But in order to do so, an SNT must be administered in the sole discretion of a trustee who must be someone other than the beneficiary. Many trustees view the preservation of SSI and Medicaid as their primary goal. For SSI, income

is defined as “any item an individual receives in cash or in-kind that can be used to meet their need for food or shelter”²¹ and may offset an SNT beneficiary’s SSI award amount. Disbursements that do not count as income may include distributions made for educational expenses, therapy, transportation, professional fees, medical services not covered by Medicaid, phone bills, recreation, and entertainment. Disbursements made from the SNT to a third party that result in the trust beneficiary receiving non-cash items (other than food or shelter) are also not considered income if those items would become a totally or partially excluded non-liquid resource if retained in the month after the month of receipt of said item. SNT trustees must also consider resource limits for beneficiaries receiving needs-based public benefits. Resources are considered cash and any other personal property, as well as any real property, that an individual (or spouse) owns, has the right, authority, or power to convert to cash, and is not legally restricted from using for their support and maintenance. An individual (or couple) with countable resources in excess of the statutory limit is not eligible for federal SSI or some federally-administered state supplementary payments. Given the complexity of these SSI rules, if the trust is not properly drafted to incorporate the settlor’s desires, an SNT trustee may focus solely on preserving the beneficiary’s SSI income, to the detriment of empowering the beneficiary/Decider.

Consider the following Example: Enhancing a Beneficiary’s Financial Literacy

- Settlers (parents) wish to enact a plan for their daughter.
- Their daughter was born with Down syndrome, but despite her challenges both parents want her to be as empowered as possible in making decisions about her own life.
- Their daughter is 19 years old, and rather than conserve her, the parents assisted their daughter to set up a Supported Decision-Making Agreement.
- Their daughter is easily influenced by others and is likely vulnerable to financial abuse.
- The daughter subsequently chose three close friends as her Supporters.

While the parents wish to empower their daughter to have as much control over her life as possible, they do have concerns about her financial literacy and financial capability. Their daughter, like many SSI recipients, has never managed any funds. Much of the support she is receiving is based on SSI and Medicaid eligibility, and she has no experience with making expenditures or investments. The parents recognize that their daughter will likely always need financial oversight to protect her from predators. Unfortunately, it is impossible to grant their daughter any real semblance of control (or to direct mandatory distributions for her benefit) from the SNT, as that would cause a loss of SSI or Medicaid benefits.

In order to comply with settlor intent and empower the daughter to have as much say in her affairs as possible, a third party SNT is drafted that incorporates language encouraging the trustee to cooperate with the daughter’s SDM Supporters. The SNT document indicates a preference for the development of an annual distribution plan based on recommendations from the daughter and her Supporters. Based on the plan, it is encouraged that the daughter has access to an administrator-managed prepaid debit card (such as the True Link Prepaid Visa Card) or an ABLE Account to promote her financial independence. All such language is precatory.

²¹ Social Security Administration, Program Operations Manual System (POMS) SI 00810.005

The distribution plan is approved by the trustee, incorporating requests from the daughter and her Supporters. The distribution plan includes pre-approved expenditures, to be executed via the use of a True Link Prepaid Visa Card (True Link Card) by the daughter. The daughter and her Supporters agree to account for her expenditures monthly by submitting receipts. True Link Cards are an allowable vehicle for paying for beneficiary expenses from an SNT without causing a potential loss in public benefits, per SSI:

“If the administrator-managed prepaid card is used to obtain cash, such as at an ATM, the withdrawal counts as unearned income. If the administrator-managed prepaid card pays for food or shelter items, such as charges at a restaurant, the individual will generally be charged with ISM up to the PMV. If the administrator-managed prepaid card pays for non-food, non-shelter items, such as for clothing at a department store, the individual usually does not receive income unless the item received would not be a totally or partially excluded non-liquid resource the following month. The administrator-managed prepaid card is not the trust beneficiary’s resource.”²²

As many people do when given their first opportunity at financial independence, the daughter initially makes inappropriate expenditures, depletes her True Link Card balance in a matter of days, and cannot account for her purchases (e.g., saving and submitting receipts). Thankfully, the trustee allows the daughter to fail at first. After all, doesn’t everyone learn from their mistakes during their lifetimes? Over time, with the help of her Supporters, the daughter gains experience not only making expenditures, but also in keeping receipts and sticking to a budget. In this example, the structure of a Supported Decision-Making Agreement was successful and the daughter gained valuable experiences in making her own decisions, setting her own goals, and being financially prudent. And while the daughter could never directly compel the trustee to continue funding the distribution plan had things gone awry, she or her Supporters could likely ask for the assistance of a trust advisory committee or trust protector to persuade the trustee to comply with settlor intent.

XII. Trust Advisory Committees, Trust Protectors, and Trustees

Like everyone, Deciders have ever-changing lives. As such, any legal and financial plan is variable and should be adaptable. A trust protector or trust advisory committee can be very useful if given the authority to interact with the trustee and SNT beneficiary/Decider. The utilization of such appointments can make for a truly collaborative and empowering administration of a trust.

²² Social Security Administration, Program Operations Manual System (POMS) SI 01120.201 1.1.e

Trust Advisory Committee:

Trust advisory committees have been incorporated in trust documents since the inception of the SNT. It has become common practice for an SNT to incorporate an advisory committee or a trust protector to ensure that settlor intent and the needs of the beneficiary are fulfilled. This can also allow for a system to make changes in the document as laws and policies change, and replacement of the trustee if needed.

Development of a distribution plan may be the primary focus of the trust advisory committee. This allows all parties to provide input, work collaboratively, and potentially pre-approve distributions, giving everyone a clear path to follow while promoting beneficiary independence. It is imperative to be clear about how the trust committee is structured, who is in charge, and when and how the committee members need to act. It is also becoming more common to require the trustee to work with a care manager to create an annual distribution plan to be reviewed by the committee and Supporter(s).

Sample trust advisory committee language graciously provided by Wealth Counsel:

The Trust Advisory Committee shall consist of a minimum of 3 members, but no more than 5 members to be determined by the chairperson(s) then serving. If any member of the Trust Advisory Committee is unwilling or unable, for any reason, to act or continue to act as a committee member, the chairperson(s) then serving may decide whether or not to fill the vacancy. However, there shall be at least three (3) members serving at all times. If there are fewer than 3 members serving and the chairperson(s) then serving are unable or unwilling to appoint a successor committee member, the Trustee may appoint the successors.

The initial Chairpersons for the Trust Advisory Committee shall be:

XXXX
XXXX

<In the event that either XXXX or MaryXXX cannot or will not serve, then the remaining chairperson shall <serve alone/select a successor chairperson/elect whether to select a co chair.>

or

<In the event that neither XXXX nor XXXX is willing to serve, then the remaining advisory committee members shall select a chairperson by majority vote.>

Duties of the Chairperson(s)

The Chairperson(s) primary duty is to ensure that the duties and the timelines of the Trust Advisory Committee are followed, and to make sure that there are at all relevant times the proper number of members on the committee.

Selection of the Remaining Trust Advisory Committee Members

The grantors shall maintain a schedule of successor Trust Advisory Committee members to be updated from time to time to provide guidance for the Trust Advisory Committee for selection of successor Trust Advisory Committee members to maintain the requisite number of committee members.

A Supporter may also potentially be a part of the trust advisory committee. If this is the case, the trustee and their counsel should be vigilant and proactively identify any conflicts of interest between the beneficiary/Decider and the Supporter(s). As per California's SDM statute: "A supporter shall not participate in any life decision in which they have a conflict of interest. This includes, but is not limited to, any decision in which the supporter has a financial or other tangible stake in the outcome."²³ As such, it may be prudent to clearly delineate the duties of the Supporters and the members of the advisory committee.

Trust Protector:

Similar to a trust advisory committee, a trust protector role can be extremely useful. In addition to the duties and rights of trust advisory committees, trust protectors are generally granted the power to amend the trust, either to satisfy settlor intent or to adapt to changes in public benefits regulations. Being able to make such changes without court intervention saves the trust unwarranted and potentially onerous legal fees. Additionally, a trust protector with the power to advise and weigh in on discretionary distribution decisions can be a wonderful tool for managing beneficiary expectations. When the trust protector or trust advisory committee has this right (not duty), it can potentially help to keep family members and Supporters involved in a beneficiary with a disability's life while providing priceless insight and guidance for the trustee.

Below, please find select pertinent provisions relating to Trust Protector or Trust Advisor appointment, graciously provided by Bradley J. Frigon, JD, LL.M (tax), CELA, CAP:

- "Any Trust Protector (including successors) shall have the right to appoint a Successor Trust Protector in writing, such appointment to take effect upon the death, resignation or incapacity of the appointing Trust Protector. If a Successor Trust Protector is named, the appointment of a Successor Trust Protector under this subsection shall take effect only if, and when, all Trust Protectors named in this Agreement fail to qualify or cease to act."
- "The Trust Protector shall have the authority to remove any Trustee with or without cause. Whenever the office of Trustee of a Trust is vacant and no Successor Trustee is effectively named, the Trust Protector shall appoint an individual or a corporate fiduciary to serve as Trustee."
- "The Trust Protector may amend any provision of this Agreement, as it applies to any Trust for which the Trust Protector is serving, pursuant to [subsequent restrictions]. Notwithstanding the foregoing, the Trust Protector may not amend this Agreement in any manner that would make Trust corpus or income available to the Beneficiary for

²³ CA Welf. and Inst. Code § 21002(4)

Medicaid eligibility. Further, the Trust Protector may not limit or alter the rights of the Beneficiary in any Trust assets held by the Trust before the amendment, nor may the Trust Protector remove or add any individual or entity as a beneficiary of any Trust asset.”

- “Any amendment made by any Trust Protector in good faith is conclusive on all persons interested in the Trust. The Trust Protector is not liable for the consequences of making or not making any amendment. Any amendment to this instrument made by any Trust Protector must be made in a written instrument signed by the Trust Protector and delivered to the Beneficiary or the Beneficiary’s Legal Representative and the Trustee of the Trust.”
- “Notwithstanding any other provision in this Agreement to the contrary, the Trust Protector shall not participate in the exercise of a power or discretion conferred under this Agreement that would cause the Trust Protector to possess a general power of appointment within the meaning of Sections 2041 and 2514 of the Internal Revenue Code. Specifically, the Trust Protector may not use such powers for his or her personal benefit, nor for the discharge of his or her financial obligations.”
- “The Trust Protector shall have no duty to monitor any Trust created under this Agreement in order to determine whether any of the powers and discretions conferred by this Agreement on the Trust Protector should be exercised. Further, the Trust Protector shall have no duty to keep informed as to the acts or omissions of others or to take any action to prevent or minimize loss. Any exercise or non-exercise of the powers and discretions granted to the Trust Protector shall be in the sole and absolute discretion of the Trust Protector, and shall be binding and conclusive on all persons. The Trust Protector is not required to exercise any power or discretion granted under this Agreement.”

Trustee:

It is possible that a Supporter may also serve as trustee (or co-trustee) of an SNT. This structure may prove extremely useful if the Supporter Trustee, in their dual role, is expected to assist the beneficiary with personal decisions and execute on them. In this scenario, potential conflicts of interest must be continuously evaluated and monitored, especially if the Supporter is a remainderperson of the SNT.

Example:

- Supporter Trustee is serving as trustee of an SNT and is not a remainderperson of the trust (thus obviating a potential conflict of interest).
- The SNT beneficiary needs an immediate emergency medical procedure and needs the Supporter to explain all facets of the procedure.

As Supporter, the Supporter Trustee may be present and privy to all facets of the medical procedure and advise on such. As Trustee, the Supporter Trustee can immediately authorize and execute the payment for services.

Of importance, should a Supporter serve in any of these dual capacities (trust advisory committee member, trust protector, or trustee), they would be subject to heightened fiduciary liability.

XIII. Emerging Research & Educational Resources

The effectiveness of Supported Decision-Making and its beneficial outcomes continue to be researched and studied. One of the most prominent research projects in this area is being conducted through a partnership of The Burton Blatt Institute at Syracuse University, the Kansas University Center on Developmental Disabilities, and the Quality Trust for Individuals with Disabilities. The project is examining how a person's decision-making process impacts their level of self-determination and quality of life. It is also studying how SDM affects a Decider's community participation and integration, family dynamics, life satisfaction and positive daily-living outcomes. The study hopes to significantly add to the existing state of evidence-based research on the benefits of SDM.

SDM successes have been lauded nationally and internationally, and one such case even led to the development of the Jenny Hatch Justice Project²⁴. The U.S. Administration on Community Living has also established the National Resource Center on Supported Decision-Making²⁵, which serves as a warehouse for information, education, and research on SDM. Both organizations have an annual national symposium on SDM for families, people with disabilities, professionals, and counsel to continue research, share knowledge and promote the concepts of SDM.

There are also fantastic resources on SDM available through the Arc of Texas²⁶, and continuing education and acceptance of SDM is codified in California statute:

“In developing educational information or training materials on supported decisionmaking or supported decisionmaking agreements, the California Health and Human Services Agency or any departments under its jurisdiction shall do all of the following:

(a) Consider the needs of individuals who have been underserved, including, but not limited to, immigrants, individuals whose preferred language is not English, individuals from rural communities, and individuals living in long-term care facilities.

(b) Consider existing materials and resources on supported decisionmaking and best practices developed nationwide.

²⁴ www.jennyhatchjusticeproject.org

²⁵ www.supporteddecisionmaking.com

²⁶ www.thearcoftexas.org/get-informed/im-a-self-advocate/sdma

(c) Consult with stakeholders to provide input about the information, materials, and training being developed. The stakeholders shall include persons with a disability, including an older adult with a disability, family members of a person with a disability and family members of an older adult living in a long-term care facility, and one representative of each of the following: the State Council on Developmental Disabilities; the protection and advocacy agency described in subdivision (i) of Section 4900; the client's rights advocate described in Section 4433; a disability organization; the California Health and Human Services Agency's Alzheimer's and Related Disorders Advisory Committee, the departments' ombudsperson offices; and an organization representing older adults.”²⁷

XIV. Conclusion

There are many practitioners who have expressed concerns that Supported Decision-Making will eliminate the option and protections that a traditional conservatorship or guardianship provides. To the contrary, to date, Supported Decision-Making has not resulted in a large-scale reduction in the amount of conservatorships or guardianships being granted. As with any significant change in legislation (e.g., ABLE Act, SECURE Act, one year elimination of the estate tax, etc.), planners’ concerns about new tools are generally assuaged over time, and, in fact, promote lively dialog and present new opportunities for beneficiaries and settlors. As such, learning about and embracing the concepts of Supported Decision-Making provides an opportunity for planners to further assist their settlor clients and empower beneficiaries to be more self-reliant than ever. Seeking the least restrictive alternative and not limiting anyone’s civil rights through Supported Decision-Making is becoming a fantastic tool to empower persons with disabilities and seniors to make informed decisions and promote their dignity and financial independence. In the end, Supported Decision-Making is about empowerment and communication - two goals which should be paramount for any advocate for people with disabilities and seniors.

Please note that the views and opinions expressed herein are solely those of the authors and do not necessarily reflect the views of True Link Financial Advisors, LLC.

²⁷ CA Welf. and Inst. Code § 21008

Supported Decision-Making

Appendix A

Who Can Be a Supporter		
California	Texas	New York
b) An individual shall not be selected as a supporter or continue as a supporter of an adult with a disability in any of the following circumstances: (1) The adult with a disability previously made, or makes, an allegation against the supporter under the Elder Abuse and Dependent Adult Civil Protection Act. (2) The adult with a disability has obtained, or obtains, an order of protection from abuse against the supporter. (3) The supporter is the subject of a civil or criminal order prohibiting contact with the adult with the disability, or is subject to a restraining order with respect to the adult with a disability. (4) The supporter has been removed as the conservator of the adult with a disability, based upon a finding that they did not act in the conservatee's best interest. (5) The supporter is found criminally, civilly, or administratively liable for abuse, neglect, mistreatment, coercion, or fraud.	Sec. 1357.053. TERM OF AGREEMENT. (a) Except as provided by Subsection (b), the supported decision-making agreement extends until terminated by either party or by the terms of the agreement. (b) The supported decision-making agreement is terminated if: (1) the Department of Family and Protective Services finds that the adult with a disability has been abused, neglected, or exploited by the supporter; (2) the supporter is found criminally liable for conduct described by Subdivision (1); or (3) a temporary or permanent guardian of the person or estate appointed for the adult with a disability qualifies.	(b) An individual who has been chosen by the decision-maker to be a supporter, or who has entered into a supported decision-making agreement as a supporter, shall be deemed ineligible to act, or continue to serve as supporter upon the occurrence of any of the following: 1. a court authorizes a protective order or restraining order against the supporter on request of or on behalf of the decision-maker; or 2. the local department of social services has found that the supporter has committed abuse, neglect, financial exploitation, or physical coercion against the decision-maker as such terms are defined in section 82.02 of this article. (c) A supporter may resign as supporter by written or oral notice to the decision-maker and the remaining supporters. (d) If the supported decision-making agreement includes more than one supporter or is amended to replace the supporter who is ineligible under subdivision (b) of this section or resigns under subdivision (c) of this section, the supported decision-making agreement shall survive for the remaining supporters, unless it is otherwise revoked under section 82.07 of this article. (e) If the supported decision-making agreement does not include more than one supporter, and is not amended to replace the supporter who becomes ineligible under subdivision (b) of this section or resigns under subdivision (c) of this section, the supported decision-making agreement shall be considered terminated.

Appendix B

Scope of Agreement		
California	Texas	New York
(a) An adult with a disability may choose to enter into a supported decisionmaking agreement with one or more chosen supporters. Support may include, but is not limited to, helping the adult with a disability obtain and understand information related to a life decision, communicating the decision to others, and assisting the individual to ensure their preferences and decisions are honored. (b) An adult with a disability's signing of a supported decisionmaking agreement does not preclude the adult with the disability from acting independently of a supported decisionmaking agreement and shall not be used by a court or other entity as evidence of incapacity. This subdivision does not limit the admissibility of evidence pursuant to Section 28 of Article 1 of the California Constitution.²⁸	An adult with a disability may voluntarily, without undue influence or coercion, enter into a supported decision-making agreement with a supporter under which the adult with a disability authorizes the supporter to do any or all of the following: (1) provide supported decision-making, including assistance in understanding the options, responsibilities, and consequences of the adult's life decisions, without making those decisions on behalf of the adult with a disability; (2) subject to Section 1357.054, assist the adult in accessing, collecting, and obtaining information that is relevant to a given life decision, including medical, psychological, financial, educational, or treatment records, from any person; (3) assist the adult with a disability in understanding the information described by Subdivision (2); and (4) assist the adult in communicating the adult's decisions to appropriate persons.²⁹	(a) If a decision-maker voluntarily enters into a supported decision- making agreement with one or more supporters, the decision-maker may, in the agreement, authorize the supporter to provide support to them in making their own decisions in areas they choose, including, but not limited to: gathering information, understanding and interpreting information, weighing options and alternatives to a decision, considering the consequences of making a decision or not making it, participating in conversations with third parties if the decision-maker is present and requests their participation, communicating the decision-maker's decision to third parties if the decision-maker is present and requests their participation, and providing the decision-maker support in implementing the decision-maker's decision.

²⁸ CA Welf. and Inst. Code § 21003

²⁹ TX Est Code § 1357.051

Appendix C

Essential Elements of a Supported Decision-Making Agreement		
California	Texas	New York
(a) A supported decision making agreement shall be written in plain language accessible to the adult with the disability and shall include, but not be limited to, all of the following: 1) A list of the areas in which the adult with a disability requests support. (2) A list of the areas in which the supporter agrees to provide the support. (3) The supporter's agreement that they meet each of the requirements specified in Section 21002. (4) Information advising the adult with a disability about their right to file a report under the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9), including, but not limited to, Sections 15656 and 15657. (5) Information and copies of other supported or substituted decisionmaking documents the adult with a disability has in place, including, but not limited to, powers of attorney, authorizations to share medical or educational information, authorized representative forms, or representative payee agreements.	TX Est Code § 1357.056(a) Subject to Subsection (b), a supported decision-making agreement is valid only if it is in substantially the following form: SUPPORTED DECISION MAKING AGREEMENT.³⁰ My supporter is not allowed to make decisions for me. To help me with my decisions, my supporter may: 1. Help me access, collect, or obtain information that is relevant to a decision, including medical, psychological, financial, educational, or treatment records. 2. Help me understand my options so I can make an informed decision; or 3. Help me communicate my decision to appropriate persons. Y/N A release allowing my supporter to see protected health information under the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) is attached. Y/N A release allowing my supporter to see educational records under the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Sec	(a) A supported decision-making agreement may be in any form consistent with the requirements set forth in this article. (b) A supported decision-making agreement must: 1. be in writing; 2. be dated; 3. designate the decision-maker, and at least one supporter; 4. list the categories of decisions with which a supporter is authorized to assist the decision-maker; 5. list the kinds of support that each supporter may give for each area in which they are designated as a supporter; contain an attestation that the supporters agree to honor the right of the decision-maker to make their own decisions in the ways and areas specified in the agreement, respect the decision-maker's decisions, and, further, that they will not make decisions for the decision-maker; 7. state that the decision-maker may change, amend, or revoke the supported decision-making agreement at any time for any reason, subject to the requirements of section 82.06 of this article; 8. be signed by all designated supporters; and 9. be executed or endorsed by the decision-maker in the presence of at least two adult witnesses who are not also designated as supporters, or with the attestation of a notary public. (c) A supported decision-making agreement may: 1. appoint more than one supporter; 2. authorize a supporter to obtain personal information as described in subdivision (e) of section 82.05 of this article; 3. authorize a supporter to share information with any other supporter or others named in the agreement; or 4. detail any other limitations on the scope of a supporter's role that the decision-maker deems important.

³⁰ https://texaslawhelp.org/sites/default/files/supported_decision-making_agreement_2019_3.pdf

California	Texas	New York
21004. (a) Notwithstanding any other provision of this division, an adult with a disability is entitled to have present one or more other adults, including supporters, in any meeting or discussion, or to participate in any written communication, including, but not limited to, individual planning meetings required by state or federal law, service and care planning meetings, discharge planning meetings, meetings with health care providers and individuals who provide residential services or long-term services and supports, and communications with a bank, financial institution, or financial planner. (b) An adult with a disability may indicate that they wish to have one or more adults attend a meeting or discussion or participate in any written communication through oral statement, gesture, or any augmentative or alternative communication method used by the adult with a disability. (c) A third party may only refuse the presence of one of more adults, including supporters, if the third party reasonably believes that there is fraud, coercion, abuse, or other action by the individuals requested to be included that the third party is required to report pursuant to the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9).		(d) A person, entity, or agency that receives a supported decision-making agreement must honor a decision made in accordance with the agreement, unless the person, entity, or agency has substantial cause to believe the supported decision-making agreement has been revoked, or the decision-maker is being abused, coerced, unduly influenced, or financially exploited by the supporter, or that the decision will cause the decision-maker substantial and imminent physical or financial harm.

Appendix D

Limits on a Supporters Authority		
California	Texas	New York
(d) (1) A supporter shall not coerce an adult with a disability. (2) Unless the supporter has a valid legal authorization to do so and the action is within the scope of their authority, a supporter shall not do either of the following: (A) Make decisions for, or on behalf of, the adult with a disability. (B) Sign documents on behalf of the adult with a disability. (3) A supporter shall not obtain information not reasonably related to matters with which the adult with a disability has requested assistance, and shall not use or disclose information for any purpose other than supporting the adult with a disability. (4) A supporter shall not participate in any life decision in which they have a conflict of interest. This includes, but is not limited to, any decision in which the supporter has a financial or other tangible stake in the outcome.	Sec. 1357.0525. DESIGNATION OF ALTERNATE SUPPORTER IN CERTAIN CIRCUMSTANCES. In order to prevent a conflict of interest, if a determination is made by an adult with a disability that the supporter with whom the adult entered into a supported decision-making agreement is the most appropriate person to provide to the adult supports and services for which the supporter will be compensated, the adult may amend the supported decision-making agreement to designate an alternate person to act as the adult's supporter for the limited purpose of participating in person-centered planning as it relates to the provision of those supports and services.	(b) A supporter is prohibited from: 1. making decisions for the decision-maker, except to the extent otherwise granted in an advance directive; 2. exerting undue influence upon the decision-maker; 3. physically coercing the decision-maker; 4. obtaining, without the consent of the decision-maker, information acquired for a purpose other than assisting the decision-maker in making a decision authorized by the supported decision-making agreement; 5. obtaining, without the consent of the decision-maker, or as expressly granted by the supported decision-making agreement, and accompanied by an appropriate release, nonpublic personal information as defined in 15 U.S.C. § 6809(4)(A), or clinical records or information under subdivision (c) of section 33.13 of this chapter; and 6. communicating a decision-maker's decision to a third-party without the participation and presence of the decision-maker.

Reporting Abuse, Coercion, Undue Influence or Financial Abuse		
California	Texas	New York
(a) A supporter is bound by all existing obligations and prohibitions otherwise applicable by law that protect adults with disabilities and the elderly from fraud, abuse, neglect, coercion, or mistreatment. This division does not limit a supporter's civil or criminal liability for prohibited conduct against the adult with a disability, including liability for fraud, abuse, neglect, breach of fiduciary duty, if any exists, coercion, or mistreatment, including liability under the Elder Abuse and Dependent Adult Civil Protection Act ³¹	REPORTING OF SUSPECTED ABUSE, NEGLECT, OR EXPLOITATION. If a person who receives a copy of a supported decision-making agreement or is aware of the existence of a supported decision-making agreement has cause to believe that the adult with a disability is being abused, neglected, or exploited by the supporter, the person shall report the alleged abuse, neglect, or exploitation to the Department of Family and Protective Services in accordance with Section 48.051, Human Resources Code.³²	§ 82.14 Reporting abuse, coercion, undue influence, or financial exploitation. (a) Any person who receives a copy of or an original supported decision-making agreement and has cause to believe the decision-maker is being abused, physically coerced, or financially exploited by a supporter, may report the alleged abuse, physical coercion, or financial exploitation to adult protective services pursuant to section four hundred seventy-three of the social services law. (b) Nothing in this section may be construed as eliminating or limiting a person's duty or requirement to report under any other statute or regulation.

³¹ CA Welf. and Inst. Code § 21002

³² TX Est Code § 1357.102

Appendix E

Liability of 3 rd Parties		
California	Texas	New York
3958. (a) A person who receives the original or a copy of a supported decisionmaking agreement described in Section 3955 shall rely on the agreement and its authority as presented. (b) A person may rely on known supports used by the adult with a disability other than a written supported decisionmaking agreement as described (in this statute)	Sec. 1357.101. RELIANCE ON AGREEMENT; LIMITATION OF LIABILITY. (a) A person who receives the original or a copy of a supported decision-making agreement shall rely on the agreement. (b) A person is not subject to criminal or civil liability and has not engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a supported decision-making agreement.	82.12 Limitations on liability. a) Subdivisions (b), (c) and (d) of this section shall apply only to decisions made pursuant to supported decision-making agreements created in accordance with this article which are signed by a facilitator and following a recognized supported decision-making facilitation or education process, as prescribed by regulations governing the facilitation and education processes promulgated by the office for people with developmental disabilities. (b) A person shall not be subject to criminal or civil liability and shall not be determined to have engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance on a decision made by a decision-maker pursuant to a duly executed supported decision-making agreement created in accordance with this article. (c) Any health care provider that provides health care based on the consent of a decision-maker, given with support or assistance provided through a duly executed supported decision-making agreement created in accordance with this article, shall be immune from any action alleging that the decision-maker lacked capacity to provide informed consent, unless the entity, custodian, or organization had actual knowledge or notice that the decision-maker had revoked the supported decision-making agreement, or that the supporter had committed abuse, physical coercion, undue influence, or financial exploitation with respect to the decision to grant consent. (d) Any public or private entity, custodian, or organization that discloses personal information about a decision-maker in reliance on the terms of a duly executed supported decision-making agreement created in accordance with this article, to a supporter authorized by the terms of the supported decision-making agreement to assist the decision-maker in accessing, collecting, or

		obtaining that information under subdivision(e) of section 82.05 of this article, shall be immune from any action alleging that it improperly or unlawfully disclosed such information to the supporter unless the entity, custodian, or organization had actual knowledge that the decision-maker had revoked such authorization. (e) This section may not be construed to provide immunity from actions alleging that a health care provider, or other third party, has done any of the following: 1. caused personal injury as a result of a negligent, reckless, or intentional act; 2. acted inconsistently with the expressed wishes of a decision-maker; 3. failed to provide information to either decision-maker or their supporter that would be necessary for informed consent; or 4. otherwise acted inconsistently with applicable law. (f) The existence or availability of a supported decision-making agreement does not relieve a health care provider, or other third party, of any legal obligation to provide services to individuals with disabilities, including the obligation to provide reasonable accommodations or auxiliary aids and services, including, but not limited to, interpretation services and communication supports to individuals with disabilities under the federal Americans with Disabilities Act (42 U.S.C.§12101).
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