STETSON UNIVERSITY

2025 National Conference on Special Needs Planning and Special Needs Trusts

Supported Decision-Making

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Supported Decision-Making

American Civil Liberties Union (ACLU):

"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."

Effective:

- Canada/British Columbia
  - *Representation Agreement Act*
- **United Nations Convention on the Rights of Persons with Disabilities**
- Australia, Ireland, Israel
- Sweden, Bulgaria, Croatia, Peru
- 20+ states

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Supported Decision-Making

National Guardianship Association (NGA):

- Guardianship should be utilized only when lesser restrictive supports are not available.
- …guardianship must be limited, allow the maximum retention of individual rights, and be customized to the individual needs of the person under guardianship.
- Under all circumstances, efforts should be made to **encourage every person under guardianship to exercise his/her individual rights** …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**.
- 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.

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Supported Decision-Making:

Goals

- Empowerment of person making the decision (Decider)
  - "least restrictive alternative"
  - assessment of all facets of a decision
  - less costly
  - more person-centered planning opportunities
- Limit guardianship/conservatorship appointments
  - "most restrictive"
  - more costly
  - O'Connor v. Donaldson, 422 U.S. 563 (1975): "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…"

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Supporters

- Selected by Decider
- Put in a position of trust (friend, family member, professional) - see **Appendix A in paper** for list of who may serve
- Tasked with information gathering and communication with Decider **not** surrogate decision-maker
- Translator role:
  - plain language
  - visual or audio communication tools
  - extra time to discuss Decisions and implications
  - list of pros and cons
  - role-playing activities
  - attending appointments and meetings
  - note taking

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Supporters

Ineligible to Serve:

- CA & NY: listed in statute
  - Decider subject of protective/restraining order against supporter
- CA: liable for abuse, neglect, mistreatment, coercion, fraud
  - NY: similar, but as found by local dept. of social services
  - TX: similar but as found by Department of Family & Protective Services
- CA: cannot sign documents for Decider unless legally authorized
- See **Appendix D in paper** for limits on Supporter authority

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Supported Decision-Making Inventory System

- Holistic assessment and reference tool
- 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)
  - Interview process with Decider
  - Collects three inventories focusing on Decider's support needs:
    - SDM Personal Factors Inventory: Decider's competency, communication preferences, goals
    - SDM Environmental Demands Inventory: evaluates complexity and nature of decision in key areas - Health, Legal, Financial, Social, Independent/Community Living - and assesses whether there are opportunities or supports available for such
    - SDM Autonomy Inventory: measures Decider's current level of autonomy

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Supported Decision-Making Inventory System

Benefits of a SDMIS:

- Customized written plan for support of a Decider
- Identifies areas where SDN is needed
- Assists in creating short- or long-term plans and types of assistance necessary
- Provides a guide for multiple Supporters as different types of decisions may require different Supporters
- Tracks decisions and their outcomes for future use
  - Decision-making is a practiced skill!
- Re-evaluates a Decider's evolving needs and life circumstances.=

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Supporter Decision Making Agreements

- Best practice: formalize in writing
  - Many states do not require as such in writing
  - Formalized agreement provides assurance to third parties
  - May assist with malpractice/fiduciary liability if formally executed
- Not a contract, it's an authorization
- Generally different than a durable POA in that it goes into effect immediately
- Limited:
  - NY: "If a decision-maker voluntarily enters into a supported decision-making agreement with one or more supporters, the decision-maker may…authorize the supporter to provide support to them in making their own decisions…, including, but not limited to: gathering information, understanding and interpreting information, weighing options and alternatives…, considering the consequences of making a decision or not making it, participating in conversations with third parties…, communicating the decision-maker's decision to third parties …, and providing the decision-maker support in implementing the decision-maker's decision." (State of New York Senate Bill S7107B, Cal. No. 540, 2021-2022 Sessions, June 1, 2021)
- Form:
  - TX, NY and many other states: in statute *(TX: or must be substantially similar to statute)*
  - ACLU - sample form
  - NY: form must be reviewed by a "facilitator" (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)

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Supporter Decision Making Agreements

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.

See **Appendix C in paper** for the Essential Elements of a SDM Agreement

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Conflict of Interest

- Occurs when any person (e.g., a fiduciary) is in a position to personally benefit from their actions made in their appointed capacity
- Putting own needs/desires ahead of beneficiary
- Self-dealing

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." (TX Est Code § 1357.0525

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." (CA Welf. and Inst. Code § 21002(4))

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Liability

California: criminal or civil liability for breach
"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." (CA Welf. and Inst. Code § 21002(a)

Texas: "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. (TX Est Code § 1357.102

See **Appendix D in paper** for more information on Reporting Abuse, Coercion, Undue Influence or Financial Abuse

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Multidisciplinary Issues

SDM inherently involves multidisciplinary focus across social work, finance, criminal justice, psychology, fiduciary administration, public benefits, etc., to include consultations with:

- Social workers
- Geriatric care managers
- Case managers
- Discharge planners
- Financial advisors
- CPAs
- Agents under POA
- Doctors

TX Model Rule 1.05

(a) "Confidential information" includes both "privileged information" and "unprivileged client information."

(b) "...a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm."

(a) A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

(3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client."

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Multidisciplinary Issues

California: "A third party may only refuse the presence of one of more adults, including supporters, if the third party <u>reasonably believes</u> 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)." [emphasis added] (CA Welf. and Inst. Code § 21004(c))

Privilege:

- many states recognize an exception to the presumption that a third-party presence invalidates the attorney-client privilege when a third person is present
- 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
- 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

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Multidisciplinary Issues

Case Study:

- 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)
- 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

Potential Solutions:

- Petition court
- ADR
- Attorney letter of opinion
- Professional opinion letter
- Non-judicial Settlement Agreement

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Multidisciplinary Issues

Third Party Liability:

Texas: good faith standard imposed on 3rd parties - "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." (TX Est Code § 1357.101)

New York: "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." (State of New York Senate Bill S7107B, Cal. No. 540, 2021-2022 Sessions, June 1, 2021)

See **Appendix E in paper** for more information on Third Party Liability

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Overview

Duty of Loyalty

- Act in the best interest of the person you serve
- "the essence of the fiduciary relationship" (J.C. Shepherd, *The Law of Fiduciaries 48I* (1981))

Duty of Care/Prudence

Act reasonably as any prudent person would

- Note: When someone has held themselves out as a professional in certain areas, a higher standard of care applies (esp. in litigation).
- *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."

Duty to Account

Accountings/reportings to beneficiaries, remainder persons, interested parties, courts, public benefits agencies, etc.

fi·du·ci·ar·y (fi-dōō-shē-ĕr-ē): n. "One, such as an agent of a principal or a company director, that stands in a special relation of trust, confidence, or responsibility in certain obligations to others."

Latin: fiduciarius, from fiducia – "trust"

Ramsey v. Boatmen's First Nat'l Bank of K.C., N.A., 914 S.W.2d 384, 387 (Mo.App.W.D.1996) —

Trustees are fiduciaries "of the highest order" and are required to exercise "a high standard of conduct and loyalty in administration of [a] trust." The duty of loyalty "precludes self-dealing," which in most cases would be considered a "breach of fiduciary duty."

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Drafting

Types of Arrangements:

- SNT = spendthrift trust with trustee sole discretion
- SDM = promotes beneficiary independence

Preservation of public benefits is only one reason for an SNT:

- Undue influence
- Fraud protection
- Lack of beneficiary financial awareness
- Beneficiary may have never been self-reliant

Consider settlor intent and the need for flexibility!

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Case Study:

- Settlors (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.
- SDMs and trustee are directed to design a distribution plan collaboratively
- Daughter initially makes inappropriate financial decisions
  - "dignity of risk"

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Trust Advisory Committee

- Promotes settlor intent and beneficiary involvement
- May weigh in on discretionary distributions
- May be tasked with development of distribution plan
- Supporters may act as part of Committee
  - Best Practice: identify any conflicts of interest (e.g., remainderperson, housemate, etc.)

From 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."

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Trust Protector

- Promotes settlor intent and beneficiary involvement
- May remove trustee
- May amend trust document for changes in law, public benefits, etc.
- May weigh in on discretionary distributions
- Supporters may act Trust Protector
  - Best Practice: identify any conflicts of interest (e.g., remainderperson, housemate, etc.)

From Bradley J. Frigon, JD, LL.M (tax), CELA, CAP:
"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 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."

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Trustee/Co-Trustee

- Promotes settlor intent and beneficiary involvement
- Sole authority for discretionary distributions
- Supporters may act Trustee/Co-Trustee
    - Best Practice: identify any conflicts of interest (e.g., remainderperson, housemate, etc.)

Case Study:

- 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.

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Emerging Research

- Prominent research by the Burton Blatt Institute at Syracuse University, the Kansas University Center on Developmental Disabilities, and the Quality Trust for Individuals with Disabilities studying impact on Decider's:
    - level of self-determination
    - quality of life
    - community participation and integration
    - family dynamics
    - daily-living outcomes
- Jenny Hatch Justice Project
- U.S. Administration on Community Living - National Resource Center on Supported Decision-Making
- **The Arc of Texas**

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Resources:

1. *Access to Information Under Supported Decision-Making Statutes*: American Bar Association
2. *Jenny Hatch Justice Project*
3. *National Resource Center on Supported Decision-Making*: U.S. Administration on Community Living -
4. *Fact Sheet: Alternatives to Guardianship: Supported Decision-Making Agreements*: The Arc of Texas
5. *Supported Decision-Making*: Partners Resource Network (video)
6. *Supported Decision-Making in the Lone Star State*: NYU Law Review

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Case Law

In the Matter of the Accounting of J.P. Morgan Chase Bank, N.A., and H.J.P. as Co-Trustees of the Mark C.H. Discretionary Trust of 1995 v. Marie H., 956 N.Y.S.2d 856 (N.Y. Surr. Ct., 2012).

Trustee's affirmative duty to be proactive in researching, documenting and providing for SNT beneficiary's needs.

- Third-party discretionary trust for the benefit of young man on the autism spectrum living in a group home
- Neither co-trustee (corporate co-trustee and attorney co-trustee) had visited beneficiary in five years.
- Court determined that Mark lacked any type of advocacy for his ongoing needs, save $3,525 expended from the trust for a care manager. The vast majority of the distributions from Mark's trust were fees for the trustee and their counsel.
- Trustee's "excuse for inaction was its lack of institutional capacity to ascertain or meet the needs of this severely disabled…young man."
- Trustee's "failure to fulfill their obligations should result in denial or reduction of their commissions for the period
- of inaction."
- Highly publicized in The Village Voice

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Thank You!

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