

Supported Decision-Making:

A Critical Analysis



What Public Officials, Professionals,
Advocates, and Families Need to Know

Reducing Risks and Limiting Liability

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Overview

Powers of attorney and supported decision-making agreements may be attractive alternatives to guardianship – for those who have capacity to enter into contracts. Such arrangements may be viable options for people who understand the terms and conditions of the documents they are signing – *if* thorny issues such as undue influence and conflict of interest are avoided. But those are big *IFs*.

Supported decision-making has great potential but also poses great risks. Because supported decision-making arrangements generally occur outside of the judicial system, they do not have the type of monitoring mechanisms that are built into guardianship proceedings.

Judges and legislators who establish or implement public policy should insist on procedural protections for supported decision-making or powers of attorney involving vulnerable adults – protections that minimize the risks of abuse, exploitation, undue influence, and conflicts of interest.

Lawyers, doctors, and other professionals who are called upon to create or who rely on these extra-judicial legal instruments for important medical, financial, or other transactions should use due diligence to ensure that the rights of seniors, people with disabilities, and other vulnerable adults are protected. Supported decision-making agreements should enhance their rights, not diminish them.

Families and agencies that care for seniors and people with disabilities should make sure that such adults have the legal capacity to enter into supported decision-making agreements and powers of attorney. They should consider filing a guardianship petition to have these arrangements evaluated and endorsed by a court as a less restrictive alternative to guardianship. With judicial approval, the alternative arrangements can receive legal recognition and the guardianship petition can be dismissed. In effect, the court would be entering a declaratory judgment that the agreements signed by the respondent are valid.

Existing law should be able to accommodate such a procedure. But if not, then courts should adopt new rules or the legislature should pass a new law to provide a procedure that gives supported decision-making arrangements some type of official scrutiny when adults with questionable capacity are parties to such legal documents. Without judicial or administrative review of powers of attorney or supported decision-making agreements, the rights of vulnerable adults are left to chance. That is a risk that public policy should not allow.

To reiterate, powers of attorney and supported decision-making agreements are great options for people who have the capacity to contract at the time the documents are signed – so long as the transactions do not involve undue influence or conflicts of interest. But for people with questionable capacity, procedures should be developed to reduce or eliminate the risk of abuse or exploitation of seniors, people with disabilities, or other vulnerable adults.

Judges, legislators, and professional associations should not give their blessing to SDM as an alternative to guardianship unless these issues are addressed in a responsible manner. If SDM or powers of attorney are explored prior to the filing of a guardianship petition, the adult in question should have *independent* counsel who should review the documents and seek a professional evaluation of the client's capacity to contract in order to ensure that the process has integrity.

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by Thomas F. Coleman

A political movement promoting supported decision making as an alternative to guardianship has been building strength and gaining momentum for several years. It has been the topic of discussion at many national conferences and has gained international attention through the United Nations.

While the term “supported decision-making” or “SDM” for short does not have an universally accepted legal definition, there does seem to be an underlying principle at its foundation. The principle is that, with enough supports and services, every person has the capacity to make major life decisions. Many SDM advocates flatly reject the notion of legal incapacity. The most ardent SDM proponents want to see guardianship laws repealed and the word “incapacity” removed from statutes.

Some SDM proponents, on the other hand, are not quite so strict in their political philosophy. They believe there is a place for guardianship in the American legal system for a very small segment of the population that obviously cannot make even the most basic decisions. This would include people in a coma or those who lack the capacity to understand even basic concepts.

However, regardless of the percentage of SDM proponents who are extreme or who are more moderate in their beliefs, conversations about supported decision-making are occurring in state houses throughout the nation. Washington is probably the most recent state to consider the concept of SDM as part of an official review of its guardianship system.

A better understanding of supported decision-making can be gained by contrasting it with the legal alternatives of independent decision-making and substituted judgment.

Independent decision-making is a process used by adults who have the capacity to make choices without support or assistance from anyone else. Substituted judgment occurs when someone appointed by a court, usually a guardian, substitutes his or her judgment for a person judged to lack capacity to do so. A middle ground – supported decision-making – involves someone helping an adult to make a decision, but with the ultimate choice left to the adult.

Generally there is no guardian or court proceeding involved in a supported decision-making arrangement. It is accomplished through informal networks of support or private contractual agreements in which the adult selects one or more persons to be an SDM facilitator or support person. From a lay person’s perspective, SDM is like the “privatization” of guardianship.

Supported decision-making in Washington is being reviewed by the Working Interdisciplinary Network of Guardianship Stakeholders (WINGS). This is an advisory body created by the Washington Supreme Court. Supported decision-making has been made a priority by the leadership of WINGS and will be the subject of two breakout sessions at the WINGS conference on March 17, 2016.

The legal, social, and personal implications of

promoting supported decision-making as an alternative to guardianship are significant. In some ways, such a shift may be comparable in significance to the privatization of Social Security or changing Medicare from an entitlement system operated by the federal government to a voucher system administered through block grants to the states. In guardianship there are procedures that call for at least some level of accountability and oversight. In contrast, SDM relies on the good will of family members of the person needing support.

The Disability and Abuse Project of Spectrum Institute is concerned that SDM increases the risk of abuse and exploitation of vulnerable adults unless there are significant procedural protections built into the process of creating and implementing SDM agreements. Guardianship may have its problems, but at least it includes checks and balances and some degree of accountability to a neutral and objective official – a judge. SDM generally operates without any public scrutiny and without monitoring by a neutral third party.

The purpose of this article is to put a spotlight on potential problems associated with supported decision-making – issues that need to be considered by judges, legislators, professionals such as lawyers and doctors, service providers, advocates for seniors and people with disabilities, families of those in need of SDM or guardianship, and adults who may be in need of help.

This article is the most recent in a series of essays published by Spectrum Institute about supported decision-making. Those essays were written to add a dimension to a national conversation about SDM that appeared to be lacking – a critical analysis of the legal and ethical implications of using SDM as an alternative to guardianship.

Spectrum Institute is neither an opponent of nor a proponent for supported decision-making. Its Disability and Guardianship Project and Disability and Abuse Project simply want the pros and the cons, the risks and the benefits, to be objectively evaluated by public officials and professionals before any major policy decisions are made.

The judicial and legislative branches of government are accustomed to reviewing both sides of an issue before major decisions are made. A Supreme Court receives briefings on all sides of an issue. A legislative committee holds public hearings at which it expects to hear testimony from those supporting and opposing a bill.

Spectrum Institute is concerned that in places such as Washington State, where supported decision-making is being seriously considered as an alternative to guardianship, the policy conversation has not included an exploration of the risks and liabilities associated with SDM. This essay attempts to fill that informational void.

Guardianship v. Supported Decision-Making

A guardianship proceeding is initiated by a petition filed by concerned party in order to bring to the attention of the court the potential lack of capacity of an individual to make major life decisions. A petition is filed because the petitioner has reason to believe that legal intervention is necessary in order to protect the adult in question.

In response to the petition, the court appoints a guardian ad litem (in some states a court investigator) to evaluate the situation and advise the court as to whether the respondent does or does not have capacity to make financial, medical, residential, educational, vocational, sexual, marital, and social decisions. A wide range of decision-making abilities are considered by the guardian ad litem and the court. One of the issues is also whether a less restrictive alternative would better serve the needs of the adult in question. Supported decision-making might be one such alternative.

It appears that WINGS is not focusing on supported decision-making in the context of an ongoing guardianship proceedings – as a less restrictive alternative – but rather on SDM as an alternative that would avoid the need to even file a guardianship petition. The primary focus of WINGS seems to be on SDM as an extra-judicial mechanism.

It is one matter for SDM to be evaluated during a

guardianship proceeding, but quite another for it to be established entirely as a private contractual arrangement. The exploration of SDM during a legal proceeding minimizes risks to the respondent and may eliminate potential liability to everyone involved if the SDM arrangement receives the approval of the court. In contrast, establishing a supported decision-making arrangement outside of a court proceeding increases the risk of abuse or exploitation of the adult in question.

Another feature that distinguishes SDM from guardianship is the scope of the decisions covered by either legal construct. Extra-judicial arrangements, such as supported decision-making agreements or powers of attorney, are usually limited to financial and medical issues. Parents or relatives concerned about the well-being of a vulnerable adult, may want restrictions on social, sexual, or marital decisions of their loved one. Those concerns can be addressed in a guardianship proceeding but not with SDM.

By definition, supported decision-making agreements do not limit or restrict the rights of the adult in question. They merely provide support for decision-making. The adult remains free to engage in risky cosmetic medical procedures, or hang out with unsavory people, or have sexual relations with potentially exploitive individuals, or even marry someone on the spur of the moment. If the only legal mechanism in place is an SDM agreement, then parent, relatives, or other concerned parties have no authority to interfere with bad or risky decisions or activities of the adult.

Contrasting POA with SDM

A discussion of supported decision-making often strays into a discussion of powers of attorney (POA). Such a conversation is mixing apples and oranges. These are two distinct legal instruments, each of which is premised on a different dynamic.

In a power of attorney, one person (principal) delegates authority to another person (agent) to make decisions on his or her behalf. Once the document has been signed and notarized, it is the

agent who is making the financial or medical decisions, not the principal. The principal can always revoke the document, but until that occurs, the agent is making the decisions in transactions with banks, realtors, landlords, medical providers, or other businesses.

In contrast, when a SDM agreement is signed, it is always the principal who is making the decisions. The designated SDM facilitator does not make decisions. He or she only helps the principal with the decision-making process. The ultimate decision is always made by the principal.

Capacity to Contract

Proponents of supported decision-making often gloss over the issue of capacity to contract when discussing powers of attorney or SDM agreements. Family members may be left with the impression that all they have to do to gain authority to make financial or medical decisions for their loved one is to have the adult sign a power of attorney. If it were only that easy! Remember the adage: "If it seems too good to be true, it probably is."

A power of attorney is a contract. The principal is delegating authority to another person (agent) to make financial or medical decisions on his or her behalf. The agent agrees to act on behalf of the principal. Implied is a covenant of good faith and fair dealing by the agent. The agent has a fiduciary relationship to the principal.

Any contract is voidable if a party lacks capacity to enter into it. Capacity requires that the principal understands the terms of the agreement and knowingly and voluntarily executes it. The issue of capacity is determined on the date the power of attorney was signed, not on the date of the transaction being done by the agent.

For an elderly person who signed the document when he or she clearly had capacity, there is no problem. But if it was signed when capacity was questionable, the power of attorney and the ultimate transaction both have questionable validity. The same holds true for an adult with an intellec-

tual or developmental disability. If his or her capacity to contract was questionable when the document was signed, then the document and the ultimate transaction have a legal cloud hanging over them.

In contrast, medical and financial transactions made by a guardian appointed by the court are solid and cannot be questioned. Parents and relatives who want security that transactions done on behalf of their loved one are legally solid, have that peace of mind in a guardianship.

In terms of financial transactions such as redirecting benefits payments to a different bank account or adding someone to a bank account as a signer who can withdraw funds, those are also matters that require capacity to contract. Those with questionable capacity who engage in such transactions may be implicating others in something that could ultimately backfire and cause unpleasant legal and financial consequences.

The issue of capacity to contract is not something that should be taken lightly.

Informed Medical Consent

A medical provider may not perform medical services on a patient without his or her informed consent. The provider must explain to the patient the risks and benefits of the procedure so that the patient has the information needed to make a reasoned decision.

When the patient is a child, the decision is made by a parent or legal guardian. But when the patient is an adult, the decision is made by the patient. The only exceptions would be when the patient is under an order of guardianship or when the patient is mentally incapacitated to the degree that he or she could not make an informed decision.

When a medical provider is presented with a power of attorney, the provider may not simply allow the designated agent to make decisions for the patient without due diligence. The provider must determine if the patient is currently able to make in-

formed decisions. If so, the provider must accept the decisions of the patient, not the agent. If the provider determines the patient lacks the capacity to give informed consent, the provider should decline to accept the authority of the agent to make decisions if there is reason to believe the patient lacked capacity to contract at the time the power of attorney was executed.

Take, for example, the situation of a doctor who knows a patient who has had questionable capacity for a long time. Perhaps the patient has an intellectual disability and the doctor knows that the condition is not recent. The doctor may have a duty to inquire further into the issue of capacity in order to avoid relying on the consent of an agent who lacks authority because the power of attorney is not valid. An order of guardianship, even a guardianship limited solely to the issue of medical decisions, would avoid this problem.

Conflict of Interest

Some parents or relatives have taken their loved one to an attorney for advice on supported decision-making agreements or powers of attorney. Due to his or her condition, the senior or person with a disability usually does not seek out the attorney or initiate the meeting. He or she is brought to a lawyer selected by the relative.

A lawyer may not represent two parties to the same transaction. The lawyer has a duty of undivided loyalty to a client. Divided loyalties are not permitted by professional ethics. The same is true for confidentiality.

While the ethical duties of loyalty and confidentiality may be waived by a client, the client must have the capacity to waive these protections. To be valid, such a waiver must be knowing and voluntary. Under these circumstances, a lawyer would have reason to doubt the ability of the senior or person with a disability to knowingly waive the conflict of interest inherent in the lawyer representing both parties to the transaction.

Lawyers should be very careful about giving

advice to a person with questionable capacity to sign a document that gives medical or financial power to another person. If that authority is misused by the agent, the lawyer may wind up as a defendant in a malpractice lawsuit or in a disciplinary proceeding with the bar association.

Undue Influence

By definition, people with cognitive and communication disabilities may be subject to undue influence. While we are all influenced to some extent by the opinions and actions of others, people with conditions that affect their cognitive functioning are more vulnerable to being influenced by others. Normal influence can cross the line and become *undue* influence very easily. The risk of this happening is even greater when the adult is dependent on the person doing the influencing.

Legal documents signed by an adult with questionable cognitive abilities can be challenged at a later date. Perhaps another family member wants to challenge a document arranged by a sibling or parent or child. It is not unusual for a power of attorney to be challenged for these reasons. An order of guardianship, however, avoids the prospect of a transaction being voided because it was premised on a power of attorney executed by a vulnerable adult as a result of undue influence.

Criminal Law Issues

Missing from discussions of guardianship versus supported decision-making is the matter of criminal law. There are potential penal implications for vulnerable adults as well as their family members that should be considered in a discussion of whether to avoid a guardianship.

One issue, especially for young adults with intellectual and developmental disabilities, is the issue of sexual vulnerability. A guardianship proceeding can address the issue of whether the respondent has the capacity to consent to sexual relations. If the answer is yes, and the adult is placed under guardianship, the issue of consenting sexual relations can be addressed in the guardianship care plan. If

the answer is no, the court can declare the adult to lack capacity to consent to sex. This will give the guardian a degree of authority to restrict sexual encounters.

An order declaring incapacity to consent to sex has other ramifications. In the event that the adult engages in inappropriate sexual behavior, and gets in trouble with the law, a guardianship order may be used to help eliminate criminal liability due to lack of criminal intent, or to reduce culpability at sentencing. A person with an SDM agreement but no guardianship would not have this defense tool available during a criminal prosecution.

An incapacity order could also help minimize the risk of sexual exploitation by care providers. Without such an order, a provider may argue that sexual relations with the adult were consensual. With a guardianship order in place, such an argument by a care provider would be untenable if the provider knew that the order included a finding of incapacity to consent to sex.

There are also criminal law implications for parents and relatives who may want to control the social or sexual behavior of their loved one. With a guardianship order giving authority to control social, sexual, medical and other decisions, a guardian could engage in behavior that could otherwise be prosecuted as a crime.

For example, a relative who cares for a dependent adult may want to take the adult to the dentist. The adult may resist. If the relatives forces them to go, this could be considered a kidnapping. Or consider a situation where a dependent adult wants to go to a motel for an encounter with a boyfriend or girlfriend, presumably for sex. Without a guardianship order, the relative would have no authority to prevent this from occurring. Confining someone to home or restricting their movement could be considered false imprisonment.

Supported decision-making agreements, or powers of attorney, do not address these issues. Actions of a guardian, however, are unlikely to be viewed by police or prosecutors as criminal offenses.

No Ongoing Oversight

Once an order of guardianship is granted, the legal proceeding remains open indefinitely. If a lay guardian is appointed – perhaps a relative – the guardian knows that he or she is responsible to the court. If a certified professional guardian is appointed, there is accountability to the court as well as to the professional licensing agency.

In some states, there are periodic investigations and reports to the court for a guardianship. In California, for example, a court investigator does a home visit and interviews the conservatee every two years. A biennial report is filed with the court.

Any interested party can file an ex parte complaint with the court at any time while a person is under an order of guardianship. If allegations of wrongdoing are reported, the court would initiate an investigation. In contrast, if there are only powers of attorney or an SDM agreement, there is no monitoring of the situation by any outside agency. Everything is handled “in house,” so to speak. If a relative is named as the agent or SDM facilitator, the relative is responsible to no one.

SDM within a Guardianship Proceeding

One option that should be considered by proponents of supported decision-making is having the SDM arrangements approved by a court order. The family could file a petition for guardianship. The petition could allege that the respondent *may* be a person in need of a guardianship.

The capacity of the adult could be evaluated by an expert prior to filing the petition. In addition to the capacity evaluation, an SDM plan could be presented to the court along with the petition. The court would have the plan evaluated by a guardian ad litem and, if the arrangements seemed to be satisfactory, the court could dismiss the petition on the ground that a less restrictive alternative to guardianship is viable.

Since the plan would have been examined by the guardian ad litem as well as by an attorney ap-

pointed by the court to represent the respondent, issues such as undue influence, conflict of interest, capacity to contract, and the like, would be avoided.

This procedure is probably available under current law. However, to ensure uniform operation of the law throughout the state, passage of new legislation or adoption of new court rules on this subject may be desirable.

Conclusion

Proponents of supported decision-making, public officials who are considering SDM as an alternative to guardianship, and professionals who will have to deal with the details of SDM in actual practice, are encouraged to read the reference materials listed on the next page. These materials were developed as a result of extensive research – often in response to proposals advanced by those who had not thoroughly considered the potential risks of SDM as well as the potential benefits.

Before the Washington Supreme Court and the Washington State Legislature consider supported decision-making as an alternative to guardianship, officials should evaluate the views of those who offer a critical analysis of supported decision-making as a new legal construct.

Seniors and people with intellectual and developmental disabilities deserve a thorough review of supported decision-making before something this significant and this new is given official approval.

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References

National Focus

- Supported Decision-Making is a Right That Needs to Become a Reality [Exhibit 1](#)
- Supported Decision-Making: Implications for Seniors [Exhibit 2](#)
- Supported Decision-Making: Adverse Effects on Rape Prosecutions [Exhibit 3](#)
- The Effect that Senate Ratification of the U.N. Convention on Disability Rights May Have on Current Guardianship Laws [Exhibit 4](#)

Supported Medical Decision-making

- Framework for Model Legislation on Medical Supported Decision-Making Agreements [Exhibit 5](#)
- A Review of “Model Legislation” for Supported Medical Decision-Making Agreements: The Defects are in the Details [Exhibit 6](#)
- Original Version of Model Legislation for Supported Medical Decision-Making Violates Medical Ethics [Exhibit 7](#)
- Original Version of Model Legislation for Supported Medical Decision-Making Violates the Supremacy Clause [Exhibit 8](#)
- Model Legislation Revised to Address Concerns of Spectrum Institute [Exhibit 9](#)

California Focus

- Principles of Supported Decision-Making Already Exist in California Law [Exhibit 10](#)
- Should the Limited Conservatorship System be Improved or Eliminated Altogether: Some Concerns about Supported Decision-Making [Exhibit 11](#)

Nevada Focus

- An Analysis of AB128: Bill’s Passage Would Diminish the Rights of People with Intellectual Disabilities [Exhibit 12](#)
- Clinical Concerns about AB 128: A Medical Power of Attorney for People with Intellectual Disabilities [Exhibit 13](#)
- A Response to Testimony About AB 128 [Exhibit 14](#)
- AB 128 Power of Attorney: Liability Concerns for Medical Providers [Exhibit 15](#)
- Concerns for Nevada Medical Providers: Use of AB 128 May Result in ADA Liability and Loss of Immunity [Exhibit 16](#)
- AB 128 Medical Power of Attorney Form May not be Understood by Most Adults with Intellectual Disabilities [Exhibit 17](#)