

# Principles of Supported Decision Making Already Exist in California Law

by Thomas F. Coleman

People who are calling for the repeal of a state-regulated system of limited conservatorship because they favor a private sector system of supported decision making, are not looking at the full picture. Supported decision making mechanisms, as an alternative to conservatorship, are already a preferred option under California law.

As explained below, the real complaints should not be focused so much on the law itself, but rather with the administration of the laws by those who are entrusted to enforce them. This would include Regional Centers, judges, court investigators, self-help clinics, and court-appointed attorneys.

The Lanterman Act declares that people with developmental disabilities are entitled to the same constitutional and civil rights protections as any other American. The California Constitution affords all people the right to freedom of speech, the right to privacy, equal protection, and due process. There are no exceptions for people with disabilities.

The Americans with Disabilities Act (ADA) requires people with disabilities to be afforded reasonable accommodations by government agencies and private businesses (such as attorneys and service providers). To the extent that any California law would conflict with the ADA, federal law prevails.

About 30 years ago, the Probate Code was amended to create a new form of protection for vulnerable adults – one that was more narrowly tailored to provide a blend of protection and independence than the general conservatorship system. A new system for *limited* conservatorships was codified into law.

That new system presumes that all adults have capacity to make decisions on all matters. This would be called *presumed* capacity. Anyone who wants to challenge this presumption, by filing a petition for a limited conservatorship must prove, by clear and convincing evidence, that the adult in question in fact lacks capacity. Such a showing

must be made on each and every aspect of life that the petitioner is seeking authority to make decisions over for the adult: medical, financial, education, residence, social, sexual, and marriage.

The law stipulates that if a less restrictive alternative to conservatorship is available and workable, it must be used. This is where supported decision making arrangements would come into play.

The petitioner seeking conservatorship has the burden of proof that such alternatives have been explored and factually show why they won't work.

The attorney appointed to represent the adult is supposed to protect his or her rights and should insist that the petitioner meet the burden of proof on the need for a conservatorship because of lack of capacity in one or more areas, and why supported decision making mechanisms won't work.

The Regional Center is required to conduct an evaluation of the adult and file a report with the court. This report should state whether alternatives to conservatorship have been explored and why they are not a realistic option.

A court investigator is supposed to visit the home, interview the adult, review Regional Center evaluations and other medical or psychological records, and determine whether other options are available (such as medical and financial powers of attorney) and whether the adult in fact has capacity, with appropriate ADA accommodations and supports, to understand and execute such documents.

Based on all the evidence, a judge must find that conservatorship is the least restrictive alternative, and if so, must take the wishes of the adult into consideration in appointing a conservator.

The law requires the conservator to always consider the wishes of the adult when making decisions.

California law already allows for, and gives preference to, supported decision making mechanisms. Limited conservatorship is supposed to be a last resort, not a first choice.

The problem lies more with the administration of the law than the policies of the law themselves.

Regional Centers are not adequately helping their clients explore and execute supported decision making options.

Court-appointed attorneys are not being properly educated on their duty to demand that lesser restrictive alternatives be seriously considered and only be rejected because the client lacks capacity-in-fact to execute them or they are not a practical option.

Court investigators are not devoting sufficient time to cases to fully explore supported decision making alternatives. Due to budget constraints, these investigators either do not conduct investigations at all or they may not be doing a thorough job.

Judges are so pressed for time and have such heavy case loads, they are not insisting that all participants – Regional Centers, court-appointed attorneys, petitioners, and court investigators – fully explore the alternatives to conservatorship and demonstrate with evidence that they have done so.

The remedy for these deficiencies is not to push for the repeal of limited conservatorship laws but to insist on better monitoring and more funding.

Having said all of this, there is one area in which reform of the system, including more funding and some quality assurance oversight, will not satisfy proponents of repeal-and-replace. That has to do with the paradigm of the system itself.

The current statutory scheme is premised on legal concepts of presumptive-capacity and capacity-in-fact. These are grounded in a medical-psychological-legal framework.

Current law presumes that all adults have capacity to make all decisions. Someone petitioning a court to establish a conservatorship has the burden of proof to show that the adult lacks capacity-in-fact.

The factual basis for any incapacity is dependent on

medical and psychological evaluations and scientific knowledge about the factual capabilities of individuals to understand concepts and to make informed decisions on matters such as medical procedures or financial transactions.

Under current law, judges look to the expert opinions of medical practitioners, psychiatrists, or psychologists about the abilities of the adult to make informed decisions in any or all of the seven areas under inquiry. Other evidence on this issue would be admissible as well, such as the observations and experiences of family members, neighbors, friends, teachers, and service providers.

Proponents of supported decision making oppose this evaluation process. They want a paradigm shift from presumptive-capacity to irrefutable-capacity.

Under this new paradigm, every adult, with enough support, is conclusively presumed to have the legal capacity to make every decision all the time. As a result, there is never a need for a guardianship or conservatorship proceeding since the concept of incapacity-in-fact does not exist.

This is a relatively new concept – one that has not been tried and tested anywhere. Supported decision making is being used to a limited extent in some areas of Canada and Australia, but those jurisdictions continue to have guardianship laws as well. Canada and Australia specified, when they ratified a United Nations treaty promoting supported decision making, that their ratification was premised on their authority to operate adult guardianship systems.

Proponents of repeal-and-replace are not giving sufficient weight to the reality that people with developmental disabilities are at a high risk for abuse, often at the hands of the people closest to them or in their circle of support.

The Disability and Abuse Project is aware of this reality and, as a result, is not willing to support the repeal of limited conservatorship laws. Instead, we want the rights of vulnerable adults to be respected, more funding for the system, and quality assurance and monitoring mechanisms to be put into place.

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