



Supported Decision-Making:

Empowering Seniors and People with Disabilities

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Supported decision-making (SDM) has become a focus of many advocates for seniors and people with disabilities who promote reducing the use of guardianships or conservatorships in favor of allowing the senior or person with a disability to make their own decisions with assistance. The SDM process enables the senior or the 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 to help the decider make informed decisions about their own life. SDM presents some challenges for planning practitioners, but it is prudent for all professionals—even those in states that lack an SDM statute—to be familiar with SDM principles.

CONSERVATORSHIPS AND GUARDIANSHIPS

Conservatorship and guardianship laws have been enacted in all states, and the relevant standards have evolved over the past half century. In the past, many states allowed 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. However, the laws have changed, leading to deinstitutionalization across the country.

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* standard for courts to follow when contemplating a guardianship or conservatorship. In 1975, the US Supreme Court held in *O'Connor v. Donaldson* that “a State cannot constitutionally confine, without more, a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.”¹

It is therefore incumbent on the elder law or special needs planning practitioner to research their state’s law to determine if changes have been made regarding the use of supported decision-making as a method to achieve the least restrictive alternative.

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 is the autonomy and empowerment of deciders to make life decisions with support when needed.

1 422 U.S. 563, 576 (1975).

Inherent in SDM is the presumption of capacity, that is, that the individual has the ability to make informed decisions and understand their implications and consequences. It is important to note that SDM can, and should, be used to the greatest extent possible even when a person may have diminished capacity or may be vulnerable to undue influence, fraud, or poor decision-making. While individuals with diminished capacity may not have retained their rights to make certain legal, health, or financial decisions, they should still be afforded the right to make decisions in their day-to-day life that respect their beliefs and preferences. In addition to information gathering, supporters are tasked with effectively communicating the relevant information 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.

Another primary objective of SDM as the least restrictive option is to reduce reliance on conservatorships and guardianships. In appropriate situations, an SDM agreement is an effective tool for supporting and accommodating the decider by enabling them to make life decisions without impeding their self-determination.

SCOPE

The American Civil Liberties Union (ACLU) defines supported decision-making as

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.²

Internationally, the United Nations Convention on the Rights of Persons with Disabilities has endorsed the concept of SDM 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 is a growing group of advocacy organizations, including the

² ACLU, Supported Decision-Making: Frequently Asked Questions 1 (2016), https://www.aclu.org/sites/default/files/field_document/faq_about_supported_decision_making.pdf.

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National Guardianship Association,³ that have endorsed the concept of SDM.

Texas was the first state to enact an SDM statute in 2015. Currently, more than 20 states have passed SDM statutes, and the list is expected to grow. The American Bar Association (ABA) maintains a summary of SDM legislation in the states that have enacted such statutes.⁴ For brevity's sake, this article focuses on SDM statutes in California, Texas, and New York.

SUPPORTERS

SDM is a practical tool that allows the decider to select supporters they trust, who could be a friend, family member, or professional. Supporters agree to assist the decider with understanding, considering, and communicating their decision. To effectively relay such information, supporters often use the following methods to assist the decider:

- 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 may be some prohibitions, depending on state law. For example, statutes in California⁵ and New York⁶ forbid a person from being a supporter if the decider has been the subject of a protective order or restraining order against the proposed supporter. Also, in California and New York, a supporter may not serve if they have been found criminally, civilly, or administratively liable for abuse, neglect, mistreatment, coercion, or fraud.⁷ California also prohibits a person from serving as a supporter if the decider previously made, or makes, an allegation against the supporter under the Elder Abuse and Dependent

Adult Civil Protection Act or if the supporter has been removed as the decider's conservator based on a finding that the supporter did not act in the decider's best interest.⁸

SDM AGREEMENTS

Most states that have SDM statutes allow either a written or verbal agreement. However, it is generally best practice to formalize an SDM agreement in writing. A written agreement provides a certain level of assurance to third parties that the decider's decisions are informed and supported. In addition, a written agreement may protect the practitioner and the third party (e.g., doctor, trustee, financial planner, etc.) from allegations of malpractice or liability. An SDM agreement is different from a durable power of attorney in that it does not give the supporter any legal authority to make decisions for or on behalf of the decider.

Most states' statutes focus on assisting the decider with gathering and interpreting information as well as subsequently facilitating implementation of the decision. In New York, for example, the statute provides,

[T]he 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.⁹

Both Texas and New York provide statutory guidance as to the particular form that SDM agreements should take.¹⁰ The ACLU has supplied a sample agreement that has been widely

3 See Nat'l Guardianship Ass'n, Position Statement on Guardianship, Surrogate Decision Making, and Supported Decision Making 2 (2017), <https://www.guardianship.org/wp-content/uploads/2017/07/SDM-Position-Statement-9-20-17.pdf>.

4 ABA Comm'n on Law and Aging, Access to Information Under Supported Decision-Making Statutes (2022), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2022-access-infmtn-sdm.pdf.

5 Cal. Welf. & Inst. Code § 21002 (West, Westlaw through ch. 1 of 2023-24 2d Ex. Sess. and ch. 1017 of 2024 Reg. Sess.).

6 N.Y. Mental Hyg. Law § 82.08 (West, Westlaw through L. 2024, chs. 1-679).

7 Cal. Welf. & Inst. Code § 21002 (West, Westlaw through ch. 1 of 2023-24 2d Ex. Sess. and ch. 1017 of 2024 Reg. Sess.); N.Y. Mental Hyg. Law § 82.08 (West, Westlaw through L. 2024, chs. 1-679).

8 Cal. Welf. & Inst. Code § 21002 (West, Westlaw through ch. 1 of 2023-24 2d Ex. Sess. and ch. 1017 of 2024 Reg. Sess.).

9 N.Y. Mental Hyg. Law § 82.04 (West, Westlaw through L. 2024, chs. 1-679); see Cal. Welf. & Inst. Code § 21003 (West, Westlaw through ch. 1 of 2023-24 2d Ex. Sess. and ch. 1017 of 2024 Reg. Sess.).

10 Tex. Est. Code Ann. § 1357.056 (West, Westlaw through 2023 Reg., 2d, 3d, and 4th Sess. of 88th Legis. and Nov. 7, 2023, Gen. Election) (includes sample agreement); N.Y. Mental Hyg. Law § 82.10 (West, Westlaw through L. 2024, chs. 1-679).

accepted by most state agencies.¹¹ In summary, an SDM agreement should

- be written in plain language and in a manner the decider can understand (which may include the use of illustrations),
- identify who will serve as a supporter and outline their duties or expectations,
- identify areas for which a decider requests support,
- identify the kind of support the decider is seeking,
- be executed according to the formalities required in the applicable state, and
- identify when the agreement needs to be reviewed and how it is terminated.

UNDUE INFLUENCE, CONFLICT OF INTEREST, AND FIDUCIARY DUTIES

In common law, there are two generally agreed-upon key elements of fiduciary responsibility, namely, the duty of loyalty and the duty of care. 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 National Bank of Kansas City, N.A.* that trustees are fiduciaries “of the highest order” and are required to exercise “a high standard of conduct and loyalty in administration.”¹² The court stated that this duty “precludes self dealing,”¹³ which in most cases would be considered a breach of duty. Self-dealing occurs when a fiduciary takes advantage of their fiduciary position in a transaction by acting in their own interests, often to the detriment of the person they are serving. Similar definitions of a supporter’s conflict of interest are included in statutes in New York, California, and Texas.¹⁴ Additionally, all three states’ statutes make it clear that supporters may be held civilly or criminally liable for a breach of their duty as a supporter.¹⁵

The duty of care is often referred to as the duty of prudence. Essentially, this duty requires all fiduciaries to act reasonably or as any prudent person would. Several states, including California, do not impose fiduciary duties on supporters; however, they are expected to act honestly, diligently, and in good faith. There is always an inherent 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 in line with the supporter’s desired outcome or value system. This risk may be heightened as the decider’s capacity changes over time.

MULTIDISCIPLINARY ISSUES

Assisting seniors or people with disabilities 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. A supporter must inevitably plan, educate, and inform the decider, and doing so may require the combined services of several professionals. This will most likely involve interactions by the supporter and decider with geriatric care managers, case managers, discharge planners, financial advisors, certified public accountants, agents under a power of attorney, physicians, home healthcare or respite providers, and the decider’s family members and friends. California’s statute specifically addresses when a supporter has a right to attend such meetings.¹⁶ All parties in these situations must be aware of and avoid ethical breaches such as the unauthorized practice of law and violations of beneficiary or client confidentiality.

The confidentiality of any information conveyed by the decider to an attorney in the presence of any third person not connected with the representation or issue at hand may be lost. The risk that the decider (or supporter) may not understand when the confidentiality privilege applies is an area of concern. The decider may believe that their communications with persons in these processes are protected when, in fact, they are not. It is crucial to always obtain the decider’s consent before divulging private or protected information, especially

11 ACLU, Supported Decision-Making Agreement, https://www.aclu.org/sites/default/files/field_document/aclu_supported_decision-making_agreement.pdf (last visited Jan. 27, 2025).

12 914 S.W.2d 384, 387 (Mo. Ct. App. 1996).

13 *Id.*

14 N.Y. Mental Hyg. Law § 82.04 (West, Westlaw through L. 2024, chs. 1–679); Cal. Welf. & Inst. Code § 21002 (West, Westlaw through ch. 1 of 2023–24 2d Ex. Sess. and ch. 1017 of 2024 Reg. Sess.); Tex. Est. Code Ann. § 1357.056 (West, Westlaw through 2023 Reg., 2d, 3d, and 4th Sess. of 88th Legis. and Nov. 7, 2023, Gen. Election).

15 See N.Y. Mental Hyg. Law § 82.12 (West, Westlaw through L. 2024, chs. 1–679); Cal. Welf. & Inst. Code § 21002 (West, Westlaw through ch. 1 of 2023–24 2d Ex. Sess. and ch. 1017 of 2024 Reg. Sess.); Tex. Est. Code Ann. § 1357.053 (West, Westlaw through 2023 Reg., 2d, 3d, and 4th Sess. of 88th Legis. and Nov. 7, 2023, Gen. Election).

16 Cal. Welf. & Inst. Code § 21004 (West, Westlaw through ch. 1 of 2023–24 2d Ex. Sess. and ch. 1017 of 2024 Reg. Sess.).

information protected under the Health Insurance Portability and Accountability Act (HIPAA), to third parties.

However, many states recognize an exception to the presumption that a third-party's presence invalidates the attorney-client privilege. Rather, the attorney-client privilege continues to apply if the third person is present to assist the client in the legal process and furthers a client's legal representation. Certainly, this exception could apply to a supporter.

Most states impose a good faith standard on third parties who interact with deciders. Texas's statute 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."¹⁷

DRAFTING

Incorporating SDM concepts into a special needs trust (SNT) may prove challenging. Precise drafting is required to reconcile what may be viewed as two diametrically opposed goals. In essence, an SNT is a spendthrift trust because the trustee has sole and absolute discretion over all distributions, and the beneficiary has no authority. Conversely, SDM promotes allowing the senior or person with a disability as the decider to control their own decisions about their lives with assistance from the supporter. The challenge is how to grant some measure of beneficiary control or input without jeopardizing the beneficiary's eligibility for public benefits, because an SNT must be administered in the sole discretion of a trustee who must be someone other than the beneficiary.

Consider the following example that involves enhancing a beneficiary's financial literacy:

- Settlers (parents) wish to enact a plan that includes an SNT for their daughter.
- Their daughter was born with Down's syndrome, but despite her challenges, both parents want her to be as empowered as possible to make decisions about her own life.
- Their daughter is 19 years old, and rather than placing her under conservatorship, the parents assisted their daughter in setting up an SDM agreement.
- Their daughter is easily influenced by others and is likely vulnerable to financial abuse.

- Their 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 are concerned about her financial literacy and capability. Their daughter, like many Supplemental Security Income (SSI) recipients, has never managed funds. Much of the support she receives is based on SSI and Medicaid eligibility, and she has no experience 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 in the SNT, as that would cause her to lose SSI or Medicaid benefits.

To comply with the settlers' intent to empower their daughter to have as much say in her affairs as possible, a third-party SNT is drafted that incorporates language encouraging the trustee to utilize SDM principles to understand their daughter's desires and preferences. The SNT document indicates a preference for the development of an annual distribution plan based on input from their daughter and her supporter. All such language is precatory.

- The distribution plan is approved by the trustee, incorporating requests from their daughter. The distribution plan includes preapproved expenditures that are to be executed by their daughter via the use of an administrator-controlled prepaid debit card. Their daughter agrees to account for her expenditures monthly by submitting receipts.
- As many people do when given their first opportunity to exercise financial independence, their daughter initially makes inappropriate expenditures, depletes her prepaid card balance in a matter of days, and cannot account for her purchases (e.g., by saving and submitting receipts). Fortunately, the trustee provides their daughter with the dignity of risk and allows her to fail at first. Over time, with the help of her supporters, their daughter gains experience not only in making expenditures but also in retaining receipts and adhering to a budget. In this example, the structure of the SDM agreement was successful and complied with the settlers' intent.

EMERGING RESEARCH AND EDUCATIONAL RESOURCES

One of the most prominent research projects examining the effectiveness of SDM and its beneficial outcomes is

17 Tex. Est. Code Ann. § 1357.101 (West, Westlaw through 2023 Reg., 2d, 3d, and 4th Sess. of 88th Legis. and Nov. 7, 2023, Gen. Election).

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.¹⁸ 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.

SDM successes have been lauded nationally and internationally, and one such case even led to the development of the Jenny Hatch Justice Project.¹⁹ The Administration on Community Living, a division of the U.S. Department of Health and Human Services, has also established the National Resource Center on Supported Decision-Making,²⁰ which serves as a warehouse for information, education, and research on SDM.

CONCLUSION

To date, SDM has not resulted in a large-scale reduction in the number of conservatorships or guardianships being granted. As with any significant change in legislation, planners' concerns about new tools are generally assuaged over time. In fact, new ideas such as SDM promote lively dialogue and present new opportunities for beneficiaries and settlors. As such, learning about and embracing the concepts of SDM enable planners to further assist their settlor clients and empower beneficiaries to be more self-reliant than ever. In the end, SDM is about empowerment and communication—two goals that should be paramount for any advocate for seniors and people with disabilities. 🌐

**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.*

18 For additional information, see *Community Living and Supported Decision-Making*, Syracuse Univ. Burton Blatt Inst., <https://bbi.syr.edu/projects/community-living-and-supported-decision-making/> (last visited Mar. 14, 2025).

19 For additional information, see Jenny Hatch Justice Project, www.jennyhatchjusticeproject.org (Mar. 14, 2025).

20 National Resource Center for Supported Decision-Making, <https://supporteddecisionmaking.org/> (last visited Mar. 14, 2025).

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