



Disability
Rights
Maryland

Empowerment. Integration. Equality.

Supported Decision-Making as an Alternative to Guardianship
Brain Injury Association of Maryland
July 28, 2020

Introductions

- Megan Rusciano, Esq
 - Disability Rights Maryland
- This presentation provides basic information for Maryland residents, it does not contain legal advice.

Overview

- **I.** Laying the Foundation
 - Example
 - Definitions
- **II.** How does supported decision-making work in practice?
- **III.** Why is supported decision-making important?
- **IV.** What are some other alternatives to guardianship?
- **V.** Practice Tips
- **VI.** Resources

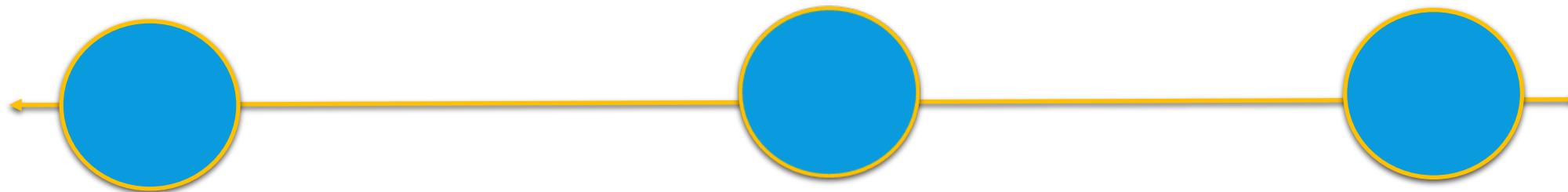
I. Laying the Foundation

Example

- **Video: Dawn & Belinda's Story from Texas**
 - Texas was the first state in the US to pass a supported decision-making law codifying supported decision-making agreements
 - Note that similar to Texas law mentioned in the video, in Maryland, guardianship CAN take away a person's right to vote and get married.
 - [Disability Rights Texas Video](#)

Capacity

- In this context, refers to a person's ability to understand, make, and communicate a decision. Effectively, it is a person's **decision-making ability**.
 - An ability to indicate will or a preference and act on it
- It exists on a spectrum that can vary depending on the person's context and the nature of the decision
- It is usually exercised through support.



Needs less support

Needs more support



Legal Capacity

- Is a legal principle that determines what decisions a person can make under law. Examples include:
 - Providing consent
 - Making a contract
- If a person has legal capacity, their decisions are recognized under law.
- Everyone is presumed to have legal capacity.
- A person may lack legal capacity to make certain decisions, but not others.

Guardianship

- If a person lacks LEGAL capacity to make a decision they are susceptible to guardianship.
- In Maryland
 - Guardian of the person
 - Guardian of the property
- If a person is under guardianship they lose the legal authority to make certain decisions by themselves. This is called substitute decision-making.
 - The guardian acts for the person.
 - The court oversees the guardianship.
 - Guardianship is an adversarial judicial process that requires the involvement of attorney

Guardianship

- Standards:

- Guardian of the person

- A person must lack sufficient understanding or capacity to make or communicate responsible decisions concerning his or her person, including provisions for health care, food, clothing or shelter

- Must be due to disability

- **Must be no less restrictive alternatives available**

- Guardian of the property

- Due to disability...

- A person must be unable to manage his or her property and affairs effectively and they must be entitled to property or benefits that require proper management

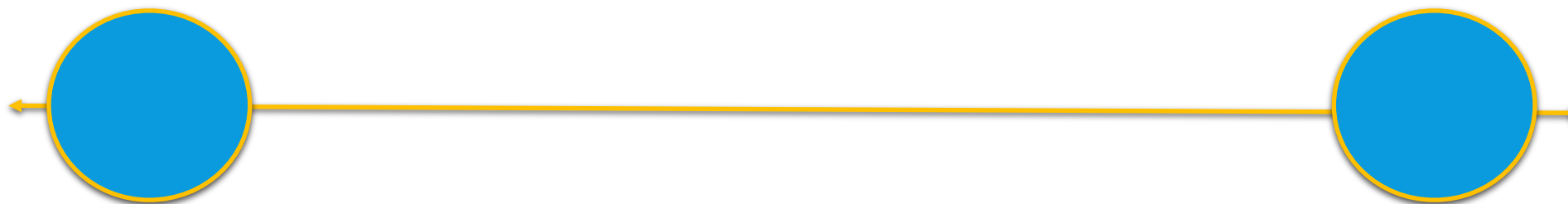


What is Supported Decision-Making?

- Alternative to guardianship that allows a person to **keep** their decision-making authority without appointing a substitute decision-maker.
- **How?** *“People use trusted friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions – it is a means for increasing self-determination by encouraging and empowering people to make their own decisions about their lives to the maximum extent possible.”* National Resource Center

on Supported Decision-Making

So to summarize:



Independent decision-making

Substitute decision-making
(guardianship)

II. How does supported decision-making work in practice?

Supported Decision-Making (SDM)

- A person may select a person or a team to help them think through, decide, communicate, and effectuate decisions.
- Supporters ask, listen, provide advice, translate, and respect the person's decision.
- **But, the person retains their right to make decisions.**
- Nationally (and internationally) it is recognized a **best practice** that preserves the civil rights of people with disabilities and eliminates the need for a substitute decision-maker in many situations.

Supported Decision-Making (SDM)

- Supported decision-making in the health care context:
 - [SDM in Health Care Video](#)

Supported Decision-Making

- **20+ states** have passed or are working on legislation to recognize supported decision-making, including:
 - Delaware
 - District of Columbia
 - Texas
 - Wisconsin
 - Alaska
 - Indiana
 - Tennessee
 - Rhode Island

III. Why is supported decision-making important?

Supported Decision-Making

- It has been endorsed by many organizations, including but not limited to:
 - American Bar Association
 - National Guardianship Association
 - National Council on Disability
 - American Civil Liberties Union
 - The Arc of the United States
 - The Uniform Law Commission

Why is SDM important?

- No existing legal tool that allows a person to select someone to **support them** in making, communicating, or effectuating decisions while allowing them to **retain their legal capacity**.
 - Guardianship: Appoints substitute decision-maker
 - Power of Attorney: Can appoint a substitute decision-maker and requires a high threshold to appoint or revoke an agent
 - Surrogate decision-maker: Substitute decision-maker
- Natural transition from our person centered planning reforms.

Why is SDM important?

- People with TBI are vulnerable to guardianship
 - SDM creates a means for supporters to support a person while they making decisions rather than making decisions for the person.
 - It helps people with TBI refine decision-making skills and self-advocacy
- People have different ways of communicating. This does not mean that they cannot express their choices, wishes, or preferences.
- To whatever extent people's preferences, choices, and decisions can be communicated, they should be respected.
 - This is critical to a person's identity

Why is SDM important?

- **Studies show that people who are denied self-determination experience worse life outcomes:**
 - Overbroad guardianship has a “significant negative impact on...physical and mental health, longevity, ability to function, and reports of subjective well-being” (Wright, 2010).
 - Experience “low self-esteem, passivity, and feelings of inadequacy and incompetency” (Winick, 1995)

Studies show that people who exercise greater self determination have improved life outcomes, including:

- Living Independently
- Working in the community at higher paying jobs and making greater advances in employment.
- Being “more likely to identify situations where they could be abused and less likely to suffer abuse.”
- Having greater financial independence
- Having greater community integration
 - Peter Blank and Jonathan Martinis, “The Right to Make Choices”: National Resource Center for Supported Decision-Making, Inclusion 3:1 (2015). See also Bradley et. al., National Core Indicator Data Brief, 2019.

IV. What are some other alternatives to guardianship?

A person is able to use the following if they are found to have legal capacity...

• General

- Powers of attorney
- Consent to exchange information (HIPAA; FERPA)
- Person-centered planning
- Supported decision-making

• Financial

- Special Needs Trust
- ABLE Accounts

• Medical

- Advanced Medical Directive
- Advanced Directive for Mental Health Treatment

A person is able to use the following if they lack legal capacity...

• General

- Person-centered planning
- Supported decision-making
- Limited guardianship
 - Can be task specific

• Financial

- Representative payee

• Medical

- Surrogate decision-making law

V. Practice Tips

- People communicate and express preferences in different ways.
- **Everyone** uses supported decision-making, regardless of disability.
- Supported decision-making is about asking, listening, providing advice and support when requested, and respecting a person's decision.
 - Sometimes people make bad decisions, it does not mean they lack capacity!

What can I do now?

- Promote self-determination
 - Ask and listen
 - Recognize the place for dignity of risk
- Help someone create an 'Expression of My Wishes'
 - Help document how someone communicates and makes decisions
 - Help document how someone uses support
- If someone presumes that an individual you are supporting is incapable, put on your hat as a supporter!
 - Explain to others how the person you support communicates. Don't let the person talk solely to you as a supporter.
 - Don't confuse your roles
- Educate others about this practice

VI. Resources

On SDM:

National Resource Center for Supported Decision-Making:

<http://supporteddecisionmaking.org/>

American Civil Liberties Union Disability Rights Program:

- <https://www.aclu.org/other/supported-decision-making-resource-library?redirect=supported-decision-making-resource-library>

On alternatives to guardianship in Maryland:

Guardianship & Its Alternatives: A handbook on Maryland Law

- <https://www.disabilityrightsmd.org/wp-content/uploads/2011/12/Guardianship-Handbook-2011.pdf>



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