Supported Decision-Making as an Alternative to Guardianship
Brain Injury Association of Maryland
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Introductions

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• 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](https://www.DisabilityRightsMD.org)
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.
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 the their lives to the maximum extent possible.”

National Resource Center on Supported Decision-Making
So to summarize:

Supported decision-making

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

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
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