

HB 336: THE SUPPORTED DECISION-MAKING AGREEMENT ACT

Who Can Enter Into the Agreement?

A supported decision-making agreement may be entered into by an adult who wants assistance with getting information, weighing options, identifying possible outcomes, or communicating decisions to others. It is a tool that can help seniors who have an early diagnosis of dementia and who want a commitment of support from multiple caregivers, rather than relying only on their spouse or an adult child. Adults who want to continue the support and advice of family and friends but who don't want to lose responsibility for their choices can avoid unnecessary guardianships with supported decision-making agreements. And those adults who have guardians, but who understand the nature and effect of an agreement, can use the agreements to build their capacity by experiencing shared responsibility for making decisions – while still having the oversight of a guardian.

The individual should have the ability to understand that a supporter will be assisting him or her with particular decisions, and to be able to make decisions with the help of supporters.

Who Can Be a Supporter?

A supporter may be any adult, and is usually a family member or friend. The adult who wants a supported decision making agreement has the free will to choose who will serve as their supporters. The individual chooses people they trust, as trust is the foundation of the process. A supporter must agree to serve in that capacity, and must be willing to provide the time and commitment necessary to carry out the agreement. A supporter should be able to clearly understand and communicate with the person to be supported. Each supporter makes a signed declaration to provide the assistance that is described in the agreement.

What is the Scope of the Agreement?

The agreement will be individualized to the needs and strengths of the adult, who is called a "principal". It may be customized to fit the circumstances or situation that the principal is in.

The principal may allow their supporter to help gather information needed for a life decision, support the decision-making process by helping the adult evaluate and understand the options and consequences, and communicate that decision to other parties. The agreement may be established for one specific decision or for many decisions.

The agreement allows the individual to decide which decisions they would like assistance with:

- Obtaining food, clothing and shelter
- Taking care of physical or mental health
- Managing financial affairs
- Obtaining education or training
- Choosing and maintaining supports and services
- Finding a job

The individual may authorize a supporter to do any or all of the following:

- provide supported decision-making, including assistance in understanding the options, responsibilities, and consequences of the adult's life decisions, without making those decisions on behalf of the adult;

- assist the adult in accessing, collecting, and obtaining information that is relevant to a given life decision;
- assist the adult with understanding the information relevant to a decision; and
- assist the adult in communicating the adult's decisions to others.

What Authority Does A Supporter Have?

A supporter has no authority to make the decisions for the principal. A supporter is only allowed to assist the individual with whatever is specified in the agreement. Supporters help the individual gather information and process that information in order to make an informed decision. A supporter can also assist in communicating the decision to the necessary third parties. A supporter merely assists the individual -- the individual is "the decider." A supporter does not have the authority to make financial transactions on behalf of the principal.

What Rights Are Maintained By The Principal?

The agreements do not change any of the principal's existing rights to make decisions. If there is a guardianship order that overlaps with an area of decision-making described in the agreement, the guardian must approve of the agreement. The principal can reject the advice of a supporter.

What are the Execution Requirements?

The adult must sign the agreement voluntarily, with no coercion or undue influence. A supporter must indicate consent to serve in that capacity by signing the agreement and making a declaration, as well. The adult and each supporter must sign in the presence of either two witnesses or a notary public. If the principal has a guardian, notice must be given to the guardian and the guardian must approve in writing.

One of the advantages of the use of supported decision-making agreements is that the parties do not necessarily need an attorney, and no court involvement is required. It is therefore less expensive and may be more accessible to parties with limited financial means. It may also be less stressful to the parties than a guardianship proceeding.

How Does It Differ From a Power of Attorney?

A power of attorney grants an agent the authority to make decisions and handle matters without input from the individual. A supported decision-making agreement does not give supporters the power to make decisions—the principal retains right to make decisions for himself or herself.

How Long Does The Agreement Last?

The agreement may specify an expiration date; otherwise it is effective until the adult or a supporter terminates the agreement. The agreement will also become invalid if the principal is subsequently found to need a guardian or a conservator.

Is Personal Information Protected?

The agreement allows a supporter to access private information only as needed to assist the adult with disabilities in obtaining or accessing information relevant to making the decision authorized by the agreement. If a supporter needs access to medical or other records protected by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the adult must sign a HIPAA release giving the supporter that access. If the adult would like the supporter to access educational records, he or she must sign a release under the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. § 1232g).

The supporter is required to ensure that the information is kept confidential and privileged and must protect the information from unauthorized access. The supported decision-making agreement does not prevent the individual from seeking their own personal information without assistance of supporter. The individual's right to their own information is preserved.

What Are the Liability Risks for Someone Relying on the Agreement?

The bill provides that a person shall rely upon the original or copy of the supported decision-making agreement. The bill absolves someone of liability for acting in good faith while relying on a supported decision-making agreement.

What about Abuse?

Because supported decision-making agreements are informal, there is no court supervision over supporters. The agreement is entered into in private and supporters are not subject to formal accountability through the bill. However, protections already exist by operation of other statutes. Principals who have free agency are protected by the laws that protect all of us from fraud, exploitation, abuse and other criminal acts. They are also protected from changes to their own legal capacity to make decisions. The availability of emergency petitions for temporary guardianship, Title 47 commitments, and the role of mandatory reporters of crimes against vulnerable adults are all unaffected by the bill or the agreements. For principals who have a guardian, there is also the additional oversight of court supervision of the guardian's actions. The bill and the agreements do not change any of those existing protections.

Can Supported Decision-Making Be Used With Guardianship and Other Alternatives?

A supported decision-making agreement theoretically could be used in conjunction with guardianship alternatives such as powers of attorney or a representative payee contract. It is possible that it could be used with a limited guardianship if the right to make the specific decision is retained by the ward. This use should be consistent, however, with the goal of promoting self-determination of the principal and avoiding a full guardianship. Other tools like Able Act accounts, Powers of Attorney, and Advanced Health Care Directives can also be used with the agreements.

CONCLUSION

Supported decision-making agreements can be an excellent tool to allow people to make their own decisions with the support they need. The supported decision-making agreement does not protect an individual from bad decisions. We all have the freedom to make bad decisions—this is known as the “dignity of risk.” Every life experience has some degree of risk, and we can learn from our mistakes as well as our successes. We often grow the most from our failures. People want to have responsibility for themselves and take on that risk.

There is a careful balance between supporting independence and protecting someone against risk. But the Supported Decision-Making Agreement Act would be a positive move away from paternalistic substitute decision-making and toward self-determination and equal access to choices about one's life.