



Supported Decision-Making: Defending Liberty

In the still of darkness, you hear a whisper foretelling that you will live until your centennial birthday. But that's not all. The whisper reveals that today you have made the last decision you will ever make. Tomorrow and for all days henceforth, every decision will be made for you.

Would this be a welcome whisper? How would you feel the next day, year, and decades knowing that you would be a muted passenger on your own life's journey? When you reach the age of 100, would you still be *you*?¹

Dreadfully, the overbroad application of guardianship and conservatorship statutes makes the midnight whisper a reality for many individuals with intellectual and developmental disabilities, cognitive impairments, dementia, psychiatric disabilities, traumatic brain injuries, older adults, and other vulnerable persons (collectively referred to in this article as "individuals with disabilities"). Too often, petitions for involuntary guardianship and

conservatorship are granted without adequate scrutiny, based on the presumption that individuals with disabilities lack legal capacity to make decisions. As a result, individuals with disabilities are stripped of their liberty rights and subjugated to the will of the appointed guardian or conservator.

Supported decision-making is a legal concept that promotes self-determination and serves as an alternative to guardianship and conservatorship. The concept of supported decision-making first gained traction in the 2006 United Nations Convention on the Rights

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of Persons with Disabilities.² Article 12 of the Convention recognizes that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life." It further directs states to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."³ Thus, individuals with disabilities shall *not* be presumed to lack legal capacity, even if they require assistance in making decisions.

Following the United Nations Convention, supported decision-making began to take root as an alternative to guardianship and conservatorship, both nationally and internationally. Today within the United States, 31 states and Washington, D.C., have enacted supported decision-making

² See <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>.

³ President Obama signed the United Nations Convention on the Rights of Persons with Disabilities treaty in 2009; however, it was not subsequently ratified. See https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=en. In 2010, the American Bar Association House of Delegates passed a resolution "urging" the United States to ratify and implement the United Nations Convention on the Rights of Persons with Disabilities." See https://www.americanbar.org/content/dam/aba/administrative/law_aging/2017_SDM_%20Resolution_Final.pdf.

¹ The opening lines of this article were inspired by philosopher Friedrich Nietzsche's "Eternal Return" from *The Gay Science* and *Thus Spoke Zarathustra*, a thought experiment that provokes self-reflection on the way we live.



legislation.⁴ This legislation generally takes two forms, referred to in this article as *informal* and *formal* supported decision-making.

abilities seek the advice of family members, friends, lawyers, doctors, accountants, religious leaders, therapists, etcetera, to make decisions both

Arrangements Act (UGCOPAA)⁵ incorporates the concept of informal supported decision-making. UGCOPAA defines supported decision-making as

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“assistance from one or more persons of an individual’s choosing in understanding the nature and consequences of potential personal and financial decisions, which enables the individual to make the decisions, and in communicating a decision once made if consistent with the individual’s wishes.”⁶

Informal supported decision-making occurs when an individual relies on natural supports for assistance with life choices. Every day, people of all

big and small. In essence, informal supported decision-making recognizes that decisions are not made in a vacuum. Rather, decision-making is a dynamic process that is usually guided by the counsel of trusted advisors. Reliance on others for support does not connote incapacity; conversely, interdependence is germane to decision-making.

UGCOPAA identifies supported decision-making as a less restrictive alternative to guardianship and conservatorship, directing that a petition for guardianship or conservatorship shall be denied if the individual can make decisions with assistance. Today, 2

⁴ The state legislation referenced herein was gathered from the National Resource Center for Supported Decision-Making, last updated on July 21, 2022, as well as additional research conducted by the author. The author’s research may not reflect all legislation enacted in the most recent legislative sessions. See <https://supporteddecisionmaking.org/> (last visited May 3, 2023).

⁵ The Uniform Law Commission passed UGCOPAA in 2017. See <https://www.uniformlaws.org/> (last visited May 3, 2023).

⁶ The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act, Section 102(31) (2017).



states have adopted UGCOPAA,⁷ and 7 more states have passed legislation that identifies supported decision-making as a less restrictive alternative to guardianship and conservatorship.⁸ Additionally, 8 states incorporate informal supported decision-making in statutes dedicated to non-discrimination in access to organ transplantation.⁹ Moreover, Connecticut, Texas, and Oregon have enacted legislation requiring that students be advised of supported decision-making as an alternative to guardianship and conservatorship as part of special education transition planning.¹⁰

In addition to informal supported decision-making, 16 states and Washington, D.C., have enacted legislation that formalizes the supported decision-making process.¹¹ Formal supported

decision-making occurs when an individual creates a written agreement identifying the individual's particular support needs and designating trusted individuals as supporters. Under some statutes, a supported decision-making

by the individual and the designated supporters in the presence of two witnesses or a notary public. Some states, such as Texas and Delaware, have created model supported decision-making agreements.

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agreement can be created by any adult, without restriction. Other statutes require that the agreement be created by an individual with a disability.

The statutes often (though not always) provide the capacity threshold for creating a supported decision-making agreement. Virtually all of the statutes require that the agreement be entered into "voluntarily," while many also add "without undue influence or coercion." The majority of statutes require that the agreement be signed

For both formal and informal supported decision-making, the supporter's role may include (but is not limited to) gathering information, presenting information in a manner that the individual understands, helping the individual to evaluate the pros and cons of different choices, providing communication assistance, and assisting the individual in implementing a decision. Importantly, a supporter is never authorized to make a decision *for* the individual. In this sense, a formal supported decision-making agreement is distinct from a power of attorney and advance directive because the supporter cannot exercise substituted judgment on behalf of the individual. However, it is often advisable for an individual to create a supported decision-making agreement in conjunction with a power of attorney and advance directive, given that the latter documents generally remain effective in the event of the individual's incapacity.

The codification of supported decision-making in multiple states is a significant step in promoting the self-determination of individuals with disabilities. However, it is important to recognize that regardless of whether

⁷ Washington and Maine have adopted UGCOPAA. See <https://www.uniformlaws.org/> (last visited May 3, 2023).

⁸ California Probate Code, section 1800.3(c) (2022); Oklahoma Statutes, section 30-1-111 (2022); Indiana Code, section 29-3-1-7.8 (2019); Minnesota Statutes, section 524.5-102, subdivision 6 (2020); Revised Statutes of Missouri, section 475.075(13)(4) (2018); Montana Code Annotated, section 72-5-305(3) (2021); Tennessee Code Annotated, section 34-1-101 (2021).

⁹ Arkansas Code, section 20-14-902(2)(D) (2022); Georgia Code section 31-1-24(a)(2) (C) (2022); Laws of Maryland, section 20-1601(C)(3) (2022); Massachusetts General Laws, Chapter 111, section 236(a) (2016); Mississippi Code Section 43-6-255(B) (iii) (2022); Ohio Revised Code, section 2108.36(A)(1)(c) (2018); Code of Virginia, section 32.1-297.2(A)(iii) (2020); Wyoming Statutes 26-20-801(a)(ii)(C) (2021).

¹⁰ Connecticut, House Bill No. 5001, Public Act No. 23-137 (enacted July 1, 2023); Texas Education Code, section 29.011 (2017); Oregon Revised Statutes, section 343.181 (2022).

¹¹ Alaska Statutes, chapter 13.56.010 et seq. (2018); California Welf. and Inst. Code, section 21005 (2023); Colorado Revised

Statutes Annotated, section 15-14-801 et seq. (2021); Delaware Code, Title 16, section 9401A et seq. (2016); Illinois Compiled Statutes 9/1 et seq. (2022); Indiana Code, section 29-3-14-2 et seq. (2019); Louisiana Revised Statutes, 13:4261.101 et seq. (2020); Maryland Code, Est. & Trusts, section 18-101 et seq. (2022); Nevada Revised Statutes, section 162C.010 et seq. (2019); New Hampshire Revised Statutes, section 464-D et seq. (2021); New York Mental Hygiene Law, section 82.01 et seq. (2022); North Dakota Century Code, section 30.1-36-01 et seq. (2019); Rhode Island General Laws, section 42-66.13-1 et seq. (2019); Texas Estates Code, section 1357.001 et seq. (2015); Washington Revised Code, section 11.130.700 et seq. (2019); Code of the District of Columbia, section 7-2133 et seq. (2018); Wisconsin Statutes, section 53.01 et seq. (2018).

supported decision-making legislation has been expressly enacted, federal and state laws, as well as policy, arguably prohibit the implementation of guardianship or conservatorship for individuals capable of making decisions with assistance.

The American Bar Association (ABA) issued a Resolution finding that

“ABA policy, federal and state constitutions, the UGCOPAA, most state guardianship [and conservatorship] statutes, and, quite possibly, the Americans with Disabilities Act . . . embrace the principle of the least restrictive alternative.”¹² (citing to *Shelton v. Tuck-*

er, 364 U.S. 479, 493-94 (1960); and *Olmstead v. L.C.*, 57 U.S. 581 (1999), among other sources).

Moreover, the National Probate Court Standards require consideration of less restrictive alternatives to guardianship and conservatorship,¹³ and the 2021 Fourth National Guardianship Summit urges the Department of Justice and federal and state agencies to recognize that supported decision-making is a reasonable accommodation under the Americans with Disabilities Act.¹⁴ In summary, various sources of law and policy support the conclusion that courts shall

deny petitions for guardianship and conservatorship where the respondent is capable of exercising supported decision-making.

As lawyers, it is our duty to safeguard the autonomy of individuals with disabilities. To aid the legal community in this regard, the ABA published a step-by-step guide for incorporating supported decision-making into daily practice.¹⁵ The first step is to “presume guardianship [or conservatorship] is not needed.” By exercising this default presumption and exploring supported decision-making as a less restrictive alternative to guardianship and conservatorship, we collectively act as defenders of liberty and drive the unsavory midnight whisper deeper and deeper into the night. ■

¹² The Resolution, passed by the ABA House of Delegates in 2017, urges states to recognize supported decision-making as a less restrictive alternative to guardianship and conservatorship. See https://www.americanbar.org/content/dam/aba/administrative/law_aging/2017_SDM_20Resolution_Final.pdf.

¹³ National Center for State Courts, <http://nscs.contentdm.oclc.org/cdm/ref/collection/spts/id/240>.

¹⁴ See Recommendation 2.4, <https://www.guardianship.org/wp-content/uploads/Fourth-National-Guardianship-Summit-Adopted-Recommendations-May-2021-1.pdf>.

¹⁵ See https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/.

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