

# **SUPPORTED DECISION- MAKING, GUARDIANSHIP, AND ALTERNATIVES TO GUARDIANSHIP**

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## Slide 1

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**A2** Author, 8/26/2015

**A3** Author, 4/9/2019

That horrifying moment  
when you're looking for  
an adult, then realize  
you're an adult. So you  
look for an older adult,  
someone successfully  
adulting...an adultier  
adult.

somee cards  
user card



# Important Things to Remember



- The Texas law presumes **all** adults have the capacity for decision-making – this applies to everyone, including people with disabilities.
- Decision-making is a learned skill – people with disabilities need opportunity, experience and support to learn to make well informed decisions.
- There are other legal ways to assist people with decision-making that do not restrict, limit, or remove individual rights.



**People with disabilities have  
the right to make mistakes**

# Why Families May Seek Guardianship



- Child reaches 18 years of age
  - Foster care
  - Residential placement
- School or physician tells them it is necessary.
- Think it is necessary for school, health care or other decisions after age 18.
- Help their child handle money.
- Connect their child with adult services.
- May believe this is the only legal solution.

# GUARDIANSHIP

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Guardianship is a legal process to determine if a person is “incapacitated.”

- A court decides if, due to a physical or mental condition, an individual is substantially unable to:
  - manage their financial affairs,
  - care for their physical health, or
  - provide food, clothing, or shelter for themselves.
- Under a guardianship, someone is appointed to make decisions on behalf of the incapacitated person



# Types of Guardianship

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- There are two types of guardianship—**guardian of the person** and **guardian of the estate**.
  - A guardian of the person is responsible for the physical well-being of the person under guardianship.
  - A guardian of the estate is responsible for the person's property and assets.
- One person can be both guardian of the person and guardian of the estate, or two different people can assume these roles.
- Both types of guardianship can be either full or limited.

# What Does Guardianship Do?



- **Removes the person's freedom of choice, self-determination and independence.**
- **Removes some or all of a person's decision-making rights.**
- **Assigns decision-making to a third party (the guardian).**
- **Requires a court order to establish and there is ongoing court oversight.**
- **Expensive – attorney fees and court costs; bond**
- **May be difficult to terminate or modify.**
- **Annual accounting and reports on the condition of the ward.**

# What does Guardianship NOT do?

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- ❑ Guarantee safety
- ❑ Guardianship  $\neq$  Protection
- ❑ Teach self advocacy

# The Guardianship Process

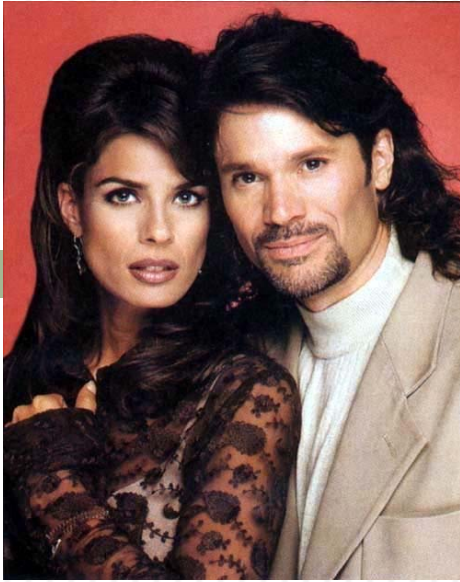
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Guardianship is a legal process and decisions are made by a judge.

- An individual seeking to become guardian is called an “applicant,” and must be represented by an attorney to obtain guardianship.
- The applicant files an application for guardianship, including a physician’s certificate of medical examination (CME).
- An attorney ad litem will be appointed to represent the person with a disability’s desires.
- A guardian ad litem may also be appointed to advocate for the best interest of the person with a disability.
- The judge has the ultimate authority to decide whether or not someone needs a guardian, and if the guardianship should be full or limited.
- The judge also has the final say in who is appointed to be guardian.
- Guardian must file annual report



"You can't live in our basement. Your brother beat you to it."



- Maybe consider alternatives, but not consistently
- Full and limited guardianships



- ❑ MUST consider alternatives
- ❑ During 84<sup>th</sup> Legislative session, TX became the first state to place supported decision-making into statute as an alternative to guardianship

# Alternatives to guardianship

- Medical power of attorney
- Durable power of attorney
- Declaration of MH treatment
- Rep payee
- Joint bank account
- Management trust
- Special needs trust
- Designation of guardian before the need arises
- Supported decision making agreement



# THE SUPPORTED DECISION-MAKING AGREEMENT ACT



## Underlying Principles Behind Supported Decision-Making



While there is no “one-size-fits-all” model for supported decision-making, it generally occurs when people receive assistance from one or more trusted friends, family members, professionals or advocates to help them understand the situations they face and choices and options they have so they can make their own decisions.



# THE LAW

# Supported Decision-Making as an Alternative to Guardianship

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- Supported Decision Making Agreement was specifically identified as an alternative to guardianship by the Legislature.

*Tex. Est. Code* § 1002.0015(10)

# Who Can Enter a Supported Decision-Making Agreement?

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- Any individual over 18 who has a physical or mental impairment that substantially limits one or more major life activity. *Tex. Est. Code § 1357.002(1) & (2)*
- A level of capacity a person must have in order to enter a supported decision-making agreement is not defined, but a person must have sufficient capacity to agree to the supporter assisting him or her in making particular decision.

# Who Can Be the Supporter? Any Adult

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- The law does not place any restrictions on who may become a supporter.
- The person who needs the support decides on someone they trust.
- Typically, the supporter may be a family member, relative or friend selected by the person with a disability.

*Tex. Est. Code § 1357.002(5)*

# Is this Voluntary or Court Ordered?

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- An adult with a disability decides they need supports with decisions.
- The person with a disability and supporter enter into the agreement voluntarily, just like a power of attorney.
- It is informal and does not require going to court.

*Tex. Est. Code § 1357.001*

# How is it Different from a Power of Attorney?

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- A supported decision-making agreement is distinct from a power of attorney because it does not allow a person to make the decisions for a person.
- In a supported decision-making agreement, the person with a disability retains the right to make decisions.

*Tex. Est. Code § 1357.054*

# What Can a Supporter Do?

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A supporter may do any or all of the following:

- 1) Assist adult with a disability in understanding options, responsibilities and consequences of life decisions;
- 2) Assist adult with a disability in accessing, collecting and obtaining medical, psychological, financial, educational and treatment records;
- 3) Assist adult with a disability in understanding information in (2); and
- 4) Assist adult with a disability in communicating his or her decision to appropriate persons.

*Tex. Est. Code § 1357.051*



# What About Confidential Information?

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- A supporter is only authorized to assist adult with a disability to access, collect or obtain information.
- This includes protected health information under HIPAA and education records under FERPA.
- A supporter shall ensure that information is kept privileged and confidential and is not subject to unauthorized access, use or disclosure.
- A supported decision-making agreement does not prevent an adult with a disability from seeking personal information on his or her own without the assistance of the supporter.

*Tex. Est. Code § 1357.054*

# When Does a Supported Decision-Making Agreement End?

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A supported decision-making agreement ends:

- 1) When terminated by the adult with a disability or the supporter;
- 2) By the terms of the agreement;
- 3) If the Department of Family and Protective Services finds that adult with a disability has been abused, neglected or exploited by the supporter; or
- 4) The supporter is found criminally liable for the abuse, neglect or exploitation of the adult with a disability.

*Tex. Est. Code § 1357.053*

## Is there a form?

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- There is a sample agreement in Texas Estates Code § 1357.056
- A simplified supported decision-making agreement form will be available on DRTx's website at [www.drtx.org](http://www.drtx.org).

**Notice of Transfer of Rights to Students with  
Disabilities Who Reach Age of Majority  
Model Form**

**This form is provided to you to inform you of the rights your student will obtain when they turn 18.  
This information should not be used to take your student's rights away.**

When a student who is eligible for special education in Texas turns age 18, all rights given to his or her parent under federal and state special education law transfer to the student. This transfer of rights means that the student may access his or her education records, make his or her own educational decisions, and sign consent for evaluations and placement, just like any other student the age of 18. While the student's parent(s) will continue to receive notices of the student's admission, review, and dismissal committee (ARDC) meetings, his or her parent(s) may attend the meeting with the student's permission.

# How can schools help?

## Right

- ❑ Financial self determination
- ❑ To vote, marry, and operate a motor vehicle
- ❑ To receive timely and appropriate health care and treatment

## Matching transition services

- ❑ Bank account info, balancing checkbook, budgets
- ❑ How to vote; decision making for personal relationships; DL test prep
- ❑ How to choose a Dr., make appointment and what to expect

# So what does this mean for transition planning?

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- (1) Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
- (2) Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes -
  - (i) Instruction;
  - (ii) Related services;
  - (iii) Community experiences;
  - (iv) The development of employment and other post-school adult living objectives; and
  - (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.
- (b) **Transition services** for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

# Recent Transition Changes

- **29.0112(b)(4) community and long-term services and support, including the option to place the student on a waiting list with a governmental agency for public benefits available to the student, such as a waiver program established under Section 1915(c), Social Security Act (42 U.S.C. Section 1396n(c))**



**We don't have to  
do all of it alone.  
We were never  
meant to.**

**- Brené Brown**

**Sharon K. Brayfield, Leadership Coach  
[FB.com/LivingLifeWithPassion](https://www.facebook.com/LivingLifeWithPassion)**





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