

# Decision-Making Supports: The Role of the Supporter or Advocate

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## ABA Commission on Law and Aging

The ABA Commission on Law and Aging is the collaborative and interdisciplinary leader of the American Bar Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

## Key Lessons

- Decision-making is a human right. At the core of being human is making choices that impact our lives. Supporting every person's ability to make choices that impact their lives protects that human right.
- Every person should have an active role in planning and decision-making. Advance planning and empowerment to select help with making these decisions is a core component of decision-making. A variety of informal and formal tools aid in decision-making. The simplest form of informal decision supports is asking for help with decisions. Other more formal legal tools exist, such as appointing agents and court appointed fiduciaries. Every model has an essential role for decision supporters. Every model or tool used for decision-making can be improved by the application of the decision supports that keep the person informed, offer choices, seek input, and provide help as needed.
- While the fiduciary duties are rooted in the law, the role of decision supports are ideal but not necessarily a legal requirement.

## Decision-Making as a Human Right

Human beings constantly make choices, and our choices define us as individuals. We make choices about what we do, where we live, what we wear, what we eat, how our money is spent, and about our health care. Decision-making, especially by persons with disabilities or who are older, is increasingly being recognized as a human right. The United Nations' Convention on the Rights of People with Disabilities (CRPD), adopted in 2006, played an instrumental role in affirming the rights of individuals to make decisions with the necessary supports to do so. The CRPD Article 12's principles serve as a starting point for materials on decision supports around the world, including a core set of values contained in a policy development guideline for aged care, published in Australia.<sup>1</sup>

The key points from the Australian document are:

1. All adults have an equal right to make decisions that affect their lives and to have those decisions respected.
2. Persons who require support in decision-making must be provided with access to the support necessary

<sup>1</sup> 6 Sinclair, C., Field, S., & Blake, M. (2018). SUPPORTED DECISION-MAKING IN AGED CARE: A POLICY DEVELOPMENT GUIDELINE FOR AGED CARE PROVIDERS IN AUSTRALIA. (2nd Edition) Sydney: Cognitive Decline Partnership Centre, pg. 5, available at [cdpc.sydney.edu.au/wp-content/uploads/2019/06/SDM-PolicyGuidelines.pdf](http://cdpc.sydney.edu.au/wp-content/uploads/2019/06/SDM-PolicyGuidelines.pdf).

for them to make, communicate, and participate in decisions that affect their lives.

3. The will, preferences, and rights of persons who may require decision-making support must direct the decisions that affect their lives.
4. Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

## The Basics of Supporting Decision-Making

Decision supports are when one person helps another person make a choice. This starts with communicating so that everyone understands the issue or question. This may require breaking complex issues into smaller, more understandable parts. It is important to let people know that they have options and help them understand risks and benefits of choices. Supporters make recommendations, but allow the person to make their own choice or express a preference. Supporters help as needed to carry out the choices and provide oversight and monitoring as needed to assure that the choices and values of the person are honored.

### Informal Supports

Informal supports far outnumber formal or legal supports. An informal support is any step that simplifies life decisions, such as enlisting the help of others or of technology to assure that goals are met.

Direct deposit is a simple informal support that is increasingly mandatory. The payor and financial institution become supporters, assuring that the money is paid and received. The person can select a trusted supporter for help in setting this up and monitoring to assure the correct amounts arrive on time.

Automatic payment is another support to ensure bills are paid. Auto-payment can be set with the vendor or financial institution. A notice is sent when the bill is due that includes the amount and payment date, and, unless an objection is made, the payment goes through with no further actions taken. Supporters selected by the person can help the person understand the choices, help them with set-up, and provide monitoring to assure that the bills are correct and that all expected bills are being paid on time. Supporters may be called upon to update information or question anything that is not working or does not look correct.

Other informal supports could include financial advisors, bill paying services, housekeepers, personal care assistants, and shopping services. Technology is bringing a wealth of informal supports, such as fall monitors, GPS tracking, and medication management systems. On the cutting edge are autonomous vehicles—while self-driving cars may be a few years off, delivery robots are already utilized in several urban areas.

### Formal Supports and Legal Tools

Formal support options are wide ranging, from financial institution tools to legal documents. These supports can be designated for financial decisions, health care decisions, or both.

#### Creating support for financial decisions:

The most common formal financial support is a joint bank account. Financial institutions require someone with legal authority to make account withdrawals. Adding someone as a signatory on an account is a way to grant this legal authority without creating a right of inheritance. This type of support gives the signatory the authority to transact business but *does not* create an ownership interest in the account. Most banks treat these as commercial accounts, and many banks charge service fees on these accounts. Finally, an individual can utilize a Power of Attorney for financial decisions. The Power of Attorney support is discussed in more detail in the health care support section below.

In each of these situations, the supporter's role is to act as the agent and as a fiduciary. A fiduciary owes special duties of loyalty, fidelity, and accountability. For a supporter, this starts with maintaining separate accounts. The supporter has a responsibility to the person to always engage the person in decision-making, keep the person informed, keep complete records, avoid conflicts of interest, and follow the directions of the person. The supporter should monitor the account to assure that the person's instructions and values are being honored.

### Creating support for health care decisions:

Any adult can name a health care surrogate or agent. Every state allows this to be done in writing, with formalities that vary from [state to state](#). In nearly every state, if a person does not name a health care surrogate, [state laws determine](#) who can make health care choices when the person is unable to or declines to do so. All health care agents or health care surrogates should act as health care *supporters*. Being a supporter requires keeping the person informed and involved in health care decisions. As needed, the supporter should accompany the person when they seek medical treatment. The supporter can help the person make choices and helps communicate those choices. The surrogate or agent acting as a supporter should only make decisions when the person is truly unable or declines to express a preference. When making a decision, the decision should be guided by an understanding of the values of the person. When selecting a health care supporter, it is critical to have conversations about the person's values and preferences.

A Power of Attorney is a document that allows a person to name and legally empower an agent to transact business, make decisions, and manage personal affairs on their behalf. [Each state has laws regarding the creation of a Power of Attorney](#). A Power of Attorney can be essential to empowering supporters to assist. The agent is a fiduciary and should act as a supporter. The agent on a power of attorney acts as a supporter by always making decisions after consulting the person and always seeking their input.

#### PRACTICE TIP

Draft decision support principles into Powers of Attorney documents and documents appointing health care agents, or include detailed instructions on decision supports in letters of instruction to agents appointed in these documents.

### Decision Supports in Involuntary Appointments

Involuntary appointments should always be a last resort, where no planning was done or planning has failed. The appointments should only be made when a person is truly unable to name and empower the persons they most trust to help, and there are decisions that must be made on behalf of the person that require legal authority.

One involuntary financial appointment is the Representative Payee. A Representative Payee is generally appointed by Social Security and charged with receiving and managing the income (benefits) of another person. Though it is possible for a person to voluntarily ask Social Security to appoint a payee, it is extraordinarily rare. It is now possible for a person to pre-designate a person to serve as payee should the appointment of a payee be needed in the future. This allows the person to select the person they most trust, and to provide guidance to that person about how they wish to manage their income.

A representative payee is a fiduciary for the person and is accountable to the person and Social Security (or other payor) for the benefits. A representative payee should always consult with the person about financial decisions and keep the person informed of what is happening with their money.

A guardian or conservator is a court appointed fiduciary for a person the court has found to be a "person in need of protection." **Guardianship or conservatorship should be a last resort, only to be considered after all alternatives have been exhausted.** Guardians and conservators should practice decision support principles.

Examples of decision support principles incorporated into the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act:

- The person subject to a guardianship petition has the right:
  - » To an attorney who must advocate for the person’s wishes, and if the person’s wishes are not reasonably ascertainable, advocate for the result that is the least restrictive (§§305 and 406).
  - » To petition for termination of the guardianship (§§319 and 431).
- The Court must:
  - » Not issue guardianship or conservatorship orders when a less-restrictive alternative is available, such as supported decision-making, technological assistance, or an order authorizing a single transaction. (§§310 and 411).
  - » Review annual reports to determine whether the guardianship or conservatorship should continue (§§317(e) and 423(e)).
- A guardian or conservator must:
  - » Create an individualized plan that takes into account the person’s preferences, values, and prior directions to the extent known to or reasonably ascertainable (§§316 and 419).
  - » Make decisions the guardian reasonably believes the adult would make if able, unless doing so would cause harm to the adult.
  - » Promote the self-determination of the adult and, to the extent reasonably feasible, encourage the adult to participate in decisions, act on the adult’s own behalf, and develop or regain the capacity to manage the adult’s personal affairs. (§§313 and 418).

Guardians support decision-making by communicating with the person, keeping the person informed, explaining decisions that are being made, explaining options, asking for preference of the person, guiding all decisions based on input from the person or the person’s values or advance instructions, and being accountable to the Court for every decision and asset.

Courts support decision-making by only moving forward with appointment when it is absolutely needed; by careful selection of guardians and conservators; by holding guardians and conservators accountable for decisions and assets; by investigating all complaints of misconduct; by ensuring the judicial system has a robust system for appeals and for investigating bad acts or failure to act by Guardians, Courts, and Judges; and by having a robust system for review, restoration of rights, modification (including removal and replacement of guardians), and termination of appointments.

## Conclusion

Empowering the right of every person to make decisions requires support for decision-making. The values and preferences of each person should prevail in the choices that are made, and appropriate legal frameworks and safeguards are needed to reduce the risk of abuse and undue influence. At the core of decision supports is communicating with the person, encouraging the person to express preferences, and doing everything possible to help the person understand the consequences of their choices.

## Additional Resources

- [ABA Resources and Research on Guardianship Reform and Decision Supports](#)
- [ABA Resources and Research on Elder Abuse](#)
- [ACL resources on Supported Decision-Making](#)

- [National Center on Elder Abuse](#)
- [NCLER training on Supported Decision-Making](#)
- [NCLER training on Advance Care Planning](#)
- [Supporting Decision-Making](#) Across the Age Spectrum, American Bar Association Commission on Law and Aging, March 2020

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**Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov).**

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