

# Decision-Making Supports

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# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://NCLER.acl.gov). See also the chat box for this web address.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# About ABA COLA

The ABA Commission on Law and Aging is a 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.
- Every person should have an active role in the planning and decision making.
- We use a variety of informal and formal tools to aid in decision-making.
- Every model has an essential role for decision supporters.
- Fiduciary duties are rooted in the law. The role of decision supports add to that, and are not necessarily a legal requirement.

# Poll #1: Your Role

- A. Attorney or Legal Advocate
- B. Social Work Professional
- C. Health Care Professional
- D. Family Caregiver / Advocate
- E. Other

# Decision-Making is a Human Right

# Choice is a Part of Our Humanity

- Making choices about
  - Where we live
  - How we live
  - What we eat, what we wear,
  - Who we associate with, socialize with
  - Our money and property
  - What happens to our bodies (health care)
- Right to make decisions is a basic human right

# Decision Making is Increasingly Recognized as a Human Right

- The United Nations' Convention on the Rights of People with Disabilities (CRPD), adopted in 2006

# Australia's Decision-Making Policy

- All adults have an equal right to make decisions that affect their lives and to have those decisions respected.
- Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate, and participate in decisions that affect their lives.
- The will, preferences, and rights of persons who may require decision-making support must direct decisions that affect their lives.
- 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.

*Source: [Supported Decision-Making in Aged Care: A Policy Development Guideline for Aged Care Providers in Australia](#)*

# Decision Supports: The Basics

# Decision Supports

- Inform and explain an issue or question in a way that the Person can understand
- Break complex issues into smaller, more understandable parts
- Offer options
- Explain risks and benefits
- Make a recommendation
- Ask for choice or preference
- Help the Person as requested or needed

# Decision Supports and Supported Decision-Making

- Decision Supports apply the person-centered and person-driven decision-making model, from Supported Decision-Making (SDM), to a broad array of tools or models
- Application of person-centered and person-driven decision-making to agency and fiduciary models will improve the quality of decision-making, and in turn, the quality of life for the Person.

# Decision Supports and COVID-19

- Raised awareness of the need for understanding the health care values and wishes of adults
- Serious illness increases the number of persons who may need support in decision-making
- Social Distancing and lock-down orders have highlighted the need for enhanced communications (video calls)
- Increased interest in video monitoring
  - Concerns about balancing privacy and safety

# Social Distancing and Decision Supports

- Decision supports require effective communication
- Video helps but does not provide as many non-verbal cues
- Has accelerated exploration of alternatives and options for communication and oversight
- Increased awareness of the needs of persons who are medically fragile
- Increased awareness of the need for decision supports

# Poll #2: COVID-19

As a result of COVID-19, have you or are you: (select all that apply)

- A. Telecommuting more than before
- B. Cancelled travel plans
- C. Been unable to meet with clients or loved one's
- D. Remained Healthy

# Informal Decision Supports

- Created by the Person
- Not legal tools or interventions
- Require understanding in general terms of what is being done
- Some are mandatory

# Example: Direct Deposit

- The Person selects the financial institution
- Makes arrangements for direct deposit
- In doing so, the person controls the decision made
- Increasingly mandatory for payment of benefits, pensions, wages, interest, or dividends
- The financial institutions support that choice by facilitating payment and receipt of the money

# Role of the Supporter in Direct Deposit

- Explain and encourage
- Honor the choices of the person
- Provide assistance with setting up or making changes
- Monitor, review, and provide oversight

# Example: Automatic Payment

- The Person makes the choice to pay certain bills automatically, by direct debit from a financial account
- The Person sets the payment date and terms
- A notice is sent, providing opportunity for review and revision
- Payment is made automatically

# Role of Supporter in Automatic Payment

- Explain
- Provide assistance as needed with set up/changes
- Monitor, review, and provide oversight as needed
- Help the Person with any questions or problems

# Technological Supports

- Technology continually redefines what a person needs to live independently
- 150 years ago, if you couldn't feed a coal or wood stove, you couldn't meet ADLS
- Advancing Rapidly Today
  - Falls monitors
  - GPS monitors
  - Electronic Medication management
  - Assistive technology
  - Autonomous Transportation (delivery robots – self driving cars.)

# Poll #3: Auto Pilot

Do you or anyone you know use:

(select all that apply)

- A. Direct Deposit
- B. Online or automatic bill payment
- C. Home delivery of groceries or medication

# Formal Decision Supports

# Formal Decision Supports Tools

- These tools involve active naming of a supporter on documents that have legal impact.
- The Person makes the choice of supporter.
- Different tools create differing obligations for the supporter.
- Because the supporter has some legal authority, extra care is needed in selection, appointment, and oversight.

# Authorized Signers on Financial Accounts

- The Person authorizes someone they trust to authorize transactions on bank or other financial accounts
- This can be done in a variety of legal ways
  - Signers on the account
  - Joint account holder (extra cautions are needed)
  - Using a Power of Attorney document

# Role of the Supporter on Financial Accounts

- Act as a fiduciary
- Always ask what the Person wants to do
- Restrict activities to the benefit of the Person
- Maintain separate accounts
- Keep accurate records
- Be accountable to the Person (can be sued under various theories for theft of assets)

# Health Care Decisions

- The Person selects and names someone they most trust to help with health care choices.
- Most states have a statutory default for persons who do not name someone.
- Should be done in writing.
- The Person needs to understand what they are asking the person to help with.
- Ideally includes conversations on health care values and beliefs.
- May include specific health care instructions.

# The Role of the Supporter in Health Care

- Always keep the Person informed.
- Empower the Person to make health care choices.
- As needed, accompany the Person to medical appointments.
- Only when the Person is truly unable to do so, or has asked the agent to do so, make decisions. Make health care decisions based on the persons values and instructions.
- Advocate for the care the Person wants.

# Power of Attorney

- Person names an agent to help transact business.
- The agent is a fiduciary owing special duties to the Person who named them.
- Agent should be directed to never make decisions without consulting with the Person and seeking the person's input.
- Should be drafted into the POA or letter of instructions to the agent.

# Role of the Supporter in a Power of Attorney

- The agent is the decision supporter, and as agent should:
  - Consult the Person on all decisions using the principles of decision support.
  - Act as a fiduciary.
  - Keep complete and accurate records.
  - When the Person is truly unable or chooses not to make a choice, the agent should let the values and directions of the Person guide decisions.

# Decision Supports in Involuntary Appointments

- Involuntary appointments should always be a last resort
  - When no planning was done
  - Or planning has failed
- And
  - The Person truly lacks the ability to name supporters or agents
- And
  - There are decisions that must be made that require legal authority to make

# Representative Payee

- Social Security and other pension or benefits programs.
- A person is named to receive payments for the benefit of another person.
- It is possible, but rare, for a person to ask SSA to appoint a payee voluntarily.
- SSA now allows pre-need naming.

# Support Roles of a Rep-Payee

- Rep Payee is a fiduciary for benefits of the Person, and responsible for:
  - Consulting with the Person about all decisions regarding the benefits;
  - Keeping the funds separate and keeping complete records;
  - Filing annual accountings with Social Security;
  - Spending the income for the benefit of the beneficiary; and
  - Being responsive to questions or complaints.

# Guardianship / Conservatorship

- A court appointed fiduciary for a person who has been determined by the Court to be a “Person in need of Protection”
- See the [PRACTICAL Guide](#) for alternatives
- Seeking a guardian or conservator should always be the last resort
- Should be limited to the extent possible
- Should be reviewed for restoration of rights

# 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). Must 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/Conservators Support Decision-Making By:

- Communicating with the Person
- Keeping the Person informed
- Explaining decision that are being made
- Explaining options
- Asking for preference of the Person
- Guiding all decisions based on input from the Person or the Persons' values or advance instructions
- Being accountable to the Person, and the Court, for every decision, every asset

# Courts Support Decision-Making By:

- Only moving forward with appointment when it is absolutely necessary
- Careful selection of guardians and conservators
- Holding G/C accountable for decisions and assets
- Investigating all complaints of misconduct
- Having a robust system for appeals and for investigating bad acts or failure to act by Guardians, Courts, and Judges
- Having a robust system for review, restoration of rights, modification (including removal and replacement of guardians), and termination

# Conclusion

- There is a role for decision supports across the spectrum of tools.
- Supporting decision-making improves the quality of the decisions that are made.
- We all have a role to play in encouraging the use of decision supports.

# Questions



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# Case Consultations

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).