

Guardianship Termination and Restoration of Rights

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ARTICLE OF FAITH

People with greater self determination are:

- Healthier
 - More independent
 - More well-adjusted
 - Better able to recognize and resist abuse
 - Better able to adjust to increasing health care needs
- Khemka, Hickson, & Reynolds, 2005; O'Connor & Vallerand, 1994; Wehmeyer & Schwartz, 1998

GETTING TO SELF DETERMINATION: SUPPORTED DECISION-MAKING

People working with “friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions.”

- Blanck & Martinis, 2015

SUPPORTED DECISION-MAKING IS A LOT OF WORDS FOR

Getting help when its needed

Just like you and me

SUPPORTED DECISION-MAKING SHOULD BE TRIED BEFORE GUARDIANSHIP

- Va Code 64.2-2017
- “Alternatives to guardianship, **including supported decision making**, should always be identified and considered whenever possible **prior to the commencement of guardianship proceedings.**” - - National Guardianship Association Position Statement on Guardianship, Surrogate Decision Making and Supported Decision Making, 2015

SUPPORTED DECISION-MAKING SHOULD BE USED AFTER GUARDIANSHIP

- Guardians must encourage the person to “participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs” - Va Code 64.2-2019
- “[T]he supported decision-making process should be incorporated as a part of the guardianship if guardianship is necessary”
- National Guardianship Association Position Statement on Guardianship, Surrogate Decision Making and Supported Decision Making, 2015

IT'S THE GUARDIAN'S JOB!

- “A guardian shall, to the extent feasible, encourage the incapacitated person to . . . develop or regain the capacity to manage personal affairs.” - Va Code Ann. 64.2-2019

Therefore, the Guardian's job is to work with the person:

- To help the person learn to make his or her own decisions, with support
- To build self-determination
- To “meet essential requirements” for taking care of his or her person and property

Guardianship as a Way-Station, Not a Final Destination

WHEN GUARDIANS DO THEIR JOB (OR HAVEN'T)

MOTION TO TERMINATE

- If the person is able to make decisions with support or independently
- **THERE'S NO MORE REASON FOR THE GUARDIANSHIP**
- So, the guardian or someone else should ask the Court to end the guardianship, in whole or in part

Va Code 64.2-2012

VA CODE 64.2-2012(c)

An order appointing a guardian or conservator may be revoked, modified, or terminated upon a finding that it is in the best interests of the incapacitated person and that:

1. The incapacitated person is no longer in need of the assistance or protection of a guardian or conservator;
2. The extent of protection, management, or assistance previously granted is either excessive or insufficient considering the current need of the incapacitated person;
3. The incapacitated person's understanding or capacity to manage his estate and financial affairs or to provide for his health, care, or safety has so changed as to warrant such action; or
4. Circumstances are such that the guardianship or conservatorship is no longer necessary or is insufficient.

VA CODE ANN. 64.2-2012(D)

The court shall declare the person restored to capacity and discharge the guardian or conservator if, on the basis of evidence offered at the hearing, the court finds by a **preponderance of the evidence** that the incapacitated person has substantially regained his ability to (i) care for his person in the case of a guardianship or (ii) manage and handle his estate in the case of a conservatorship.

In the case of a petition for modification of a guardianship or conservatorship, the court shall order (a) limiting or reducing the powers of the guardian or conservator if the court finds by a preponderance of the evidence that it is in the best interests of the incapacitated person to do so, or (b) increasing or expanding the powers of the guardian or conservator if the court finds by clear and convincing evidence that it is in the best interests of the incapacitated person to do so.

PROCEDURE UNDER 64.2-2012

Upon petition by the incapacitated person, the guardian or conservator, or any other person or upon motion of the court, the court may (i) declare the incapacitated person restored to capacity; (ii) modify the type of appointment or the areas of protection, management, or assistance previously granted or require a new bond; (iii) terminate the guardianship or conservatorship; (iv) order removal of the guardian or conservator as provided in § 64.2-1410; or (v) order other appropriate relief.

“CAN I REPRESENT SOMEONE UNDER GUARDIANSHIP?”

- Some have argued that people under guardianship are, by definition, incompetent and cannot enter contracts – including contracts for representation.
- So, if a person under guardianship requests your representation, can you do it?

YES

- “The respondent has the right to be represented by counsel of the respondent's choice. If the respondent is not represented by counsel, the court may appoint legal counsel” - Va Code § 64.2-2006.
- Even though this refers to the person having a right to counsel BEFORE being put into guardianship, it shows the legislature’s intent that people SHOULD be able to have counsel when their fundamental rights are at stake

YES

- “Upon petition by the incapacitated person, the guardian or conservator, or any other person or upon motion of the court, the court may (i) declare the incapacitated person restored to capacity” – Va Code 64.2-2012
- This means the person under guardianship has the right to petition the court to modify or terminate it
- But that right would be useless if s/he didn't ALSO have the right to seek representation to help
- Otherwise, the incapacitated person would have no EFFECTIVE way to argue for his or her rights.

YES

- This is a First Amendment issue. The person under guardianship SHOULD be able to speak and associate with an attorney to explore or seek restoration
- An attorney is VERY different from a Guardian ad Litem. The attorney represents the person and his/her interests. A GAL advocates for the person's "best interests."

PRACTICE TIP

- Make your retainer conditional. Say that you will attempt to make an appearance as counsel and will represent if Court approves it.
- Make a special appearance on behalf of the person asking the Court to recognize you/appoint you as counsel

EXPLORING ALTERNATIVES: CAN THE PERSON “MANAGE” AND “MEET” WITH SUPPORT?

- Remember, the standard for modification/termination is whether the person has regained or gained capacity and/or whether the current guardianship is too broad
- Therefore, to explore whether this is so, you should explore the person’s ability to make decisions, with or without support

RESOURCES FOR EXPLORING SUPPORTED DECISION-MAKING

Martinis, 2019. Making it Happen, Steps in Supported Decision-Making

<https://publications.ici.umn.edu/impact/32-1/making-it-happen-strategies-for-supported-decision-making>

Francisco & Martinis: Supported Decision-Making Teams: Setting the Wheels in Motion:
<http://supporteddecisionmaking.org/sites/default/files/Supported-Decision-Making-Teams-Setting-the-Wheels-in-Motion.pdf>

MAKING IT HAPPEN

STEPS IN SUPPORTED DECISION-MAKING

Listen and Think

- Supported Decision-Making should always be based on the person's strengths, needs, and interests.
- Start by encouraging the person to think about decisions he or she makes now and those the person needs help to make.
- RESOURCE: The Missouri Stoplight Tool:
<https://www.moddcouncil.org/uploaded/Guardianship%20Manual%20Appendix%201.pdf>

MAKING IT HAPPEN

STEPS IN SUPPORTED DECISION-MAKING

Identify Opportunities and Challenges

- Explore the types of support the person wants to use.
- Talk about the support he or she uses now. If one way of supporting the person works well, think about trying it for other life areas.
- If you're not sure what to try, brainstorm about ways to give and get support
- RESOURCE: The "Supported Decision-Making Brainstorming Guide:"
<http://supporteddecisionmaking.org/sites/default/files/sdm-brainstorming-guide.pdf>

MAKING IT HAPPEN: STEPS IN SUPPORTED DECISION-MAKING

Find Supporters

- Connect with the people, professionals, agencies, and organizations that can provide the support the person wants.
- Consider support from programs like Aging and Disability Resource Center, Area Agency on Aging, Medicaid Waiver, Centers for Independent Living.

MAKING IT HAPPEN

STEPS IN SUPPORTED DECISION-MAKING

Coordinate Support

- Work with the person, supporters, professionals, and agencies to develop a Supported Decision-Making plan laying out who will support the person and how the person will use that support.
- RESOURCE: “Setting the Wheels in Motion”:
<http://supporteddecisionmaking.org/sites/default/files/Supported-Decision-Making-Teams-Setting-the-Wheels-in-Motion.pdf>

MAKING IT HAPPEN: STEPS IN SUPPORTED DECISION-MAKING

Put it in Writing

- Not specifically required by law but effective
- Create written plans saying who will give support, when, and how
- Examples of agreements are at www.SupportedDecisionMaking.Org

EXPLORING ALTERNATIVES, THE ABA'S PRACTICAL MODEL

PRESUME that guardianship is not needed.

REASONS for concern – “What’s the problem?”

ASK if the problem is temporary or easily addressable- “What’s the root cause?”

COMMUNITY Connect with resources – “What would it take to solve the problem?” and “Who can provide that?”

TEAM Has the person already identified people s/he wants to work with?

IDENTIFY If the person does not have a team, examine abilities, limitations, wants, needs, and contacts to see if a team can be made or supports provided

CHALLENGES Are there potential problems with team members or resources?

APPOINT If the person wants to give someone else the power to support or make decisions, help the person do it consistent with his or her wishes

LIMIT As a last resort, seek a guardianship limited to **ONLY** those areas the person **cannot** make decisions with or without support

AFTER EXPLORING, DOCUMENT

If the person is able to “manage” and “meet” using support, document what the support is and how it works

- This can be as easy as creating a Supported Decision-Making Team “Roster” listing who will do what, how, and when – e.g., *In Re: Conservatorship of Marie Bergum*: Superior Court, Santa Cruz (CA), Case No: 19PR00378
- You can also formalize the Support plan by creating Supported Decision-Making Agreement, Power of Attorney, Advanced Directive, Representative Payee Agreement, or other method

PRACTICE TIP

- If you create a formal plan or agreement, the person should not sign it
- Team members should sign, but not the person.
- Represent to the court that the person WILL sign the plan once the Court affirms his/her legal right to do so

SAMPLE ALTERNATIVE: MEDICAL DECISION-MAKING POWER OF ATTORNEY

“[M]y agent will work with me to make decisions and give me the support I need and want to make my own health care decisions. This means my agent will help me understand the situations I face and the decisions I have to make. Therefore, at times when my agent does not have full power to make health care decisions for me, my agent will provide support to make sure I am able to make health care decisions to the maximum of my ability, with me being the final decision maker.”

MEDICAL POWER OF ATTORNEY PART 2

“If I am found to be incapable of making my own health care decisions as described above, my attorney-in-fact shall make decisions and take actions on my behalf as directed below or (if not directed below) in accordance with **preferences I made known to her prior to my incapacity. If I had not previously made my preferences known, then, in making any decisions or taking any actions under the terms of this instrument, my attorney-in-fact will first discuss the situation and the decision to be made/action to be taken with me and give primary consideration to my express wishes before making the decision or taking action. If I am not capable of discussing the situation with my attorney-in-fact and I have not previously made my preferences known, my attorney-in-fact must use her best judgement to make the decision I would have made/take the action I would have taken in that situation, even if it is different from what she would have done in that situation.”**

SAMPLE ALTERNATIVE FINANCIAL POWER OF ATTORNEY

I will not buy, sell, manage, or otherwise take or exercise any interest in any tangible property or item costing or worth more than \$X without my agent's agreement. For example, if I want to buy or sell a car for \$20,000, I would need my agent to agree or the sale could not go through.

In making decisions whether or not to buy, sell, manage, or otherwise take or exercise any interest in any tangible property or item costing or worth more than X, **my agent and I will discuss the situation and give consideration to my express wishes before my agent decides whether or not to agree.**

SAMPLE LANGUAGE

FINANCIAL POWER OF ATTORNEY 2

I agree that my agent will be listed as a joint account holder on all bank or other financial institution accounts – including checking and savings accounts, as well as credit and debit cards – that I have or open while this power of attorney is in effect.

I agree that I will not withdraw more than \$X from any account, write a check for more than \$X, or otherwise cause more than \$X to be withdrawn from or charged to any account unless my agent agrees.

In making decisions whether or not to agree to write checks, withdraw money from my accounts or charge money to my accounts, my agent and I will discuss the situation and **give consideration to my express wishes before my agent decides whether or not to agree.**

SAMPLE ALTERNATIVE “GROWTH CLAUSE” FOR POA

“My agent and I will review this [Power of Attorney/Plan/Advanced Directive/Agreement] to see if it should be changed or cancelled at least every years. However, unless my agent and I change the [], I cancel it, my agent resigns, or either I or my agent dies, the power of attorney will continue.”

DOCUMENTING CAPACITY EVALUATIONS

- 64.2-2012 does not REQUIRE that the person's "regaining" capacity be documented by an evaluation or proven via expert testimony
- However, it certainly helps to have an expert testify whether the person does, in fact, have capacity.
 - This was done in *Ross and Ross v. Hatch*, Va. Cir. (Newport News), Case No. CWF-120000-426 and *In Re: Ryan Herbert King*, D.C.Sup.Ct. (Probate) Case No.: 2003 INT 249

DOCUMENTING CAPACITY EVALUATIONS 2

- Another option is to have an expert evaluate the person to render an opinion as to whether the person is, in fact, using SDM. Even if the expert cannot testify regarding the person's medical/mental status, it goes to the continuing "necessity" of the guardianship.
 - This was done in *In the Matter of the Guardianship and Conservatorship of Emery Scott Olson*, District Court, Laramie County (WY), Docket No. 45-341 and *In Re: Tecora Micklel*, D.C. Sup.Ct (Probate) Case No.: 2015 INT 291

DOCUMENTING CAPACITY EVALUATIONS 3

- Another option is to have an expert testify or submit an affidavit to “educate the court” about the theory, practice, and benefits of SDM.
 - This was done in *In re: the Guardianship of Jamie Lavonne Beck*, Superior Court, Wayne County (IN), Case No.: 89DO2-1805-GU-000044 and *re: the Guardianship of Tyler Borjas*, Probate Court, Miami-Dade County (FL), Case No.:2017002056GD02

PRACTICE TIP

CAPACITY EVALUATORS

- If you are hiring an evaluator to determine mental/medical status, make sure that s/he has knowledge of alternatives to guardianship or Supported Decision-Making
- If the person uses support to make decisions, s/he should have support available to take part in the evaluation
- The supporter can help the person understand the evaluator and the evaluator understand the person
- This also gives the evaluator a greater understanding of how the person uses support

PRACTICE TIP:

CAPACITY EVALUATIONS

- Evaluations should not just focus on the person's diagnosis or the impact of it
- For example, IQ and the mini mental status exam are useful for diagnosis, but do not measure how the person makes decisions or uses support
- So, evaluations should be functional, examining HOW the person navigates real world environments and makes decisions.
- Example: In, *In Re: Ryan Herbert King*, D.C.Sup.Ct. (Probate) Case No.: 2003 INT 249, the evaluator shadowed Mr. King through a typical day, and was able to render an opinion on how he made decisions in a variety of environments.

PRACTICE TIP: SUPPORT EVALUATORS

- Evaluator who will testify about the person's use of support to make decisions should have experience working with people who use SDM and, preferably, have facilitated someone's use of SDM before
- Evaluator should also be able to discuss research and studies on SDM and other alternative to guardianship
- "Educating the Court" is a must

Practice Tip: Educating the Court

- Society sees guardianship as “a humanitarian response to the vulnerability of the incompetent” - Frolik, 1998
- Guardianship proceedings are seen as “benevolent” with all parties on the same side, working to “protect” the person – e.g. Wright, 2004
- “I have a first cousin who has the same intellectual disability as Ms. Hatch. I’d want somebody to take care of her.” – *Ross and Ross v. Hatch*, Va. Cir. (Newport News), Case No. CWF-120000-426 (Tr, 2/10/13)

The Court MUST be shown that the case is not about “protecting” or “taking care” but determining whether or not the person CAN make decisions and NOT whether the person makes “good decisions”. See Va. Code 64.2-2000 (bad decisions, alone, do not establish incapacity).

Practice Tip: Educating the Court

“Would it be fair to say that **incrementally** she could begin at a group home **I’m not talking about independence now.** I’m talking about gradual Then maybe some independence of herself....” - *Ross and Ross v. Hatch*, Va. Cir. (Newport News), Case No. CWF-120000-426

The Court MUST be shown that one does not “earn” rights. Rights and capacity are PRESUMED - See, Va Code Ann. 54.1-2983.2 (all adults are presumed capable of making informed decisions unless proven otherwise)

PRACTICE TIP: EDUCATING THE COURT

But given everything that I've heard here today, there are certain issues when you're dealing with certain people, and **there has to be some discipline attached. . .** The people who supply these supported services are only as good as their abilities and their background and knowledge . . . **If everyone was like you, then I would feel better. . ."** -

The Court must be told that the decision must be based on the evidence, not supposition or speculation. If there is evidence that the person has a support team and is using it, that's enough.

Remember, it's a preponderance of the evidence standard!

Practice Tip: Educating the Court

“My grandmother said there’s a lot of things that you want in life that make it the best. . . **In a perfect world, everything you say that could take place probably could take place. . .** But you and I know that this is not a perfect world.”

The Court MUST be shown that it can’t expect perfection. Mistakes can and will happen. Bad decisions will be made. That’s natural.

NO ONE can meet the Mr. Spock Standard and make ONLY logical, correct decisions

PRACTICE TIP:

EDUCATING THE COURT - SAFETY

NOTHING: Not Guardianship, Not Supported Decision-Making is 100% "Safe."

HOWEVER: Supported Decision-Making Increases Self-Determination (Blanck & Martinis, 2015), which is correlated with increased Safety (Khemka, Hickson, & Reynolds, 2005).

SIGNS AND SIGNALS – ABUSE AND NEGLECT

- Injuries
- Unusual bruising or abrasions
- Fear or nervousness
- Withdrawal
- Basic needs not being met
- Overdependence on another
- Bills not being paid
- Living below means
- Things are missing

BUT REMEMBER: ADULTS ARE ALLOWED TO MAKE BAD DECISIONS

- Health
 - Money
 - Love
 - Living Conditions
-
- Va. Code Ann. 64.2-2000 (bad decisions don't establish incapacity)
 - Va. Code Ann. 54.1-2983.2 (all adults are presumed capable of making informed decisions unless proven otherwise)

BUT REMEMBER: THE SAME PROTECTIONS ARE AVAILABLE

Whether you are in guardianship or not

- Police
- APS
- Medicaid Fraud Unit
- Protection and Advocacy
- Adult Disability Resource Center

AFTER THE COURT IS EDUCATED

- “Guardians shall assist Respondent in making and implementing decisions we have termed ‘supported decision making.’” - *Ross and Ross v. Hatch*, Va. Cir. (Newport News), Case No. CWF-120000-426
- “One of things that resonated with me as I was reading through the materials was the statement about decision-making and how you can't guarantee that Scott will always make the correct decision. But that's so true with everything in life, every decision that people normally make. I mean, you're going to make mistakes, certainly. And Scott, like everybody else, will learn from those mistakes. I am certainly willing to dissolve the guardianship-conservatorship and see if this works.” - *In the Matter of the Guardianship and Conservatorship of Emery Scott Olson*, District Court, Laramie County (WY), Docket No. 45-341

IT HAPPENS



Jenny Hatch and her attorney celebrate after the court victory. (TWP)

‘I’m so happy to go home today’

Theresa Vargas

Jenny Hatch, a 29-year-old-woman with Down syndrome, can live the life she wants after a judge rules she can reside with friends.

IT CAN HAPPEN



IT DOES HAPPEN



IT WILL HAPPEN



IT KEEPS HAPPENING



IT WILL KEEP HAPPENING



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CHANGE THE CULTURE, CHANGE THE WORLD

Remember the Goals

- **EVERYONE** “the causal agent” in his or her life
- **EVERYONE** giving and getting the help we ALL need to make decisions to the maximum of our abilities
- Older adults and people with disabilities with “the same opportunities for success and security as their nondisabled peers.” - Gustin & Martinis, 2016

JOIN THE CONVERSATION

The National Resource Center for
Supported Decision-Making:
SupportedDecisionMaking.Org

The Burton Blatt Institute at Syracuse
University: www.bbi.syr.edu

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