

MODEL LANGUAGE FOR SUPPORTED DECISION-MAKING STATUTES

INTRODUCTION

Approximately 16.1 million Americans over fifteen years old had a “reported mental, cognitive, or emotional disability” in 2005,¹ and nearly 50 million Americans are affected by neurodegenerative conditions each year.² Such disabilities can lead courts to determine that these individuals are incompetent—incapable of managing their own affairs.³ When such a determination is made, the Western legal tradition imposes an obligation on the State as *parens patriae*, or “parent of the country,” to protect that person and their property.⁴ In practice, the State often imposes guardianship on people whose disabilities interfere with their decision-making ability, thereby entrusting another person with decision-making on their behalf.⁵ People with disabilities, activists, and scholars have critiqued the guardianship system for not doing enough to investigate the actual limitations of those subjected to guardianship and for denying too many of their rights.⁶ As respected jurist Judge Cardozo wrote, “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.”⁷ Guardianship exposes the tension between protecting an individual’s best interests (from the view of the State) and recognizing the right to self-determination and decision-making.

Supported decision-making offers a different approach to balancing the rights of the individual with the State’s obligation to protect people with disabilities. Put simply, the person with a disability retains decision-making authority over their own life and receives any necessary decision-making

1. Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 166 n.24 (2010). This number is expected to increase with the growing number of older adults. *Id.*

2. Jalayne J. Arias, *A Time to Step In: Legal Mechanisms for Protecting Those with Declining Capacity*, 39 AM. J.L. & MED. 134, 138 (2013).

3. *See infra* Part I.B.

4. Salzman, *supra* note 1, at 164.

5. *See infra* Part II.A, for a discussion of guardianships. It may be more accurate to refer to substituted decision-making instead of the narrower category “guardianships” because some states distinguish between guardians and conservators based on whether the person has authority over lifestyle or financial decisions. However, this Note will primarily rely on the more common terminology of guardianship.

6. *See infra* Part II.A. Broadly speaking, the “right” at issue is the right to make decisions about one’s life; this implicates many areas of life, including the right to marry or dissolve a marriage, to work, to select housing, to consent to medical treatment, and to invest or gift money, among other decisions. *See infra* note 60.

7. *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914).

assistance from others per a voluntary agreement.⁸ While advocates initially promoted the model primarily for use by people with intellectual or psychosocial disabilities,⁹ there has been a trend to extend its use to other groups, such as older persons¹⁰ and people with dementia.¹¹

In light of the growing interest in supported decision-making, this Note examines existing supported decision-making statutes to propose model language that best serves people with disabilities. Part I of this Note provides a brief introduction to medical and legal determinations of capacity or competency. These concepts are necessary to understand the circumstances in which guardianship and supported decision-making agreements apply. Part II of this Note then explores the use and history of substituted decision-making, specifically guardianship, and the subsequent development of supported decision-making as an alternative. Part III delves into an analysis of existing statutes on supported decision-making, considering how each answers several key questions: What is required of the principal to enter a supported decision-making agreement? How does supported decision-making relate to guardianship? What is required of the supporter? And finally, what is the role of the State? Part IV takes up these questions again, but this time proposes model statutory language to suggest how legislatures should answer them to better serve people with disabilities.

I. DETERMINING MEDICAL CAPACITY AND LEGAL COMPETENCY

For the purpose of this Note, capacity will be treated as a medical determination and competency as a legal one; in reality, the terms are often used interchangeably. As a medical determination, “capacity” is found by physicians and psychiatrists¹² and is best understood as existing on a continuum¹³—capacity can range from high to average to low and may vary based on context. “Competency,” however, is a legal determination often made by probate courts¹⁴ and exists as a binary¹⁵—a person is either competent or incompetent. Judges, then, must decide at which point on the

8. Megan S. Wright, *Dementia, Autonomy, and Supported Healthcare Decisionmaking*, 79 MD. L. REV. 257, 262 (2020). The use of a formalized agreement is relatively new, but informal supported decision-making is as old as decision-making itself. Anyone who has ever asked another person to explain a problem or possible solution, to assist in weighing the options, or to communicate a decision to others has engaged in supported decision-making. Rebekah Diller, *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 FORDHAM URB. L.J. 495, 516 (2016).

9. Diller, *supra* note 8, at 520.

10. *Id.* at 524.

11. Wright, *supra* note 8, at 284.

12. Arias, *supra* note 2, at 136.

13. *Id.* at 137.

14. *Id.* at 136.

15. *Id.* at 137.

capacity continuum an individual moves from competent to incompetent.¹⁶ As will be seen, both determinations have tremendous implications for individual rights, and the methods by which these determinations are made are subject to strong criticism.¹⁷

A. Medical Determinations of Mental Capacity

Individuals use a variety of skills to manage their affairs, and these skills—including “memory, reasoning, judgment, and decision making”—collectively form mental capacity.¹⁸ Capacity exists on a “continuum” as it may vary across skills and over time.¹⁹ Adults are assumed to have capacity,²⁰ so physicians are unlikely to evaluate an individual’s level of capacity “without cause.”²¹ When an evaluation is considered necessary, it generally focuses on the individual’s capacity to make a specific decision or perform a specific action.²² Although evaluations vary, four criteria are commonly considered:²³

1. The ability to “maintain and communicate a choice or decision,”²⁴
2. The ability to “understand relevant information,” including the ability “to recall the information” and “to comprehend the meaning of the information provided,”²⁵
3. The ability to “appreciate his or her situation,” in that the individual can “apply the consequences of a decision or action to her circumstances,”²⁶ and

16. *Id.*

17. *See infra* Part II.

18. Melanie Gavisk & Edith Greene, *Guardianship Determinations by Judges, Attorneys, and Guardians*, 25 BEHAV. SCI. & L. 339, 339–40 (2007).

19. Arias, *supra* note 2, at 138 (quoting Jason Karlawish, *Measuring Decision-Making Capacity in Cognitively Impaired Individuals*, 16 NEURO SIGNALS 91, 93 (2008)).

20. *Id.* at 139.

21. *Id.* at 142. What constitutes “cause?” Typically the physician is considering this question in the healthcare setting, so their goal is to establish that a patient is capable of giving informed consent (e.g. to a recommended procedure or medication). “[C]ommon law presumes competency, which means testing for capacity to satisfy informed consent is not so much a legal as an ethical requirement.” Lauren Padama, Note, *Informed Consent and Decision-Making After Loss of Competency in Dementia Patients: A New Model*, 28 S. CAL. INTERDISC. L.J. 173, 181 (2018). If a patient agrees with their doctor, the doctor is unlikely to call into question the patient’s decision making capacity; if the patient does not, however, then the doctor may investigate if the patient lacks capacity, which would put the decision in the hands of the physician or another substituted decision-maker. Wright, *supra* note 8, at 311.

22. *See* Arias, *supra* note 2, at 142.

23. *Id.* at 142–43. Also known as the Appelbaum-Grisso criteria, these conditions of capacity stem from legal standards. *Id.*; *see also* Jason Karlawish, *Measuring Decision-Making Capacity in Cognitively Impaired Individuals*, 16 NEURO SIGNALS 91, 93 (2008) (framing the standards as “understanding, appreciation, choice and reasoning”).

24. Arias, *supra* note 2, at 143. Communication of one’s choice is “almost a universally accepted component of capacity.” *Id.*

25. *Id.*

26. *Id.* at 143–44.

4. The ability to apply the individual's own values to the information provided in reaching a decision, called "[r]ational manipulation."²⁷

Researchers consider capacity to be "a domain-specific and risk-sensitive concept."²⁸ Domain-specific means capacity can vary across different decisions or actions,²⁹ so an evaluation must consider the types and level of skills needed for the decision or action being assessed.³⁰ For example, the abilities necessary to drive a car safely to a familiar destination are different than the abilities necessary to plan a budget, so an individual may have capacity in one domain and not the other. Risk-sensitive means that "the threshold for capacity should be adjusted to the risk-benefit profile of the decision."³¹ For example, driving a car and driving a riding lawnmower require a similar set of skills, but the risks involved are different. To the extent that driving a car is higher risk because it involves greater speeds and more interactions with other drivers, it requires a higher degree of capacity.³²

Capacity evaluations face a number of criticisms. The most significant is that "clinical judgments of capacity can often be inaccurate, unreliable, and even invalid."³³ So far there is no consensus on what criteria to evaluate to determine capacity,³⁴ so assessment tools themselves differ and cannot be validated.³⁵ Different doctors using the same assessment tools, or the same doctor using different assessment tools, may reach different conclusions regarding an individual's capacity, particularly with regard to

27. *Id.* at 144. This is the most controversial criterion because there is "a risk of abuse by evaluators making determinations based on the unconventional nature of a person's choices, instead of the inability to reason." *Id.*

28. Scott Y. H. Kim et al., *Preservation of the Capacity to Appoint a Proxy Decision Maker: Implications for Dementia Research*, 68 ARCHIVES GEN. PSYCHIATRY 214, 214 (2011).

29. *See id.* at 215.

30. Arias, *supra* note 2, at 140.

31. Kim, *supra* note 28, at 215.

32. Judges have also recognized this distinction in risk levels in determining if a party had capacity to take certain legal actions. *See, e.g., In re Marriage of Greenway*, 158 Cal. Rptr. 3d 364, 372–74 (Ct. App. 2013) ("the determination of a person's mental capacity is fact specific, and the level of required mental capacity changes depending on the issue at hand. . . . Simply stated, the required level of understanding depends entirely on the complexity of the decision being made.").

33. Jennifer Moye & Daniel C. Marson, *Assessment of Decision-Making Capacity in Older Adults: An Emerging Area of Practice and Research*, 62 J. GERONTOLOGY 3, 9 (2007).

34. For example, the emphasis on communication abilities may fail to account for the ways a patient's emotional responses to the medical evaluation process (such as fear or frustration) may influence behavior (e.g. cause someone to refuse to answer questions). Evaluators may mistakenly attribute that behavior to incapacity. *See Wright, supra* note 8, at 269 n.61.

35. Arias, *supra* note 2, at 146. Part of the challenge of creating a universal tool or set of tools is that, as discussed, different skills are needed "to maintain capacity for purposes of medical, lifestyle, legal, or financial decision-making." *Id.* at 140. The tool(s) used will have to take these differences into account. Part of the challenge is also pragmatic: "[f]ewer tools have been developed to address capacity in the context of everyday or financial decision-making." *Id.* at 146. This is largely because these areas are not of concern to the medical practitioners developing and using the evaluations.

appreciation and reasoning.³⁶ The choice of competency assessment or doctor may therefore be the true determinative factor in an evaluation's outcome.³⁷ In addition, "it is not at all clear that persons with typical decision-making abilities and no disabilities would be found to have capacity if formally evaluated,"³⁸ which further undermines the legitimacy of restricting an individual's rights based on such an evaluation.³⁹ Finally, despite the decision-specific nature of capacity assessments, the tests do not always account for the context of the actual decisions, which means that these tests may not make an accurate prediction of decision-making capacity in real-life situations.⁴⁰

To the extent these assessments provide at least some basis for determining capacity, it is of additional concern that clinicians do not always engage in a formal evaluation to make a finding of incapacity before removing a patient's decision-making authority.⁴¹ Instead, these clinicians base their decision on "history, diagnosis, disability, age, appearance, behaviour or the fact that someone was making an unwise decision."⁴² For example, doctors have presumed that dementia patients are incapacitated after conducting only an informal assessment or no assessment at all.⁴³ If a physician reaches a finding of incapacity, they may turn to other sources (such as an advance directive or surrogate decision-maker) for medical decisions.⁴⁴ A finding of incapacity can also be used to inform a legal determination of incompetency.

B. Legal Determinations of Competency

Incompetency is usually determined after a family member, friend, or agency files a guardianship petition following some event that suggests a potential need for guardianship, such as "an acute illness, financial mismanagement, or institutional placement."⁴⁵ Physicians or mental health

36. Moye & Marson, *supra* note 33, at 7.

37. Padama, *supra* note 21, at 187.

38. Wright, *supra* note 8, at 269 n.61. For example, one study found that "almost the entire healthy sample satisf[ie]d the elements needed to prove capacity." Padama, *supra* note 21, at 186 (emphasis added). This means that some of the "healthy sample" failed to meet the criteria for capacity. Due to the presumption of capacity, most people without disabilities would not ordinarily be evaluated; if people without any disability cannot meet the standard for capacity, what are the implications for how we currently approach decision-making rights and capacity?

39. See *infra* notes 60–61 and accompanying text for discussion of the restriction of rights.

40. R. Ryan Darby & Bradford C. Dickerson, *Dementia, Decision Making, and Capacity*, 25 HARV. REV. PSYCHIATRY 270, 274 (2017).

41. Wright, *supra* note 8, at 276 n.104.

42. *Id.* (quoting Hugh Series, *Best Interests Determination: A Medical Perspective*, in THE LAW AND ETHICS OF DEMENTIA 91 (Charles Foster et al. eds., 2014)).

43. *Id.* at 269 n.60.

44. *Id.* at 269.

45. Gavisk & Greene, *supra* note 18, at 340–41.

professionals may then file reports that evaluate the individual's "medical condition, cognitive and functional capacities, attempts to increase capacity, and level of supervision needed" as part of the guardianship process.⁴⁶ Court personnel (e.g. a court investigator or guardian ad litem) may make a separate evaluation, and the individual as well as family members, friends, and other sources may provide input as appropriate.⁴⁷ A probate judge makes the final determination of competency when deciding the guardianship petition.⁴⁸

For a judge to hold that an individual is incompetent usually "require[s] two findings: (1) the individual is at risk of harm because of an inability to provide for personal or financial needs; and (2) the individual lacks the cognitive ability to understand and appreciate decisions."⁴⁹ In determining incompetency, "the individual's particular diagnosis or condition is not supposed to be determinative; what is supposed to matter is the functional ability to make decisions."⁵⁰ If a judge determines that an individual lacks the capacity to manage her own medical, financial, and daily affairs, the judge will find that person incompetent⁵¹—at which point the person loses the legal right to manage those affairs.⁵² Unlike in the medical context, where physicians evaluate capacity in relation to a specific activity, in the legal context, judges usually evaluate competence on an all-or-nothing basis and the threshold for incompetence is less clear.⁵³ Most laws do not specify "the level or breadth of impairment or deficits necessary" for a finding of incompetence, so the court must act subjectively when deciding whether a

46. *Id.* Unfortunately, such medical evidence is "often incomplete and inadequate." Arias, *supra* note 2, at 147. "A study reviewing the clinical evaluations and determinations of incompetence for guardianship proceedings in three states reports that guardianship orders often lack adequate clinical basis." *Id.* at 151.

47. Gavisk & Greene, *supra* note 18, at 341.

48. *See id.*

49. Diller, *supra* note 8, at 500.

50. *Id.* at 501. This approach is the result of reform efforts. "Reformers succeeded in changing the standard for determining whether to appoint a guardian from a diagnostic-based, medical declaration of incompetency to a functional assessment of the person's ability to make decisions." *Id.* at 505. "The movement to functional assessments of 'capacity' was significant in guardianship reform efforts in the 1980s and 90s. This transition was a significant advance over earlier models in which 'capacity' was determined by status or medical diagnosis, or through an 'outcomes' approach." Kristin Booth Glen, *Introducing a "New" Human Right: Learning from Others, Bringing Legal Capacity Home*, COLUM. HUM. RTS. L. REV., Spring 2018, at 1, 14 n.54. An outcomes approach bases the capacity determination on whether the individual's decisions are considered to have good or bad consequences from the perspective of the evaluator. *Id.* at 35–36, n.164 (citing ANNA ARSTEIN-KERSLAKE, RESTORING VOICE TO PEOPLE WITH COGNITIVE DISABILITIES: REALIZING THE RIGHT TO EQUAL RECOGNITION BEFORE THE LAW 84 (2017)).

51. Arias, *supra* note 2, at 147.

52. *Id.* at 136.

53. *See id.* at 150. Recent reforms have created the option of limited guardianships, which apply only to specific areas of decision-making. However, they are rarely used. *See infra* Part II.A for a discussion of the promise—and disappointment—of limited guardianships.

person requires a guardian.⁵⁴ Like capacity assessments, competency determinations face several criticisms, including overly broad determinations, vague standards, and inadequate supporting medical evidence.⁵⁵

II. SUBSTITUTED AND SUPPORTED DECISION-MAKING

If an individual lacks the capacity to make their own decisions, how will those decisions be made? Two possible answers are relevant to this Note.⁵⁶ First, another person could make those decisions on behalf of the individual who lacks capacity; second, someone could work with the person who lacks capacity to help them make their own decisions. The first choice is known as substituted decision-making and has strong legal precedent;⁵⁷ the second is known as supported decision-making and, while it is often used informally, has only recently gained legal standing.⁵⁸

54. Arias, *supra* note 2, at 150. The American Bar Association and American Psychological Association attempted to provide some guidance through a handbook published in 2006. “The Handbook establishes a ‘six pillar’ analysis of capacity, including consideration of: (1) the individual’s medical status; (2) the individual’s cognitive function; (3) the individual’s everyday functioning; (4) the consistency of the individual’s choices with her values; (5) the potential risk of harm and the level of supervision needed; and (6) whether there are means to enhance capacity. . . . Without legislative adoption of this structure, judicial bodies are limited in their ability by current legislative language.” *Id.* (citing ABA COMM’N ON LAW & AGING, AM. PSYCHOLOGICAL ASS’N & NAT’L COLL. OF PROBATE JUDGES, JUDICIAL DETERMINATION OF CAPACITY OF OLDER ADULTS IN GUARDIANSHIP PROCEEDINGS 4–5 (2006), available at <http://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf>).

55. *See id.* at 147.

56. A third alternative is the use of a written advanced directive or living will. These documents are prepared by an individual prior to the loss of decision-making capacity and may express preferences or decisions regarding a variety of matters, including healthcare. Professor Norman L. Cantor, for example, shared his own advance directive as an example of how to “hasten [one’s] post-competence demise” by rejecting “any and all life-sustaining means” after the loss of certain cognitive abilities. Norman L. Cantor, *On Avoiding Deep Dementia*, HASTINGS CTR. REP., July–Aug. 2018, at 15, 16. Professor Rebecca Dresser criticized Cantor’s article and the use of advanced directives, opining that an individual’s expectations of life with a condition like dementia may not reflect the actual experience; she argues that advance decisions may not reflect contemporaneous best interests and preferences. Rebecca Dresser, *Advance Directives and Discrimination Against People with Dementia*, HASTINGS CTR. REP., July–Aug. 2018, at 26.

57. For example, forty-one jurisdictions (when considering all fifty states and D.C.) have laws governing the “appointment of a default surrogate for medical decision making in the absence of an agent.” Erin S. DeMartino et al., *Who Decides When a Patient Can’t? Statutes on Alternate Decision Makers*, 376 NEW ENG. J. MED. 1478, 1479 (2017). Substituted decision-making has been said to “dominate modern legal frameworks.” Eilionóir Flynn & Anna Arstein-Kerslake, *The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?*, 32 BERKELEY J. INT’L L. 124, 132 (2014).

58. The first supported decision-making law passed in the United States in 2015; as of writing, only nine jurisdictions (including D.C.) have adopted such laws. *See infra* Part III.

A. Substituted Decision-Making

Substituted decision-making refers to systems in which someone is appointed to make a decision on another's behalf based on the latter's best interests.⁵⁹ This Note will focus on guardianship, the system to which an estimated 1.5 million Americans are subject.⁶⁰ A probate judge appoints a guardian upon finding that an individual "(1) meets the state's standard for incompetence and (2) would benefit from a guardianship."⁶¹ The legal⁶² and personal⁶³ consequences of this decision are profound. Once the judge vests a surrogate (guardian) with the right to make decisions for the incapacitated person, the incapacitated person "ceases to be 'a legal actor' whose decisions receive legal recognition."⁶⁴

A guardianship proceeding is, "by its nature, uncomfortable, embarrassing, and stigmatizing."⁶⁵ Guardianship has been called a "civil death,"⁶⁶ and Congressman Claude Pepper claimed that "[t]he typical ward has fewer rights than the typical convicted felon."⁶⁷ This extreme loss of rights coupled with numerous and scandalous reports of abuse by guardians⁶⁸ has led to strong critiques of and opposition to guardianship.⁶⁹

59. See Flynn & Arstein-Kerslake, *supra* note 57, at 125.

60. Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1131 (2013). The exact number is unknown due to insufficient recordkeeping. *Id.*

61. Arias, *supra* note 2, at 147.

62. Salzman, *supra* note 1, at 167 ("Guardianship laws potentially impact many decisions that define who we are as human beings: where and with whom we live; whether we can travel, marry, engage in certain social activities or interactions; whether we accept or reject medical treatment; and whether and how we manage our income and resources.").

63. *Id.* at 169, 170 ("As the individual is deprived of the right to make decisions, he or she experiences a loss of control and a feeling of helplessness that has critical implications for his or her psychological well-being." Compounding this effect, "[t]he 'disuse of decision-making powers' may lead to further decline in the individual's capabilities and sense of competence to act in the world, leading to further isolation and loss of abilities.").

64. Diller, *supra* note 8, at 501.

65. Salzman, *supra* note 1, at 176.

66. Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, HUM. RTS. BRIEF, Winter 2012, at 8, 9 (quoting Robert D. Dinerstein, *Guardianship and Its Alternatives*, in ADULTS WITH DOWN SYNDROME 235, 236 (Siegfried M. Pueschel ed., 2006)).

67. Diller, *supra* note 8, at 502 (quoting *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace: Hearing Before the H. Select Comm. on Aging*, 100th Cong. 4 (1987) (statement of Rep. Claude Pepper, Chairman, H. Select Comm. on Aging)).

68. See, e.g., *Who's Guarding Against the Guardians?*, WBUR (Oct. 5, 2017), <https://www.wbur.org/onpoint/2017/10/05/state-sanctioned-guardians> [<https://perma.cc/3EEB-JCHT>]. The National Association to Stop Guardian Abuse also documents victims of abuse and seeks to empower and advocate for those who may be subject to guardianship. NAT'L ASS'N TO STOP GUARDIAN ABUSE, <https://www.stopguardianabuse.org> [<https://perma.cc/2TS2-N8F4>].

69. See, e.g., Dinerstein, *supra* note 66, at 9 ("Plenary guardianship falsely assumes that incapacity for individuals with disabilities is an all or nothing proposition; that where found it exists in

Guardianship has undergone a series of reforms in order to provide more dignity to the person subject to it and to reduce incidents of abuse.⁷⁰ As one part of reform, policy makers created limited guardianship, “requiring courts to limit a guardian’s authority to only those realms of decision making with which the individual needs assistance,” as an alternative to the broad power granted under a plenary guardianship.⁷¹ The aim was to limit the guardian’s authority in direct relation to the individual’s specific deficits.⁷² However, people subject to a limited guardianship may still be treated as if they lack capacity in areas that are not covered by the order.⁷³ Perhaps even more troubling, judges rarely appoint limited guardians;⁷⁴ plenary guardians may be appointed “with only minimal investigation” of the individual’s capacity and deficits.⁷⁵ The system’s preoccupation with determining whether an individual is incompetent or competent also means that little consideration is given to whether other “options that fall somewhere between autonomous and substituted decision making” should be legally recognized.⁷⁶ Finally, reforms have also failed to end abuse, as “[a] steady drumbeat of press reports from around the country has confirmed that these deficiencies persist.”⁷⁷

Regardless of whether reforms can ever prevent abuse or adequately limit the use of guardianships, some argue that guardianship should not be allowed under any circumstances. At an international level, the U.N. Committee on the Rights of Persons with Disabilities (“the Committee”) has interpreted the Convention on the Rights of Persons with Disabilities (“CRPD”) as forbidding “all forms of substitute decision-making.”⁷⁸ The

all areas of an individual’s life; and that, once found to exist the individual (especially one with an intellectual disability) will not regain capacity at some later time. It fails to recognize that people with disabilities, like people without disabilities, have areas of varying capacity, in different areas of their lives, and at different times.”).

70. See Diller, *supra* note 8, at 504.

71. Salzman, *supra* note 1, at 174.

72. See Arias, *supra* note 2, at 156.

73. Salzman, *supra* note 1, at 176.

74. See, e.g., Pamela B. Teaster, Erica F. Wood, Susan A. Lawrence & Winsor C. Schmidt, *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 199, 219 (2007) (noting that a study of guardianship in ten states in 1994 found that judges limited the guardianship in only thirteen percent of the guardianship orders, while a national study in 2005 found that public guardianship programs limited guardianship in only zero to ten percent of cases); Diller, *supra* note 8, at 508 (“[A] recent study reviewed all guardianship filings in 2008 in certain Indiana courts and found that limited guardianships were granted in *less than one percent* of the cases.”).

75. Wright, *supra* note 8, at 272.

76. Salzman, *supra* note 1, at 242–43.

77. Diller, *supra* note 8, at 510.

78. *Id.* at 513. Article 12 requires that states “recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.” Convention on the Rights of Persons with Disabilities and Optional Protocol art. 12, ¶ 2, Dec. 13, 2006, 2515 U.N.T.S. 3. The United States has signed, though not ratified, the CRPD; state laws, which govern guardianship, are therefore not bound

Committee recognizes “legal capacity” as a human right distinct from “mental capacity,” so an individual should not be stripped of decision-making authority regardless of decision-making ability.⁷⁹ Within U.S. law, Leslie Salzman argues that guardianship presumptively violates the integration mandate of Title II of the Americans with Disabilities Act by isolating people with disabilities from their community.⁸⁰ Both she⁸¹ and the Committee⁸² express support for supported decision-making as an alternative to guardianship.

B. Supported Decision-Making

Under a model of supported decision-making (“SDM”), “an individual with cognitive challenges is the ultimate decision-maker but is provided support from one or more persons who explain issues to the individual and, where necessary, interpret the individual’s words and behavior to determine his or her preferences.”⁸³ Independent living advocates devised SDM as a means of enabling people with disabilities to make decisions even though, under traditional systems, they would be found to lack decision-making capacity.⁸⁴ SDM can be viewed as a tool of accessibility:

[J]ust as we recognize that the law—and common principles of human decency—generally require that we build a ramp so that an individual with a physical impairment can enter a building without being carried up the steps, we should also recognize a legal obligation to provide decision-making support to an individual with limitations in mental capabilities rather than assign a guardian to make decisions *for* that person.⁸⁵

While terminology varies, for purposes of this Note, a principal is an adult who receives decision-making assistance through an SDM agreement or arrangement, and a supporter is an adult who provides that assistance. Four factors commonly characterize SDM arrangements:

by the Convention, though “the United States is bound not to defeat its object and purpose.” Diller, *supra* note 8, at 514–15.

79. See Diller, *supra* note 8, at 512–15, for a discussion of the right of legal capacity and its application in Article 12 of the CRPD. The CRPD has not adequately addressed the practical consequences of this approach in extreme cases. See *infra* note 152 and accompanying text.

80. Salzman, *supra* note 1, at 206–09.

81. *Id.* at 231.

82. See Diller, *supra* note 8, at 514.

83. Kohn et al., *supra* note 60, at 1120. See Karrie A. Shogren et al., *Supported Decision Making: A Synthesis of the Literature Across Intellectual Disability, Mental Health, and Aging*, 52 EDUC. & TRAINING AUTISM & DEVELOPMENTAL DISABILITIES 144 (2017), for a review of the literature on factors that influence decision-making, support needs, and supports.

84. Diller, *supra* note 8, at 511–12.

85. Salzman, *supra* note 1, at 165–66.

1. The principal retains legal decision-making rights;
2. The principal enters the SDM arrangement voluntarily and may terminate it at will;
3. The principal must be an active participant in making decisions covered by the arrangement; and
4. Decisions made by the principal with a supporter are legally binding.⁸⁶

The transition from substituted to supported decision-making has been described as a “[p]aradigm [s]hift.”⁸⁷ SDM simultaneously centers the individual in their own decision-making, and recognizes that it is not necessarily inconsistent for that individual to rely on the support of others, “so long as it is at the individual’s choosing.”⁸⁸

As the above factors demonstrate, SDM is a process-focused, not outcome-focused, reform. This focus creates the risk of declaring the decision-making process to be a “success” even if the decisions reached by that process are harmful, whether objectively or from the principal’s perspective.⁸⁹ There is an unavoidable tension in simultaneously wanting to ensure decisions are in the principal’s best interest and to protect the principal’s autonomy; “allowing or even encouraging a person with cognitive or intellectual disability to ‘learn from mistakes’ may undermine efforts to protect that person from harmful outcomes.”⁹⁰ With “little empirical evidence directly evaluating supported decision-making,”⁹¹ it is difficult to know how its use affects the principal. There is also a risk of abuse or undue influence by the supporter, who may not be trained or monitored; even a well-meaning supporter may unintentionally influence the principal’s decisions through the manner in which the supporter presents or discusses decisions,⁹² and there is no reason to assume that supporters will be well-meaning.⁹³ These concerns do not suggest, however, that SDM

86. Leslie Salzman, *Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?*, 4 ST. LOUIS U. J. HEALTH L. & POL’Y 279, 306–07 (2011).

87. Kohn et al., *supra* note 60, at 1120.

88. Dinerstein, *supra* note 66, at 10.

89. Kohn et al., *supra* note 60, at 1141.

90. *Id.* at 1142. Kohn et al. also note, “there is a potentially unavoidable paradox in acknowledging that a person has diminished decision-making capacity but maintaining that he or she is nevertheless capable of meaningfully contributing to decision-making discussions and that the decisions that result from such discussions reflect his or her wishes. Similarly, how does one avoid a similar paradox in maintaining that a person can make that decision with assistance unless one is confident that person has a ‘consistent set of values’ to ground such a decision?” *Id.* at 1140 (quoting OFFICE OF THE PUB. ADVOCATE, SUPPORTED DECISION-MAKING: BACKGROUND AND DISCUSSION PAPER 23 (2009)).

91. *Id.* at 1128.

92. *Id.* at 1137.

93. Abuse by court-appointed guardians is a well-known concern. See *infra* note 68 and accompanying text. Supporters are in a similar position and may likewise abuse their position.

“lacks normative justification.”⁹⁴ While guardianship is critiqued as a de facto infringement on an individual’s rights,⁹⁵ supported decision-making upholds and enforces those rights.

III. STATUTORY ANALYSIS

Texas became the first state to pass a supported decision-making statute in 2015;⁹⁶ seven other states and D.C. have since followed,⁹⁷ and several other states have expressed support for SDM in guardianship laws⁹⁸ or court decisions.⁹⁹ There is no model language for SDM statutes; comparing state SDM laws reveals differences that could have a significant impact on who has access to SDM agreements and how these agreements affect their legal rights. An analysis of SDM laws in other countries (written prior to the existence of any U.S. statutes) found that “many of the statutory schemes widely described as enabling supported decision-making have features that are inconsistent with how its promoters typically define supported decision-making.”¹⁰⁰ This section addresses how each U.S. statute has answered several key questions related to supported decision-making and to what degree the statutes align with or differ from the aims of advocates and legal theorists.

94. Diller, *supra* note 8, at 529.

95. *See supra* notes 78–80 and accompanying text.

96. Wright, *supra* note 8, at 286; *see* TEX. EST. CODE ANN. § 1357 (West 2019) (effective September 1, 2015).

97. ALASKA STAT. § 13.56 (2019) (effective December 26, 2018); DEL. CODE ANN. tit. 16, §§ 9401A–9410A (2020) (effective September 15, 2016); D.C. CODE § 7-2133 (2020) (effective May 5, 2018); IND. CODE § 29-3-14 (2020) (effective July 1, 2019); NEV. REV. STAT. § 162C.010 (2019) (effective July 1, 2019); N.D. CENT. CODE § 30.1-36 (2019) (effective August 1, 2019); 42 R.I. GEN. LAWS § 66.13 (2020) (effective July 8, 2019); WIS. STAT. § 52 (2020) (effective April 18, 2018).

98. *See, e.g.*, ME. STAT. tit. 18-C, § 5-401 (2019); MO. REV. STAT. § 475.075(13)(4) (West 2019). In Tennessee, a bill was introduced to codify supported decision-making agreements, but was eventually amended to add the term “least restrictive alternatives” to the definitions section within the guardianship statute. The definition was given as “techniques and processes that preserve as many decision-making rights as practical under the particular circumstances for the person with a disability.” *In Your State: Tennessee*, NAT’L RES. CTR. FOR SUPPORTED DECISION MAKING, <http://supporteddecisionmaking.org/state-review/tennessee> [<https://perma.cc/MVC5-PJ8C>] (last updated Feb 1, 2020). *See also* 2018 Tenn. Pub. Acts 605 (“AN ACT to amend Tennessee Code Annotated, Title 34 [Guardianship], relative to supported decision-making agreements”).

99. *See, e.g.*, *In re Guardianship of Dameris L.*, 956 N.Y.S.2d 848, 853, 856 (Sur. Ct. 2012) (finding “that guardianship is no longer warranted because there is now a system of supported decision making in place that constitutes a less restrictive alternate to the Draconian loss of liberty entailed by a plenary 17-A guardianship”; “supported decision making must be explored and exhausted before guardianship can be imposed”).

100. Kohn et al., *supra* note 60, at 1121.

A. *What is Required of the Principal to Enter a Supported Decision-Making Agreement?*

Under contract law, an individual must have legal competence to enter into a valid contract.¹⁰¹ If supported decision-making agreements require the same legal competence as other contracts, however, the group of people who could benefit from them would be restricted to those who are already able to make legally binding decisions on their own. Such a restriction would undermine the purpose of adding SDM as a legally recognized option for individuals with disabilities to avoid guardianship. The first inquiry when examining state statutes must therefore be to identify what group of individuals are able to participate in SDM agreements. Seven of the nine existing statutes specify that the existence of an SDM agreement should not be interpreted as evidence that the principal lacks capacity.¹⁰² Even if the principal does not by default lack capacity, does one have to *have* capacity to participate in an SDM agreement? That is, what level of capacity is required of the principal?

Four states—Alaska, Delaware, Indiana, and Nevada—require that the principal “understands the nature and effect of the agreement.”¹⁰³ Kristin Booth Glen regarded it as “a real step backward” that the Delaware law not only includes this requirement, but “relies on a medical model in determining capacity.”¹⁰⁴ This approach fails to recognize decision-making as a right.¹⁰⁵ As noted in Part I.A, understanding is one of the factors assessed when evaluating capacity in a medical context. However, the

101. U.C.C. § 3-305 (AM. LAW INST. & UNIF. LAW COMM’N 2002); RESTATEMENT (SECOND) OF CONTRACTS § 12 (AM. LAW INST. 1981). The term “competence” has been used in the text for consistency within this Note; however, the sources actually refer to “capacity.” As noted in Part II, the terms are often used interchangeably.

102. ALASKA STAT. § 13.56.150(c) (2019); DEL. CODE ANN. tit. 16, § 9404A(c) (2020); IND. CODE § 29-3-14-4(c) (2020); NEV. REV. STAT. § 162C.300 (2019); N.D. CENT. CODE § 30.1-36-04(6) (2019); 42 R.I. GEN. LAWS § 66.13-4(c) (2020); WIS. STAT. § 52.03 (2020).

103. ALASKA STAT. § 13.56.010(b)(2) (2019); DEL. CODE ANN. tit. 16, § 9405A(a)(2) (2020); IND. CODE § 29-3-14-4(a)(2); NEV. REV. STAT. § 162C.200(1)(b) (2019). Those states also require that the principal “enter[] into the agreement voluntarily and without coercion or undue influence.” ALASKA STAT. § 13.56.010(b)(1); DEL. CODE ANN. tit. 16, § 9405A(a)(1); IND. CODE § 29-3-14-4(a)(1); NEV. REV. STAT. § 162C.200(1)(a). The Wisconsin and D.C. statutes do not use this language, but do specify that the agreement must be voluntary. D.C. CODE § 7-2133(a) (2020); WIS. STAT. § 52.10(1) (2020). The voluntary nature of these agreements is discussed in more detail in Part II.D. Voluntariness is not relevant to the principal’s capacity, but rather recognizes that it is meaningless to enforce an agreement meant to protect an individual’s autonomy if the very formation of that agreement violated the individual’s autonomy.

104. Glen, *supra* note 50, at 29. When Glen wrote her article, only the Texas and Delaware statutes existed; it is unclear if she would characterize the Alaska, Indiana, and Nevada laws as relying on a medical model.

105. Glen critiques the practice of SDM in the United States for failing to focus on “the human right of legal capacity” and instead permitting the denial of that right based on the absence of “mental capacity, however defined.” *Id.* at 26–27.

omission of any other factors suggests that a person may be eligible to participate in an SDM agreement even if they are unable to demonstrate capacity to make decisions on their own. It is also noteworthy that this clause only requires understanding “of the agreement” itself, as opposed to understanding of decisions that will be made under the agreement. There is no requirement that the principal must have the capacity to make decisions covered by the agreement without the help of a supporter.

Alaska specifies that “a principal is considered to have capacity even if the capacity is achieved by the principal receiving decision-making assistance.”¹⁰⁶ This is the only statute to directly affirm the capacity of the principal when relying on a supporter. Delaware similarly recognizes the validity of capacity achieved through use of a supporter; that statute allows “a judicial determination that the principal lacks the capacity to engage in the making of specific decisions covered by the agreement *despite the assistance of a supporter*”¹⁰⁷ as grounds for limiting or abrogating the terms of the agreement. By implication, the principal may be found to have capacity to make these decisions *with* the “assistance of a supporter.” Both of these statutes acknowledge that an individual who cannot by themselves meet the requirements for capacity may be able to do so with a supporter. The supporter would therefore have to participate in the capacity assessment, which would require a significant change to how these assessments are typically conducted.¹⁰⁸

Rhode Island’s SDM statute operates from the principle that “[a]ll adults should be able to choose to live in the manner they wish and to accept or refuse support, assistance, or protection.”¹⁰⁹ This statute does not indicate, however, if there are any limitations to the use of an SDM agreement based on the individual’s capacity. The expansive language (“[a]ll adults”) implies that there are no restrictions based on capacity—even an adult who has been deemed incapacitated would be able to “accept . . . support.” Compare this to language in the Nevada statute, which states as the first principle to be used in interpreting the statute: “An adult should be able to live in the manner in which he or she wishes and to accept or refuse support, assistance or protection *as long as* the adult does not harm others and *is capable of making decisions about such matters*.”¹¹⁰ Nevada thus included a capacity determination as a prerequisite to participation in an SDM agreement. The phrase “about such matters” may appear to limit the scope of capacity

106. ALASKA STAT. § 13.56.150(d).

107. DEL. CODE ANN. tit. 16, § 9405A(i) (emphasis added).

108. See Arias, *supra* note 2, at 145–46, for a discussion of capacity assessment methods and instruments.

109. 42 R.I. GEN. LAWS § 66.13-2(b)(1) (2020).

110. NEV. REV. STAT. § 162C.100(2)(a) (2019) (emphasis added).

needed, but it depends how one understands “such matters”: Need the principal only have capacity to decide to accept or refuse support, or need they have capacity to decide the manner in which they wish to live? Given that the first clause—that “the adult does not harm others”—only seems relevant to decisions about how the person lives, it seems likely that the second clause is likewise focused on those life decisions. The scope of the required capacity is therefore hardly limited at all.¹¹¹

Two lines later, the Nevada statute includes as a third principle, “An adult should receive the most effective, yet least restrictive and intrusive, form of support, assistance or protection *when the adult is unable to manage his or her affairs alone.*”¹¹² This principle guides the determination of appropriate support for anyone who lacks capacity “alone,” so it does not contemplate the effect of a supporter on the capacity determination. The principle calls for balancing effectiveness with restrictiveness; if SDM is effective, it is preferable to guardianship because it is also less restrictive. If SDM is ineffective, then guardianship may be preferable. Notably, however, the statute does not define “effective” in this context.¹¹³

Texas, on the other hand, states that the SDM statute is intended to benefit “adults with disabilities who need assistance with decisions regarding daily living but *who are not considered incapacitated persons* for purposes of establishing a guardianship.”¹¹⁴ It has been noted that the Texas statute does not directly state a capacity requirement for participation in an SDM agreement, but that “the advocates responsible for its passage appear to believe that the traditional test of ‘understand and appreciate’ applies.”¹¹⁵

As shown, existing statutes are inconsistent in what they require of the principal to a supported decision-making agreement. The majority view is that the principal must have, at a minimum, the limited capability of understanding the agreement.¹¹⁶ Some statutes do not specify that any level

111. What kind of decisions fall outside the ambit of the manner in which a person wishes to live? While it would be possible to imagine minor decisions (e.g. whether to turn left or turn right while out for an evening stroll) that do not affect the manner in which one lives, it becomes more difficult to exclude decisions as they grow in importance (e.g. whether to exercise regularly or whether to live in an area with sidewalks and parks for taking walks).

112. § 162C.100(2)(c) (emphasis added).

113. This is similar to the risk a patient faces of a doctor questioning their decision-making capacity because the patient disagrees with the doctor’s recommendations. See *supra* note 21. The lack of a definition of “effective” will allow judges to make normative judgments about an individual’s decisions in managing their affairs. A judge may determine that support is only “effective” if it results in decisions that the judge feels are in the individual’s best interests. The idiosyncratic principal whose decisions the judge considers harmful or suboptimal is at greater risk of being subjected to guardianship because the judge finds SDM ineffective. See *supra* note 89–90 and accompanying text for additional discussion of the tension between protecting best interests and protecting the right to self-determination.

114. TEX. EST. CODE ANN. § 1357.003 (West 2019) (emphasis added).

115. Glen, *supra* note 50, at 29. See *supra* notes 25–26 and accompanying text for discussion of the “understand” and “appreciate” factors in capacity evaluations.

116. See *supra* note 102 and accompanying text.

of capacity is required of the principal,¹¹⁷ while one statute requires that the principal have capacity with regard to all decisions covered by the agreement.¹¹⁸ These capacity requirements determine what population of individuals have access to supported decision-making. Capacity requirements also provide insight into whether SDM can fulfill the ambition of reformers to eliminate guardianships.¹¹⁹ The following section addresses this question.

B. How Does Supported Decision-Making Relate to Guardianship?

At first blush, SDM agreements and guardianship both seem to exist as solutions to the same problem: how to decide the affairs of someone whose ability to do so personally is compromised. Are these solutions complementary or contradictory? The CRPD, as interpreted by the Committee, aims to eliminate guardianships entirely and replace them with mechanisms that provide support to people with disabilities.¹²⁰ Advocates of this outcome may find the two approaches to be contradictory in their underlying principles, with SDM prioritizing individual autonomy and guardianship providing paternalistic protection. However, the replacement of guardianships is not a necessary or inevitable goal of SDM statutes. No U.S. jurisdiction has taken the step of dismantling its guardianship system, so where SDM statutes exist, they exist side-by-side with guardianship statutes.

The following diagrams illustrate the possible meanings of “side-by-side.” The lines represent the capacity spectrum, and the circles indicate the group eligible to be served by either SDM agreements (SDM) or guardianships (G). All adults are assumed to be on the left, with full capacity.¹²¹ However, an assessment may indicate that an individual lacks certain abilities, pushing that individual further to the right.¹²² Eventually, on the far right, are people with no capacity for decision-making at all, such as those who are in comas. A plenary guardianship assumes that an individual is at the far right of the spectrum and unable to care for themselves or manage their own affairs in any part of their lives.¹²³ The

117. See *supra* notes 107 and accompanying text.

118. See *supra* note 108 and accompanying text.

119. See *supra* notes 71–74 and accompanying text.

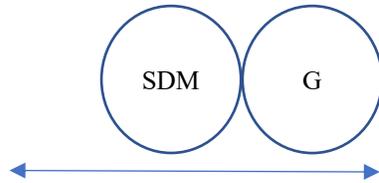
120. Diller, *supra* note 8, at 513–14.

121. See, e.g., Arias, *supra* note 2, at 139 (“Clinicians and professionals operate from a presumption of capacity.”); Gavisk & Greene, *supra* note 18, at 340 (“All adults are presumed to possess capacity unless adjudicated as incapacitated in guardianship or conservatorship proceedings”).

122. See discussion *infra* Part I.A.

123. See Dinerstein, *supra* note 66, at 9.

question that must be addressed by SDM statutes¹²⁴ is whether and how much of the population currently served by guardianship laws will have the option of using an SDM agreement. There are four possibilities:

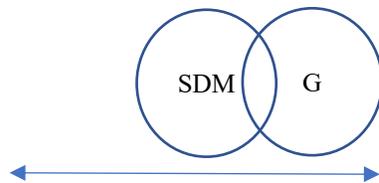


1. Separate Populations: This scenario would occur if the SDM and guardianship statutes defined mutually exclusive requirements for the populations that they serve. For example, Texas’s SDM statute states that it is meant to “recognize a less restrictive substitute for guardianship for adults with disabilities . . . who are not considered incapacitated persons for purposes of establishing a guardianship.”¹²⁵ This statute envisions SDM agreements serving a completely separate population from the guardianship law, because people who are incapacitated and may be placed under guardianship cannot participate in SDM. Similarly, the Delaware statute states that its purpose is to “[p]rovide assistance . . . to adults who do not

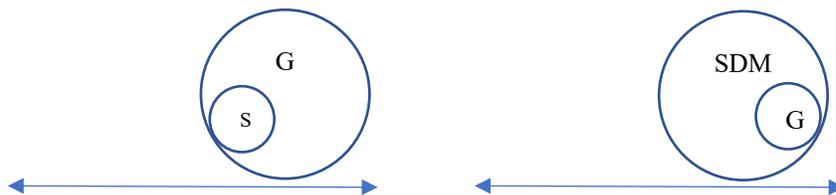
124. While this analysis focuses on statutes pertaining to supported decision-making agreements, some jurisdictions reference SDM within their guardianship law, though they lack a specific SDM statute. For a discussion on the existence of supported decision-making language within guardianship statutes and cases, see Wright, *supra* note 8, at 294–95. Wright argues that “principles of supported decisionmaking should be built into [guardianship] laws. That is, where possible, surrogates and guardians should support persons with disabilities in making their own decisions rather than taking over the decision-making process.” *Id.* at 301. However, guardianship laws limit the rights of the individual subject to them and confer authority on the guardian. See *supra* Part II.A. While SDM could be encouraged in this context, it is not clear if or how it could be enforced. In addition, appointing a guardian over an individual who is still capable of making their own decisions with support would be an unnecessary intrusion on that individual’s rights. The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (“the Act”) takes the position that guardianship is not appropriate and should not be imposed if supported decision-making (or another alternative that “remove[s] fewer rights than guardianship”) is available and sufficient to meet the individual’s needs. UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROTECTIVE ARRANGEMENTS ACT § 301 cmt. (UNIF. LAW COMM’N 2017). Even if the individual petitions the court to appoint a guardian for themselves, the drafters of the Act note that it would be preferable for the individual to use a power of attorney or SDM. § 302 cmt. The Act requires that the court make a finding that SDM (and other alternatives) cannot meet the individual’s needs before appointing a guardian. § 310(a)(1).

125. TEX. EST. CODE ANN. § 1357.003 (West 2019). The “substitute” language is, perhaps, telling. The original language in the Senate Bill was “alternative,” but this was replaced by the House Bill with “substitute.” See S. 1881, 84th Leg., Reg. Sess. (Tex. 2015); H.R. 39, 84th Leg., Reg. Sess. (Tex. 2015). According to the Merriam-Webster dictionary, “alternative” means “offering or expressing a choice,” *Alternative*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/alternative> [<https://perma.cc/B2HN-GKU2>]; “substitute,” on the other hand, means a “thing that takes the place or function of another.” *Substitute*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/substitute> [<https://perma.cc/2HML-SY69>]. The significance of this word choice hints at the policy choice of whether SDM was intended to be an option available for individuals to choose, or a replacement for guardianship in circumstances where it was not needed.

need a guardian.”¹²⁶ This type of SDM statute is the most limiting in terms of who may participate.



2. Intersecting Populations: This scenario would occur when there is some overlap between the requirements for participation in SDM agreements and guardianship; while some individuals may only participate in one or the other, some could participate in either—or even both. For example, both the Alaska and Indiana SDM statutes allow an individual subject to guardianship to enter an SDM agreement; written consent of the guardian is required if the SDM agreement interferes with the guardian’s authority.¹²⁷ As noted earlier, the Alaska statute also recognizes an individual’s capacity when that capacity is achieved with support.¹²⁸ In that case, if a supporter is available, the individual may be found to have capacity and thus not be subject to a guardianship; if no supporter is present, the individual may be found to lack capacity and thus be subject to a guardianship. The statutes do not limit SDM to those who lack capacity on their own, however, so some individuals may enter an SDM agreement even though they would not have been subject to guardianship without it. Because Alaska and Indiana also require that principals to SDM agreements understand the agreement,¹²⁹ some individuals may not qualify and are subject to guardianship only.



3. Subset Population: Similar to intersecting populations, this scenario would occur if the overlap in requirements for the principal in an SDM agreement and a person subject to guardianship make one population a subset of the other. In this scenario, all people who are subjected to guardianships qualify as principals to SDM agreements, but some people who participate in SDM are not subject to guardianship (or vice versa).

126. DEL. CODE ANN. tit. 16, § 9402A(a)(1) (2020).

127. See ALASKA STAT. § 13.56.010(c) (2019); IND. CODE § 29-3-14-4(d) (2020).

128. ALASKA STAT. § 13.56.150(d) (2019); see *supra* text accompanying note 104.

129. See *supra* note 102 and accompanying text.

Rhode Island’s SDM statute may provide an example. One of the purposes of the Rhode Island law is to “[e]stablish the use of supported decision-making as an alternative to guardianship.”¹³⁰ As noted previously, this law is also to be interpreted by the principle that “[a]ll adults should be able to choose to live in the manner they wish and to accept or refuse support, assistance, or protection.”¹³¹ This language suggests that Rhode Island makes SDM agreements available to everyone, while stopping short of eliminating guardianship. In other words, all individuals who need assistance have access to SDM, and a subset of that population may still be subject to guardianship due to personal choice, lack of an appropriate supporter, or for other reasons. This statute is the most expansive and inclusive with regards to SDM.



4. Same Populations: This scenario would occur if the requirements to participate in an SDM agreement were identical to the requirements to be subject to guardianship. In this case, an individual could presumably choose which system they preferred, or other factors may weigh into the decision, such as the availability of a supporter. No statutes currently follow this model.

As this analysis shows, there is little agreement regarding the relationship between supported decision-making and guardianships; several jurisdictions do not even clearly address the issue.¹³² Perhaps the only point of agreement is that supported decision-making cannot fully replace guardianships.

C. What is Required of the Supporter?

There is likely an underlying assumption that a principal would not select or retain a supporter who did not have the capacity to offer support.¹³³ North

130. 42 R.I. GEN. LAWS § 66.13-2(a)(4) (2020).

131. § 66.13-2(b)(1); *see supra* text accompanying note 107.

132. *See, e.g.*, D.C. CODE § 7-2133 (2020); NEV. REV. STAT. § 162C.100 (2019); N.D. CENT. CODE § 30.1-36 (2019); WIS. STAT. § 52 (2020).

133. Not all jurisdictions entrust the principal to choose whomever they wish. Several statutes prohibit certain categories of people from serving as supporters, such as people who may have a conflict of interest (e.g. the principal’s employer or employee) and people who may be a threat to the principal (e.g. individuals against whom the principal has a protective order or who have been convicted of certain

Dakota has the only statute that references supporter capacity.¹³⁴ There, an SDM agreement is terminated if a “court has determined the supporter lacks capacity to make or communicate responsible decisions concerning residential or educational matters, medical treatment, legal affairs, or vocational, financial, or other matters affecting the health or safety of the named individual.”¹³⁵ Four other states require that the supporter “act with the care, competence, and diligence ordinarily exercised by individuals in similar circumstances, with due regard either to the possession of, or lack of, special skills or expertise.”¹³⁶

The Texas statute articulates the most basic formulation of the supporter’s role, stating, “A supporter may exercise the authority granted to the supporter in the supported decision-making agreement.”¹³⁷ North Dakota and Wisconsin explicitly state that the supporter may not act as a “surrogate decisionmaker” or sign legally binding documents on the principal’s behalf.¹³⁸ Delaware and Indiana list several prohibited activities,¹³⁹ and Indiana also states the affirmative responsibilities of the

offenses). *See, e.g.*, ALASKA STAT. § 13.56.020 (2019) (“A supporter must be an adult, but may not be (1) an employer or employee of the principal, unless the employer or employee is an immediate family member of the principal; (2) a person who provides paid support services, except decision-making assistance, directly to the principal, unless the person is an immediate family member of the principal; or (3) a person against whom a protective order or restraining order has been entered by a court on request of or on behalf of the principal.”); D.C. CODE § 7-2132 (2020) (“(a) The following individuals, except if the individual is the supported person’s relative, may not be a supporter: (1) An individual who provides physical, mental, or behavioral healthcare services or disability services to the supported person, or the owner or operator of the entity providing the healthcare services or disability services to the supported person; or (2) An individual who works for a government agency that is financially responsible for the supported person’s care. (b)(1) An individual shall not be a supporter if: (A) There is or has been a finding by a government agency that the individual: (i) Abused, neglected, or exploited the supported person; or (ii) Inflicted harm upon a child, elderly individual, or person with a disability; or (B) The individual is or has been convicted of any of the following criminal offenses, or their equivalent in any other state or territory, within 7 years before entering the supported decision-making agreement: (i) Any sexual offense . . . where the victim was a child, elderly individual, or person with a disability; (ii) Aggravated assault, . . . where the victim was a child, elderly individual, or person with a disability; (iii) Fraud . . . ; (iv) Theft in the first degree . . . ; (v) Forgery . . . ; or (vi) Extortion . . .”).

134. *See* N.D. CENT. CODE § 30.1-36-05(3)(c) (2019).

135. *Id.*

136. DEL. CODE ANN. tit. 16, § 9406A(d) (2020); 42 R.I. GEN. LAWS § 66.13-6(c) (2020); *see also* ALASKA STAT. § 13.56.090 (2019); NEV. REV. STAT. § 162C.210(3) (2019).

137. TEX. EST. CODE ANN. § 1357.052(a) (West 2019).

138. N.D. CENT. CODE § 30.1-36-04(7) (2019); WIS. STAT. § 52.10(2) (2020).

139. DEL. CODE ANN. tit. 16, § 9406A(c); IND. CODE § 29-3-14-5(c) (2020) (“A supporter is prohibited from: (1) exerting undue influence upon the adult; (2) receiving a fee for service related solely to services performed in the role of supporter; (3) obtaining, without the consent of the adult, information acquired for a purpose other than assisting the adult in making a specific decision authorized by the supported decision making agreement; (4) acting outside the scope of authority provided in the supported decision making agreement; or (5) obtaining, without the consent of the adult, nonpublic personal information as defined in 15 U.S.C. 6809(4)(A).”).

supporter.¹⁴⁰ Four states require that the supporter sign a “declaration” indicating their relationship to the principal, their willingness to act as a supporter, and their acknowledgment of their duties as a supporter.¹⁴¹ This survey should make clear that there are significant disparities in the detail provided regarding the duties and permitted authority of the supporter; however, with no clear mechanism for training or monitoring supporters,¹⁴² this statutory language may be all that supporters have in trying to understand their role.

D. What is the Role of the State?

In all nine jurisdictions, all that is required to enter an SDM agreement is the signature of a notary or two witnesses,¹⁴³ unlike guardianship, the State need not make any determination about the principal’s capacity or be involved in any way.¹⁴⁴ This is in keeping with the general presumption that all adults are competent and can therefore enter into binding agreements.¹⁴⁵ Requiring court oversight is also unnecessary because, unlike when a guardian is assigned, the principal is not giving up any rights under an SDM agreement.¹⁴⁶ Involving the court would likely only make the process more expensive while burdening the court system.

In addition, none of the statutes include any provision for the state to monitor the supporter or the agreement. This is striking given that SDM agreements are intended to serve similar populations to those served by guardianships, and abuses by guardians are well documented; indeed, it is in part in response to those abuses that SDM and other alternatives have gained attention.¹⁴⁷ Presumably, the expectation in most jurisdictions is that individuals who are participating in SDM agreements, because they have not lost their rights to act independently, have greater opportunity to protect themselves; they can, for example, terminate the agreement at any time.¹⁴⁸ The SDM statutes also often provide means for reporting suspected abuse. For example, the SDM agreement, which is intended to be shown to third

140. IND. CODE § 29-3-14-5(a) (“A supporter must: (1) support the will and preference of the adult, and not the supporter’s opinion of the adult’s best interests; (2) act honestly, diligently, and in good faith; (3) act within the scope set forth in the adult’s supported decision making agreement; (4) avoid conflicts of interest; and (5) notify the adult in writing of the supporter’s intent to resign as a supporter.”).

141. ALASKA STAT. § 13.56.050 (2019); DEL. CODE ANN. tit. 16, § 9405A(f) (2020); IND. CODE § 29-3-14-7(d) (2020); 42 R.I. GEN. LAWS § 66.13-5(e) (2020).

142. See *supra* note 92 and accompanying text regarding the need to monitor supporters.

143. See, e.g., ALASKA STAT. § 13.56.040(3) (2019); TEX. EST. CODE ANN. § 1357.055(a) (West 2019).

144. See *supra* note 86 and accompanying text.

145. See *supra* note 119.

146. See *supra* note 86 and accompanying text.

147. See *supra* notes 68–77 and accompanying text.

148. See, e.g., 42 R.I. GEN. LAWS § 66.13-5(g) (2020).

parties, in many cases includes language instructing the third party on how to report suspected abuse.¹⁴⁹ Several states provide for the automatic termination of the agreement if the supporter has committed certain acts, such as fraud,¹⁵⁰ and/or prohibit individuals from serving as supporters if they have previously committed certain acts, such as elder abuse.¹⁵¹ Overall, however, it is left to individuals—the principal, supporter, or third parties—to identify possible abuses or violations and report them, with no consequences outlined in the SDM statutes themselves. With no real safeguards in place, SDM may put the principal at significant risk.

IV. MODEL STATUTORY LANGUAGE

If current attitudes¹⁵² continue and more states consider the adoption of supported decision-making statutes, it becomes prudent to develop model language. Consistency across jurisdictions may ensure that agreements are recognized and followed all over the country, providing the principal with greater mobility. The development of model language also provides the opportunity to lay bare the assumptions and trade-offs behind statutory schemes so that legislators can more fully consider the implications of the legislation. This Note will not endeavor to address the full scope of a supported decision-making statute, but will only consider the topics analyzed above: competency requirements for principals, how SDM relates to guardianship, requirements of supporters, and the role of the State.

A. Competency Requirements for Principals

As noted in Part III.A, existing statutes have articulated different competency requirements for the principal entering into a supported

149. See, e.g., D.C. CODE § 7-2132(d) (“WARNING: PROTECTION FOR PERSON SUPPORTED [·] IF A PERSON WHO RECIVES [RECEIVES] A COPY OF THIS AGREEMENT OR IS AWARE OF THE EXISTENCE OF THIS AGREEMENT HAS CAUSE TO BELIEVE THAT THE ADULT NAMED AS A SUPPORTED PERSON IS BEING ABUSED, NEGLECTED, OR EXPLOITED BY THE SUPPORTER, THE PERSON MAY REPORT THE ALLEGED ABUSE, NEGLECT, OR EXPLOITATION TO THE CITYWIDE CALL CENTER AT 311, METROPOLITAN POLICE DEPARTMENT AT 911, ADULT PROTECTIVE SERVICES AT (202) 541-3950.”) (second alteration in original).

150. See, e.g., IND. CODE § 29-3-14-9(a) (2020) (“Except as provided in the supported decision making agreement, a supported decision making agreement terminates in the following situations: . . . (5) A court of competent jurisdiction determines that a supporter has used the supported decision making agreement to commit: (A) financial exploitation; (B) abuse; or (C) neglect; of the adult.”).

151. See *supra* note 131.

152. The adoption of supported decision-making is due not only to the recognition of decision-making as a right, but also to financial considerations. In Texas, SDM was presented by Chief Justice Nathan Hecht and others as a cost-saving measure that could help the court weather the “silver tsunami.” Eliana J. Theodorou, Note, *Supported Decision-Making in the Lone-Star State*, 93 N.Y.U. L. REV. 973, 1006 (2018).

decision-making agreement. Those requirements in large part determine what population of people may participate in the agreements. To be consistent with the goal of SDM as a tool for providing access, SDM statutes should not require that the principal have full capacity. To have capacity (or “not be incapacitated”) is to already have the legal ability to make decisions about one’s life; an SDM agreement provides minimal benefit in this context. People who cannot meet the standards for capacity, however, can gain tremendous independence through the use of SDM as a decision-making tool.

At the same time, it would be disingenuous to claim that everyone, regardless of condition, can participate meaningfully in SDM.¹⁵³ Rebekah Diller, referring to the CRPD’s approach, found that it “seems to rely on a legal fiction that persons will remain the legal actors making their own decisions under circumstances where it may not be possible to discern their will and preferences. . . . [T]he pragmatic problems are so substantial that they risk undermining the rest of the project.”¹⁵⁴ To avoid that risk, statutes must be explicit in defining the minimum competency to be required of the principal. Most importantly, the principal must be able to understand the agreement itself—as required by the majority of existing statutes.¹⁵⁵ Understanding SDM and the role of the supporter allows the principal to utilize the arrangement under their own initiative; if the principal does not know what a supporter is there to do, the principal will not seek out their support when faced with decisions.

In addition, the statute should make it clear that any decision made or action taken by the principal with the aid of a supporter is legally valid and binding (absent the sort of extenuating circumstances that could void any decision). To this end, the statute should acknowledge that an individual using a supporter is considered to be competent to the same degree as if they had the same capability acting alone. An individual who is able to communicate a decision through a supporter, or who develops their understanding of a situation through a supporter, is just as competent as an individual who does these things without a supporter. This affirmation of the principal’s competency supports the purpose of the statute and may resolve challenges to decisions made by the principal.

Finally, it has been noted that individuals subject to a limited guardianship are sometimes treated as though they lack capacity in other

153. This does not mean that guardianships cannot be replaced via other means. Advocates for the elimination of guardianships, including supporters of the CRPD, may propose alternative systems that fill the gap left by SDM agreements. This paper is confined to SDM, however, and finds that it would not be appropriate to use SDM, as currently understood in the United States, in every case in which an individual lacks capacity.

154. Diller, *supra* note 8, at 534.

155. *See supra* Part III.A.

areas as well.¹⁵⁶ The same problem may happen to principals in an SDM agreement. To minimize this issue, the statute should re-affirm the principle that all adults are considered competent until otherwise shown, and should establish as guidance to courts that the existence of an SDM agreement may not be interpreted as evidence of an individual's incompetence or incapacity.

The following language, adapted from existing statutes,¹⁵⁷ may be used as a model:

1. An adult may enter into a supported decision-making agreement if all of the following apply:
 - a. The adult enters into the agreement voluntarily and without coercion or undue influence.¹⁵⁸
 - b. The adult understands the nature and effect of the agreement.¹⁵⁹
2. All adults are presumed to be capable of managing their affairs and to have capacity unless otherwise determined by the [relevant court].¹⁶⁰
 - a. A principal is considered to have capacity even if the capacity is achieved by the principal receiving decision-making assistance.¹⁶¹
 - b. Execution of a supported decision-making agreement may not be used as evidence of incapacity and does not preclude the ability of the adult who has entered into such an agreement to act independently of the agreement.¹⁶²

B. Relationship to Guardianship

Under the above capacity requirement, the population served by SDM agreements and guardianships will be overlapping. Guardianship would still be available for those who do not meet the “understanding” threshold to participate in SDM agreements. Individuals who do meet the “understanding” threshold may enter an SDM agreement or may be appointed a guardian if, without support, they lack capacity to make independent decisions; this is the overlapping population. Some individuals, however, may choose to enter an agreement even though they would not be subject to a guardianship otherwise.¹⁶³

156. See *supra* note 73 and accompanying text.

157. See *supra* notes 95–96 for all statutes considered in the drafting of these model provisions.

158. DEL. CODE ANN. tit. 16, § 9405A(a)(1) (2020).

159. DEL. CODE ANN. tit. 16, § 9405A(a)(2).

160. DEL. CODE ANN. tit. 16, § 9404A(a) (2020).

161. ALASKA STAT. § 13.56.150(d) (2019).

162. DEL. CODE ANN. tit. 16, § 9404A(c).

163. For example, people whose conditions will decline over time, such as individuals with dementia, may benefit from building a relationship with a supporter while they still retain decision-making capacity. The supporter can develop trust with the principal and learn the principal's preferences

If the would-be principal already has an appointed guardian, some statutes require that the guardian approve the SDM agreement if it would cover the same areas as the guardianship.¹⁶⁴ This requirement puts the principal's ability to enter an SDM agreement and execute their decision-making rights at the discretion of the guardian, with no recourse for the individual. The statute could remove any barrier to people subject to guardianship entering SDM agreements, but this could result in significant confusion, for example if the guardian is unaware of the SDM agreement and continues acting on the principal's behalf. The principal, as someone who has already been found incompetent, may also be particularly vulnerable to abuse; in the balance of best interests and individual rights, the guardian should be able to intervene to protect the person subject to the guardianship. The statute can protect the individual's rights by creating a mechanism for the individual to enter an SDM agreement despite the guardian's protest if the principal is able to achieve capacity with the supporter, thus vacating (or limiting) the need for the guardian.

The following language may be used as a model:

1. The purpose of this chapter is to establish the use of supported decision-making as an alternative to guardianship¹⁶⁵ for adults who meet the requirements of this chapter.
2. An adult may not enter into a supported decision-making agreement under this section if the agreement supplants the authority of a guardian of the adult, unless
 - a. The guardian consents in writing to the adult entering into the supported decision-making agreement;¹⁶⁶ or
 - b. The adult appeals to the court that appointed the guardian and demonstrates that the adult is able to act with capacity with the aid of the supporter named in the supported decision-making agreement.

C. Requirements for Supporter

North Dakota requires supporters to have the “capacity to make . . . responsible decisions.”¹⁶⁷ Under SDM, however, it is not the supporter who

so that, when the principal's condition deteriorates, the supporter is in a position to take on additional decision-making responsibility (up to and including becoming a guardian). Arias, *supra* note 2, at 157.

164. See *supra* note 125 and accompanying text. This would come into play, for example, if the guardian has authority to make financial decisions and the principal wishes to enter an agreement that would provide support for the principal to manage their own finances.

165. See 42 R.I. GEN. LAWS § 66.13-2(a)(4) (2020).

166. See IND. CODE § 29-3-14-4(d) (2020).

167. N.D. CENT. CODE § 30.1-36-05(3)(c) (2019).

is making the decision, but the principal;¹⁶⁸ the statute's language is therefore misleading. Any capacity restrictions should be applied only to the principal, including the principal's capacity when acting with support. It is not difficult to imagine a scenario in which a principal selects a supporter who has or develops mental impairments; for example, an older person in the early stages of dementia may view their spouse as a natural choice for their supporter, but the spouse, too, may develop mild cognitive impairments as they age. Whether the supporter is able to provide adequate support is determined not by their own capacity, but by the principal's capacity when acting with support. The supporter need only have sufficient capacity to enable the principal to meet the requirements specified in Part IV.A. The legislature should therefore leave it to the principal to determine who they wish to rely on for support.¹⁶⁹

Supporters must also demonstrate an awareness of their duties and a willingness to fulfill their responsibilities with due care. Requiring supporters to sign a declaration at the inception of the agreement is one means of accomplishing this goal, though it provides little assurance of the supporter's understanding of the agreement. Many advocates suggest mandating training for supporters as a more proactive measure, though additional research is needed regarding supporters' performance to determine what training would be most effective.¹⁷⁰ The statute should at a minimum specify the supporters' responsibilities and duty of care. The following serves as model language, derived from existing statutes:

1. A supporter must:
 - a. Support the will and preference of the principal, and not the supporter's opinion of the principal's best interests;¹⁷¹
 - b. Act within the scope set forth in the principal's supported decision-making agreement;¹⁷²
 - c. Act with the care and diligence ordinarily exercised by individuals in similar circumstances, with due regard to the supporter's possession of, or lack of, special skills or expertise;¹⁷³
 - d. Avoid conflicts of interest,¹⁷⁴ and make any such conflicts known to the principal;

168. See *supra* note 83 and accompanying text.

169. See Arias, *supra* note 2, at 157–58 for a comparison of the benefits and drawbacks of the principal selecting family or friends as supporters compared to the court appointing a supporter, as occurs in jurisdictions outside the U.S.

170. See Kohn et al., *supra* note 60, at 1144.

171. See IND. CODE § 29-3-14-5(a)(1) (2020).

172. See IND. CODE § 29-3-14-5(a)(3).

173. See NEV. REV. STAT. § 162C.210(3) (2019).

174. See IND. CODE § 29-3-14-5(a)(4).

- e. Complete court-approved training on the duties and obligations of the supporter;
 - f. Sign a declaration indicating
 - i. The supporter's relationship to the principal;¹⁷⁵
 - ii. The supporter's willingness to act as a supporter;¹⁷⁶ and
 - iii. The supporter's acknowledgement of the duties and obligations of a supporter;¹⁷⁷ and
 - g. Notify the principal in writing of the supporter's intent to resign as a supporter.¹⁷⁸
2. A supporter is prohibited from:
- a. Acting as a surrogate decision-maker for the principal or signing legal documents on behalf of the principal;¹⁷⁹
 - b. Exerting undue influence upon the principal;¹⁸⁰
 - c. Receiving a fee for service related solely to services performed in the role of supporter;¹⁸¹
 - d. Obtaining, without the consent of the principal, information acquired for a purpose other than assisting the principal in making a specific decision authorized by the supported decision-making agreement;¹⁸² or
 - e. Acting outside the scope of authority provided in the supported decision-making agreement.¹⁸³

The statute should also specify the consequences of a failure to fulfill statutory obligations or the commission of a prohibited act. Appropriate consequences could vary from voiding the agreement to criminal sanctions for abuse or fraud.

D. Role of the State

Because adults are presumed to have capacity,¹⁸⁴ there is no need for the State to verify that an individual meets the requirements of entering an SDM agreement prior to the creation of that agreement.¹⁸⁵ The primary role of the State is therefore to establish SDM agreements as a legal option and then to

175. See DEL. CODE ANN. tit. 16, § 9405A(f)(1) (2020).

176. See DEL. CODE ANN. tit. 16, § 9405A(f)(2).

177. See DEL. CODE ANN. tit. 16, § 9405A(f)(3).

178. IND. CODE § 29-3-14-5(a)(5).

179. See N.D. CENT. CODE § 30.1-36-04(7) (2019).

180. See IND. CODE § 29-3-14-5(c)(1).

181. IND. CODE § 29-3-14-5(c)(2).

182. See IND. CODE § 29-3-14-5(c)(3).

183. See IND. CODE § 29-3-14-5(c)(4).

184. See *supra* note 119.

185. The State may, of course, verify the principal's understanding if the agreement is challenged on this basis.

monitor these agreements. As noted in Part II.A, a common critique of guardianship is that insufficient monitoring has allowed frequent and significant abuses of the system. Similar risks may arise under SDM agreements—in fact, ensuring that these agreements do not make individuals “more vulnerable to abuse” has been described as the “most significant challenge to supported decision-making.”¹⁸⁶ Unfortunately, the ability of the principal to terminate the agreement may not be sufficient to protect against such abuses; if the principal faces limitations in overseeing the supporter’s actions or communicating concerns to third parties, the supporter may be able to hide any misconduct. Monitoring is thus necessary “to avoid trading an underfunded guardianship system for underfunded supported decision-making services that are unable to meet the goal of maximizing the integration of individuals with limitations in decision-making abilities.”¹⁸⁷

A monitoring system would have three mandates tied to the three parties. First, monitoring should ensure that principals continue to meet the requirements to maintain the agreement; if a principal loses the ability to understand the agreement, then the court may void the agreement and determine if other arrangements are needed. Second, monitoring should oversee the actions taken by the supporter. If the supporter is not fulfilling their legal duties, then the monitor could take action, including taking the supporter to court.¹⁸⁸ Among the duties to be considered is whether the supporter is exceeding the authority granted them by the principal. Finally, monitoring may consider whether any third parties have failed to honor the agreement. Third party breaches are likely to be identified only when they are reported to the monitoring body, so the SDM agreement should clearly indicate how any party can report suspected violations. Because SDM agreements can only be effective in realizing the principal’s decision-making right if they are observed by third parties, this should be a requirement.¹⁸⁹

Monitoring systems under supported decision-making statutes will likely reflect the monitoring system in a state’s guardianship statute.¹⁹⁰ No model

186. Diller, *supra* note 8, at 535.

187. Salzman, *supra* note 1, at 230.

188. See Wright, *supra* note 8, at 310 (citing MICHAEL BACH & LANA KERZNER, LAW COMM’N OF ONT., A NEW PARADIGM FOR PROTECTING AUTONOMY AND THE RIGHT TO LEGAL CAPACITY 118 (2010)).

189. See Glen, *supra* note 50, at 21.

190. For discussion of strategies used and recommended for monitoring guardianships, see Naomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 STETSON L. REV. 143 (2007) (discussing findings from a 2005 AARP national survey of monitoring practices); and NAOMI KARP & ERICA WOOD, AARP PUB. POLICY INST., *GUARDING THE GUARDIANS: PROMISING PRACTICES FOR COURT MONITORING* (2007) (identifying recommended practices based on the 2005 study).

language is provided here to account for inevitable variations in state resources and reporting structures; however, by applying the above principles to existing structures, the legislature may develop its own monitoring framework.

CONCLUSION

With millions of Americans living with disabilities that may affect their decision-making capacity,¹⁹¹ it is critical that the legal system consider how it protects their rights and interests. Although the number of individuals subject to guardianship is unknown, the current challenges to guardianship implementation and accountability call into question whether this system is capable of fulfilling its purpose to protect vulnerable adults.¹⁹² Normative challenges call into question whether any level of reforms would be sufficient to redeem a model based on the denial of rights.

Supported decision-making agreements offer an alternative to guardianship that may prevent abuse and protect the rights of people with disabilities.¹⁹³ Although more research is needed on how these agreements are used, the recent passage of legislation in nine jurisdictions sanctioning SDM agreements as a legal tool indicates that this model is gaining traction in American jurisprudence.¹⁹⁴ However, variations in the way these bills are drafted may lead to outcomes that fall short of advocates' goals. Statutes vary in who may participate in and benefit from SDM. In some cases, SDM is unavailable to individuals who can be made subject to guardianship, so it does nothing to address the problems in the guardianship model.¹⁹⁵ In other jurisdictions, individuals who could benefit from SDM may have the opportunity to choose this model either to avoid guardianship or to reclaim decision-making power even when subject to guardianship.¹⁹⁶ Unfortunately, no jurisdiction offers training or other assistance to supporters or creates a mechanism for monitoring SDM agreements, creating the risk of misuse and abuse.¹⁹⁷

The model statutory language proposed by this Note is intended to maximize the benefits of SDM agreements. Statutes should be written such that all adults who are capable of understanding and freely entering the agreement have the opportunity to take advantage of SDM, particularly when doing so may allow them to avoid the loss of rights that would occur

191. *See supra* notes 1–2 and accompanying text.

192. *See supra* Part II.A.

193. *See supra* Part II.B.

194. *See supra* Part III.

195. *See supra* Part III.B.

196. *See supra* Part III.B.

197. *See supra* Part III.D.

if they were subjected to guardianship. While this will not eliminate guardianships in the cases of individuals who have no ability to meaningfully participate in the decision-making process, it will provide substantial relief to individuals currently subjected to guardianship despite their ability to make their own decisions with help. Statutes should also establish the role of the State in training supporters and monitoring SDM agreements to ensure that these arrangements do not exploit or otherwise abuse the principal. By following these guidelines, legislatures may improve the quality of life of vulnerable populations and reinforce the right of adults to be the master of their own lives.

*Rachel Mattingly Phillips**

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