

PRESENTED AT

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Affecting Special Needs Trusts

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Representing Parties in Supported Decision-Making Agreements

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By

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I. INTRODUCTION

A. Introduction to the Supported Decision-Making Agreement Act

Texas became the first state in the nation to recognize supported decision-making agreements as a less restrictive alternative to guardianship. The Supported Decision-Making Agreement Act, found in Chapter 1357 of the Texas Estates Code, became effective September 1, 2015. The Act defines supported decision-making as “a process of supporting and accommodating an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, without impeding the self-determination of the adult.” Tex. Est. Code § 1357.002.

The supported decision-making agreement act allows an adult with a disability to choose a supporter to help obtain the information needed to make a decision, help them understand the choices and risks, and communicate the decision to the appropriate people. Tex. Est. Code § 1357.003. The supporter does not make the decisions for the adult. Tex. Est. Code § 1357.051.

A supported decision-making agreement is an alternative to guardianship for an adult with a disability who may need assistance with making decisions regarding daily living but is not so incapacitated that he or she needs a guardianship. Tex. Est. Code § 1357.003. The statute includes a supported decision-making agreement form, or you may use one that is in substantially the same form. Tex. Est. Code § 1357.056.

A sample supported decision-making agreement is attached as Appendix A.

B. The Need for Supported Decision-Making

Persons with intellectual, developmental or cognitive disabilities are often considered not capable of decision-making. They may lack some of the cognitive skills used to make decisions, such as reasoning, problem-solving, planning and focused attention. The historic response has been to place them under a guardianship to protect them. The growing trend is away from

guardianship and toward alternatives that allow the person to make their own life decisions. Several factors fueling this trend are presented in the following sections.

1. Self-Determination

The imposition of a guardianship, or substituted decision-making, results in the individual with a disability losing authority to make their own life choices. They lose their legal personhood. “The ability to steer one’s course—whether characterized as self-determination, liberty, the pursuit of happiness or freedom of choice—is a fundamental value in American law.”¹ Guardianship takes away a person’s freedom of choice, self-determination and independence. U.S. Representative Claude Pepper has stated, “the typical ward has fewer rights than the typical convicted felon.”²

Many individuals with intellectual or cognitive disabilities can understand some aspects of the decision-making process or may be able to express preferences about their life. The challenge is to allow them to be part of the process whenever possible, so that with assistance they can gain some level of self-determination.

2. Impact of Guardianship

Guardianship can result in negative outcomes for individuals who would benefit from less restrictive alternatives. Guardianship can leave the individual feeling disempowered, with no control over their own life because someone else is making decisions for them. The person may experience a stigma because of the legal inability to make decisions. Their well-being and physical and mental health may be adversely affected.³

3. The ADA Generation

This generation of people with disabilities is the first to grow up with the rights and opportunities protected and promoted by the Americans with Disabilities Act, according to Richard LaVallo, Legal Director of Disability Rights Texas. They believe that community integration and self-determination are crucial elements of well-being.

Texas public schools are required to provide transition services to students with disabilities, so they can move successfully from high school to adult life. According to the Individuals with Disabilities Education Act (IDEA),⁴ the individual education plan must include the development of goals to assist the student with training for employment or independent living skills, and assisting the student to reach those goals. Students are taught self-advocacy skills and

¹ Glen, Kris, *Beyond Guardianship: Supported Decision-Making by Individuals with Intellectual Disabilities*, retrieved on January 3, 2016 from https://nlrc.acl.gov/Legal_Issues/Guardianship/docs/kris_glen_paper_final_10-12.pdf

² Representative Pepper, serving as chair of a House Select Committee held on September 25, 1987 on *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*. H.R. Rep. No. 100-641, at 1 (1987)

³ Jennifer L. Wright, *Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA*, 33 *Int'l J.L. & Psychiatry* 350, 354 (2010).

⁴ 20 U.S.C. § 1400

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