

Supported Decision- Making: Protecting Rights, Ensuring Choices

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THERE ARE STUPID QUESTIONS

What's Your Favorite
Right?

RIGHTS=CHOICES

“I am my choices. I cannot not choose. If I do not choose, that is still a choice. If faced with inevitable circumstances, we still choose *how we are* in those circumstances.”

- Jean Paul Sartre

RIGHTS=CHOICES

CHOICES=SELF DETERMINATION

- Life control
- People's ability and opportunity to be “causal agents . . . actors in their lives instead of being acted upon”
 - Wehmeyer, Palmer, Agran, Mithaug, & Martin, 2000

BENEFITS OF SELF-DETERMINATION

People with greater self determination are:

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

ANOTHER STUPID QUESTION

Are Your Rights Worth
ANYTHING If You're Not
Allowed to Use Them?

AND YET: 2,000 YEARS AND COUNTING

- **Ancient Rome:** “Curators” appointed for older adults and people with disabilities.
- **5th Century Visigothic Code:** “people insane from infancy or in need from any age . . . cannot testify or enter into a contract”
- **Feudal Britain:** divided people with decision-making challenges into “idiots” and “lunatics” and appointed “committees” to make their decisions

GUARDIANSHIP IN THE U.S.

“Plenary” or “Full” Guardianship

- Gives the Guardian power to make ALL decisions for the person.
- Used in the **VAST** Majority of cases
- “As long as the law permits plenary guardianship, **courts will prefer to use it.**”

- Frolik, 1998

IN MISSISSIPPI

- All appointed guardians are “general” guardians with the power to make all decisions for the ward. - MS Code 93-13-15
- Conservators have the same authority as guardians. - MS Code 93-13-259
- The only practical difference between guardians and conservators is that one must be adjudicated incompetent to receive a guardian. - *Harvey vs. Meador*, 459 So.2d 288 (Miss 1984).

AS A RESULT

Guardians and Conservators have “substantial and often complete authority over the lives of vulnerable [people].”

4 NAELA J. 1, 7 (2008).

This includes power to make the most basic health, personal, and financial decisions.

AARP, Guardianship Monitoring: A National Survey of Court Practices 1-2 (2006).

WHEN PEOPLE ARE DENIED LIFE CONTROL

Study after Study shows:

- “[F]eel helpless, hopeless, and self-critical”
- Deci, 1975
- Experience “low self-esteem, passivity, and feelings of inadequacy and incompetency,”
decreasing their ability to function
- Winick, 1995

THE PROBLEM

“The typical ward has fewer rights than the typical convicted felon By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen.”

- House Select Committee on Aging, H.R. Rpt. 100-641 (opening statement of Chairman Claude Pepper)

WHERE DO WE GO FROM HERE?

Guardianship **MAY** be Needed:

- In emergency situations when
 - The person is incapacitated and cannot give consent
 - The person did not previously identify how decisions should be made in that situation
 - There is no one else available in the person's life to provide consent through a Power of Attorney, Advanced Directive, or other means

- To support People:
 - Who face critical decisions and have no interest in or ability to make decisions
 - Who need immediate protection from exploitation or abuse

GUARDIANSHIP IS NEVER NEEDED

JUST

- “Because you have ____”
- “Because you’re ___ years old”
- “Because you need help”
- “Because that’s the way its always been”
- “For your own good”

BUT WE MEANT WELL

“Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”

Olmstead v. U.S., 277 U.S. 438 (1928)

WE MUST'VE MEANT REALLY WELL

Estimated number of adults under guardianship has **tripled** since 1995

- Reynolds, 2002; Schmidt, 1995; Uekert & Van Duizend, 2011.

RESEARCH

People under guardianship can experience a “**significant negative impact** on their physical and mental health, longevity, ability to function, and reports of subjective well-being”

- Wright, 2010

ON THE OTHER HAND

People with disabilities who exercise greater self-determination have a **better quality of life**, more independence, and more community integration.

- Powers et al., 2012; Shogren, Wehmeyer, Palmer, Rifenburg, & Little, 2014; Wehmeyer and Schwartz, 1997; Wehmeyer & Palmer, 2003

AND

Women with intellectual disabilities exercising more self-determination are **less likely to be abused**

- Khemka, Hickson, and Reynolds, 2005

AND

People with Intellectual and Developmental Disabilities who do **NOT** have a guardian are more likely to:

- Have a paid job
- Live independently
- Have friends other than staff or family
- Go on dates and socialize in the community
- Practice the Religion of their choice

2013-2014



SO, WHERE DO WE GO FROM HERE?

If:

- We **KNOW** that some people need more support as they age or due to disability
- We **KNOW** that guardianship can result in decreased quality of life and
- We **KNOW** that increased self-determination leads to improved quality of life

Then we need a means of **INCREASING** self-determination while **STILL** providing support

MARGARET “JENNY” HATCH

Margaret “Jenny” Hatch

Twenty-Nine year old woman with Down syndrome.

- High School graduate
- Lived independently
- Employed for 5 years
- Politically active



THE SITUATION: FEBRUARY 2013

- Court Order putting Jenny in a “temporary guardianship”
- Living in a segregated group home
- No cell phone or computer, Facebook password changed
- Guardians controlled all access to her
- Working up to 5 days a week for 8 months – made less than \$1000

Jenny's Rights In One Sentence

Guardians had the power:

“[T]o make decisions regarding visitation of individuals with Respondent, Respondent's support, care, health, safety, habilitation, education, therapeutic treatment and, if not inconsistent with an order of commitment, residence.”

WHY?

FROM THEIR EXPERT

On Jenny's:

- Independent Living Skills: **“If she had assistance, she may be able to do that”**
- Legal Skills: **“she would need assistance to understand a legal document”**
- Money Management: **She needs “assistance with [a] bank account.”**

THEREFORE...

“She’s going to need assistance to make decisions regarding her healthcare, her living arrangements and such like that, she will need someone to guide her and give her assistance.”

AND...

“I believe what would be beneficial to Jenny is that she is afforded the opportunity to have individuals around her who support and love her, who give her the assistance she needs.”

PETITIONERS' SWORN STATEMENT

How could Jenny execute a Power of Attorney?

“[N]ot only did Jenny have an opportunity to review the documents, but also the attorney had the opportunity to get to know Jenny and understand her capabilities and limitations in understanding legal documents. Based on this series of observations over several visits, the attorney concluded, and we concurred, that Jenny was capable of understanding these documents.”

WHAT THAT ALL ADDS UP TO

Jenny Needs Support:

- To Understand Legal Issues
- To Understand Medical Issues
- To Understand Monetary Issues
 - In her Day to Day Life

IN OTHER WORDS

JENNY IS A PERSON

We Are All Jenny Hatch

A WAY FORWARD: SUPPORTED DECISION-MAKING

“a recognized alternative to guardianship through which people with disabilities use friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions without the “need” for a guardian.”

- Blanck & Martinis, 2015

THINK ABOUT IT

How do you make decisions?

What do you do if you're not familiar with the issue?

- Taxes?
- Medical Care?
- Auto Repairs?

What Do You Do?

SO, SUPPORTED DECISION-MAKING IS A LOT OF WORDS FOR

Getting help when its needed

Just like you and me

AND JUST LIKE YOU AND ME:

Decisions Jenny had made with Support

- **Sign Power of Attorney**
 - **Consent to Surgery**
- **Medicaid Waiver Individual Service Plan**
 - **Application for Paratransit**
- **Authorization to share medical records**
- **Assignment of a Representative Payee**

FINAL ORDER

- First 4 pages justify guardianship.

“However”

- Guardians to be who she wants
- She lives where she wants
- Guardianship for only 1 year – Expired August, 2014
- Only over 2 things – medical and safety

FINAL ORDER

EVEN DURING the 1 year limited guardianship:

“Guardians shall assist Respondent in making and implementing decisions we have termed ‘supported decision making.’”

JENNY GOT JUSTICE



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

‘I’m so happy to go home today’

Theresa Vargas

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

WHY?

**Jenny is Strong, Smart, Determined
AND**

She had support from:

- Friends and professionals
- National Organizations and Leaders
- Media
- A Judge who was willing to Listen and Learn

IN OTHER WORDS

Jenny Got Lucky

THE LESSON JENNY TEACHES US

Justice and Self-Determination should:

- **NEVER** depend on luck or who you know.
- **ALWAYS** Be the Rule **NOT** the Exception

SO, WHERE DO GO FROM HERE? WHEN DOES A PERSON NEED A GUARDIAN?

“In any case where a guardian has been appointed for an adult person by a court of competent jurisdiction of any state, and the adult thereafter . . . is a resident of this state and is **incompetent** to manage his or her estate,” the Chancery Court may appoint a guardian. – MS Code 93-13-121

The chancellor may appoint guardians of the person and estate, or either, of persons found to be in need of mental treatment . . . and **incapable** of taking care of his person and property – MS Code 93-13-111

“If a person is **incapable** of managing his own estate by reason of advanced age, physical incapacity or mental weakness, or because the person is missing or outside of the United States and unable to return,” the Chancery Court may appoint a conservator. – MS Code 93-13-251

THINK ABOUT IT: WHAT DOES IT MEAN TO BE “INCAPABLE” OR “INCOMPETENT”

- People may be able “capable” of making some decisions but not others.
 - Or be “competent” to “manage [his or her] estate” only with assistance.
 - Or be “incapable of taking care of [his or her] person or property” unless they get help understanding the issues.
- e.g. Salzman, 2010

Capacity to take medication is not the same as capacity to prescribe it!

A NOT-SO-STUPID QUESTION

If people can only “take care of [their] person or property” **with assistance or support**, are they “incapable” or “incompetent”?

ARE YOU?

WHICH MEANS: ASK A QUESTION

BEFORE seeking or recommending
Guardianship or Conservatorship:

**What ELSE Have You
Tried?**

OR, AS THE NATIONAL GUARDIANSHIP ASSOCIATION SAYS

“Alternatives to guardianship, **including supported decision making**, should always be identified and considered whenever possible **prior to the commencement of guardianship proceedings.**”

- National Guardianship Association Position Statement on Guardianship, Surrogate Decision Making and Supported Decision Making, 2015

SUPPORTED DECISION-MAKING CAN HELP PEOPLE “MANAGE” AND “TAKE CARE OF” THEMSELVES AND THEIR PROPERTY

Supported Decision-Making can help people:

- Understand information, issues, and choices;
 - Focus attention in decision-making;
 - Weigh options;
 - Ensure that decisions are based on their own preferences
 - Interpret and/or communicate decisions to other parties.
- Salzman, 2011

IT'S A PARADIGM, NOT A PROCESS

There is no “one size fits all” method of Supported Decision-Making.

Can include, as appropriate

- Informal support
 - Written agreements, like Powers of Attorney, identifying the support needed and who will give it
 - Formal Micro-Boards and Circles of Support
- Martinis, Blanck, and Gonzalez, 2015.

IN COMMON

ALL Forms of Supported Decision-Making recognize:

- That **EVERYONE** has the Right to Make Choices to the Maximum of Their Ability;
 - That you can get help exercising your Right to Make Choices without giving it up; and
 - That there are as many ways to give and get help as there are people
- Dinerstein, 2012.

SUPPORTED DECISION-MAKING AND SELF DETERMINATION

“Supported Decision-Making has the potential to increase the self-determination of older adults and people with disabilities, encouraging and empowering them to reap the benefits from increased life control, independence, employment, and community integration”

- Blanck & Martinis, 2015

MISSISSIPPI LAW ALREADY REQUIRES IT

Guardianship or Conservatorship may only be ordered if the person is proven to be “incapable” or “incompetent” to take care of him or herself or property.

MS Code 93-13-111, 121, 251

**HOW CAN YOU PROVE THIS UNLESS
SOMETHING ELSE HAS BEEN TRIED AND
FAILED?**

OPPORTUNITIES FOR SUPPORT ARE ALL AROUND US

- “Informed Consent” to medical care
- “Person Centered Planning” in Medicare/Medicaid
- “Student Led” IEPs
- “Informed Choice” in Vocational Rehabilitation
- “The Conversation” and “Five Wishes” for End of Life Planning

AFTER GUARDIANSHIP

- Guardians, including the Court - which is the “ultimate guardian” – MUST “take all necessary steps to conserve and protect the best interest of those wards” – *Mississippi Comm’n on Judicial Performance v. Shoemake*, 2016 WL 1459109 (April 14, 2016)
- MS Code 93-13-38: Guardian is responsible for the “comfortable maintenance and support of the ward”

WHAT ARE YOU TRYING?

MAXIMIZING SELF DETERMINATION IS A PERSON'S "BEST INTERESTS"

REMEMBER: People with greater self determination are

- Healthier
 - More independent
 - More likely to be employed
 - More well-adjusted
 - Better able to recognize and resist abuse
- Khemka, Hickson, & Reynolds, 2005; O'Connor & Vallerand, 1994; Wehmeyer & Schwartz, 1998

KEEP TRYING!

WHEN WHAT YOU TRIED WORKS!

- When any person for whom a guardian has been appointed . . . the chancery court . . . may so determine” and terminate the guardianship. – MS Code 93-13-151
- “A conservator may . . . be discharged by the appointing court when it appears that the conservatorship is no longer necessary” – MS Code 93-13-267

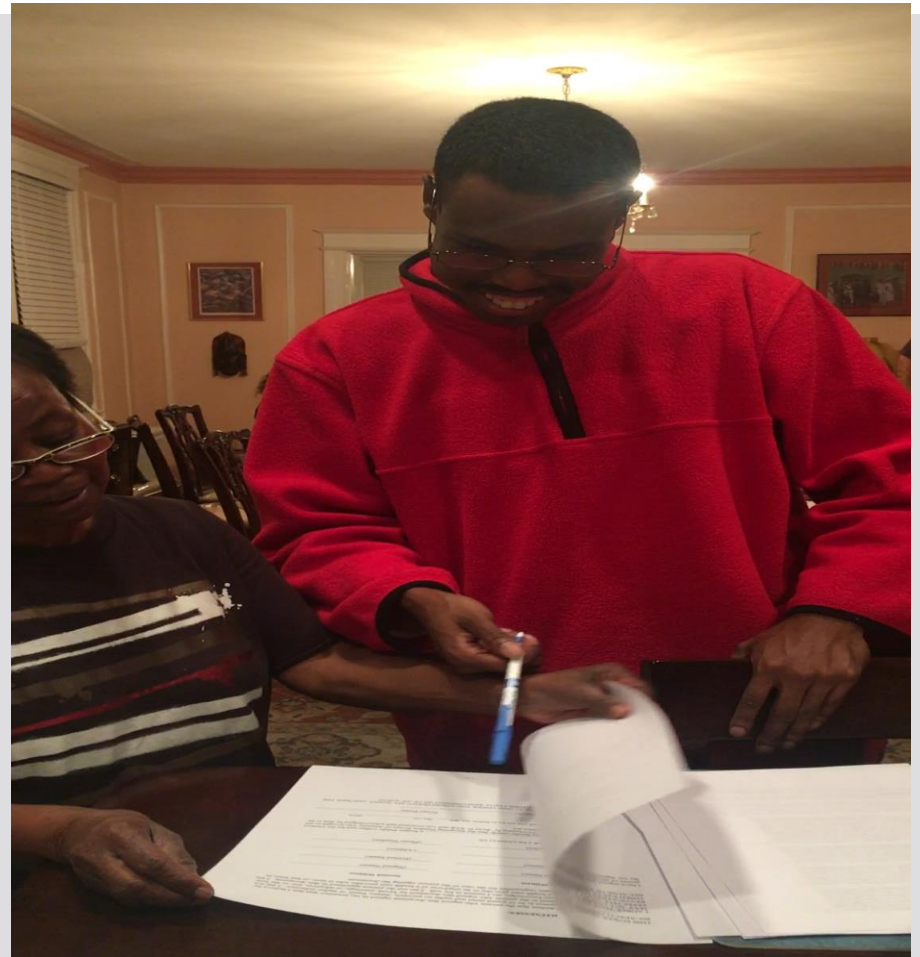
DOESN'T THAT MEAN...

A Guardian/Conservator's job is to work with the person:

- To help the person learn to make his or her own decisions, with support
- To build self-determination
- To “take care of” their person and property
- And then ask the Court to terminate the Guardianship/Conservatorship?

Guardianship as a Way-Station, Not a Final Destination

IT CAN HAPPEN



IT IS HAPPENING: LEGISLATION AND POLICY

- Laws in Texas and Delaware holding that guardianship should only be put in place if there are no less restrictive alternatives and recognizing Supported Decision-Making as such an alternative
- The U.S. Administration for Community Living funding the National Resource Center for Supported Decision-Making, describing SDM as “an alternative to and an evolution from guardianship”
- A report by the Virginia Secretary of Health and Human Services recommending that state law be amended to recognize SDM as a “legitimate alternative to guardianship”
- The American Bar Association publishing a journal article calling for *the increased use of SDM* and a guide designed to help attorneys and others focus on SDM as an alternative to guardianship;
- The National Guardianship Association’s position paper stating that SDM should be attempted before imposition of a guardianship

IT IS HAPPENING: PRACTICE

- Projects in Maine, New York, North Carolina, South Carolina, Minnesota, Wisconsin, Florida, Nevada, Idaho, Massachusetts to increase access to and implementation of supports and services designed to help people avoid or be restored from undue or overbroad guardianship

IT IS HAPPENING: VERMONT SUPPORTED DECISION-MAKING TASK FORCE

- Vermont Task Force “to create solutions and initiatives that transform practices in a way that brings a culture of collaboration”
- Includes consumers, families, and representatives of the Provider, Legal, Educational, Employment, Advocacy, Mental Health, Aging, and Developmental Disabilities communities

VERMONT PROJECTS

- Pilot project between DD Provider and Public Guardian to identify people who could “take care of themselves’ with appropriate supports, plan for and provide the supports, and move to terminate guardianship
- Project between State P&A and State DD Agency to identify people at risk of guardianship and help them receive appropriate supports and services

VERMONT PROJECTS

- Pilot project to increase collaboration between agencies and service providers to make sure supports are available to help people “take care” of themselves
- Reviewing and revamping competency evaluation guidelines to examine whether people could “take care” of themselves with appropriate supports
- Education of people, families, judges, attorneys, and others about alternatives to guardianship

**IT WILL HAPPEN
IF WE REMEMBER THAT**

Supported Decision-Making
ONLY works if we Recognize,
Respect, and Honor
EVERYONE's Right to Make
Choices

REMEMBER THE CHALLENGE

EVERY great advance in civil rights fundamentally changed the way “things have always been”

REMEMBER THE OBSTACLES

Change is **HARD**

“We were not promised ease. The purpose of life . . . is not ease. **It is to choose, and to act upon the choice.** In that task, we are not measured by outcomes. We are measured only by daring and effort and resolve.”

Stephen R. Donaldson

REMEMBER THE GOAL

Older adults and People with Disabilities having “the same opportunities for success and security as their nondisabled peers. . . . If we change the culture, we will change the world!”

Gustin & Martinis, 2016

JOIN THE CONVERSATION

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

The Burton Blatt Institute at Syracuse
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