

CESDM Guide to Supported Decision Making in Minnesota: A Resource for Families and Other Supporters

 **Volunteers
of America®**
MINNESOTA AND WISCONSIN

Revised 2022

CESDM Guide To Supported Decision Making in Minnesota: A Resource For Families And Other Supporters

This Guide should not be considered as legal advice, nor is the intention to provide legal advice. Families considering using many of the tools and interventions discussed in this Guide should consult an attorney familiar with guardianship, incapacity planning tools, and Medical Assistance requirements.

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**CESDM Guide To
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Guardianship is too much, it takes away [my son's] rights, and I don't want that. He wouldn't want that either. I want to work with him to be on his own, get his own place, maybe he will even raise a family one day. The options you gave me are exactly what I was looking for, I just didn't know what it was.

~CESDM Guardianship Info Line caller

I. INTRODUCTION

A. Center for Excellence in Supported Decision Making

In 2016, Volunteers of America Minnesota and Wisconsin opened the Center for Excellence in Supported Decision Making (building upon and expanding the scope and services offered by VOA's Protective Services) with funding provided by an Elder Justice Grant through the Administration for Community Living. The central focus of the grant is developing and establishing a replicable statewide model based on Supported Decision-Making (SDM) to promote safe and viable alternatives to guardianship and conservatorship in Minnesota. Initial grant activities included formal partnerships with Lutheran Social Service Minnesota, Minnesota Department of Human Services, Minnesota Elder Justice Center, and Minnesota's Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS MN) to pilot specific programs.

In October 2018, VOA MN's Center for Excellence in Supported Decision Making (CESDM) was awarded a state grant from the National Resource Center for Supported Decision Making (NRC-SDM) to build upon this work and further increase Minnesota's awareness and use of supported decision-making (SDM) through professional and community education and ensuring the involvement of people impacted by guardianship and/or supported decision making. Through the generosity of the NRC-SDM in awarding the grant, CESDM developed this guidebook.

Today, CESDM continues to work toward systems change in guardianship and promote supported decision making across Minnesota with our team of social workers, and partner Estate & Elder Law Services, independently and in collaboration with community members, including WINGS MN and its members.

Serving Vulnerable Adults and Their Support Systems

Through the statewide Guardianship Information Line, CESDM staff consult with families and professionals, providing in-depth phone-based consultation, information, advice, and referral, with an emphasis on identifying suitable alternatives to guardianship where possible. The Center Social Workers can also provide objective in-person assessments regarding need for guardianship and available alternatives in the Twin Cities Metropolitan Area. VOA MN's Estate & Elder Law Services provides legal and technical advice, as well as facilitation of legal tools such as Supported Decision-Making Agreements, Power of Attorney and Health Care Directive documents, and where necessary, petitioning for guardianship/conservatorship.

Impacting The Community

The CESDM team offers a variety of continuing education and training topics for professionals or community groups including supported decision making, guardianship/conservatorship and less restrictive alternatives, rights of people under guardianship, ethical dilemmas around balancing safety and quality of life, health care directives, the spectrum of surrogate decision making, and more.

There is strong and growing evidence that people with disabilities are happier, safer, and healthier when they are empowered to make choices about their own lives. The Working Interdisciplinary Network of Guardianship Stakeholders (WINGS MN) was established as part of a national movement for improving guardianship and conservatorship practices. Co-Convened by CESDM, WINGS includes membership from legal, advocacy, court, state, county, and social service organizations.

WINGS Minnesota is dedicated to:

- Supporting guardians and conservators, particularly family members or friends, through education to better understand best practices and their responsibilities.
- Building awareness and processes that ensure that less restrictive alternatives are the default choice.
- Sustaining a cooperative conversation where all members work to improve outcomes and increase self-determination for individuals who may need assistance making legal or medical choices.

**B. CESDM Guide to Supported Decision Making In Minnesota:
A Resource For Families And Other Supporters**

This resource guide was developed in response to requests expressed by families and professionals throughout Minnesota, indicating a need for written information about guardianship, supported decision-making, rights of people under guardianship and more. Though many excellent resources exist across websites, from social service, legal and guardianship organizations, CESDM recognizes that not everyone has easy access to computers and the internet, and that it can be confusing and overwhelming to search across seemingly endless sources of information to find answers to the particular issues facing individuals and families. CESDM hopes this Guide will be a helpful resource: both a source of detailed information and a starting point for finding answers to questions and concerns facing families and professionals working with older adults with cognitive challenges, individuals with psychiatric and/or intellectual/developmental disabilities. Professionals serving these populations may also find the Guide useful, but it is geared toward

the unique needs and questions of families and other supporters who are working with, supporting, or concerned about an individual's cognitive, intellectual, or psychiatric functioning and who may need help with decision making.

- Though this Guide is intended to be the definitive resource on supported decision making in Minnesota, it's important to also have a firm understanding of guardianship: what it is and when it's appropriate, how to obtain guardianship, how it may be the most appropriate tool to address otherwise irresolvable issues for a person who lacks decision making capacity, the practicalities and limitations of guardianship, less restrictive alternatives and how it intersects with supported decision-making.
- This Guide also addresses common concerns for families once a guardianship is in place, such as discussion of what rights a person under guardianship retains, how to serve as a guardian in the most person-centered way, how to terminate a guardianship that is no longer necessary.
- Finally, the Guide offers a comprehensive list of resources for further exploration and next steps.

This Guide should not be considered as legal advice, nor is the intention to provide legal advice. Families considering using many of the tools and interventions discussed in this Guide should consult an attorney familiar with guardianship, incapacity planning tools, and Medical Assistance requirements.

Readers of this Guide should also remember that each situation is specific, and tools or approaches discussed here may not be applicable

to each situation. Though there are common themes present in these situations, and though MN has just one guardianship statute, each individual and family is unique and no one situation or recommendation will be right for everyone; contact CESDM to discuss your situation for an individualized consultation.

What a great resource...we call when we really need the help. Thanks!
~ Guardianship Information Line caller

CESDM's Guardianship Information Line is staffed by experienced, compassionate, social service professionals who are guardianship experts and who are dedicated to 1) understanding the situation the caller is describing, 2) helping callers better understand the possible tools and least restrictive interventions available to address their concerns as well as pros and cons of each, and 3) collaborating to develop the next steps the caller can take, uniquely tailored to each particular situation and set of circumstances, balancing concerns they have about the person's risk and safety with self-determination rights.

CONTACT US	952-945-4174 local	GUARDIANSHIP INFORMATION LINE
	844-333-1748 toll free	
	cesdm@voamn.org email	

You were so helpful. You explained everything so clearly and I think Supported Decision Making could work in this situation and my son would have more self-determination...I have always felt there was another option and others keep pushing guardianship, but you have me thinking again that this could work.

~ Guardianship Info Line caller

II. Overview: Guardianship and Supported Decision-Making

Guardianship and Conservatorship are court-appointed substitute decision makers, following a petitioning process and court hearing.

Conservatorship

A conservator is appointed to manage the estate of an individual, (formerly called a protected person), or person subject to conservatorship. Managing the estate may include managing the person's income, governmental benefits, bank accounts, investments, income taxes, real estate, insurance, and any other financial matter. A conservatorship may be limited in duration, or in the areas of financial management, or powers, granted to the conservator. A conservator is required to submit an initial inventory and annual accounting, and other documents, annually.

In appointing a conservator, a judicial officer (judge or referee) has determined that the person:

- is unable to manage their property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions, even with the use of appropriate technological assistance, or because the individual is missing, detained, or unable to return to the United States; and
- has property that will be wasted or dissipated unless management is provided or that control of the person's money is needed to pay for their care and basic needs or the care of a legal dependent; and

the person's identified needs cannot be met by less restrictive means, including use of appropriate technological assistance.¹

Guardianship

A guardian is appointed to make personal decisions for an individual, (previously called a ward, now called a person subject to guardianship. This could include determining where a person lives, making medical decisions, arranging for general care, management of their personal property, applying for governmental benefits (if there is no conservator), entering in to care contracts (if there is no conservator), and making "supervisory" decisions to ensure a person's safety needs are met, establishing ABLE accounts, and representing the person in certain legal matters (if there is no conservator).

Since Guardianship is the removal of decision making rights, and quite restrictive in nature, the court requires proof that this intervention is absolutely necessary. Minnesota's guardianship law requires less restrictive alternatives be tried before seeking guardianship; in fact, the paperwork requesting the appointment of a guardian (called the petition) requires a description of all less restrictive alternatives (LRAs) that were tried and considered, for how long they were attempted, and why these LRAs won't meet the person's needs. This also must be proven in the court hearing. The law states that the court may appoint a guardian only if it finds that the person's "identified needs cannot be met by less restrictive means, including but not limited to use of appropriate technological assistance, supported decision making, community or residential services, or appointment of a health care agent".

¹ Minnesota Statutes 524.5-409

In Minnesota, there are two types of guardians: private and public. A private guardian may be a family member, volunteer, county contracted guardian, or a professional individual or organization. A public guardian is rare: this is when the Commissioner of the Minnesota Department of Human Services is appointed to serve as guardian, and a county employee is assigned to carry out the guardianship duties, for a person with developmental/intellectual developmental disability who has no family or other person to serve as a private guardian. People sometimes get these two types of guardianship confused and should remember that even if the person's guardian is a paid professional, the guardian is still called a private guardian.

A guardianship may be limited by the areas of personal decision making, or powers, granted to the guardian, and it may be limited in duration. Any guardianship can be time-limited if the Court orders it, and as of August 2020, any guardianship for an individual under 30 years old is temporary and automatically expires after 72 months. If a guardianship is still needed and necessary at that time, a petition can be brought to the court to request another guardianship appointment.

Annually, a guardian is required to submit a report (sometimes called "Annual Well-Being Report" or "Guardian's Annual Report") which describes the person's current mental, physical, and social condition, living arrangements, restrictions placed on the person's right to visit and communicate with others, services provided to the person, whether the guardianship is still needed, and other details.

In appointing a guardian, a judicial officer (judge or referee) has determined that the person is incapacitated to make their own decisions. This means that, because of a cognitive, intellectual, or psychiatric condition:

- the person cannot make responsible personal decisions; and,
- the person is demonstrating that they cannot meet their personal needs for food, clothing, medical care, shelter, and safety, even with appropriate technological assistance; and,
- the person's identified needs cannot be met by any less restrictive options.²

A person may need the assistance of both a guardian and conservator, only a guardian, or only a conservator. The guardian and conservator can be the same person, or two different people. Sometimes there are co-guardians or co-conservators, but this is generally not recommended as it can become very complicated since the co-guardians or co-conservators must agree on decisions.

This Guide focuses on guardianship only.

Guardianship: Food for Thought

Guardianship is an important and necessary tool in some, but not all cases. It is often considered when a person is having difficulty in decision-making due to a cognitive, psychiatric, or intellectual disability. Guardianship may be a helpful and appropriate tool if it is the *only* way to make sure a person's basic needs are met, or if it is the *only* way to make sure that other people are not mistreating or taking advantage of them. Or, a guardianship may be the only way a the person can continue living in the community, through consenting to necessary care and services.

But guardianship is also a very serious decision. While Guardianship may be a tool to protect and help a vulnerable adult, it is also a removal

² Minnesota Statute 525.5-310

of constitutional decision-making rights. This may mean that the person has very limited say in decisions about their life, their home, their relationships, etc. It is an option of last resort because it is such a heavy-handed tool. It should only be used in extreme circumstances when there is just no other way to help a person.

Even though the intention is to help or protect a person, there are “unintended consequences” to consider. It is important to consider what a guardianship will accomplish, or what it will change. Even though a guardianship may be sought with very good intentions, it can also lead to some unfortunate results.

Take, for example, the situation where a guardian’s top priority is the person’s safety. They make try to make all decisions to ensure nothing bad ever happens to the person, and work to remove any risk, essentially “bubble wrapping” the person to protect from any harm. This, in turn, can make the person feel they have no control or say in their life; this focus on safety rather than quality of life and the loss of self-determination and autonomy can deeply affect the person. They may feel angry or frustrated and may act out (sometimes called “behaviors”) to communicate they’re upset. This frustration can come out as being belligerent, or they may start hitting, swearing, or yelling. Alternatively, people may turn inward, and withdraw, become depressed and hopeless, feeling that nothing they have to say matters anyway.

Sometimes, it may seem that restricting a person’s choices is for their own good, and necessary. This choice is considered justified because it ensures their safety. But this can promote a false sense of safety: when someone is told they can’t do something, like smoke, or use the internet, or see someone they want to see, they will often just find sneaky ways to do this anyway; this could lead to even more danger than if there were no or more modified approach to this risk.

So even though guardianship is a necessary tool in many circumstances, it should be used only as a last resort, when every other alternative has been tried. Except in emergency³ situations, there is almost always time to consider other approaches and strategies, and it's required by law to try other approaches first.

Guardianship, Choice, and Self-Determination

We all enjoy making our own decisions about our lives and things that are important to us, even if other people don't agree with these decisions. We decide how we spend our time, who we spend it with, what we're going to have for meals (sometimes even when our meal choices are very unhealthy), the clothes that we shop for and wear: this is called self-determination, or autonomy. The right to make choices, even those that others think are risky, is part of being a human. This is called the dignity of risk, "the idea that self-determination and the right to take reasonable risks are essential for dignity and self-esteem and so should not be impeded by excessively-cautious caregivers, concerned about their duty of care."⁴ Too often, people who have a guardian find that they have lost the dignity of risk. Though it usually comes from a place of good intentions, when guardians make decisions about where a person lives, or eats or can't eat, who they can date (or if they can date at all), where they work, and health choices that emphasize safety and risk elimination, the person might be safe, but also very miserable. Also, very often people learn from their mistakes, building skills and experience so they will do better next time. But if they are never

³ An emergency guardianship petition can be filed if, in following the normal petitioning process, there will likely be "substantial harm to the person's health, safety, or welfare, and that no other person appears to have the authority and willingness" to address the emergency. MN Statutes 524.5-311

⁴ Wikipedia contributors. (2019, May 16). Dignity of risk. In *Wikipedia, The Free Encyclopedia*. Retrieved 21:38, August 23, 2019, from https://en.wikipedia.org/w/index.php?title=Dignity_of_risk&oldid=897394114

allowed to make a choice or make a mistake they will never grow and learn from their mistakes or learn how to make good decisions.

Research also informs us that labeling can have a very negative impact on a person. For example, when a person is labeled incompetent (incapacitated), it impacts how others view the person, but also, how the person sees themselves, diminishing their self-esteem and self-concept: it can “inhibit performance, diminish motivation, and depress mood.”⁵

The benefits of self-determination are significant. According to the National Resource Center for Supported Decision Making, “[p]eople with greater self-determination are healthier, more independent, more well-adjusted, better able to recognize and resist abuse.”⁶

This is why many states, including Minnesota, are changing their ideas and practices about guardianship, to think more carefully about how to help a person make decisions instead of automatically turning to guardianship and removing the right to make the decisions.

This won’t work for everyone, and guardianship is certainly necessary in some circumstances. For example, if a person absolutely does not, and cannot, recognize that they need help making decisions to ensure safety and basic needs are met, they might need a guardian. So too might the person who is so resistive to receiving any help, and no one can get through to them to help them see the benefit of having help, and they are in danger. Or some people who cannot be independent just don’t have anyone in their lives who could or would be trustworthy to help support them. Some people still need guardians, at least for a

⁵ Winick, B. J. (1995). The side effects of incompetency labeling and the implications for mental health law. *Psychology, Public Policy, and Law*, 1(1), 6-42.

⁶ Khemka, Hickson, & Reynolds, 2005; O’Connor & Vallerand, 1994; Wehmeyer & Schwartz, 1997 & 1998; Powers et al., 2012; Shogren et al., 2014; Wehmeyer & Palmer, 2003

while. But a lot of people don't: they might just need extra help and support.

Supported Decision-Making

Supported Decision Making (SDM) is not only a philosophy, but also a law in many nations and continues to be recognized by law across the United States. MN guardianship statute was updated in August 2020 to define SDM as a less restrictive alternative to guardianship. It's the idea that just because someone needs help making some decisions, that doesn't mean they need a guardian, it just means they need some extra support.

Supported Decision-Making is easy and intuitive. This Guide will lay out the details—*but don't get lost in them*. Remember that everyone can (and does!) participate in SDM. There are legal and casual ways to offer this decision-making help to people.

There are many ways to think about and describe SDM, here is one definition: supported decision-making is a recognized alternative to guardianship "where people with disabilities use trusted 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.⁷

Minnesota's guardianship law defines it this way: "assistance from one or more persons of an individual's choosing in understanding the nature and consequences of potential personal and financial decisions which

⁷ Blanck, P., Martinis J.G. (2015) The Right to Make Choices: The National Resource Center for Supported Decision-Making. *Inclusion*, Vol. 3(1), 24-33

enables the individual to make the decisions and, when consistent with the individual's wishes, in communicating a decision once made."⁸

Supported Decision-Making encourages the involvement of the person, seeking opportunities for growth and to maximize the person's independence while addressing their vulnerabilities. In this model, the person is encouraged to identify who he or she would like to be on their "team": these people are often called supporters. These individual supporters or groups of supporters then assist the person in making decisions in areas such as: medical decisions, applying for governmental benefits, end of life care, and making decisions about where to live or what services to receive, and any other decision the person wants help with. Supporters help the person to make decisions in any way that is helpful to the person such as:

- helping to gather relevant information and explaining it in ways the person can understand
- helping the person understand various options and choices
- discussing the pros and cons of each option with the person
- helping the person understand possible negative or unintended consequences which may occur because of a particular choice
- helping the person communicate preferences and decisions to others

Rather than involving the courts and asking a judge to make a legal, and often permanent, declaration that the person is incapacitated and in need of a guardian to make decisions *for* them, Supported Decision-Making recognizes that although the person might need help making decisions, or arranging for care and services, their team of supporters

⁸ MN Statute 524.5-102 Subd. 16a

can help by making decisions *with* them and they may be able to get their needs met without court involvement.

*Just because people have a disability
does not mean they need a
guardianship. Many times they need
just a little help.*

~ Jenny Hatch

Read more about Jenny Hatch and her story at *The Jenny Hatch Justice Project*, a project of Quality Trust: www.jennyhatchjusticeproject.org

III. Guardianship Considerations for Specific Populations

Because guardianship has been the default tool for so many years to address concerns about decision making for people with cognitive, psychiatric, or intellectual/developmental disabilities, a lot of misinformation has been promoted. The following sections examine common myths and then present correct facts organized around a few of the populations that are most often represented in guardianship:

- A. Older adults, including those living with Alzheimer’s Disease or other related dementia

- B. Adults living with psychiatric diagnoses

- C. Transition age youth or young adults with intellectual / developmental disabilities

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A. Older Adults

Historically, guardianship has been viewed as a means of protecting an older adult who may experience cognitive impairment, or have a diagnosis of Alzheimer's or related dementia, or someone who may not be making the safest choices for themselves. Family members and caregivers of older adults may find themselves in a situation where a doctor, social worker, or other professional is recommending guardianship. While in some cases guardianship is necessary, it is the most restrictive tool, and is a last resort option. Even a person with significant impairments may have the ability to participate in alternatives to guardianship, such as a health care directive or supported decision-making.

What is less often discussed is that guardianship removes a person's rights to make many decisions for themselves; even if a guardian intends to significantly include the person subject guardianship in decision-making, the guardian is not legally mandated to do so in many areas. Sometimes, even unintentionally, having a guardian can lead to the person feeling powerless and infantilized, and this can lead to defiant and resistive behavior or attitudes.

Myth: *A person living with Alzheimer's Disease or other cognitive impairment needs a guardian.*

Fact: Decisions about the need for guardianship are complex and should never be based purely on a diagnosis of Alzheimer's or any other disease or disability. Guardianship is rarely needed in situations where someone has Alzheimer's disease if there are supports available and the person is not resisting help. There are many ways to ensure that someone with dementia has their needs met without the use of guardianship.

Depending on the person's stage in the disease process and their individual abilities to express their preferences and wishes, many alternatives can be considered such as informal decision making on behalf of the older adult or appointing a health care agent who can ensure necessary services are received. Or the person may be willing and able to sign a Release of Information consent form, enabling a trusted family member or other support person to be involved in conversations with medical and other health care providers about medications and other health care, and residential decisions.

Myth: *A guardian is necessary for a person to be placed into a care setting such as Memory Care.*

Fact: Requiring a guardian be appointed for admission to a care setting is discriminatory, removes a person's basic decision-making rights, and is not required by law. Of course, ensuring that a payer source is available and accessible to a facility or other care provider is important, and often can be achieved through obtaining a Representative Payee through the Social Security Administration, Railroad Retirement Board, or Veterans Administration fiduciary, or establishing another fiduciary, such as a trustee, attorney-in-fact under a power of attorney, or a conservator. Another option is to become the authorized representative for Medical Assistance. Additionally, engaging with family or other supporters to sign admission papers and consents as informal decision makers is helpful when decisional capacity is in question and there is no controversy.

Myth: *A Vulnerable Adult who has been abused or exploited requires a guardian.*

Fact: Guardianship is a power of consent, not a power of removing all

risk. The court appointment of a guardian or conservator may or may not be the best remedy for protection against abuse or financial exploitation. There are many additional interventions to consider, depending on the circumstances involved. Consider the actual risk of future abuse or exploitation, as well as what protections can be implemented to effectively prevent further abuse or exploitation.

In all cases, report any abuse or neglect to the Minnesota Adult Abuse Reporting Center at 844-880-1574 for possible investigation and, if applicable, to mobilize the unique resources of county adult protective services for the protection of the vulnerable adult.

Myth: *Guardianship/Conservatorship is required for an older adult with cognitive deficits to prevent the person from being financially exploited.*

Fact: Unfortunately, even people under guardianship/conservatorship could be financially exploited. This intrusive court action should not be engaged simply because something *may* happen; instead, professionals, families, and other supporters should work with the person and the situation to put measures in place that will address vulnerabilities to financial exploitation, such as a representative payee, power of attorney, trust, or banking tools such as on-line monitoring to monitor financial transactions. Another approach would be developing systems where the person has access to less cash on hand to minimize giving away or losing all their money: utilizing debit or store gift cards is an excellent way to ensure the person still has ability to make purchases while protecting overall assets. It may also be advisable to contact the credit companies to flag inquiries and require alerting the person or their financial supporter so that others don't try to take out credit cards in the person's name.

B. Mental Health

Historically, guardianship has been viewed as a means of protecting an adult with a mental health condition, or someone who simply may not be making the safest choices for themselves. Family members and caregivers of persons with mental health issues may find themselves in a situation where a doctor, social worker, or other professional is recommending guardianship. While in some cases guardianship is necessary, it should not be the first step. Even a person with significant impairments may have the ability to participate in alternatives to guardianship, such as a Health Care Directive (including advance psychiatric directives), supported decision-making assistance and/or agreements, or simply being part of their own care and recovery plan.

What is less often discussed is that guardianship actually removes a person's rights to make many decisions for themselves; even if a guardian intends to significantly include the person subject to guardianship in decision-making, the guardian is not legally mandated to do so in many areas. Research and experience have shown that having a guardian can lead to the person feeling powerless and infantilized, and this can lead to defiant and resistive attitudes, actions, or responses.

Myth: *A person living with mental health challenges needs a guardian in order to stay safe in the community.*

Fact: Decisions about the need for guardianship are complex and should never be based purely on a diagnosis of any disease or disability. Guardianship is rarely needed in situations where someone has a mental illness if there are supports available and/or the person is not resisting help. There are many ways to support a person without

the use of guardianship. Depending on the severity of the person's disease process and their individual abilities to express their preferences and wishes, many alternatives can be considered such as appointing a health care agent who can ensure necessary services are received when the person's mental health symptoms prevent them from being able to speak for themselves.

A Psychiatric Health Care Directive, as a stand-alone document or as part of a standard Health Care Directive, may be a good option for someone in this circumstance who has a disease or condition with fluctuating or cyclical periods of psychiatric instability. The person may be able and willing to sign a Release of Information consent form so the supporter can talk with medical and psychiatric teams and continue to be involved in conversations and decisions about medical and other health care, as well as psychiatric care and treatment.

Even a person with significant disabilities who can't understand complicated medical or psychiatric treatment decisions may still be capable of appointing a health care and/or psychiatric decision-maker.

Myth: *A guardian is necessary for a person to be placed into a care setting such as a psychiatric hospital unit.*

Fact: Requiring a guardian be appointed because of a diagnosis for admission to a care setting is discriminatory, removes a person's basic decision-making rights, and is not required by law. Of course, ensuring that a payer source is available and accessible to a facility is important, and often can be achieved through obtaining rep payee or establishing a fiduciary, such as a trustee, attorney-in-fact under a power of attorney, or a conservator. Additionally, engaging with family or other supports of the individual to sign admission papers and consents is

helpful when decisional capacity is in question. If a person meets statutory criteria, a mental health commitment may be used if a person needs involuntary mental health treatment; this is a more temporary intervention than guardianship and may be all that is needed to help the person recover or become psychiatrically stable.

Myth: *An adult who is under commitment needs to have a guardian appointed.*

Fact: This is not necessarily true. Ideally, the person under commitment will receive appropriate mental health care or treatment to stabilize, after which the commitment would be terminated. Once stable, the person should complete a health care directive, including an advance psychiatric directive, so there is a decision maker in place should the person's symptoms or psychiatric instability cause an inability to be involved in their own decision making again in the future. Additionally, it is important to help the person build supports to ensure they are successful with managing their mental health symptoms and remaining safe when discharged from the hospital. This can be achieved through case manager support, informal support of family or friends, psychiatric support services, and other approaches.

Myth: *A Vulnerable Adult who has been abused or exploited requires a Guardian.*

Fact: The court appointment of a guardian or conservator may or may not be the best remedy for protection against abuse or financial exploitation. There are many interventions to consider, depending on the circumstances involved. It is necessary to consider the actual risk of future abuse or exploitation, as well as what protections can be implemented to effectively prevent further abuse or exploitation.

In all cases, it is important that any abuse or neglect be reported to the Minnesota Adult Abuse Reporting Center at 844-880-1574 for possible investigation and to mobilize the unique resources of county adult protective services for the protection of the vulnerable adult.

Myth: *Guardianship/Conservatorship is needed to prevent a person from being financially exploited.*

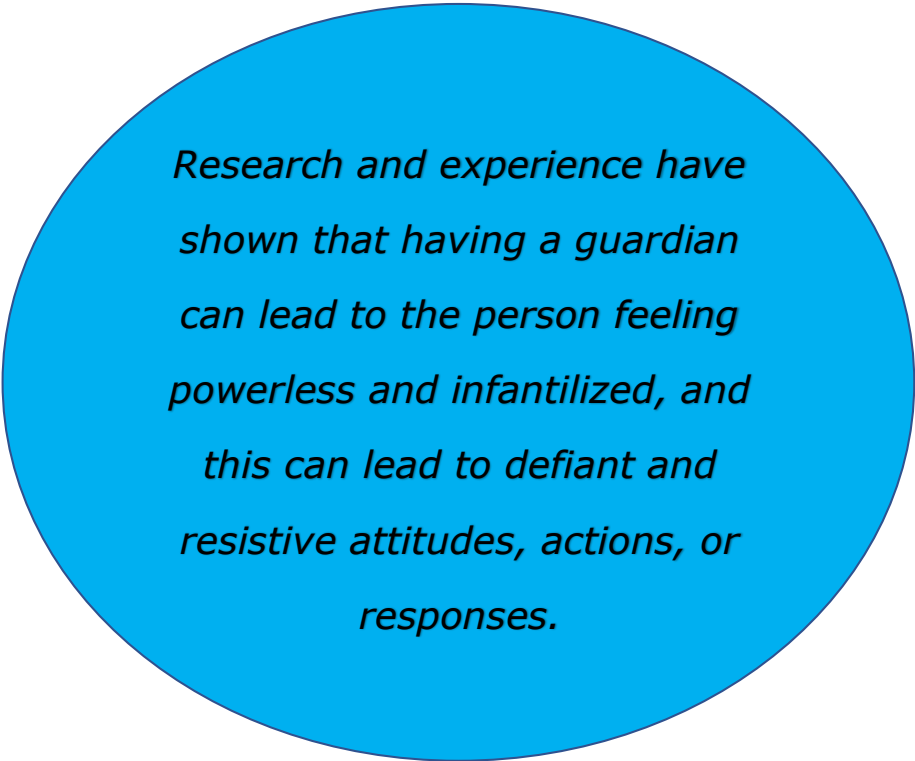
Fact: Unfortunately, even people under guardianship/conservatorship could be financially exploited. This intrusive court action should not be engaged simply because of something that may happen; instead, professionals, families, and other supporters should work with the person and the situation to put measures in place that will address vulnerabilities to financial exploitation, such as a representative payee, power of attorney, trust, or utilizing banking tools such as on-line monitoring to enable a trusted person to keep an eye on financial transactions. Another approach would be developing systems where the person has access to less cash on hand, to minimize giving away or losing all of their money; utilizing debit or store gift cards is an excellent way to ensure the person still has ability to make purchases while protecting overall assets. It may also be advisable to contact the credit companies to flag inquiries and require alerting the person or their financial supporter so that others don't try to take out credit cards in the person's name.

Myth: *Guardianship can fix the problems a person might experience during a mental health crisis or help avoid future crises.*

Fact: Often a mental health crisis is compounded by abuse of drugs or alcohol, loss of housing or transportation, perhaps even loss of a stable

employment. If a person's behaviors during a crisis sabotage others' efforts to help, guardianship is frequently considered to fix such problems. However, guardianship authority is rarely able to address behaviors. Instead, a mental health commitment may be necessary to stabilize the person's mental health. Once stabilized, the person may be able to complete an advance psychiatric directive, and/or work with trusted supporters to establish new goals and continue to work with mental health and community supports to attain these goals.

As a relatively permanent tool, guardianship should not be utilized if there is likelihood that a Civil Commitment will help the person stabilize and regain ability to be make personal decisions, independently or with the support of trusted others.



Research and experience have shown that having a guardian can lead to the person feeling powerless and infantilized, and this can lead to defiant and resistive attitudes, actions, or responses.

Individuals whose guardianships were terminated and who are now using supported decision making shared their thoughts.

Communication: walk me through what you are doing so I can learn maybe use that next time.

I'm an adult. I want to be able to make my own choices.

When I was 19 I was dumb and immature. I'm more wise now.

C. Transition Age Youth and Young Adults With Intellectual / Developmental Disabilities (IDD)

For years parents and caregivers of young adults with intellectual and/or developmental disabilities have been instructed to obtain guardianship for the person when they turn 18. Families are often told that once their child is legally an adult, they will no longer be able to participate in medical, education, or social service conversations with providers: they are told the remedy is to seek guardianship.

This fear-based approach also fails to acknowledge that almost all young people, including those without disabilities, still rely on their parents and families for decision making. It is the rare 18-year-old who is ready to be completely independent from family, never needing further guidance and assistance to address some poor choices or lack of skill or knowledge. In fact, it is now well known that the human brain is not even fully developed until at least 25 years of age, yet families of young people with disabilities are often pressured to seek guardianship; it is assumed they are not fully capable of exercising good decision making and thus need a guardian. Yet, young people without disabilities are usually not expected to be fully independent and capable of consistently good decision making until they are in their twenties.

Another fear some families have is whether they have liability should the person engage in illegal activity. Is a guardian legally responsible for the person's illegal activity? Similarly, some families have questions about criminal court and whether a guardian is needed to have authority or ability to "protect" the person from criminal charges, or to be involved in the criminal process. These are very real and concerning scenarios, as well as very nuanced and complicated. Consulting an experienced attorney is the best course of action to ensure appropriate steps are taken.

Myth: *Guardianship is required for a person with an IDD once that person turns 18.*

Fact: Guardianship is not required by MN law or policy to receive county, state, or federal services, to sign an Individualized Education Plan (IEP), or to move into to a residential home. Families and individuals are often told this, even by professionals, but that is a mistake of professionals, and often a misinterpretation of the Individuals with Disabilities Education Act (IDEA), not a statement of law. Many individuals and families in this situation find it works very well for the person to sign a Release of Information consent form once the student turns 18, which enables the family's continued involvement in the educational planning conversations.

Myth: *If a person has a disability and can't make decisions independently, that person must have a guardian appointed to make decisions for them.*

Fact: Many people are willing to have help making decisions. This can be very successful way to support individuals with help from trusted supporters. The ability to complete tasks independently is not a requirement for anyone, and young people with disabilities should not be expected to be independent either. Needing help does not mean a person needs a guardian.

Myth: *Doctors won't talk to me as a parent once my child turns 18, so I need to obtain guardianship.*

Fact: Consider having the individual sign a Consent for the Release of Information form if the person understands the form when someone explains it to them. This will allow health care professionals to talk to

supporters and involve them in decision making. (Note: If a person's physical disability prevents them from being able to sign, an x or witnessed verbal consent is suitable.) The person can also simply inform their providers that they want their supporter to be involved in discussions and decision-making. Ideally, the person will complete a Health Care Directive, appointing a health care agent to make medical discussions if the person is unable to do so even with help. Even a person with significant disabilities who can't understand complicated medical treatment decisions may still be capable of appointing a health care decision-maker.

Myth: *Guardianship is required for a person with an IDD to prevent them from making bad choices.*

Fact: Guardianship does not remove all risk; it is a power of consent, not a power of compliance. Short of placing a person in an overly secure living environment that removes all risk (and places excessive restrictions on the person), guardianship rarely is an effective tool in preventing a person from making any bad choices. Even though this is a well-meaning desire to remove all chance of harm, this may offer a false sense of security, and will also very likely lead to a poor quality of life for the individual. Instead, recognize that decision-making is a skill. People with disabilities should receive guidance, coaching, and support to learn to recognize risk, develop good life skills, and maximize independence at levels reasonable to their disability. The person and their support team (families, professionals, trusted others of their choosing) can work together to identify areas of risk and vulnerabilities, and develop plans to avoid trouble spots and ways to address the trouble when it does arise. No one is exempt from making poor choices; everyone makes bad, or risk, choices, and often people learn from their

mistakes. Families and other supporters should work with people with disabilities to learn about good decision-making the same way they work with others without disabilities when they make bad choices: to learn from it and find ways to prevent it from happening in the future.

Myth: *Guardianship/Conservatorship is required for a person with an IDD to prevent the person from being financially exploited.*

Fact: Unfortunately, even people under guardianship/conservatorship may be financially exploited. This intrusive court action should not be engaged simply because of something that may happen; instead, professionals, families, and other supporters should work with the person and the situation to put measures in place that will address vulnerabilities to financial exploitation, such as a representative payee, power of attorney, trust, or utilizing banking tools such as on-line monitoring to enable a trusted person to keep an eye on financial transactions. Another approach would be developing systems where the person has access to less cash on hand, to minimize giving away or losing all their money; utilizing debit or store gift cards is an excellent way to ensure the person still has ability to make purchases while protecting overall assets. It may also be advisable to contact the credit companies to flag inquiries and require alerting the person or their financial supporter so that others don't try to take out credit cards in the person's name.

Myth: *Guardianship can change behaviors, prevent bad decisions, or make the person do something or stop doing something that others want them to do or not do for care and safety reasons.*

Fact: Since guardianship is a power of consent, not a power of

compliance, it is rarely able to address behaviors. Instead, behaviors or “bad choices” should be addressed in creative ways seeking solutions that are meaningful to the person / applicable to the situation such as learning why the person is behaving the way they are, addressing the underlying emotions, or understanding what life skills the person needs help developing to seek behavioral change.

Myth: *Guardianship is required in case the person engages in criminal activity and is responsible for the illegal activity of a person subject to guardianship.*

Fact: Another fear some families have is whether they have liability should the person engage in illegal activity. Is a guardian legally responsible for the person’s illegal activity? Similarly, some families have questions about criminal court and whether a guardian is needed to have authority or ability to “protect” the person from criminal charges, or to be involved in the criminal process. These are very real and concerning scenarios, as well as very nuanced and complicated. Consulting an experienced attorney is the best course of action to ensure appropriate steps are taken.

CONTACT US	952-945-4174 local	GUARDIANSHIP INFORMATION LINE
	844-333-1748 toll free	
	cesdm@voamn.org email	 Volunteers of America® MINNESOTA AND WISCONSIN

IV. LESS RESTRICTIVE ALTERNATIVES

Guardianship is not intended to be used proactively to address risks that may (or may not) occur in the future. Rather it is meant to address specific, current, and demonstrated needs of the person when no less restrictive alternatives exist. While recommendations to seek guardianship are usually very well-intended attempts to address a person's vulnerabilities, it's not a simple "fix-all" tool that will solve all the problems in a person's life.

Knowing the facts behind why the recommendations are made and being well informed about available and effective alternatives to guardianship is important to ensuring that the most appropriate intervention is chosen among the many decision-making options. Recognizing that guardianship is a heavy-handed tool that removes a person's rights and is often more restrictive than is necessary to meet their needs is an important factor when considering approaches to help a person. There are many alternatives to guardianship to explore which do not remove a person's constitutional rights and can still be protective in addressing a person's vulnerabilities while promoting the benefits of self-determination. Minnesota guardianship law clearly states that less restrictive alternatives need to be explored and/or attempted prior to petitioning for guardianship.

A. Supported Decision Making

Supported decision making (SDM) is a newer approach to decision making which acknowledges that everyone, even people with disabilities or cognitive impairments, has the right to make decisions. Instead of having a guardian make choices *for* them, people with disabilities use supporters -- family, friends, peers, professionals, community members

or others -- supporters who *help* them make *their own* choices. A person using supported decision making might make a formal written agreement to appoint trusted advisors, such as friends, family, or professionals, to serve as supporters. The supporters help the person with a disability understand, make, and communicate their own choices. However, a written supported decision-making agreement is not necessary. SDM is also a process, or a new way of thinking about incapacity, capacity, and decision making. Whenever someone helps a person understand available choices, the pros and cons of choices, the unintended consequences of making a particular choice or any other activity which helps a person to make decisions without needing a guardian, that is supported decision making.

Recent Guardianship reform in Minnesota has made great progress in advancing supported decision making and promoting individual rights. Many laws and policies require person-centered practices that prioritize community integration, honor a person's abilities, and provide support to address their disabilities in ways which help them be as independent as possible.

SDM is a person-centered practice in which individuals are supported to make choices for themselves and their own lives, maintaining their dignity and autonomy, without the financial costs, burdens, and negative consequences of having a guardian.



Using Less Restrictive Alternatives: Real Life Example

Genevieve and her family are talking about her moving to an assisted living apartment because she has a new diagnosis of Alzheimer's Disease. Many people tell her family that they have to become her guardian because she can't find her own place to live, or understand how to pay for it, or get help from county programs, couldn't sign a lease or can no longer figure out how to pay her bills, buy groceries, plan meals and more. Instead, her kids contact the county to request an assessment, explaining to Genevieve what it means to have extra help. Her family finds some assisted living communities that could meet her needs and that she can afford; after touring some together she chooses the one she likes best, and they help her move. She appoints her son as her health care agent and her daughter as her Agent in a Power of Attorney so that as her disease progresses, they can take over decision making if necessary. She is happy in her new home, and says her kids make it all happen for her: she is enjoying the benefits of family and professionals who support her to make sure her bills are paid and that she has the care and services she needs. This is how supported decision making works.



B. Health Care Directive

A Health Care Directive (HCD) is a legal document designed to ensure that health care providers understand a person's views and desires regarding health care to inform medical decisions in the future if the person is medically unable to speak for themselves. It also allows the person (the principal) to name someone (the agent) to make health care decisions in the event one is unable to make their own health care decisions. In a Health Care Directive, the principal can state views and values about general health care and specific treatments, describe health care goals and medical treatment preferences, and state religious and spiritual beliefs, as well as describe preferences regarding health care and wishes regarding organ donation and body disposition at the

time of death. Many believe that it is more important to name an agent than it is to describe health care desires in the document; however, all agree that the person should take the time to thoroughly discuss their values and beliefs regarding health care choices with the agent(s) to help guide the agent's decision-making when the need arises.

The principal must have the capacity to sign the HCD. Though there is no clear-cut definition of capacity, it is generally agreed that the person has capacity to sign the document if the principal understands the concepts behind naming the agent and/or describing desires regarding health care. It is important to note that knowing who one would want to make their decisions is a much lower level of capacity required than it is to be able to understand complicated medical choices. Thus, even a person with significant cognitive, psychiatric, or developmental disabilities may still be able to complete the portion of the HCD that names an agent. This would then be a valid Health Care Directive.

A Health Care Directive goes into effect when an attending physician states that the principal is currently incapacitated and unable to make their own health care decisions (unless the principal wrote in some other triggering event at the time of completion of the document).

An attorney is **not** necessary to complete a Health Care Directive. Many professionals can assist a person in completing a health care directive including nurses, social workers, and care coordinators in health care systems.

Health Care Directive Form Requirements

Minnesota does not require any particular form or format, if the following requirements are met. The principal must have capacity to understand the document, and the document must name a health care agent or

contain health care instructions or both. The document must be in writing and dated, state the person's name, be signed by the principal and either notarized *or* witnessed by two people. The witnesses must be 18 or older, cannot be named in the document as the health care agents and only one of the witnesses can be a health care provider or an employee of a health care provider.

Choosing a Health Care Agent

The principal should name an agent (or agents) who they trust to understand their wishes and follow through with preferences. It is desirable to have an agent who is geographically close to the principal but is not necessary if the agent is available when needed and understands the principal's needs. If more than one agent is chosen, the principal must indicate whether the agents may act independently of one another or whether the agents must act together. When multiple agents are required to act together, it can be a problem if there is disagreement among the agents or if some of the agents are unavailable. It is advisable to name a primary and at least one alternate agent, in case the primary agent is unable or unwilling to act when there is a need for a decision. Unless related by blood, marriage or adoption, a health care provider or employee of health care provider who is providing services at the time of signing or when decisions need to be made generally cannot be named as the agent.⁹

Sometimes people are reluctant to serve as a health care agent because they fear getting in trouble if they do something wrong. However, Minnesota law states that if the agent acts in good faith, they are not subject to criminal prosecution or civil liability¹⁰. Good faith means the agent is acting according to the wishes stated in health care directive,

⁹ [MN Statute 145C.03, Subdivision 2](#)

¹⁰ [Minnesota Statute 145C.11, Subdivision 1](#)

or, if this does not provide adequate guidance, then acting in the best interest of the principal, "considering the principal's overall general health condition and prognosis and the principal's personal values to the extent known."¹¹ Reluctance to serve as agent could also be based on a person's fear that they will have to assume full care and maybe financial responsibility for the person, but that is not true. The health care agent's role would be to consent to health care decisions only. They are welcome to assume more responsibility than that but are not required to simply because they are the health care agent. Another reason someone may be hesitant to act as an agent is they don't fully understand what the role requires. It can be helpful and clarifying to share exactly what their expectations are and are not.

Powers of the Health Care Agent

Once a Health Care Directive's authority is triggered -- when an attending physician says the person is currently unable to make health care decisions -- the agent automatically has the power to make all health care decisions listed in the document and according to the law¹², including those pertaining to keeping the principal alive; the power to choose health care providers; the power to choose where the principal will live and receive health care and support related to health care; and the power to review and obtain medical records and give consent to release records to others. These are called default powers. If the principal does not want the agent to have all the default powers, the principal must cross a line through those powers or otherwise indicate this limitation on the form.

There are powers that the principal can also grant to the agent, but the principal must specifically choose those powers on the form. These

¹¹ [Minnesota Statute 145C.01, Subdivision 1a](#)

¹² [Minnesota Statute 145C.07](#) and [Minnesota Statute 145C.05](#)

optional powers include organ donation; disposition of the body after death; making health care decisions for the principal even if the principal is still able to decide or communicate; and decisions regarding mental health treatment including electroconvulsive therapy and antipsychotic medication. When these mental health treatment powers are chosen, this is an Advance Psychiatric Directive. An Advance Psychiatric Directive is strongly recommended if the principal has a mental health disorder that sometimes causes them to be psychiatrically unstable and in need of mental health treatment. This may help avoid the need for a Civil Commitment if the person is refusing psychiatric care during a mental health crisis.



Using Less Restrictive Alternatives: Real Life Example

“Tim” is a young adult with I/DD living with his parents. He needs a medical procedure, but his doctor says he is incapacitated and is refusing to do the procedure without the consent of a legal decision maker, specifically a guardian. His family never sought guardianship because they all work together to make decisions and have never seen the need for guardianship. Tim does not understand the medical procedure or why he needs it, but adamantly tells anyone who asks that he trusts his sister and his parents to make decisions for him and talk to the doctors on his behalf. Even though he does not have the capacity to state his medical preferences or spell them out in a health care directive, he can still complete one to name his sister and parents as his agents because he understands that signing the paper means they can speak on his behalf, and he knows that they will still include him in the decisions they make.



C. Civil Commitment

There are many resources to support a person with mental illness, including enlisting family and trusted others to support the person in

decision making, crisis support teams, hospitalization or community-based mental health services, case management, and many more. But sometimes when a person is experiencing a mental health crisis, is a danger to themselves or others, and is refusing treatment, court-ordered Civil Commitment¹³, may be appropriate. Commitment requires a county pre-petition screening, and like guardianship, involves many legal steps before a court hearing where a judge decides whether to commit the person to require psychiatric care or treatment.

Many commitment legal professionals view guardianship as less restrictive than commitment because of how the law is written, but many others view commitment as less restrictive than guardianship for a number of reasons: (1) the person's constitutional rights of decision making are not permanently removed through the commitment process, (2) the commitment is time limited, (3) there is no pre-petition screening process in guardianship and, (4) if no further action is taken, the initial six-month commitment period expires (or at the recommendation of the commitment case manager, the court may extend the commitment for additional twelve month periods).

Through the commitment process the person is also assigned a mental health case manager who can assist with assessing the person's need for, and connecting the person to, additional supportive services such as personal care attendant, independent living skills worker, nursing or in-home care, and assist with placement in a facility if necessary. There are additional court ordered interventions, such as a "Jarvis Order", which can mandate that a person be administered medications against their wishes. Though it may sound extreme, this is often an effective way to help a person experiencing a mental health

¹³ [Minnesota Statutes 253.B](#)

crisis, and over time may result in the person returning to their previous level of functioning, often called their baseline. Once the person is stabilized, it is recommended that they complete a Health Care Directive with additional direction for psychiatric needs, or an Advance Psychiatric Directive. This way, there is a plan in place should there be a future mental health crisis, and both guardianship and future commitments could be avoided.



Using Less Restrictive Alternatives: Real Life Example

Eva is 47 years old, living with bipolar disorder. Over the years she has been civilly committed numerous times; in the most recent episode, as the commitment period was coming to an end, involved professionals suggested guardianship be initiated to stop the cycle of commitments. However, her social worker recommended that, since she has done well in the past until she stops taking her medications, this time they should help her complete a psychiatric health care directive stating that in the future if she becomes ill again, her medical and psychiatric care team can follow instructions she made in the HCD to administer medications even if she declines during a future mental health crisis. She is agreeable to this plan but is fearful about money management because she tends to lose thousands of dollars during manic phases of her illness. Her social worker helps connect her with an attorney to assist in naming an agent to protect her money when she is ill through a power of attorney.



D. Care / Case Management

Guardianship is often recommended when an older adult or person with a disability is unable to understand their care needs, and/or is unable to independently arrange for necessary care and support, residential services, medication management and keeping appointments. However, if the person is not resistive or sabotaging plans that others

help them make or make for them, simply ensuring they are receiving community, social, health and/or residential services is often all that is needed. In these cases, guardianship would be too heavy of an intervention. Instead, a care or case manager is all that is needed to help connect a person to and maintain necessary care, services, and supports.

A county or county-contracted case manager may be available to a person through a Medical Assistance Waiver program (such as CADI, EW, DD or BI Waivers). A case manager's role is to help a person obtain and maintain needed services and benefits. The county where the person lives will complete an assessment, and based on the findings of that assessment, the case manager will make recommendations to the person about available services (many at no cost to the person), help connect the person to the services, and also be available to help apply for and obtain additional identified services and benefits.¹⁴

For those who can afford the private pay fees, a private care manager serves in a very similar role to the case manager, but whose scope can go far deeper. This service is typically billed on an hourly basis, which is sometimes called a fee-for-service support. It is rarely covered by private insurance and is not covered by Medicare or Medical Assistance.

If a person (or their family) has the financial ability to pay for this service, a care manager can be a beneficial advocate and coordinator for a person and their support team. A care manager can provide personalized guidance and information, as well as coordination of resources and other services tailored to support and meet physical, social and financial care needs while maximizing independence and

¹⁴ To find out more about county case management, contact the Senior Linkage Line at 1-800-333-2433 or the Disability Hub at 1-800-333-2466.

quality of life for older adults, adults with disabilities, and those who are caring for them. Though not therapists or professional mediators, a skilled care manager, especially one with a social work background, may be very effective in helping families navigate through conflict and mediate family discord. A skilled care manager would also recognize when it's time to refer a family for therapy, formal mediation, or other interventions.¹⁵



Using Less Restrictive Alternatives: Real Life Example

"Cindy" has difficulty taking care of herself; as a result, she has been in the hospital several times in the last few months because of how she is neglecting herself by not eating, not taking her medications correctly and more. But her new case manager recognizes that it's not Cindy's fault: because of her brain injury, she keeps forgetting what she's supposed to do. So they work together to build in supports to such as an independent living skills (ILS) worker to help her with getting to the grocery store and planning easy but nutritious meals. Her professional care team also helps her with renewing her medication prescriptions, setting up her medical appointments and scheduling rides. They are also helping her develop new skills and reminders so that maybe in the future, she will need fewer supports. But in the meantime, she is happy that no one is bugging her about needing to move to a higher care setting.



E. Financial / Benefits Management

There are various options to support a person if they lack the ability to successfully manage finances and have had issues such as missing multiple rent or mortgage payments, overdraft fees, or difficulty with applications or renewals for Medical Assistance. Having someone to manage or assist with management of finances, and who has the ability

¹⁵ To find a certified care manager or learn more about this option, contact the Aging Life Care Association at www.aginglifecare.org

to contract or otherwise pay for needed care and services or residential choices may be all that is needed to avoid guardianship. These options include banking tools or appointing/obtaining someone else to manage their money for them. This is called a fiduciary, and may include: Daily Money Manager, Representative Payee, Veterans Administration Fiduciary, Power of Attorney, Trustee, and Conservatorship.

Caution in choosing a person who will have access to bank accounts or investments and in naming a fiduciary is critical, as these could also grant easy access for bad actors to steal the person's money. An attorney should be consulted for many of the following options to avoid unintended consequences that could arise with ownership questions, legal transfers of money, and more.

Banking Tools

An individual needing extra help may name a trusted person as an authorized signer on their bank account(s) and take over or assist in bill paying. Or this trusted person could be granted permission to monitor account activity via phone or internet to detect trouble at earliest stages, but still allowing the person to feel free and have full access to their own money. For some people technology can be a great support and using an app or web-based type of support can help with budgeting and reminders about payments. Additionally, setting up automatic payments for bill payment and automatic deposits of income checks can be a helpful way to ensure nothing is missed.

Daily Money Manager (DMM)

This person or organization offers services to ensure nothing falls through the cracks including necessities like paying monthly bills, assisting with tax records, balancing checkbooks, decoding medical bills, and negotiating with creditors. Daily Money Managers charge an hourly

fee for their services. Typically, the DMM does not take over bill payment, but rather assists the individual to organize their paperwork and pay their bills correctly.¹⁶

Representative Payee

Usually called a Rep Payee, this tool can be set up to manage a person's benefits through the Social Security Administration (SSA), however, this does not give the Rep Payee ability to manage any benefits other than Social Security. For people whose only income is from SSA (or Veterans Administration or Railroad Retirement Board), this can be an excellent tool to protect and manage a person's income and would avoid the need for conservatorship.

Having a Rep Payee appointed by the SSA can be voluntary (the person requests it) or involuntary (someone applies on behalf of the person and proves why they cannot manage their own money). A Rep Payee can be a trusted friend or family member who is willing to take on the responsibility of accounting for and managing the person's social security benefits, or it may be a professional individual or agency. The Rep Payee needs to keep clear records of how the person's money is spent and must account to the SSA annually. For persons receiving Railroad Retirement benefits, the Railroad Retirement Board (RRB) has a very similar program. A Rep Payee can set up a budget and help the person plan a budget, and work with the person or their supports to ensure the person has access to their personal funds for spending. It

¹⁶ For more information about DMM opportunities and concerns, and to see if the person you are considering is a member, contact the American Association of Daily Money Managers 854-357-9191, info@aadmm.com or www.aadmm.com

can be a helpful interim step for the person to learn how to responsibly manage their money.¹⁷

The Veterans Administration (VA) has a similar program for veterans who receive pensions or other VA income; this person is called a VA Fiduciary.¹⁸

Power Of Attorney

If a person has income or assets in addition to governmental benefits, and needs or wants assistance with financial management, a power of attorney (POA) may be the best tool. A POA is a legal document that allows the person (the principal) to authorize someone else (an attorney-in-fact, or AIF) to handle their financial affairs. An attorney-in-fact can be anyone the principal names: a trusted family member or friend, or a professional individual or organization who serves in a fiduciary capacity and who charges a fee for their services.

A power of attorney can be durable, which means it continues to be effective even if the principal becomes incapacitated. It is desirable to have an AIF who is geographically close to the principal, but not necessary if the AIF is able to adequately carry out their duties and protect the person's assets. If more than one AIF is chosen, the principal must indicate whether the attorneys-in-fact may act independently of one another or whether they must act together. When multiple attorneys-in-fact are required to act together, it can be a problem if there is disagreement among them or if some are unavailable. It is advisable to name a primary and at least one alternate AIF, in case the

¹⁷ For more information, contact SSA at 1-800-772-1213 or www.ssa.gov/payee or if applicable, RRB at 1-977-772-5772 or www.rrb.gov

¹⁸ For more information, contact the Veterans Administration at 1-888-407-0144 or www.benefits.va.gov/fiduciary/beneficiary.asp

primary AIF is unable or unwilling to act when there is a need for a decision. The authority of an AIF ends at the death of the principal.

The POA is a very powerful document and should not be entered into without serious consideration and the advice of an attorney. It is very important to choose the appropriate person to serve as attorney-in-fact. No one who is untrustworthy or on shaky grounds financially should be named attorney-in-fact.

A power of attorney does not take away any rights of the principal to access their own money. An experienced attorney should prepare the power of attorney, due to the potential for misuse or mistakes made by others who may offer to help the person complete the POA.

A POA can also be helpful to enable the AIF to communicate with insurance companies, credit companies, manage investments, taxes, insurance, engage in contracts for services, and more.

A POA is revocable by the principal with capacity to do so; if the person no longer has capacity, the appointment of a conservator will revoke a POA. Previously completed POA documents remain in effect until formally revoked. A person who is easily convinced to sign new POA documents appointing additional attorneys-in-fact may not be a good candidate for this tool.

Done properly with trusted individual(s) named as AIF, a POA can be an excellent tool to provide for financial management and protection from exploitation through a person's life, avoiding the need for a conservator.

A POA is a legal alternative to conservatorship, and if a conservatorship petition is filed, the court will consider the AIF as the principal's nominee to serve as conservator. Contact an attorney who specializes in this area for more information.

Trusts

There are many types and purposes of Trusts: family wealth management, planning for incapacity, planning for future Medical Assistance eligibility, and planning for a child's future or the future needs of an adult offspring with a disability. A Trust can be put in place to avoid conservatorship in the future if the principal becomes incapacitated and unable to manage their own money and assets. Trusts are very complicated legal documents and should be prepared by an experienced attorney who is familiar with decisional capacity issues as well as Medical Assistance requirements. Contact an attorney who specializes in this area for more information.

Conservatorship

A conservator is appointed by the court to manage the estate of the person subject to conservatorship. This is the most restrictive option of financial management and takes away the person's rights to manage their finances and gives those rights to the conservator. However, sometimes this may be necessary to protect the income and assets of a vulnerable person who is refusing to allow others to help them, who is not capable of completing a POA or Trust, or who is influenced by bad actors to appoint them as their fiduciary. It also may be necessary to access the person's income and assets to pay for necessary care, residential or other services. With this tool in place, the person who does not sabotage a home or residential care plan may not need a guardian, so this is considered a less restrictive alternative to guardianship.



Using Less Restrictive Alternatives: Real Life Example

"George" is 73 years old and living alone in his home. He is widowed and has no children. Recently, he has been giving his money to telephone scammers and his funds are quickly running out. He is having difficulty budgeting, is not paying his bills because he thinks he can pay everything off later after he receives the payout he thinks is coming. At one point his electricity was turned off for non-payment. He has gone to the bank several times in a week seeking withdrawals of thousands of dollars, stating he won the lottery in another country and needs to send money for taxes so he can claim his new fortune. The bank has concerns along with a neighbor friend who has filed a report with adult protection. George doesn't understand the risks of his new spending habits and doesn't believe what anyone is trying to tell him about these scams. He refuses to sign a POA to allow anyone to help him. His nephew Greg decided to work with an attorney to petition the court to be appointed as George's conservator to protect his assets. Though Greg was disappointed that, because of George's resistance and inability to understand the financial exploitation they couldn't avoid court intervention, he is relieved that the conservatorship powers will allow him to protect his uncle, keep all the bills paid, contract for care services that may be necessary and above all, help George remain in his beloved home.



Summary

There are many options less restrictive than guardianship which may meet a person's needs for care and safety while also enabling the person to retain their rights and experience the sense of satisfaction that comes with being in charge of one's own life. Sometimes it's just a little extra support and sometimes it's using the "power of the purse strings" in small or significant ways to protect assets and pay debts and for care needs. Creativity and willingness to try various options are key.

All these types of less restrictive alternatives are also examples of supported decision making, if they are used in a way that includes the person in the decisions.

As demonstrated in the examples, even people who are otherwise quite impaired due to a medical, psychiatric, or intellectual disability may be able to have their needs met if they have family, community, and/or professional support to accommodate for their deficits. It requires creativity and time to sort out how to address a person’s unmet needs in the most supportive, least restrictive ways.¹⁹

This Guide should not be considered as legal advice, nor is the intention to provide legal advice. Families considering using many of the tools and interventions discussed in this Guide should consult an attorney familiar with guardianship, incapacity planning tools, and Medical Assistance requirements.

¹⁹ In 2020, CESDM produced several brief [guardianship and supported decision making explainer videos](#) to provide examples of considerations discussed in this Guide.

V. Guardianship Petitioning Decisions

Despite all intentions and attempts at resolving problems outside of guardianship, guardianship may be the best option in some situations. If, after reviewing sections of interest in this guidebook, it seems that guardianship may be the most appropriate available option to address vulnerabilities and meet a person's needs, there are still a few areas to consider, such as: whether guardianship will even be able to address or resolve the issues that are being presented; how someone petitions the court to obtain guardianship; who will be the guardian, and whether it should be a family member or a professional.

A. *Practical Realities of Guardianship: Will It Work?*

Guardianship is often recommended or considered because of a problem or behavior that is causing concern about compliance or safety. It's important to really think about whether the authority within the guardianship will effectively address the specific issues. For example, if a person doesn't like where they are living and continues to say they are going to move out or run away, or a confused older adult keeps saying they want to "go home" and need to call a cab, or a person has been living with homelessness for years and continually declines assistance for housing support, a guardianship will likely not be able to fix any of these concerns. While it's true that the guardian would have legal authority to decide where a person lives or ability to sign someone up for services, the practical challenge is getting a person to stay where they don't want to be or accept help that they don't think they need.

Creative approaches to ensure a person's care and safety needs are met may be possible, without the need for guardianship, and one should always consider what other supports exist to help address these challenges, so the supporter isn't going it alone. Recognizing when a

person is simply making a statement about intentions but has no ability to act upon it can help families and other supporters feel less urgency to seek guardianship. In the case of a confused person stating they need to call a cab and go home, pause and consider whether they actually can look up the number and use the phone to schedule a ride, or have a way to pay for the ride, or even a destination in mind. Often the answer to these questions is no, and a better approach would be to validate the feelings behind the statements and kindly redirect them; for example, "Tell me more about your home," or "What did you like best about home?" or "that sounds lovely, I can understand why it's so special to you," and then attempt to engage them in something meaningful to redirect their attention away from the concerning statements.

Other areas of concern are the instances of refusal (such as refusal to take medications or to bathe) or "risky" behavior such as leaving the group home to meet friends without notifying staff. As noted above there is a balance between the legal authority that a guardian has and the practical application of that authority. Even when there is a guardian in place, these issues still come up and the guardian struggles because they can't "fix the problem." It is helpful to consider whether guardianship should even be sought if it can't solve the problem, and instead put more attention into creative problem solving with the person and the professional care team to try to address the refusals or risky behaviors in practical ways.

Sometimes conservatorship or guardianship is sought because of concerns about financial mismanagement or vulnerability to being taken advantage of. But as discussed in *Chapter IV Less Restrictive Alternatives*, there are many other means that are less intensive than guardianship or conservatorship which may be able to address concerns

about losing or giving away money, such as applying for rep payee, power of attorney, or co-managing a bank account. Additionally, depending on the person’s willingness and ability, simply helping them to learn budgeting skills, and how to recognize scams and make better financial choices may be a good solution, especially when paired with backup plans such as a trusted person monitoring bank transactions.

Often people find that there is not one easy answer or solution to situations such as these, even if a guardianship is established. It’s a matter of creativity in trying to problem solve by looping in the team of professionals, trusted supporters, and, as able, the person themselves to address concerns. Trying to get to the root of the behavior and addressing it from there can be frustrating and time intensive but is often successful and more satisfying than the expense, time, and burden of involving the courts.

Contact the CESDM Guardianship Information Line for an in-depth discussion of your circumstances and whether guardianship or another option may be effective in addressing the present concerns.

CONTACT US	952-945-4174 local	GUARDIANSHIP INFORMATION LINE
	844-333-1748 toll free	
	cesdm@voamn.org email	 MINNESOTA AND WISCONSIN

B. *Assessing the Need for Guardianship*

Usually when guardianship is being recommended or someone is considering guardianship, the deficits of the person are highlighted to show reasons that guardianship is needed. One pertinent point that needs to be considered in each situation is why the deficit exists and whether they are reversible or treatable, and whether there are ways to build in supports or provide education in certain areas to address the deficit or needs which are unmet as a result of the deficit.

For example, if a person makes very unsafe choices about who they spend time with and are engaging in risky behavior, instead of automatically stating they need a guardian, first consider: Has the person been supported to find ways to connect with people who have similar interests in a safer environment? Is the person missing something important to them, something of meaning or purpose, and they are acting out as a result? Does the person understand the risks of their choices? Has anyone talked with them about the risk and what they could lose, or how to approach the situation in ways that reduce the risk? Thinking through these questions may reveal ways to help the person reduce their risk, while promoting a more trusting relationship between the person and their supporters. Remember, it is rarely desirable to eliminate all risk: total safety with no risk is likely impossible and attempts to try will usually cause great misery for the person being protected; the better, and more effective, goal may be to try to reduce risk, seeking a balance between the person's safety and happiness or meaningful life. Assist the person to learn from their poor choices, if possible, and work toward building decision making skills is one effective approach. Particularly when the person is not able to fully participate in problem-solving, supporters and care teams can also work together to

set up situations where the person can still engage in activities of their choosing, but risk is reduced.

There are a few useful tools in determining if guardianship is appropriate or whether there are alternatives available. One such tool is the Guardianship Decision Tree which works like a flow chart to determine if guardianship is the correct approach.²⁰ Another excellent resource is the PRACTICAL tool.²¹

PRACTICAL is an acronym, or abbreviation of each of nine areas of consideration. Carefully thinking about each area will help families and professionals to sort out whether there are other ways to approach the person's need for assistance. If all steps are followed and the decision is still to proceed with guardianship, one can be confident that guardianship is indeed the least restrictive way to meet the person's needs.

1. *Presume* guardianship is not needed. Less restrictive alternatives should be considered first.
2. *Reason:* look specifically at the reasons for concern, such as trouble managing money, arranging for health care, engaging in unsafe relationships, ability to live in the community and meet basic needs, finding a job, having personal safety, making personal decisions, and so on. This helps identify whether there are specific areas that may need additional help.
3. *Ask if a triggering concern may be caused by temporary or reversible conditions.* There are many treatable medical conditions

²⁰ MN DHS, WINGS MN, CESDM [Guardianship Decision Tree](#)

²¹ Developed by the American Bar Association with assistance from the National Resource Center on Supported Decision Making, it was developed for attorneys, but is user friendly and can be easily used by anyone to help avoid unnecessary guardianships. [PRACTICAL Tool](#)

that can mimic a permanent disability, such as a vitamin deficiency, malnutrition or dehydration, urinary tract or other infection, hearing loss, depression. Seek medical evaluation to determine if any of these conditions are present, and treatable so the person can regain ability to make their own decisions, alone or with support. It may also be wise to postpone decisions about abilities or need for guardianship until the condition improves, such as following a stroke, brain injury, or other illness or accident. Consider that a person's apparent inability to make informed decisions may be based on professionals' lack of understanding that noncompliance may be due to poverty or other lack of resources, or a misunderstanding about a person's cultural values or practices.

4. *Community*: Family and/or community and residential supports may be sufficient to address a person's unmet needs and accommodate their disabilities without having to seek guardianship. A great question to ask is *what would it take* to help the person make decisions and/or obtain the help necessary to ensure their care and safety needs are met? This could include hearing aids, physical therapy, counseling, independent living skills training, more in-home services, coaching family to be more effective and engaged, or a move to a more supportive living environment, and so much more.
5. *Team*: Having a team of supports can be the difference between getting needs met or not; the person may have already appointed helpers under a Health Care Directive or Power of Attorney or may have informal teams of support. Ask the person who they would like and trust to help them make medical decisions, or who they'd

trust to take care of their money in the future if they couldn't do it on their own.

6. *Identify abilities:* In addition to considering the person's deficits which cannot be addressed in any other way, this is a good time to also identify the person's strengths, including their willingness to have help.
7. *Challenges:* now that possible accommodations for disabilities, and community and family resources have been considered to address identified areas of deficit, consider challenges. This may include the reality that the person's identified supporters are in fact abusive or taking advantage of the person, or the person can't qualify for needed and desired levels of community or residential care. Being careful to ensure one's own ageism, ableism or biases about safety, messy families, or cultural differences aren't interfering with objective views of the person's identified team or community services is essential. Determine whether the challenges can be overcome.
8. *Appoint legal supporter or surrogate consistent with person's values and preferences.* Determine whether the person can participate in the completion of tools which appoint a legal decision maker or formal supporter, such as naming a health care agent, an attorney-in-fact, a trustee, rep payee, etc. Completion of tools which will eliminate the need for guardianship is a great goal and allows the person to be involved in selecting the person that will best be able to honor the person's values and preferences.
9. *Limit any necessary Guardianship petition and order.* If guardianship (or conservatorship) must be utilized, the petition

should request only those powers needed by the guardian or conservator to meet the needs or protect the person. Also, consider whether the guardianship or conservatorship should be time-limited if the need for assistance is thought to be temporary.

C. **Petitioning Process**

Preparing the Petition

Once it has been determined that the person’s disability or decision making deficits are likely irreversible, that there are no less restrictive measures available to meet the person’s needs²², and that guardianship is the only mechanism to effectively provide for the needs of the person, the next things to determine are who will be the petitioner (the one who signs the petition and provides testimony in court), who is the most appropriate, best qualified person to serve as guardian (often the same person as the petitioner), and what powers and duties are needed by the guardian to provide for and protect the person. If a conservator is needed to manage and/or protect money, the process is identical and can be done at the same time as the guardianship.

Choosing the Guardian

It is important to note that most proposed guardians²³ will have to go through a criminal and Department of Human Services background check, and will need to report any occurrences of bankruptcy, professional license problems, and specific other personal matters.²⁴

²² Petitioners are required to list in the petition what less restrictive alternatives have been tried, for how long, and why they did not work. [MN Statute 524.5-303 \(b\) \(9\)](#)

²³ Exception: parents who raised person with IDD in family home through time of petition.

[MN Statute 524.5-118](#)

²⁴ [MN Statute 524.5-303\(c\)](#)

Commented [AW1]: I'm a bit surprised that the Petitioning process and choosing a guardian info is in the Guide to SDM. I'm assuming this was an intentional addition when created?

Commented [AR2R1]: @Allycia Wolff good question: it would mean removing the entire VI section. I am of mixed mind about this; People do want to know. And when we tell them how arduous the process is, might they be more tempted to turn to other sections as in, "whoa, this is harder than I thought, maybe we shouldn't do this". Ideas: keep, significantly reduce it, pull out most of it and make another document about the petitioning process (but would we be duplicating the Branch's Gship Manual? but ours would be more digestible?) But if we have our own, people see it as standalone document and ignore our other publications, just looking for how to seek Gship?
@Kathleen Carlson weigh in too

People are sometimes reluctant to serve as guardian for someone else because they are afraid they might get in trouble if the person under guardianship does something illegal or is afraid of choosing the wrong care provider. In actuality, “a guardian is not liable to a third person for acts of the person subject to guardianship solely by reason of the relationship” and “a guardian who exercises reasonable care in choosing a third person providing medical care or other care, treatment, or service for the person subject to guardianship is not liable for injury to the person subject to guardianship resulting from wrongful conduct of the third person.”²⁵

Families are sometimes counseled to nominate an independent, or professional guardian to serve instead of a family member to preserve the family member’s relationship with the person subject to guardianship; it is often believed that this will be less stressful for families and the person. However, this is not universally true: sometimes families who have made this choice end up feeling very frustrated by “losing control” of the situation. Further, there is often great value to the person to have someone who knows them and their values; the emotional connection and personal long-standing relationship may promote more harmony in the guardianship relationship. Another problem is that, although the independent guardian should involve the family in decision making, they are not required by law to do so. And if there are differing views on the best way to meet the person’s needs, the guardian’s decision is final. Independent guardians may be over worked, underpaid, and may not have the time to dedicate to the person that their family was hoping would happen. On the other hand, the more objective perspective may be very helpful, and in fact necessary to preserve the familial

²⁵ [Minnesota Statute 524.5-315](#)

relationship. Each situation is unique to the person: sometimes a family or friend would be the best person to serve as guardian and in other situations, an independent guardian may be best, if one is available.

Other Considerations

Though not required by statute, most courts require the submission of a *Physician's Statement in Support of Guardianship* to help the court understand that the person's deficits are the result of a cognitive, psychiatric, or intellectual disorder, rather than just eccentricities, or making decisions that other don't like.

It is recommended that petitioners work with an attorney experienced in guardianship procedures, but it is also possible to proceed without an attorney, or *pro se*. This is not advised, as most people do not have the skills and knowledge base to complete this somewhat complicated process and may lack confidence to adequately prove the need for guardianship against a court appointed attorney and/or other family members who may be objecting to the petition. The costs of establishing or maintaining a guardianship are paid from the funds of the person needing the guardianship (at this stage the person is called the respondent), or from court or county funds²⁶ if the person has very little or no money. In this situation, a petition seeking designation of *in forma pauperis* status (indigent) has been filed and approved by the court. If an attorney asks a family member to pay the attorney's fees privately, the family may want to search for another attorney who will accept the court fees as payment in full.²⁷

Filing the Petition

²⁶ [Minnesota Statutes 524.5-502](#)

²⁷ Families can find an attorney at the [National Academy of Elder Law Attorneys \(NAELA\)](#) or [Minnesota State Bar Association](#) (select guardianship under area of practice)

The petition is the document which is filed with the court in the county where the person resides and which includes the respondent's full name, address, phone number, next of kin and other interested parties, the basis for the person's incapacities, the evidence showing the person can't make their own decisions or provide for themselves even with help, and the description of what less restrictive alternatives were tried and ruled out. The petition also includes the name, contact, and background information for the proposed guardian, and the requested powers and duties of guardianship.

The petition for guardianship is filed with the probate court in the county in which the respondent resides, or in the case of conservatorship, owns real estate. The attorney representing the petitioner will file the petition. Unless there is an emergency, the court hearing will usually be scheduled to take place several weeks, or sometimes months, in the future.²⁸

Next Steps

After the petition is filed and a court date set, a Court Visitor will "serve" the petition on the respondent; this means the visitor will need access to the person and will read and explain the petition to the respondent. This could be very upsetting to the respondent, so caregivers should be prepared for this possibility.

At that time, if the proposed respondent does not indicate that he or she already has one, the Court should appoint an attorney to represent the respondent during the process. The court appointed attorney's role is to represent the respondent's wishes regarding the guardianship and the nominated guardian, even if this may conflict with what is in the

²⁸ Petitioners who wish to petition without an attorney can find all the related forms at [MN Judicial Branch](#).

best interest of that person. All these steps are important due process protections and are necessary because rights are removed when a guardian is appointed. These steps can also be frustrating to family members and extremely upsetting to respondents, who may have no ability to understand why this is happening and no appreciation that others are just trying to help and protect them.

Court Hearing

The respondent should attend the court hearing, even if they won't understand it. This is a monumental day, and the person should have the opportunity to observe what is going on, and ideally, be asked by the hearing officer (judge or referee) whether they believe they need a guardian and who they would want to be their guardian. The only time a respondent should be excused from attending is if they refuse to attend or if they are *medically* unable to attend. It is usually considered the petitioner's job to get the person to the court hearing.

During the court hearing, the petitioner will be sworn in and through questioning by their attorney and possible cross-examination by the respondent's attorney, will provide most of the testimony to prove the need for the appointment of the guardian. This can be very painful for family members to have to publicly describe the deficits of the respondent, and it can be very upsetting for the respondent to be present and listening to the petitioner and others talking about them as though they are not even in the room while describing their deficits and mistakes.

The petitioner's attorney may call other witnesses in support of the petition for the appointment of a guardian, and the court appointed attorney may call witnesses to testify about why the person does not

need a guardian. The respondent may be asked to testify as well, or at least answer basic questions.

Typically, if no one objects to the appointment of a guardian during the court hearing, the hearing officer will decide whether to appoint the guardian and will grant the guardian powers that were proven to be needed. If the petition is contested, there will usually be a delay in the court hearing date. Once the hearing occurs, and if there was a lot of evidence to review, the hearing officer may conclude the court hearing without announcing a decision. This is called taking the matter under advisement and in this case, the hearing officer has up to 90 days to decide whether to appoint a guardian, which guardian to appoint, and which powers to grant.

Annual Reporting Requirements

In addition to ensuring the person's needs are met, the guardian has annual court reporting requirements: (1) *Annual Report of the Guardian* (also called the *Personal Well-Being Report*) and (2) the *Affidavit of Service*, which tells the court that the Guardian also delivered the (3) *Annual Notice of Right to Petition for Termination or Modification of Guardianship or Other Relief* to the person under guardianship.

VI. Guardianship Best Practices

A. *Person-Centered Guardianship Practices*

It is critical that the guardian pay special attention to carrying out their duties in a way that is respectful of the humanity and individuality of the person. One way to approach this is from the perspective of putting the person's unique values, preferences, desires at the center of any decision made for, or with, the person; this is called person-centered thinking. A person-centered practice is one that supports the person to full engagement in their own life and in their community.

Minnesota Association of Guardianship & Conservatorship (MAGiC) is a membership organization for professional guardians/conservators, attorneys, social workers, and others involved in the spectrum of decision making. MAGiC has published Standards of Practice for professional guardians and conservators, though families and other supporters may also find this set of recommended best practices to be helpful in serving as guardian/conservator. The Standards of Practice define person-centered practices as *active, ongoing processes of listening to and focusing on an individual's desires, hopes and intentions for that person's life. This is a way of assuring that all persons have the right to make decisions and have choices about their life and the opportunity to contribute to their community. Being person centered is a broad concept and thought process: it is ongoing and continuous. Person centered planning seeks to identify what is important to a person, such as relationships, hobbies, residential choices, as well as what is important for a person, such as health, safety, policy and law compliance, and so on. Persons under guardianship / conservatorship are entitled to receive person-centered services. The guardian/conservator should identify and advocate for the person's*

goals, needs, and preferences when this will not cause substantial harm to the person. ²⁹

Sometimes tension arises when a person wants to do things that the guardian wants to restrict, usually due to the guardian's good intentions and desire to protect the person from harm. The guardian may not recognize that the person's happiness and life-satisfaction are dependent on the ability to enjoy freedom and choice. Additionally, if a parent becomes legal guardian of their young adult child with disabilities at 18, they may experience a struggle in the transition from parent to guardian. The scope of decision making is different, and only includes the powers granted by the court. It can be difficult to balance the roles of guardian and parent. It is natural to want to protect an adult child living with a disability, while trying to also help them gain life skills and independence in the long run.

Unlike the role and scope of a parent which could include decisions about personal choices such as dating and self-expression, a legal guardianship does not. Recognizing that one's child is an adult now, and that the role of a parent is very different than the role of a guardian. Guardians must remember that their authority does not extend beyond the specific powers granted by the court.

Guardians also may feel pressure to ensure nothing bad ever happens, fearing they will get in trouble with Adult Protective Services or the courts if they allow the person to be in risky situations or make risky decisions. Person-centered thinking and practices can help guide family guardians to think through these issues, and to develop an understanding that there is dignity in risk, and, that supervision and protection practices can allow reasonable amounts of risk taking while

²⁹ [MAGiC Standards of Practice \(2019\) II. A.](#)

reducing likelihood that serious harm will happen to the person or others.

Sometimes guardians find themselves in conflict with people and agencies providing support and residential services to their family member, when these providers seem to be insisting that the providers must let the person do whatever the person wants. This is not exactly correct, but it's important for guardians to realize that Minnesota law requires that licensed providers of home and community based services provide person-centered planning and service delivery, which means that they "must provide services in response to the person's identified needs, interests, preferences, and desired outcomes as specified in the coordinated service and support plan..."³⁰ and that "services must be provided in a manner that supports the person's preferences, daily needs, and activities and accomplishment of the person's personal goals and service outcomes, consistent with the principles of person-centered service delivery that (i) identifies and supports what is important to the person as well as what is important for the person, including preferences for when, how, and by whom direct support services are provided; (ii) uses that information to identify outcomes the person desires; and (iii) respects each person's history, dignity, and cultural background."³¹

This requirement sometimes causes confusion and tension between the person, their service providers, and the guardian. It's important that providers and guardians understand the necessity and importance of ensuring that services and decisions are not overly restrictive and find the balance between what is important *to* the person, such as relationships, hobbies, residential choices, how to spend the day, personal expressions (including jewelry, hairstyle, clothing) and what is

³⁰ [Minnesota Statutes 245D.07 Sub. 1a](#)

³¹ [Ibid](#)

important for the person, such as health, safety, complying with laws and policies.

MAGiC's Standards of Practice for Guardians provide guidance toward the goal of person-centered guardianship practices. Though these are not mandated by law, they are best practices for guardians. These Standards include the following guidelines:

1. *The individual should be asked what he/she wants in relation to the decision at hand as well as identification of life goals. Consider any needed assistance or accommodations the person may need due to cognitive functioning and ability to express themselves. Even individuals who do not use words to communicate still have opinions and preferences. Behaviors such as smiling, grimacing, pulling away from, or leaning into, touch or other stimuli are all forms of non-verbal communication.*
2. *If the individual is unable, even with assistance, to express goals and preferences, input from others familiar with the person should be sought to help determine what the person would want.*
3. *The guardian/conservator shall:*
 - a. *encourage opportunities for the person to exercise rights retained by the person and which the person is capable of exercising;*
 - b. *encourage the person to participate to the maximum extent of the person's abilities in all decisions that affect him or her, to act on his or her own behalf where able to do so, and to develop/regain capacity to the extent possible.*
 - c. *recognize there is dignity in risk. Individuals experience increased life satisfaction when they are encouraged to make their own decisions. In exercising decision-making authority*

*granted by the court, the guardian/conservator and the person should engage in a risk/benefit analysis in consideration of the individual's desires. Decisions which place the person at low risk of harm should generally be supported. For decisions with higher potential risk outcomes, the guardian/conservator should engage the care team to assist with risk management and mitigation activities when necessary to address the risk of significant harm.*³²



Guardian Balancing Risk and Safety: Real Life Example

"Susie" is 20 years old and like almost everyone her age, very much wants a cell phone, but her mother Sharon, who is also her guardian, says no because she is worried that Susie will get in trouble with meeting dangerous people on-line, uncontrolled shopping, visiting porn sites, and will become obsessed with the phone and drop out of other activities. But Susie is already borrowing her friends' phones at school and work. Sharon realizes that the "secret" phone use puts Susie in the very vulnerable situations she is worried about and sees it's unfair to deny her something that is very normal for people her age. Susie and Sharon meet with her ILS worker and case manager to discuss risks, risk reduction approaches, and the benefits of having a phone, like letting her to call for help if she's in danger. They agree to get Susie a phone and explore ways to reduce risks such as teaching Susie phone and internet skills, and exploration of parental and other settings that allow limiting some internet access, turning on location settings, and monitoring sites visited. They also discuss reasonable limits on her screen time. Now Sharon is more confident that Susie is reasonably protected (safety) and Susie is thrilled to get to be like her friends.



³² [MAGiC Standards of Practice, II. A.](#)

B. *Rights of People Under Guardianship*

Although the powers that may be granted to a guardian are broad, persons under guardianship and conservatorship retain many rights such as due consideration of their preferences, and the right to privacy and visitation with people of the person's choice. The person keeps any right not specifically restricted by a court order, including powers granted to the guardian. These rights are protected by Minnesota's guardianship law and listed in the Bill of Rights for Persons Subject to Guardianship or Conservatorship³³.

Summarizing the Bill of Rights, people under guardianship have the right to:

1. treatment with dignity and respect;
2. due consideration of current and previously stated personal desires and preferences, including but not limited to medical treatment preferences, cultural practices, religious beliefs, and other preferences and opinions in decisions made by the guardian or conservator;
3. participate in decision making about and receive timely and appropriate health care and medical treatment that does not violate known preferences or conscientious, religious, or moral beliefs of the person subject to guardianship or person subject to conservatorship
4. exercise control of all aspects of life not delegated to the guardian or conservator by court order;
5. guardianship or conservatorship services individually suited to the person's conditions and needs;
6. petition the court to prevent or initiate a change in abode;
7. care, comfort, social and recreational needs, employment and employment supports, training, education, habilitation, and rehabilitation care and services, within available resources;
8. be consulted concerning, and to decide to the extent possible, the reasonable care and disposition of the clothing, furniture, vehicles, and other personal property and effects of the person subject to

³³ [Sec. 524.5-120 MN Statutes](#)

guardianship or person subject to conservatorship, to object to the disposition of personal property and effects, and to petition the court for a review of the guardian's or conservator's proposed disposition;

9. personal privacy;
10. communicate, visit, or interact with others, including receiving visitors or making or receiving telephone calls, personal mail, or electronic communications including through social media, or participating in social activities, unless the guardian has good cause to believe restriction is necessary because interaction with the person poses a risk of significant physical, psychological, or financial harm to the person subject to guardianship, and there is no other means to avoid the significant harm. In all cases, the guardian shall provide written notice of the restrictions imposed to the court, to the person subject to guardianship, and to the person subject to restrictions. The person subject to guardianship or the person subject to restrictions may petition the court to remove or modify the restrictions;
11. marry and have children, unless court approval is required;
12. elect or object to sterilization, if that right has not been restricted by the court
13. at any time, petition the court for termination or modification of the guardianship or conservatorship, and any decisions made by the guardian or conservator in relation to powers granted, or for other matters;
14. be represented by an attorney in any proceeding or for the purpose of petitioning the court;
15. vote, unless restricted by the court; and
16. complete a health care directive, including health care instructions and/or the appointment of a health care agent, if the court has not granted a guardian the following powers: abode; medical decision making; or care, comfort and maintenance needs powers.

Balancing Safety vs. Autonomy

This exploration of principles and rights is intended to help the guardian address choices the person wants to, and has the *right* to, make while also balancing health and safety concerns. The likelihood of harm must be weighed in consideration of the happiness and choices of the person; in recognition that a person who feels they have some room to make

choices, and feel self-determination, will be happier and more likely to cooperate with needed care provision. Some common areas of conflict or concern include dating and friendship choices; personal expression such as tattoos, hairstyles and clothing; use of alcohol and other substances; internet and/or cell phone usage; food choices, and community, social, or religious activities. Consider the following factors when trying to decide how to balance guardianship responsibilities for health and safety with the person's right to make choices and experience maximum levels of life-satisfaction and self-determination:

- Do the guardian's court-appointed powers cover this decision? If the choice does not fall under the powers granted to the guardian, the guardian doesn't have the right to make the decision; the person under guardianship does. However, as a trusted member of the care team, the guardian can play an important role in supporting the person in decision making, including seeking opportunities to help the person learn how to make choices consistent with their own values and needs, understanding consequences of the choice, and exploring together other ways to meet the person's desires that may be safer.
- Who is objecting to the person's desired choice? The guardian? The provider? Another family member who is influencing the guardian or provider? Is the objection based on what is best for the person, or on the objector's own issues? This may require some exploration to help identify the source of the conflict: sometimes the stated reasons for the objection (health or safety) are very different than the actual, unstated reasons (opposition to the person's lifestyle choices or conflicting values between the person and the guardian). A trusted person outside of the relationship may be able to provide helpful

insight, such as a therapist, spiritual leader, mediator, or case manager.

- What is the likelihood this decision will cause serious harm to the person (or others), or that the person will even be able to carry out the decision? If there is no concern about harm, but rather is a lifestyle or values-based conflict, the person should be allowed to make the decision, but it is appropriate to support the person in making the decision, including seeking opportunities to help the person learn how to make choices consistent with their own values, goals, and needs, and understanding the likely consequences of their decisions.
- Does the need for safety (likely serious harm) outweigh the enhancement of quality of life / current life satisfaction (happiness) for the person? Are there less risky ways the person can do the desired activity?
- Will the choice significantly impact the person's desired outcomes and life goals (including ability to continue living in current setting, obtaining and maintaining a job, etc.)?
- Is there a creative way to meet both choice and safety? This may require some exploration with the person to better understand what the person wants and is hoping to achieve to determine if the person's wishes can be addressed in less concerning ways.

These can be very challenging situations for the guardian to navigate, and frustrating for the person under guardianship. Sometimes having a more objective person from outside the situation to weigh in can be beneficial in finding solutions or approaches that balance the person's wishes with health and safety concerns.

C. Terminating Guardianship

Termination of guardianship is a great option for many individuals subject to guardianship when it is no longer necessary to ensure their needs are met. This may be if a person has recovered from an accident or injury or if a young person has matured and is now able to make decisions and participate in or lead their own care choices. Sometimes the protection of a guardianship is no longer necessary given the person's current condition and living situation; maybe they no longer object to the recommended care and services, or the original medical decision requiring guardianship is no longer an issue.

When is the right time to terminate a guardianship? Where does the person or those supporting them start, and how do they learn what options exist outside of the guardianship?

If the person is agreeable and cooperative with their guardian and other supporters and care providers, that's a good indication that the person may have other options. That's not to say that the person has to agree with every option presented to them, or that the person will never make mistakes or "cause problems," but if they are willing to listen to suggestions and are working to learn how to weigh out decisions while gaining input from those they trust, this may be a good indicator that it's time to try termination of the guardianship or a more limited guardianship.

Many options are available to support people in their decision making including: financial power of attorney, health care directive, Supported Decision Making agreements, representative payee services, etc. (see Chapter IV. *Less Restrictive Alternatives* for more information about these and other options.) If a person under guardianship is consistently adversarial and attempting to sabotage necessary services and support

or would do so in the absence of a guardian, limited or no guardianship is likely not an option.

For example, a guardian may have been appointed for an older adult living with dementia due to family conflict about how to meet the person's needs and instability in food/housing/services of the older adult. It is fair to consider re-assessing the need for guardianship once the family conflict has been removed or if the areas of vulnerability have been addressed and the care situation is now, and likely to remain, stable. Or, in the case of a stroke or brain injury, it is possible that a person's cognition and condition may improve over time.

Another example is a young adult experiencing complex mental health issues. Maybe a guardianship was needed for a few years but now with structure, treatment and support, the person is stable. They too should be reassessed to see if a less restrictive option, like a psychiatric health care directive may be more appropriate long term.

Termination in favor of supported decision making and/or other tools such as health care directives, financial management, care or case management is worthwhile to consider. It is not unattainable and is supported by the courts when appropriate.

Connecting with the person's professional support team, such as social workers, clinic staff, community support staff, psychologists, etc., can be a good first step to evaluate whether termination and less restrictive options may be appropriate for the person under guardianship. Looking at what's different in their life now compared to when the guardianship was first established and noting improvements as well as supports that have been added in can be a helpful step. Ask those around the person what they think about terminating the guardianship: why or why not? Are their concerns warranted, and if so, are there other ways to address

the concerns with supports other than guardianship? For some, petitioning to further limit a Guardianship may be an appropriate next step as a trial, with a goal of later terminating the guardianship.

The petitioning process to terminate or modify a guardianship is the same as petitioning to establish the guardianship, however, in a termination petition the burden is on the person seeking termination to prove that a guardianship isn't needed. This can be very challenging, and professionals or family members who are concerned that the person will be completely unsafe without a guardian have the right to object to the petition.

There is a lot of misunderstanding about terminating guardianship: many people believe that the petitioner must prove that the person under guardianship is able to be "restored to capacity," meaning they no longer suffer from the original condition that was present at the time the guardianship was put in place. *This is wrong and unnecessary.* Rather, it needs to be proven that the level of protection of the guardianship is no longer necessary; this could be because the person got better, or because there are now adequate supports and protections in place, so the guardianship is not needed anymore.

Someone (the person subject to guardianship, the guardian, a family member or professional) needs to file a petition with the court. Though it is possible to do this without an attorney, or *pro se*, that is not recommended given the potential objections that could arise. Once the petition is filed, and all interested parties receive proper notice, a hearing is scheduled. Minnesota law says the person subject to guardianship has the right to an attorney³⁴, though some jurisdictions have been reluctant to do so. At the hearing, testimony and evidence

³⁴ Minnesota Statute 524.5-304

is provided to the court to explain why a guardianship is no longer necessary. The petitioner should be prepared to explain what other supports will be put in place (see LRA to Guardianship) if the guardianship is terminated, or if none, why none are needed. Interested parties will have a chance to state their objection.

These situations can be difficult for the person under guardianship, the guardian, and families. Family members may not agree that the guardianship should be terminated, which can put stress on all parties. Often this is related to fear of what could happen if the guardianship ended, not any bad intent or desire to control the person. The person may not feel like their voice is being heard or may become agitated having to listen to the concerns about their deficits described in detail by those objecting to the termination. Relationships can become strained, and the situation could become worse.

On the other hand, when all parties are in support (even if everything isn't perfect) there can be some wonderful benefits and relationships can become stronger because the person feels empowered and independent while knowing they still have their parent(s) or other supports to help them as needed. The goal should always be to work toward maximum independence, consistent with the person's needs and abilities.

There are a number of tools and resources that can help person and the guardian sort out whether the person still needs the guardianship or if other forms of support would be suitable. One is the PRACTICAL tool, which can be helpful as a guide to work through various areas of a person's life and determine whether sufficient supports exist, can be added in, or continue to be an area of vulnerability. See Chapter V. *Guardianship Petitioning Decisions* for more information on this tool.

The National Resource Center on Supported Decision Making has many tools that don't require extensive training to utilize. A few of these include the *Supported Decision-Making Brainstorming Guide* and the *Stoplight* tool. Another helpful tool is the ACLU *When Do I Want Support* form. These tools are a great way to work through different areas of a person's life to highlight strengths as well as address areas where support is still needed. It's helpful to sit down with the person and work through any of these tools; this gives them an opportunity to reflect on areas where they have learned new skills and have strengths as well as identifying where supports continue to be needed and how those can be addressed if guardianship is no longer in place.

It's ok if not everything is perfect...no one's life is. What is important is whether the person is engaged in their own life, wants to be able to make decisions about how they live, and has the ability to do so (even if they need a little help sometimes).

Consulting an attorney, such as the original petitioning attorney, for guidance on next steps if questioning whether less restrictive options may be appropriate is advised. Guardians who wish to petition without an attorney can find all the related forms at the MN Judicial Branch website at www.mncourts.gov/GetForms. Remember the Guardianship Information Line is here to discuss what options are the best fit for your situation.

Competent service and accurate information is always valued. When these are combined with active listening and caring and a soft touch, they are "gold".

~ Guardianship Information Line caller

CONTACT US

952-945-4174
local

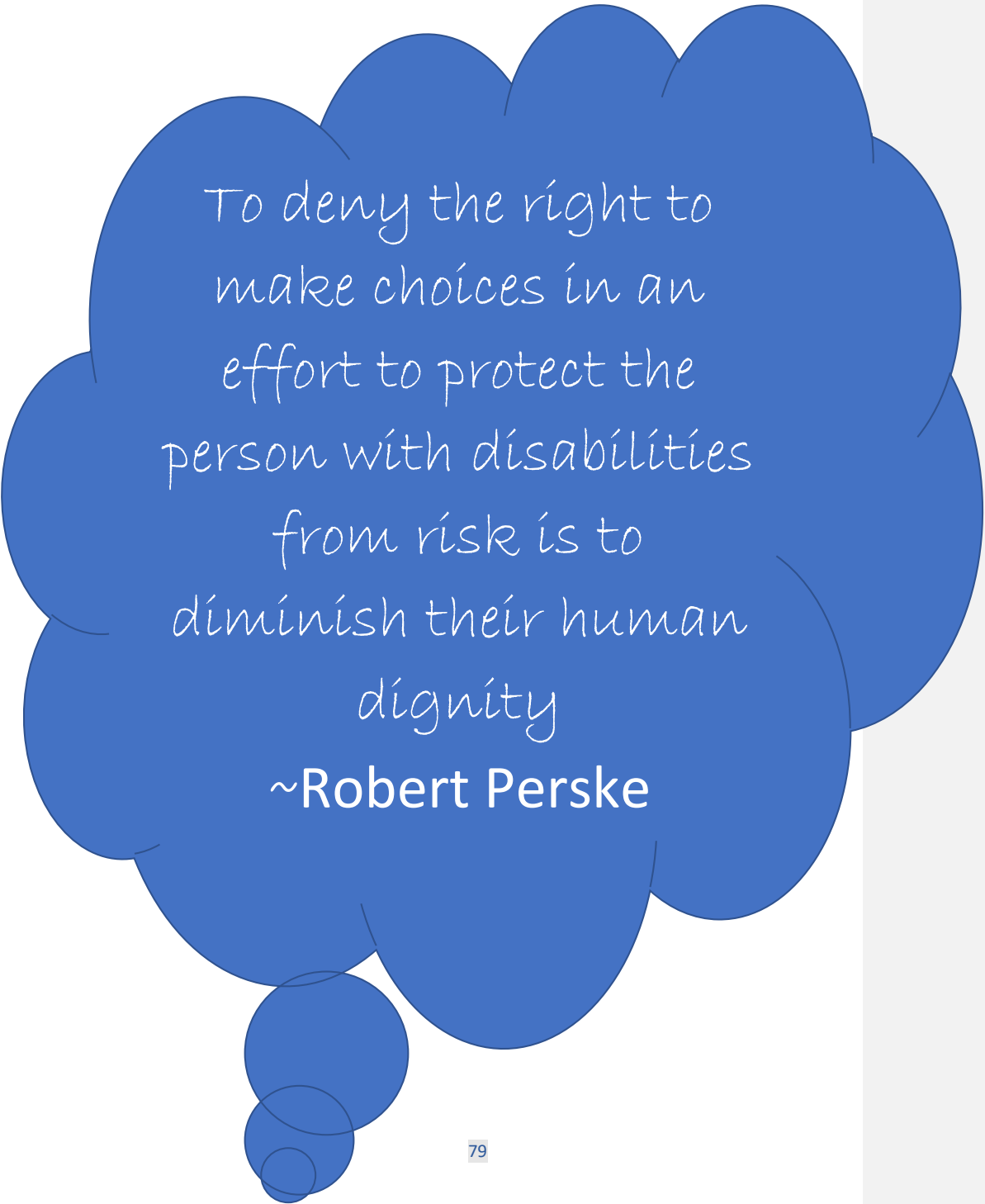
844-333-1748
toll free

cesdm@voamn.org
email



**GUARDIANSHIP
INFORMATION LINE**

 **Volunteers of America**
MINNESOTA AND WISCONSIN



To deny the right to
make choices in an
effort to protect the
person with disabilities
from risk is to
diminish their human
dignity

~Robert Perske

VII. Supported Decision Making

Supported Decision Making is “a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make, and communicate to others, decisions about the individual’s life.”³⁵ Supported Decision Making (SDM) is built around the concept that all people need at least occasional help to make decisions, and that even though someone cannot make decisions independently, they may still be able to participate in decision-making with the support of others. SDM is a person-centered intervention where a person is empowered to make decisions *with* the support of trusted family, friends, and members of their professional care and support teams, rather than others making decisions *for* the person, such as through guardianship. Supported Decision Making is an effective tool to support individuals who need help with decision making and can be used across many settings including educational and medical systems as well as social services.

Many states have passed legislation to officially recognize SDM as a legal decision-making option; some of these states have approved formal Supported Decision-Making Agreements (SDMA), where an individual can appoint a legal supporter or supporters to assist in various areas of decision making.

While Minnesota does not require that a person use an SDMA or write down their preferences about who will help and how decisions will be made, it does define supported decision making³⁶, mandates that SDM

³⁵ 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](#), p. 10, Human Rights Brief, Volume 19, Issue 2 Article 2 (2012)

³⁶ [MN Statutes 524.5-102 Subd. 16a](#)

be attempted prior to petitioning for guardianship and lists supported decision making as one of many less restrictive alternatives to guardianship³⁷. Keep in mind that Supported Decision making is a concept, as much as it is an action or approach.

Supported Decision Making recognizes that all people, even those with disabilities, have the right to make choices. Just because someone needs extra help to make decisions or meet their needs, it doesn't mean they are incapacitated or in need of a guardian; it may simply mean they need some extra help. Even people without disabilities turn to someone close to them to help make a complicated health care decision ("should I consent to aggressive treatment for this life-threatening cancer, or should I enjoy the time I have left traveling and being with the people I love?"), or financial decisions (many of us use accountants to complete and file our taxes), or deciding whether to buy a new car rather than put more money into fixing the current one. When we turn to trusted others to get more information and opinions, we are making good decisions. But we tend to think that if a person with a disability can't make a decision completely independently, they need a guardian. Supported Decision Making philosophy says we all have the right to make decisions, we all need help sometimes to make decisions, and people with disabilities should be supported to learn how to be good decision makers, or supported to better understand the choices they face.

A. *How to do it*

Understanding and agreeing with the ideas behind supported decision making is one thing, but the big question for many is how to actually "do" SDM. People often ask for step-by-step guides to explain to them

³⁷ [MN Statutes 524.5-310 \(a\)\(2\)](#)

how supported decision making is done. But the reality is, it's not as complicated as it may seem, and many families and professionals are already "doing" supported decision making without realizing that they are.

For example, according to the National Resource Center for Supported Decision Making's *Supported Decision-Making Brainstorming Guide*³⁸, families and others are doing supported decision making any time they help a person:

- manage their money by "opening a joint bank account, making a budget together, having an SSI rep payee and then discussing how to spend money"³⁹ or
- make health care decisions by "attending medical appointments together, explaining healthcare choices in plain language, sharing access to medical records"⁴⁰ or
- help the person with housing decisions by "visiting possible homes together, making lists of pros and cons, setting up 'trial runs' visiting different homes, meeting possible roommates, discussing support staff needs"⁴¹ or
- helping the person figure out how to spend their time by "helping the person find a job based on her interests, responding to her preferences about what she does every day, teaching her how to take transit to get where she wants to be, talking about safety, consent, and choice in relationships, helping her think about different options and decide which is the best fit for her"⁴²

³⁸ Quality Trust, 2016 www.supporteddecisionmaking.org/node/388

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

Another great tool is *How To Make A Supported Decision-Making Agreement*, published by the American Civil Liberties Union (ACLU).⁴³ This 36-page guide walks individuals, and their families, through every step of supported decision making, encouraging users to think about: choices made in daily life, what support looks like, when the person wants support and from whom, as well as how to talk to supporters. The booklet also has a sample Supported Decision Making Agreement and worksheets to help guide conversations with supporters, and recommendations about sharing the Agreement with medical and special education professionals.

The ACLU tool's *When Do I Want Support* worksheet is modeled after the *Stoplight Tool*⁴⁴, developed by the University of Missouri Kansas City Institute for Human Development. In both versions, various areas of daily living are listed in rows, organized around daily life and employment, healthy living, personal safety and security, social and spirituality, and community living, citizenship and advocacy. People completing the tool with the person needing support are encouraged to consider specific decisions within each category, and place a mark under a green column of "Good to Go", meaning the person can make the choice alone or with some support; the yellow column "Consider More Supports for Decision Making", meaning the person needs more help than they are currently receiving, and a red column "Consider Guardianship", meaning if there are no other ways to provide assistance, guardianship may be necessary for this particular area of decision making. The ACLU tool labels the columns differently: "I Can Do This Alone", "I Can Do This With Support" and "I Need Someone Else To Do This For Me". Both tools help individuals and families see

⁴³ [How to Make a Supported Decision-Making Agreement](#)

⁴⁴ [MO Guardianship: Understanding Your Options & Alternatives](#)

more clearly that people may need help in only some areas, but likely not every area of decision making; this should help identify which options may be most suitable to the person's strengths and areas of inability. Even if guardianship is pursued, the tools can help determine that limited guardianship is appropriate.

Many states' statutory SDM tools as well as the available SDM guides and suggested forms encourage individuals to appoint supporters who will assist them in various areas of decision making. But to simply ask someone to "name your supporters," may be too vague or overwhelming; many people will say they don't know. In breaking down situations by categories, as many SDM tools do, it helps the person conceptualize how they are already getting help, who is helping them, and where they may need additional help.

Using tools such as the Brainstorming Guide is very useful as it helps the person and supporters think about these areas of their life and whether they are totally dependent, totally independent, or somewhere in between. It can help lay out what's going well, identify areas of life decisions where they aren't involved at all, and also prompts people and their supporters to think about other supports that would be beneficial to assist a person in areas of higher need.

Just starting the conversation may be the hardest part. Families (and professionals) may be concerned about how to talk about decision making, and choices, and areas of vulnerability because they haven't had much practice, or they fear the response they'll receive from the person. Sample language can be helpful in prompting the conversations.

Sample Statements to Guide Supported Decision Making Conversations

Identifying Supporters

- *When you're confused or worried, who do you usually call?*
- *If you have a really good day, and something exciting happens, who do you call first? Second?*
- *Tell me something you're good at. Now let's talk about something you want to learn or get better at doing.*

Preparing to Make a Decision

- *It sounds like this is overwhelming to you. Let's make a list of your choices. Once we list your choices, we can talk about what you do or don't like about these options.*
- *How can I help you with this?*
- *How do you think we can work through this?*
- *What do you think we should do next?*
- *I'd like to hear in your own words what you think is going on/what you're worried about/why we are talking today.*

Remember that the person is the center of the discussion. Rather than imposing ideas on them, they are to be encouraged and given the space to express their opinions, hopes, and worries without feeling pressure about what they think others want them to say.

It is normal to fear for the person's safety; this is hard work for families to transition from being the parent of a child with a disability to the parent of a young adult with a disability who wants to be independent. Or for the adult children of a parent with a cognitive disability to shift from doing things *for* the person to doing *with* the person.

Role of Supporter

It can be challenging for supporters as they themselves must gain new skills and approaches in helping the person with the disability. For some, this is a continuation of how they have always done it, but for others, this is a new and somewhat scary idea to shift from making decisions for the person to ensuring the person has all the information and support they need to make the decision themselves or with their supporters.

There are many ways families and others can be effective decision makers and decision supporters. In any given decision, supporters should help by gathering relevant information, and then explaining it in ways the person can understand. The supporters should help the person understand the various options and choices, and then discuss the pros and cons of each option with the person. It is perfectly acceptable, and even advisable, to help the person understand possible negative, or unintended consequences, that may arise as a result of a particular choice. Sometimes, the person may need the supporter to actually communicate their preferences and decisions to others. Being shy and intimidated by professionals such as doctors, surgeons, social workers, and attorneys is natural, but this shyness may be misinterpreted as inability to make or communicate decisions. With the person's permission, the supporter may need to speak for the person until the person gains confidence to do so.

So, while families may fear that allowing a person to make a decision will place the person in danger, by utilizing supported decision making, when the person is truly supported to make decisions in the ways described above, they will usually make the decision that is best for them.

SUPPORTED DECISION MAKING CHECKLIST

- ✓ Supporters are chosen by the person: identification of who will help in what areas of decision making (family; friend; coworker; professionals such as case manager, job coach, ILS worker, other)
- ✓ Person drives the conversation, unless they want others to do so.
- ✓ Person and Supporters have identified areas where the person needs or wants support
- ✓ Supporters are educated to role: supporting, guiding, not making decision, keeping own biases out, okay to illuminate natural consequences, and “if you do this, then that”
- ✓ Supporters understand how the person envisions them supporting
- ✓ Supporters make decisions *with* the person not *for* the person (unless the person asks them to)

For more practical information, see: [**Best Practices in Supported Decision Making: How to Be an Effective Supporter**](#)



Supported Decision Making in Real Life Examples

"Harold" is 86 years old, living in his split-level home in rural Minnesota; he completed a Power of Attorney several years ago. Due to mental health symptoms combined with physical frailties and lack of available home care in his area, Harold needs to move to a setting where there is more help available, however, he is refusing any talk of moving when his friends and doctor raise the topic. Guardianship is recommended. When his social worker talked with him about the benefit of completing a Health Care Directive, Harold said he trusts his niece and no one else. This opened up a conversation with Harold's niece who agreed to be appointed as his Health Care Agent. After further discussions with his niece, Harold agreed that it was best to move to the assisted living where his sister lives, and where he could bring his cat. Because people helped explain options to him, and provided opportunity for him to make the decision with the input of someone he trusts, he was able to make the "right" decision.

"Gary" is living in a nursing home following self-neglect at home leading to a hospitalization. His out-of-state family hired a care manager, Gwen, to explore the senior housing resources available to him, to tour, and present information to Gary. Gary very thoughtfully declined various assisted living housing options because they were all outside of his suburban community, which he viewed as part of his identity. Gwen found him an option in his own suburb, and arranged a tour for him and his friend which she toured with her friend. Gary and Gwen then met with his friend and out-of-state family to discuss the new apartment, the

location, the needed cares and costs of services there. Ultimately, Gary decided that he likes where he is living now and wants to stay at the nursing home. Even though Gary didn't have friends or family to help him, he used the support of a professional to understand his options and make the best decision for him, regarding where to live.

"Tilly" is living with significant physical disabilities, and is dependent on the internet to remain connected to her friends and to stay current with politics. She is very frustrated and reports her Representative Payee to the MN Adult Abuse Reporting Center (MAARC) for not giving her money to get her laptop fixed and to buy the newest iPhone and an iPad, but this changes nothing because her Rep Payee explained that Tilly only has \$400 in her personal needs account and no money left each month after paying her bills. Tilly is furious, yells at staff who try to help her, and rages about not getting to have her own money. Her social worker Tina sat down with her and again explained about Medical Assistance rules and how, painful as it is, she is only allowed \$99/month for personal needs funds, and listened to Tilly express how it feels to have this condition, to be living in a care center, and not get to spend as she pleases. Tina brought in her own laptop to show Tilly the cost of iPhones and iPads; they calculated how long it would take to save her money. Tina learned what was important to Tilly about having these devices, and they discussed pros and cons of each. Now that she understood the options, and financial limitations, Tilly decided she needed a connected device now, and asked Tina to help her order a new laptop with the \$400 she had already saved.

“Sally” recently decided to look for a new apartment. She knew that she wanted to be near the bus line and close to her healthcare system. She didn’t want to move out of the county and knew her budget was limited. She found a few places she liked online and in the paper, but the applications were confusing. She knew her ILS worker could help her fill them out to make sure she didn’t miss something important. She wasn’t sure if she could afford a moving van and who would drive it for her, the deposit was a lot of money and she wasn’t sure she could cover these expenses. She called her county case manager who helped her sort out the financial and practical aspects of the move, ensuring it was successful.

Kaylee’s former ILS worker Kim has remained in her life as a trusted friend. Recently Kim and Kaylee walked around the Mall of America dreaming about the things they’d buy if they had more money, and then planned to splurge on a movie and popcorn. Trying on fancy dresses just for fun, Kaylee announced that she was going to buy one because it was on sale for 75% off. Kim knew the dress would cost all of Kaylee’s money, that she usually hated wearing dresses, and had no occasion to wear this one. But Kaylee really wanted the dress. Kim agreed it was really pretty and suited Kaylee, and she could certainly buy the dress but then they couldn’t go to the movie. Kaylee was near tears as she struggled to make this decision, but then Kim offered to take pictures of Kaylee in the dress, to be printed and hung up in her room. This was exactly the right way to frame it: Kaylee said she wanted her roommate to see the dress, but really wanted to see the movie starring her favorite actor. When the choices and options were explained to her, and she was able to identify why she wanted the dress, the decision was easy.

"...our most cruel failure in how we treat the sick and the aged is the failure to recognize that they have priorities beyond merely being safe and living longer; that the chance to shape one's story is essential to sustaining meaning in life ... we have the opportunity to refashion our institutions, our culture, and our conversations in ways that transform the possibilities for the last chapters of everyone's lives." ²⁷

²⁷ Gawande, Atul, author. (2014). *Being mortal : medicine and what matters in the end*. New York :Metropolitan Books, Henry Holt and Company

B. RESOURCES

Supported Decision Making Information and Forms

- The [Center for Excellence in Supported Decision Making](#) Staffed by social service professionals, the *Guardianship Information Line* provides expert information, advice, consultation, and referral regarding guardianship, supported decision making, and alternatives including supported decision making.
CESDM@voamn.org 952-945-4174 toll free: 1-844-333-1748
 - [Best Practices in Supported Decision Making: How To Be An Effective Supporter](#), CESDM
 - [Guardianship & Supported Decision Making Explained](#) videos, CESDM
- [Working Interdisciplinary Network of Guardianship Stakeholders in MN](#) (WINGS MN)
- [National Resource Center for Supported Decision-Making](#)
- MN DHS in partnership with WINGS MN has published a series of informative and engaging [videos on Supported Decision Making by Jonathan Martinis](#); public and professional audiences are welcome to widely share and incorporate these into their own training events.
- The Arc and the American Association on Intellectual and Developmental Disabilities [Joint Position Statement on Supported Decision Making](#).
- National Guardianship Association (NGA) [Position statement on guardianship, surrogate decision making, and supported decision making](#)
- [Supported Decision Making Sample Agreements](#) to use as a model.

Assessing Needs and Other Supported Decision-Making Tools

- [PRACTICAL Tool](#) aims to help identify and implement decision-making options for persons with disabilities that are less restrictive than guardianship
- [Guardianship Decision Tree](#) a collaboration of MN Department of Human Services, CESDM, and WINGS MN
- [Missouri Stoplight Tool](#) aims to help identify less restrictive options and identify strengths

- [Brainstorming Guide](#)
Can help people brainstorm ways that they are already using supported decision-making, and think about new ways supported decision-making could help the person with a disability learn to make their own safe, informed choices.
- [Charting the LifeCourse](#), for individuals and families: framework and tools to organize ideas, vision, goals and problem-solve, navigate, and advocate for supports

Health Care Directive

- [Health Care Directive Form](#) and follow link to resources for further instructions and sample language
- [Light the Legacy](#) provides health care directive forms, provided in several languages.

Guardianship

- [Center for Excellence in Supported Decision Making](#) (CESDM) has established the Guardianship Information Line. Staffed by licensed social workers, the Guardianship Information Line provides expert information, advice, consultation, and referral regarding guardianship, supported decision making, and other alternatives. CESDM@voamn.org or 952-945-4174 or 1-844-333-1748
- [Minnesota Judicial Branch](#) website provides an overview of Guardianship/Conservatorship, case look up, duties & responsibilities, conservator account programs, forms, training, rules, laws, and other resources
 - [MyMNConservator](#) (MMC) is the online conservator account reporting application for conservators to file their inventory and annual accountings electronically.
 - [MyMNGuardian](#) (MMG) is the online guardian reporting app for guardians to file their annual report
- Minnesota's public guardianship law is [Statute 252A](#) Developmental Disability Protection
- Minnesota's *private guardianship/conservatorship law* is found in [Article 5 of the Uniform Probate Code](#), Protection of Persons Under Disability and Their Property, 524.5-101 – 524.5-903

- The Minnesota Attorney General publishes [Probate and Planning](#), an overview which includes health care directives, power of attorney, guardianship, and conservatorship
- [Minnesota Association for Guardianship and Conservatorship](#) (MAGiC), nonprofit organization founded in 1989 to explore substitute decision-making for vulnerable individuals
- [National Guardianship Association](#) (NGA) is establishing and promoting nationally recognized standards, protecting the interests of guardians and people in their care
- [Center for Guardianship Certification](#): *voluntary* guardian certification program
- [The American Bar Association's Commission on Law and Aging](#), working to improve state guardianship policy and practices, strengthen elder abuse prevention and protection, and more

Miscellaneous

- [National Academy of Elder Law Attorneys](#), Find an Attorney feature
- [Minnesota State Bar Association Find a Lawyer](#) feature allows for searching by practice area
- Minnesota's [Vulnerable Adult Act](#) is the statute that defines maltreatment of vulnerable adults (abuse, financial exploitation, neglect), mandated reporters and reporting maltreatment requirements.
- [MN Department of Human Services](#) has helpful information about identifying and reporting suspected cases of maltreatment. Contact MN Adult Abuse Reporting Center (MAARC) to report suspected maltreatment of a vulnerable adult, 24 hours per day/seven days a week: 1-844-880-1574



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Guardianship Information Line

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CESDM intends this Guide to be a helpful resource: both a source of detailed information and a starting point for finding answers to questions and concerns facing families and professionals working with older adults with cognitive challenges, individuals with psychiatric and/or intellectual/developmental conditions.

Users are welcome to download, print, and share this booklet widely, with credit given to the Center for Excellence in Supported Decision Making at Volunteers of America. Contact CESDM to order by mail. Links to this Guide available on our [webpage](#)