

FEATURE STORY: SUPPORTED DECISION MAKING: THE MISSING PIECE IN THE PUZZLE OF PLANNING FOR CLIENTS WITH DIMINISHED CAPACITY

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Text

[*19] Advising clients to plan ahead for who will make decisions on their behalf should they become incapacitated constitutes a significant component of elder law and estate planning. However, the customary legal path of appointing a substitute decision maker, while obviously required for many clients with diminished capacity, is certainly not a necessity for all such clients. It used to be assumed that capacity was a fixed state, but now it is known that there are wide variations in the level of incapacity among individuals with the same diagnosed intellectual disability and a good deal of daily flux in the capacity level of an individual who has been diagnosed with Alzheimer's disease or dementia. Clients with diminished capacity may continue to possess the ability to make decisions for themselves or may, with assistance, regain or come to develop the ability to make their own decisions.

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A Puzzle Where Existing Pieces Don't Always Fit

The data also indicates that individuals with diminished capacity want their caregivers to believe in their potential to grow in this fashion and want them to offer the necessary assistance. ² Jenny Hatch, a young woman with Down's Syndrome living in Hampton, Virginia, was one such individual. Hatch successfully challenged the necessity of having a legal guardian appointed to handle her decisions by advocating for the use of a simple voluntary contract called a Supported Decision Making Agreement. ³ The concept of supported decision making has achieved national **[*20]** prominence and has galvanized the community of persons with disabilities and the agencies that serve them here in Tennessee. This article will explore how supported decision making can fill the gap that currently

¹ Tennessee Council on Developmental **Disabilities**, Public Policy, *What Is Supported Decision Making?* <http://www.tn.gov/content/tn/cdd/public-policy/supported-decisionmaking.html>.

² Quality Trust for Individuals with Disabilities, *Annual Monitoring Report and Data Summary*, 2, 19 (Oct. 1, 2011 -- Sept. 30, 2012), <http://jennyhatchjusticeproject.org/publications>.

³ Final Order, *Julia S. Ross et al. v. Margaret J. Hatch*, Virginia: In the Circuit Court of Newport News, Case No. CWF120000426P-03 (Aug. 2, 2013).

exists when a client with diminished capacity needs assistance, but still has sufficient capacity to make decisions if that assistance is provided, and will discuss recent legislation here in Tennessee requiring consideration of supported decision making when it can be shown, as in the case of Jenny Hatch, to be a viable alternative to appointment of a conservator.

What Happens When a Durable Power of Attorney Doesn't Fit?

Suppose that you receive a call from Ms. Elder, a 75-year-old client for whom you prepared a durable power of attorney for managing her finances. At the time the document was prepared, Ms. Elder had suffered a stroke that left her partially paralyzed on her left side. Although she was recovering and has since recovered for the most part, she expected that she would no longer be able to drive and so wanted to appoint her daughter to be able to act immediately on her behalf to handle her financial affairs, with her son as alternate. Now she says she wants to revoke the power of attorney, because her daughter is not only making decisions that Ms. Elder finds objectionable, she is also not telling Ms. Elder what is going on until after it happens. Ms. Elder suspects that her daughter is in the process of putting her home up for sale, and she says that while she understands she may have to move some day, she loves her home and wishes to age in place if at all possible. In any case, Ms. Elder says she does not need to move right now. You ask Ms. Elder if it would help to meet with her daughter. Ms. Elder doesn't know but is willing to do that, so you set up the meeting. At the meeting, the daughter makes clear that she believes she has the responsibility under the power of attorney to do what is best for her mother, despite the fact that her mother may still retain the capacity to have an opinion as to her preferences. As she puts it, "I know that Mom disagrees with this, which is why I haven't bothered to ask her about it. She may know what she wants, but what she wants isn't realistic." Then, as if she is reading your mind, the daughter goes on to tell you that if her mother decides to revoke the power of attorney, she will seek a conservatorship over her mother. After the daughter leaves, your client immediately asks, "What did she mean, seek a conservatorship? Can she DO that?"

Under Tennessee law, any person with knowledge that a person with a disability is either partially or totally incapable of caring for his or her needs and requires the assistance of the court, may petition for the appointment of a conservator. ⁴ Before Tennessee's conservatorship law was overhauled in 1992, the appointment of a conservator required a finding by the court that the proposed ward was "incompetent," which was in essence a finding of total incapacity based on an outdated view of disability and cognitive impairment. ⁵ By focusing instead on determining the extent of disability and on the actual effect that the disability has had on the person's ability to function, the law now recognizes that a person's capacity must be measured along a continuum. As former Tennessee Supreme Court Justice William C. Koch Jr. put it while still on the Court of Appeals:

Capacity is not an abstract, all-or-nothing proposition. It involves a person's actual ability to engage in a particular activity. Accordingly, the concept of capacity is task-specific. A person may be incapacitated with regard to one task or activity, while retaining capacity in other areas because the skills required in one situation may differ from those required in another. ... Capacity is also situational and contextual. ... It may be affected by many variables that constantly change over time. ... Finally, capacity is not necessarily static. It is fluid and can fluctuate from moment to moment. A change in surroundings may affect capacity, and a person's capacity may improve with treatment, training, greater exposure to a particular type of situation, or simply the passage of time. ⁶

Given the advent of this more enlightened view of disability and diminished capacity, what are Ms. Elder's daughter's chances of prevailing in a conservatorship proceeding? Ms. Elder does have a mobility impairment as a result of the stroke, as well as some vision and hearing loss. So, if she receives a written document in the mail, she is unable to retrieve it from the mailbox and cannot read it because of her loss of vision. She can receive and

⁴ *Tenn Code Ann.* § 34-3-102.

⁵ Donna R. Tate-Hackett, Comment, Survey of the New Tennessee Guardianship and Conservatorship Act, [60 Tenn. L. Rev. 651, 651 \(1993\)](#).

⁶ [In re Conservatorship of Groves, 109 S.W.3d 317, 333-334 \(Tenn. Ct. App. 2003\)](#)

process the information in the letter if she is wearing her hearing aids and her daughter reads the letter to her, but her daughter doesn't have time to do that. The daughter instead has the mail forwarded to her address and just handles things from there, leaving Ms. Elder out of the loop entirely. Ms. Elder has not been examined by a doctor to determine if she is suffering from any memory loss or reduction in the executive functioning of her brain, but based on your interaction with her, you feel that if she does have such deficits, they are minimal at this point. And, although the daughter has alleged that Ms. Elder's desire to remain at home is "unrealistic," she has not said why, and there does not [*21] appear to be any undue influence underlying Ms. Elder's desire to stay in her home nor any threat of exploitation that might be cause for concern if she does remain there. ⁷

Thus, a court's granting of a total conservatorship seems extremely unlikely, particularly in light of *Tenn Code Ann.* § 34-1-126, which provides that appointment of a conservator is only appropriate if it constitutes the "least restrictive alternative." In fact, where there is a functional principal/ agent relationship or durable power of attorney in place, the courts have explicitly declined to grant a conservatorship. ⁸ But in Ms. Elder's case, the durable power of attorney is not working out to her satisfaction. Unfortunately, if she revokes it, Ms. Elder can clearly expect to have to defend against a petition seeking conservatorship. Furthermore, she will need to be prepared to manage without whatever assistance her daughter has been providing, as at best the relationship between Ms. Elder and her daughter will be strained. Although withdrawal of all help on the part of the daughter would arguably be retaliatory and childish, the daughter is only human and may feel hurt and betrayed by Ms. Elder's resistance to what she feels are her well-meaning efforts to safe-guard her mother's safety and well-being. But in this case, Ms. Elder may well value her happiness and freedom to choose to the detriment of her safety and well-being. And while it is clear under the statute that Ms. Elder's daughter owes her a "fiduciary duty," ⁹ the decision-making standard to be used in fulfilling that duty is far from crystal clear. Ms. Elder's daughter assumes that she is to make decisions that would promote her mother's "best interests," but the statute doesn't say that. Instead, Tennessee's articulated decision-making standard under a durable power of attorney vests the agent with the authority to exercise the powers granted by applying "the attorney-in-fact's best judgment and discretion on behalf of the principal." ¹⁰ This standard is broader than both "best interests" of the principal and "substituted judgment" ¹¹ standards, and arguably allows the agent to incorporate considerations relevant to both where appropriate. In addition, although the "best interests" standard is a recognized standard of fiduciary decision making, Professor Nina Kohn notes that its seeming objectivity is illusory, as interpretation of what constitutes "best interests" varies significantly even among

⁷ See [In re Lawton, 384 S.W.3d 754,756 \(Tenn. Ct. App. 2012\)](#). The *Lawton* case involved an elderly gentleman with significant physical infirmities, who married a much younger woman who proceeded to persuade her husband to loan a substantial amount of his money to her friends, as well as making gifts to her. His son filed a petition for conservatorship out of concern that his father's funds would soon be depleted, leaving him without adequate means of support. *Id.* The Court of Appeals did uphold the trial court's finding that a conservatorship was needed, but it should be noted that the appellate court's opinion does not examine the evidentiary sufficiency of the trial court's findings on the issue of disability. The record on appeal did not include either a transcript or statement of the evidence submitted at the relevant hearing, and the parties further stipulated at trial that the respondent was a person with a disability in need of the court's assistance, so the appellate court held that its only option was to assume that whatever proof was submitted was adequate to support the trial court's ruling. *Id.* 763-65. The trial court's independent finding of clear and convincing evidence that appointment of a conservator was in the best interests of the respondent was specifically affirmed by the appellate court, however. *Id.* at 764-65.

⁸ [Smith v. Smith, 397 S.W. 2d 186, 196-98 \(Tenn. Ct. App. 1965\)](#), cert. denied (Tenn. 1965); [In re Armster, 2001 WL 1285904](#), *5 (Tenn. Ct. App. 2001); [Crumley v. Perdue, 1997 WL 691532](#)*1, 4 (Tenn. Ct. App. 1997)

⁹ *Tenn Code Ann.* § 34-6-107.

¹⁰ *Tenn Code Ann.* § 34-6-109.

¹¹ Often used in the context of health care decision making, the substituted judgment standard refers to a decision-making model that attempts to implement decisions that the adult with a disability would have made, to the extent that the agent or decision maker has knowledge of the adult's values, beliefs, and subjective preferences so as to be able to determine what those decisions would be. Michael L. M. Jordan & Stuart C. Bear, 1 *Durable Powers of Attorney and Health Care Directives* § 3.27 (4th ed., Nov. 2017).

those states that explicitly incorporate the best interests standard in their guardianship and/or conservatorship statutes. ¹²

Persons with Diminished Capacity Have a Right to Make Decisions if They Can Do So with Assistance

In addition, safety and well-being, while critically important, are not the only values at issue, as already noted above. Although not absolute, autonomy and the right to make decisions affecting one's life lie at the core of human dignity. To quote again from Justice Koch: Autonomy, an adult person's right to live life consistent with his or her personal values, is one of the bedrock principles of a free society. Our understanding of liberty is inextricably intertwined with our belief in physical freedom and self-determination, [citation omitted] and in our belief in the fundamental right to acquire, own, and dispose of property ... When viewed as personal power, autonomy takes on added significance to elderly persons, many of whom fear the loss of their independence and their ability to control their own lives. All that many elderly persons have under their control is the prerogative to decide how to live out the rest of their days ... This ability to exercise this control and to maintain their individual dignity often forms the basis for their self-esteem and their belief in their continuing viability as a person.

[*22] Thus, the loss of status as an autonomous member of society can intensify any disability that an elderly person may have. ¹³

In short, an adult's right to self-determination is a fundamental right and someone can only be constitutionally deprived of this right if there is adequate due process. ¹⁴ Tennessee's conservatorship law provides for notice ¹⁵ and hearing, ¹⁶ and places the burden on the petitioner to show by clear and convincing evidence ¹⁷ that the need for such deprivation exists. As long as the proposed ward (Ms. Elder, in this case) has the functional capacity to take care of herself, is capable of receiving and processing information concerning the decisions she needs to make, is able to formulate preferences with respect to her decisions that are based on the information she has received and are consistent with her values (even if not always ideal from the standpoint of her "best interests"), and she can communicate her preferences, then she would appear to have the constitutional right to make her own decisions, even if she needs help in gathering the information and putting it in a form that she is able to receive and process.

Unfortunately, neither durable powers of attorney nor conservatorship proceedings are designed to further decision-making participation by the vulnerable adult, although neither precludes that possibility. With respect to immediately effective durable powers of attorney, the agent should certainly consult with the principal while the principal still possesses decision-making capacity as a matter of traditional agency law. ¹⁸ Unfortunately because the durable power of attorney document delegates the decision-making authority to the agent, the temptation in a busy world is simply to forego consultation. Where the principal possesses full capacity, revocation will solve the problem, but where the principal has some diminished capacity, the vulnerability is often such that the principal may be either physically unable to effectively revoke or is fearful of exercising the right of revocation. To help address this, Professor Kohn recommends making communication and consultation "an explicit element of the agent's duty,"

¹² Nina Kohn, "Elder Empowerment as a Strategy for Curbing the Hidden Abuse of Durable Powers of Attorney," [59 Rutgers L. Rev. 1, 13-16 \(Fall 2006\)](#).

¹³ [Groves, supra n. 6, at 327-29.](#)

¹⁴ [Mathews v. Eldridge, 424 U.S. 319, 335 \(1976\)](#); [State Department of Human Services v. Northern, 563 S.W.2d 197, 213 \(Tenn. Ct. App. 1978\)](#).

¹⁵ [Tenn Code Ann. § 34-1-108\(c\)\(1\)](#).

¹⁶ [Tenn Code Ann. § 34-1-108\(c\)\(1\) & 34-3-106\(1\) & \(2\)](#).

¹⁷ [Tenn Code Ann. § 34-1-126](#).

¹⁸ [Heard v. Miles, 32 Tenn. App. 410](#) (Tenn. Ct. App. 1949); [Restatement Third \(Agency\) §§ 8.01](#), 8.09, and 8.11 (2005)

even where the principal may have diminished capacity,¹⁹ much as lawyers have an ethical duty to continue to communicate with and consult clients whose capacity is diminished, "as far as reasonably possible" in an attempt to "maintain a normal client-lawyer relationship."²⁰

Once a conservatorship has been granted, the statute neither requires nor prohibits consultation with the ward. Certainly the conservator, having final authority under the order and being under no duty to consult with the ward, is free to simply exercise that authority without seeking input from the ward. The statute does allow the ward to seek termination or modification of the conservatorship "by any means," which may include "oral communication or informal letter."²¹ Nevertheless, a vulnerable ward may be in no position to exercise even those options without assistance.

Other States Recognize Supported Decision Making as the Missing Piece

In contrast, the concept of supported decision making provides a unique vehicle to support and assist a person who may have diminished physical, sensory or mental capacity, but who still possesses decision-making capacity if provided with the necessary aid. The concept first surfaced in statutory form with the enactment of the Texas Supported Decision Making Act in 2015.²² The Texas statute defines supported decision making as "a process of supporting and accommodating an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, without impeding the self-determination of the adult."²³ An adult with a **disability** may freely establish a **supported decision making** agreement with another adult ("the supporter") who is willing to "exercise the authority granted" under the agreement.²⁴ The agreement enables the supporter to obtain information for the vulnerable adult and then to explain and interpret the information in order to assist the person with a disability in understanding the choices available, arriving at a decision, and communicating that decision to third parties.²⁵ Under the terms of the agreement, the supporter owes the adult with a disability certain "fiduciary duties"²⁶ and specifically consents to accept the role of supporter in accordance with the terms of the agreement. The Texas statute also provides a model "supported decision making form" that complies with the requirements of the statute, which facilitates the implementation and adoption of such agreements.²⁷

Following the passage of the Texas statute, the American Bar Association (ABA) launched a campaign to introduce its members to the concept of supported decision making and to explain how supported decision making agreements could be used to enhance the quality of life experienced by elders and persons with lifelong disabilities.²⁸ At present Delaware²⁹ and Washington, D.C.³⁰ have also passed legislation similar to that enacted in Texas.

¹⁹ Kohn, *supra* n. 12, at 42-45.

²⁰ Tenn. Sup. Ct. R. 8, RPC 1.14(a).

²¹ *Tenn Code Ann.* § 34-3-108(b).

²² *Tex. Estates Code Ann.* §§ 1357.001 et. seq.

²³ *Tex. Estates Code Ann.* § 1357(3).

²⁴ *Tex. Estates Code Ann.* §§ 1357.051 and 1357.052.

²⁵ *Tex. Estates Code Ann.* §§ 1357.01(1) -- (4); see also American Bar Association, "ABA Urges Supported Decision Making as Less-Restrictive Alternative to Guardianship," 38 No. 6 *Bifocal* 95 (July -- August 2017).

²⁶ The specific fiduciary duties are to 1) act in good faith; 2) act within the authority granted by the agreement; 3) act loyally and without self-interest; and 4) avoid conflicts of interest. *Tex. Estates Code Ann.* §§ 1357.052(b) and 1357.056.

²⁷ *Tex. Estates Code Ann.* § 1357.056.

In addition, there is a national website, the National Resource [*23] Center for Supported Decision-Making,³¹ dedicated to promotion of the concept, and the role that it can play in preserving the rights of persons with disabilities, particularly in the context of conservatorships.

Legislative Action to Preserve Autonomy Here in Tennessee

During the spring 2018 session of the 110th General Assembly of the Tennessee Legislature, a bill (SB 264) concerning Supported Decision Making was introduced by Sen. Becky Massey, R-Knoxville, with the backing of the Tennessee Council on Developmental **Disability** as part of a "**Supported Decision Making** Workgroup" composed of eight Tennessee organizations concerned with **disability** issues.³² The original bill summary provided on the Tennessee General Assembly website described the bill as containing virtually all of the provisions described earlier as being part of the Texas Supported Decision Making statute.³³ As finally enacted, the legislation is deceptively simple and consists of only the following:

SECTION 1. [Tennessee Code Annotated, Section 34-1-101](#), is amended by adding the following as a new subdivision:

() "Least restrictive alternatives" means techniques and processes that preserve as many decision-making rights as practical under the particular circumstances for the person with a disability.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.³⁴

The phrase "supported decision making" appears only as part of the descriptive title introducing the enactment and does not occur within the statute itself. No form language for establishing a supported decision making agreement is provided, and it is unclear just exactly how the courts and parties are expected to proceed with respect to implementation of the new law. But at the very least, an attorney who represents a respondent in a conservatorship matter will now have a duty to specifically raise supported decision making as a less restrictive alternative to the granting of a conservatorship in those cases where it is applicable. In Ms. Elder's case, if a supporter can be recruited from among her other relatives and friends, a supported decision making agreement should eliminate any concern about conservatorship.³⁵ It will also be up to attorneys who represent seniors and younger persons with

²⁸ The ABA House of Delegates also adopted Resolution 113 (Aug. 14, 2017), which advocates the amendment of guardianship statutes nationally to require consideration of supported decision making as a "less restrictive alternative" to imposition of a guardianship or conservatorship. See American Bar Association, *supra* n. 25. The Uniform Law Commission's recently revised Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act also incorporates supported decision making as a recognized less restrictive alternative to imposition of a guardianship or conservatorship. Uniform Guardianship, Conservatorship, and Other Protective Proceedings Act '102(13) (Unif. Law Comm'n 2017).

²⁹ 16 *Del. Code Ann.* 9401A et seq.

³⁰ [D.C. Code § 7-2131](#) et seq.

³¹ The National Resource Center can be found at <http://www.supporteddecisionmaking.org>.

³² In addition to the TN Council on Developmental Disability, the Workgroup included The Arc Tennessee, Disability Rights TN, TN Statewide Independent Living Council, Vanderbilt Kennedy Center, Family Voices TN, the TN Disability Coalition and Support & Training for Exceptional Parents (STEP). See Tennessee Council on Developmental **Disability, Supported Decision-Making**, <https://www.tn.gov/cdd/public-policy/supported-decision-making.html>.

³³ SB 0264/HB 0941 Bill Summary, Tennessee General Assembly, <http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB0264&GA=110>.

³⁴ Tenn. Pub. Ch. No. 605 (110th General Assembly, 2017-2018).

³⁵ Obviously supported decision making is far from a panacea; the lack of any suitable volunteer supporter will undoubtedly prove to be a frequent barrier to its use. One can only hope that as the concept becomes more familiar, there will be greater willingness on the part of families and friends to serve in this capacity.

disabilities to lead the way by advising clients generally that ***supported decision making*** agreements are an available option in the arsenal of planning for diminished capacity.

Fortunately the ABA Commission on Law and Aging, in conjunction with the ABA Commission on Disability Rights, the ABA Section on Civil Rights and Social Justice and the ABA Section on Real Property, Trust and Estate Law have produced an excellent free publication titled "A Practical Tool for Lawyers: Steps in Supporting Decision-Making," which is available to download from the ABA website at www.ambar.org/practicaltool. A power point presentation, "Supported Decision-Making Basics," by David Godfrey, senior attorney, ABA Commission on Law and Aging, is also available free of charge at www.justiceinaging.org/wp-content/uploads/2017/07/Supported-Decision-Making-Basics.pdf.

Using these resources, it will ultimately be the task of all of us as advocates to educate the public concerning the importance of respecting the decision-making rights of those who are vulnerable, and the responsibility to support, rather than supplant, those rights, whenever possible.

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