



July 22, 2017

# Decision Making and People with Disabilities

## *Guardianship/Conservatorship and Supported Decision Making*

*Presented by*

Peter Harrison, Attorney

Rebecca Miller, Attorney

Amy Boulware- Care Manager: Elder Law and Special Needs

CHAMBLISS

CHAMBLISS, BAHNER & STOPHEL, P.C.

fiercely loyal.



# Supported Decision-making

- Envisions allowing an individual with a disability to work with a team and make his or her own choices.
- Contemplates individual entering into an agreement with a supporter to assist with decisions about living arrangements, health care, and financial matters
- Advocates of supported decision-making argue that conservatorships are overly restrictive and prevent self-determination

# Supported Decision-making Agreements

- **Representation Agreements** designate supporter(s) to assist with decisions in areas like health care, finances, living arrangements, employment, and relationships.  
Support areas include health care, finances, employment, living arrangements and relationships.



fiercely loyal.

# Who can be a supporter?

- Family member
- Friend
- Caregiver
- Other trusted person.



# How does Supported Decision Making Work?

- Supporter(s) sign statements that they will respect the person's choices and decisions
- Individuals sign the agreement before a notary public who stamps, signs and dates the document.
- Advocates of supported decision-making have put forth legislation in hopes that such agreements will be honored in the community by doctors, merchants, landlords, etc.
- Supporters have no decision-making authority

# Supported Decision-Making Laws

- Supported Decision-making is not generally recognized in the United States –Texas is the only state that has passed a law providing for supported decision-making agreements.
- Legislation was introduced in Tennessee to define supported decision-making and allow supporting decision-making agreements
  - Allows an adult with a disability to enter into an agreement with a supporter to assist with decision-making
  - Supporter is authorized to assist but does not have decision-making authority
  - Includes a form agreement
- Tennessee's proposed legislation has been deferred for further study

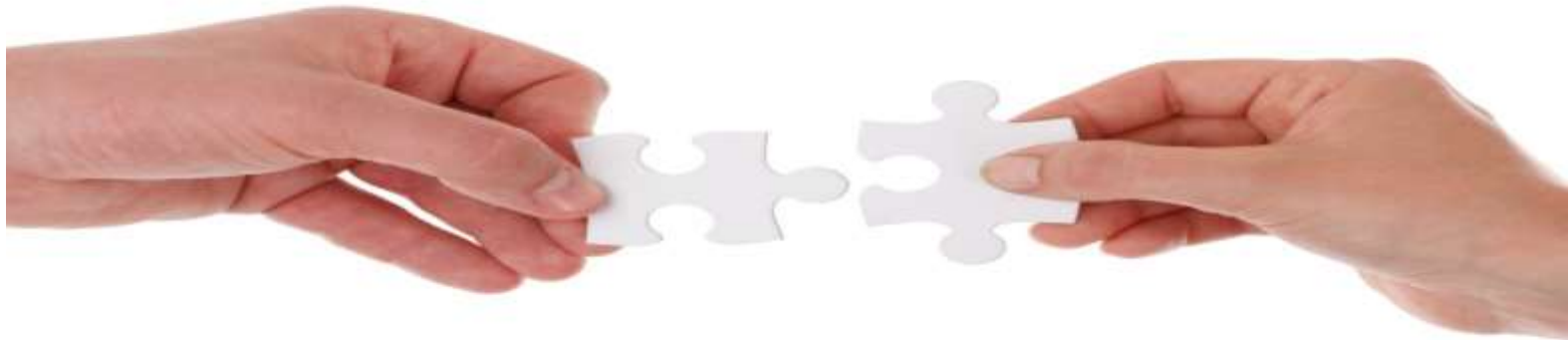
# Limitations of Supported Decision-Making

- Supported Decision-making Agreements confer no decision-making authority to supporter
- False sense of protection
- Supporter has access to confidential information
- Risk of undue influence
- Risk of abuse, neglect, exploitation
- Cost



# What is a Conservator?

- Appointed by the Court to make personal, health care, or financial decisions for a person who is disabled and in need of the assistance of the court.
- Required to act in the best interest of the ward, protect the ward, and to use the ward's assets to provide for his or her care and maintenance.



# When does someone need a Conservator?

- Lack of capacity to make responsible decisions
- Identify reasons for concern
  - Ability to make decisions and explain reasoning
  - Ability to understand finances
  - Ability to understand legal documents
  - Insight regarding medical needs
  - Ability to maintain proper hygiene and diet
  - High-risk behaviors and understanding consequences
  - Making safe decisions about relationships
- Less restrictive options like financial or health care powers of attorney, advance directives, or trusts should be considered

# Are there other alternatives to conservatorship?

# Health Care Surrogate

- *Health Care Surrogate.* A person designated by a patient or identified by the supervising health care provider to make decisions for a patient who lacks capacity where no agent or conservator has been appointed.



# Representative or Protective Payee

fiercely loyal.

- *Representative or Protective Payee.* A person appointed to manage Social Security, Veterans' Administration, Railroad Retirement, welfare or other state or federal benefits or entitlement program payments on behalf of an individual.

**Representative  
Payee**



fiercely loyal.

# Advance Care Plan

- *Advance Care Plan*. Details the type of care a person wants (or does not want).



# Health Care Power of Attorney

- Health Care Power of Attorney: Names an agent to make health care decisions.
- Advocates of Supported Decision-making suggest use of financial and health care powers of attorney complement a supported decision-making agreement but recommend authority for the attorney-in-fact only upon incapacity.

# Financial Power of Attorney

- *Financial Power of Attorney.* Grants legal rights and powers to another (the agent or attorney-in-fact). The attorney-in-fact stands in the shoes of the principal and can act for him or her on financial, business or other matters. In most cases, even when the power of attorney is immediately effective, the principal does not intend for it to be used unless and until he or she becomes incapacitated.



# Revocable Trust

- *Revocable trust.* A revocable or "living" trust can be set up to hold an older person's assets, with a relative, friend or financial institution serving as trustee.



# What is the Process for Conservatorship?

- Petition with notice to proposed ward and family members
- Medical evidence is required
- Proposed ward may object and/or request attorney
- Petitioner must submit “clear and convincing” evidence that proposed ward is disabled and in need of the assistance of the court
- If a conservator is necessary, then the Court will determine who should serve as conservator. The Court may consider whether the proposed ward has previously appointed someone to help with decisions, whether family members are willing to serve, and the proposed ward’s input regarding potential conservators

## Conservator cont.

- The conservator can be a person, like a family member, or a non-profit agency or private corporation.
- The guardian need not be a person at all -- it can be a non-profit agency or a public or private corporation.
- The court must impose the least restrictive alternatives for adequate protection of the person with a disability

# A Conservatorship must impose the “least restrictive alternative” for the protection of the ward.

If a conservator is needed:

- Conservatorship should be limited to what is absolutely necessary, such as:
  - Specific property/financial decisions
  - Property/finances
  - Specific personal/health care decisions
  - Only personal/health care decisions
- Conservatorship may be reassessed or modified and rights may be restored

# What are the benefits of Conservatorship?

- Provides peace of mind for the ward's family
  - Court oversight ensures that ward receives proper care
  - Prevents financial exploitation and ensures that the ward's funds are managed wisely.
- Ward cannot override Conservator's decisions

# What are the Cons of Conservatorship?

- Cost
  - Attorney
  - Conservator if no family member is available to serve as conservator
- Burden of formal reporting to the Court
- Court proceedings may be upsetting for proposed ward.
- Financial abuse may still occur despite safeguards
- Ward's rights are removed, and it may be difficult to have rights reinstated
- Proceedings can divide families

fiercely loyal.

# QUESTIONS



fiercely loyal.



# Disclaimer

This presentation is provided with the understanding that the presenter is not rendering legal advice or services. Laws are constantly changing, and each federal law, state law, and regulation should be checked by legal counsel for the most current version. We make no claims, promises, or guarantees about the accuracy, completeness, or adequacy of the information contained in this presentation. Do not act upon this information without seeking the advice of an attorney.

This outline is intended to be informational. It does not provide legal advice. Neither your attendance nor the presenter answering a specific audience member question creates an attorney-client relationship.