

TEXAS GUARDIANSHIP ALTERNATIVE: SUPPORTED DECISION-MAKING

Parent Organizations Academy

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Presentation by Disability Rights Texas

OUTLINE OF PRESENTATION

This presentation covers the following topics:

- ☐ Background on guardianships
- ☐ Guardianship reform in Texas
- ☐ Legal alternatives to guardianship
- ☐ Texas Supported Decision-Making Act
- ☐ Texas Bill of Rights for persons under guardianship

Questions are welcome at any time!

GUARDIANSHIP

Guardianship is a legal process to determine if a person is “incapacitated.”

A court decides if, due to a physical or mental condition, an individual is substantially unable to:

- ☐ manage their financial affairs,
- ☐ care for their physical health, or
- ☐ provide food, clothing, or shelter for themselves.

Under a guardianship, someone is appointed to make decisions on behalf of the incapacitated person, referred to as the “ward.”

Types of Guardianship

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- There are two types of guardianship—guardian of the person and guardian of the estate.
 - A guardian of the person is responsible for the physical well-being of the person under guardianship.
 - A guardian of the estate is responsible for the person's property and assets.
 - One person can be both guardian of the person and guardian of the estate, or two different people can assume these roles.
 - Both types of guardianship can be either full or limited.

The Guardianship Process

- Guardianship is a legal process and decisions are made by a judge.
- An individual seeking to become guardian is called an “applicant,” and must be represented by an attorney to obtain guardianship.
- The applicant files an application for guardianship, including a physician’s certificate of medical examination (CME).
- An attorney ad litem will be appointed to represent the person with a disability’s desires.
- A guardian ad litem may also be appointed to advocate for the best interest of the person with a disability.
- The judge has the ultimate authority to decide whether or not someone needs a guardian, and if the guardianship should be full or limited.
- The judge also has the final say in who is appointed to be guardian.

The Road to Guardianship Reform

- In the summer of 2013, advocates for persons with disabilities and the elderly began meeting to discuss problems with guardianship system in Texas.
- This led to the creation of the Guardianship Reform and Supported Decision-Making Work Group (GRSDM), which developed 8 guardianship reform proposals.
- GRSDM presented the 8 proposals to Texas Working Interdisciplinary Network of Guardianship Stakeholders (WINGS).
- WINGS adopted the majority of the reform proposals.
- The Office of Court Administration supported the WINGS proposals.
- Chief Justice Hecht of the Texas Supreme Court testified in support of the reforms.

Significant Changes

- For the first time, the Texas legislature mandated that probate courts consider **alternatives to guardianships and supports and services** before a guardianship is created.
- Texas became the first state in the nation to codify **supported decision-making** in statute as an alternative to guardianship.
- Texas codified a **Bill of Rights of Wards**.

ALTERNATIVES TO GUARDIANSHIP

Alternatives to Guardianship: Texas Estates Code

Alternatives to guardianship include:

1. Medical Power of Attorney;
2. Durable Power of Attorney;
3. Declaration for Mental Health Treatment;
4. Representative Payee;
5. Joint Bank Account;

Alternatives to Guardianship

- 6. Management Trust;
- 7. Special Needs Trust;
- 8. Designation of Guardian Before the Need Arises;
- 9. Alternate Forms of Decision-Making Based on Person-Centered Planning; and
- 10. Supported Decision-Making Agreement.

Tex. Est. Code §§ 1002.0015 & 1357.001 et seq.

Supports and Services: Now Defined in Estates Code

“Supports and Services” – available formal and informal resources and assistance that enable an individual to:

1. Meet the individual’s needs for food, clothing, or shelter;
2. Care for the individual’s physical or mental health;
3. Manage the individual’s financial affairs; or
4. Make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.

Tex. Est. Code § 1002.031

Common Supports and Services

1. **Supportive and Trusted Family Members and Friends** – Support and assist with explaining potential benefits and risks when making decisions about everyday issues like money management, cooking, hygiene, health care, safety, and relationships.
2. **Medicaid Waiver Programs** – Assist with supports to ensure that medical and personal needs are met in the community.
3. **Case Management Services** – Coordinate services with goal of individual with disability being as self-sufficient as possible.
4. **Person-Centered Planning** – Process of planning with and supporting an individual that honors the individual's preferences, choices, and abilities.
5. **Free or Reduced Price Meals, Foods, and Prescription Delivery**

Common Supports and Services

- 6. **Free or Reduced Price Transportation** – Taxi vouchers, van services, and public transit for appointments when mobility and safety are concerns.
- 7. **Daily Call or Home Visit Services** – Volunteer making daily calls to individual, get help if needed, and provide social contact.
- 8. **Utility Companies** – Notify third party if individual does not pay on time.
- 9. **Technology** – Devices such as smart phones and tablets can help the individual become and remain independent (e.g. timers to remind when to take medication, turn off stove, and lock the door.)

Common Supports and Services

10. Credit Union and Banking Services – Provide services for individuals that may need assistance with money management. Some options are:

- **Direct Deposit:** Income or government benefits (e.g. SSI) can be directly deposited into an account and regular payments for rent, utilities etc. can be made from the account.
- **Joint Accounts:** An account where at least two people have access to the funds either to make a deposit or withdrawal. A co-signer account requires both people to sign documents in order to authorize withdrawals.

11. Debit Cards – Reloadable cards can be used as a money management tool to help the individual adhere to a budget.

FINDINGS REQUIRED FOR GUARDIANSHIP ORDERS

Before Appointing a Guardian: Evidence Required

Before appointing a guardian, the probate court must find by **clear and convincing evidence** that alternatives to guardianship and supports and services have been considered and determined not to be feasible.

If the court grants a limited guardianship, the court order must specifically state whether the proposed ward lacks the capacity with or without supports and services to make personal decisions regarding residence.

Tex. Est. Code § 1101.101(a)(D) & (E) and (c)

A More Restrictive Setting: Person Under Guardianship May Object

Except in cases of emergency, a guardian has the right to decide where the ward resides but may only place a ward in a more restrictive placement if the guardian provides notice to the court, the ward, and any person who has requested notice and after:

1. The court orders the placement after a hearing if the ward or another person objects to the proposed placement before the 8th business day after receipt of notice; or
2. The 7th business day after the court's receipt of notice if the court does not schedule a hearing on its own motion before that date.

Tex. Est. Code § 1151.051(e)

Choice of Guardian: Ward Preference Considered

Before appointing a guardian, the court shall make a reasonable effort to consider the ward's preference of the person to be appointed guardian regardless of whether the person was designated by the ward before the need arises.

Tex. Est. Code § 1104.002

Duty to Provide Information About Ward

A guardian of an adult ward shall as soon as practicable inform relatives if:

1. The individual dies;
2. The individual is admitted to an acute care medical facility for 3 days or more;
3. Residence is changed; or
4. The person is staying at a location other than his or her residence for more than a week.

A court may relieve the duty to inform the relative if the relative elects not to receive notice, the relative's whereabouts are unknown, guardian is unable to establish communication, a protective order was issued against relative to protect ward, relative is found to have abused, neglected or exploited ward, or notice is not in best interest of ward.

Tex. Est. Code § 1151.056

THE SUPPORTED DECISION-MAKING AGREEMENT ACT

The Supported Decision-Making Agreement Act – We're Number One!

Texas is the first state to recognize supported decision-making as a substitute for guardianship.

Tex. Est. Code § 1357.001 et seq.

The Drawbacks of Guardianship

- Expensive – attorney's fees, court costs and bond.
- Requires a court order to establish and ongoing court oversight, including submitting annual accountings and reports on the condition of the ward.
- Removes some or all of the individual's decision-making rights and assigns decision-making to a third party.
- Curtails the individual's freedom of choice, self-determination and independence.
- May be difficult to terminate or modify.
- Can lead to family conflict.

Why Families May Seek Guardianship

- Their child with a disability turns 18.
- Their child's school or physician tells them it is necessary.
- They believe it is necessary to continue to be involved in school, health care or other decisions after their child turns 18.
- To help their child handle money.
- Lack of awareness of other legal alternatives.

Important Things to Remember

- Texas law presumes that adults have decision-making capacity – this applies to everyone, including people with disabilities.
- Decision-making is a learned skill – people with disabilities need opportunity, experience and support to learn to make well-informed decisions.
- There are legal ways to assist people with decision-making that do not restrict, limit, or remove their rights.

What is Supported Decision-Making?

A process of **supporting and accommodating** an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, **without impeding the self-determination of the adult.**

Tex. Est. Code § 1357.002(3)

What is Self-Determination?

- Self-determination means making your own choices, learning to effectively solve problems, and taking control of and responsibility for one's life.
- Practicing self-determination also means that one experiences the consequences of making choices.

(National Parent Center on Transition and Employment)

The Benefits of Self-Determination

People with greater self-determination have a higher quality of life:

- Participate and contribute to community individual lives in
- Independent living within the community
- Financial independence
- More ownership in service plan and goal setting
- Healthier
- Better able to recognize and resist abuse
- “Making choices based on one’s preferences has been identified as one of the essential aspects of independent functioning in society”.

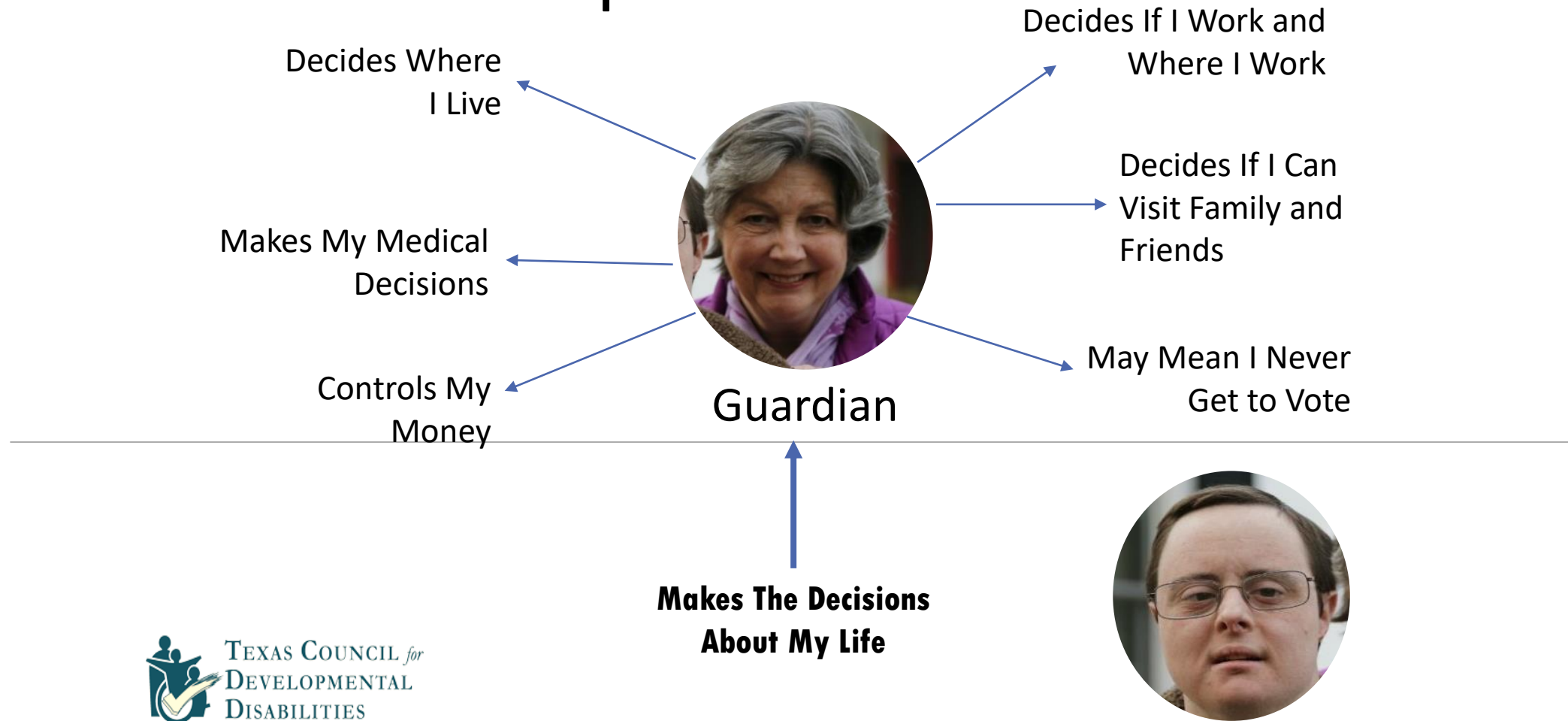
(Khemka, Hickson and Reynolds, 2005; O’Connor and Vallerand, 1994; Wehmeyer and Schwartz, 1998).

Why is Self-Determination Important?

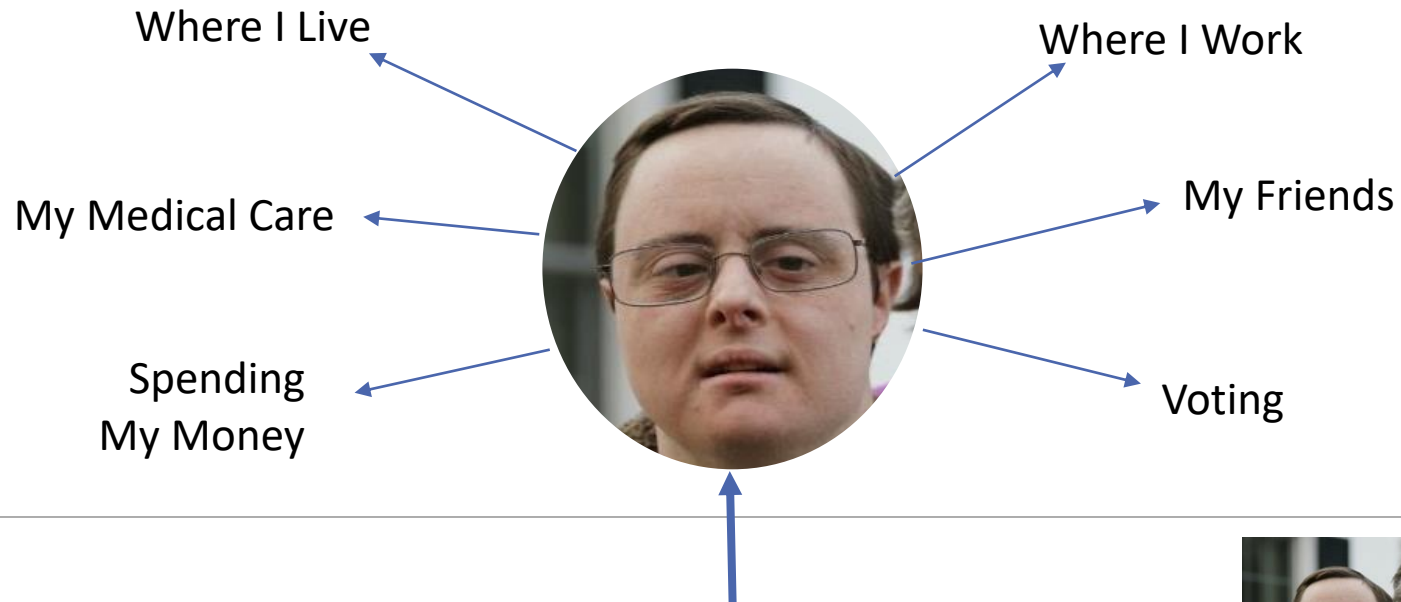
When denied self-determination, people:

- “[F]eel helpless, hopeless, and self-critical” (Deci, 1975).
- Experience “low self-esteem, passivity, and feelings of inadequacy and incompetency,” decreasing their ability to function (Winick, 1995).
- When a person experiences the above mentioned emotions and mental states, there is a strong likelihood of a person’s physical (and mental) health to be projected into a state of decline.

GUARDIANSHIP



SUPPORTED DECISION-MAKING



**I Make My Own Decisions with Help of
My Supporter**



Who Can Enter into a Supported Decision-Making Agreement?

- Any individual over 18 who has a physical or mental impairment that substantially limits one or more major life activity. *Tex. Est. Code § 1357.002(1) & (2)*
- A level of capacity a person must have in order to enter a supported decision-making agreement is not defined, but a person must have sufficient capacity to agree to the supporter assisting him or her in making particular decisions.

Who Can Be the Supporter? Any Adult

- The law does not place any restrictions on who may become a supporter.
- The person who needs the support decides on someone they trust.
- Typically, the supporter may be a family member, relative or friend.

Tex. Est. Code § 1357.002(5)

Is it Voluntary or Court Ordered?

- An adult with a disability decides they need supports with decisions.
- The person with a disability and supporter enter into the agreement voluntarily, just like a power of attorney.
- It is informal and does not require going to court.

Tex. Est. Code § 1357.001

How is it Different from Power of Attorney?

- A supported decision-making agreement is distinct from a power of attorney because it does not allow a person to make the decisions for a person.
- In a supported decision-making agreement, **the person with a disability retains the right to make decisions.**
- Chief Justice Hecht described supported decision-making agreements as “Power of Attorney Lite.”

Tex. Est. Code § 1357.054

What Can a Supporter Do?

A supporter may do any or all of the following:

1. Assist adult with a disability in understanding options, responsibilities and consequences of life decisions;
2. Assist adult with a disability in accessing, collecting and obtaining medical, psychological, financial, educational and treatment records;
3. Assist adult with a disability in understanding information in (2); and
4. Assist adult with a disability in communicating his or her decision to appropriate persons.

Tex. Est. Code § 1357.051

What Legal Duties Does the Supporter Have to the Person with a Disability?

- A supported decision making agreement creates a statutory fiduciary relationship between the supporter and the person with a disability, (*Tex. Est. Code § 1357.052*).
- When a person agrees to provide support to an adult with a disability under a supported decision-making agreement, the supporter has a duty to:
 - Act in good faith
 - Act loyally and without self-interest; and
 - Avoid conflicts of interest.
- A supporter could be held liable for violating these duties.

When Does a Supported Decision-Making Agreement End?

A supported decision-making agreement ends:

1. When terminated by the adult with a disability or the supporter;
2. By the terms of the agreement;
3. If DFPS finds that adult with a disability has been abused, neglected or exploited by the supporter; or
4. The supporter is found criminally liable for the abuse, neglect, or exploitation of the adult with a disability.

Tex. Est. Code § 1357.053

What About Confidential Information?

- A supporter is only authorized to assist adult with a disability to access, collect, or obtain information.
- This includes protected health information under HIPAA and education records under FERPA.
- A supporter shall ensure that information is kept privileged and confidential and is not subject to unauthorized access, use, or disclosure.
- A supported decision-making agreement does not prevent an adult with a disability from seeking personal information on his or her own without the assistance of the supporter.

Tex. Est. Code § 1357.054

What are the Requirements for the Supported Decision-Making Agreement Form?

- The adult with a disability and the supporter must sign the agreement voluntarily in the presence of two witnesses over 14 *or* a notary public.
- There is a sample agreement in Texas Estates Code § 1357.056.
- A supported decision-making agreement may be in any form as long as it substantially complies with §1357.056(a).
- A simplified supported decision-making agreement form is available on DRTx's website at www.drtx.org.

What If Someone Suspects Abuse or Exploitation?

If a person who receives or is aware of the supported decision-making agreement has cause to believe that an adult with a disability is being abused, neglected, or exploited by the supporter, the person shall report the allegation to DFPS.

Tex. Est. Code § 1357.102

Can a Supported Decision-Making Agreement Be Used Along With Other Alternatives to Guardianships?

- Yes. A supported decision-making agreement can be used in conjunction with other alternatives to guardianships, such as a medical power of attorney or representative payee.
- This is consistent with the goal of supported decision-making as a way to promote the self-determination of persons with disabilities and avoid guardianships.

BILL OF RIGHTS FOR PERSONS UNDER GUARDIANSHIP

Bill of Rights for Wards

- The bill of rights for persons under guardianship were compiled in one statute so that it would be easier for wards, guardians, and attorneys to be aware of the rights of wards.
- 24 State and federal rights for persons under guardianship are now listed in the Texas Estates Code.

Tex. Est. Code §1151.351.

Cornerstone of the Bill of Rights

A person under a guardianship has all of the rights, benefits, responsibilities, and privileges granted by the constitution and laws of Texas and the United States except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted.

Tex. Est. Code § 1151.351(a)

Enforcing the Bill of Rights

- A person under guardianship may file a complaint with the probate court regarding a violation of any of the rights.
- A person under guardianship may petition the court and retain counsel to represent the their interest “for other appropriate relief” under the Bill of Rights.

Tex. Est. Code § 1151.351(b)(10) & (17)

For More Information:

Disability Rights Texas
www.disabilityrightstx.org
