

SUPPORTED DECISION MAKING

16 Del.C. Chapter 94A

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Public Guardian

**THE ROLE OF THE AD LITEM ATTORNEY IN CHANCERY
COURT GUARDIANSHIPS**

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Lexie McFassel has served as the Public Guardian since 2009. In addition to her guardianship duties, she works with advocates and families to provide education about guardianship and alternatives, and worked to bring Supported Decision Making to Delaware. Before being appointed Public Guardian, Ms. McFassel worked at Community Legal Aid Society, Inc. in both the Disabilities Law Program and Poverty Law Program, assisting individuals in special education, services and benefits matters, family law matters involving domestic violence and in landlord-tenant matters. Ms. McFassel was a Wolcott Fellow and law clerk for the Honorable Joseph T. Walsh and also clerked for the Court of Common Pleas. She received her law degree from Widener University School of Law in 2000 and her Bachelor of Arts in English and History from the University of North Texas in 1991. She has been a National Certified Guardian since 2009.

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SUPPORTED DECISION MAKING

The State of Delaware has created an option to assist people in making decisions, when that person can still make decisions, but may need some help because of physical or cognitive disability. Every person has a right to make their own choices, but some may need help.

There are several options available in Delaware for assistance with decision-making in your personal life, with health-care, or financial decisions. These options include having someone you know act as a Surrogate Decision Maker (16 Del.C. §2507), act as your Advanced Health Care Directive Agent (16 Del.C. §2500 et seq.), or act as your Power of Attorney for some or all of your financial matters (12 Del.C. §49A-101 et seq.). Alternately, you may have a guardian appointed for you (12 Del.C. §3901 et seq.).

Supported Decision Making is different from these options. Supported Decision Making allows the individual to continue to make their own decisions by enabling others to help them. Supported Decision Making was created by Senate Bill 230 in 2016, and is found in the Delaware Code at Title 16, section 94A. Governor Jack Markell signed the bill into law on September 15, 2016. The Bill was sponsored by then Senator (now Lieutenant Governor) Bethany Hall-Long and Representatives Debra

Heffernan and David Bentz. Delaware was the second state in the nation to adopt this option of decision making.

Supported Decision Making emphasizes individuals retain their own right to make decisions but may need help. It is specifically designed to assist in situations where providers may need a gentle reminder that individuals in Delaware retain capacity and are presumed to be capable of managing their affairs unless and until the Court of Chancery (the Court having jurisdiction over adult guardianships) determines otherwise. This does not ignore the practical reality that a provider may refuse to recognize consents or authorizations provided by an individual they believe lacks capacity, and of course that provider may still do so under Supported Decision Making Agreement. Supported Decision Making is meant to recognize that an individual helping another to assess information and reach a decision is a positive and beneficial thing that we should all be allowed to have without having our abilities to make that decision stripped away.

- **WHAT IS SUPPORTED DECISION MAKING?**

Supported Decision Making serves individuals who can make decisions, but who need or could benefit from assistance in gathering, reviewing, or interpreting information. The role of the Supporter is to assist the adult in gathering and assessing information, and in evaluating the options, responsibilities and consequences of the adult's life decisions, including those about health care, financial decisions, and support services. The Supporter is chosen by the Principle. Most importantly, the Supporter does not have individual authority to make decisions.

- **HOW DO I CREATE AN AGREEMENT AND APPOINT A SUPPORTER TO HELP ME?**

There is a form, which was created by the Department of Health and Social Services (DHSS), which can be used, or one may be created independently of that form. (There is no requirement to use the exact form developed by DHSS). Before executing the form, it must be established the principle understands the nature and effect of the agreement.

The form must contain the following elements:

- It is voluntary, in writing, and dated.
- It designates at least 1 supporter.
- Identify the types of decisions for which the supporter is authorized to assist, and which they may not.
- The agreement must be signed by each party in the presence of 2 adult witnesses able to serve under Section 9405(A).
- The agreement must be accompanied by a declaration page, signed by each supporter and in the presence of witnesses.
- The declaration page must contain the supporter's relationship to the adult; the supporter's willingness to act as a supporter and supporter's acknowledgement of the duties of a supporter. (Individuals who can serve as a supporter is limited by section 9406A(b)).

An agreement may be created which appoints a Supporter for some roles and not for others. A Supporter may assist with health affairs, supportive services, and/or financial affairs. The agreement may also specifically exclude areas in which the Principle does NOT wish to have the assistance of the Supporter. The agreement should note whether further releases for

release of information are included with the form or will be provided, as in the case of a HIPAA form (Health Insurance Portability and Accountability Act of 1996) or a FERPA form (Family Education Rights and Privacy Act of 1974).

The people who act as witnesses must also be able to understand the method of communication used by the Principle.

- **WHO CAN ACT AS A SUPPORTER?**

The Principle may choose the person they want to help them, whether it is a neighbor, a friend, or a family member. The Supporter must be over 18 years of age. Individuals who may NOT act as Supporter are: 1) People who work for the Principle, unless they are family), 2) A person who already gets paid to assist the Principle, unless they are being paid to act as a Supporter (similar to a paid power of attorney or fee-for-service guardian) or also unless they are family, or 3) Someone the Principle as a protection from abuse order against, or who has to stay away from the Principle due to a Court order.

- **WHO WITNESSES THE AGREEMENT?**

The Principle needs to find someone to watch them sign the document which appoints the supporter. The 2 adult witnesses required may not be: a supporter for the principal, an employee or agent of a supporter named in the supported decision-making agreement, or any person who does not understand the type of communication the principal uses, unless an individual who understands the principal's means of communication is present to assist during the execution of the supported decision-making agreement.

- **PROTECTION FOR INDIVIDUALS WHO COMPLY WITH OR DECLINE TO COMPLY WITH AN AGREEMENT:**

The Statute provides specific protection for individuals who in good faith act in reliance on an authorization, or who decline to honor an authorization. For example, if a doctor is presented with an agreement and allows a supporter to access information on behalf of the principle, he cannot be held liable for having done so. By the same token, that doctor may decline to honor the authorization if he questions the validity of the agreement, most particularly whether the principle had capacity to execute it.

- **PRACTICAL APPLICATION IN FINANCIAL AREAS:**

It is recommended that if a Principle wishes to utilize a Supported Decision Making Agreement in financial arenas, that the individual recognize it has limited application and the individual would be best served by appearing at the financial institution with their Supporter to make arrangements for the Supporter to have access to the information the Principle desires the Supporter to have. This does not mean (emphasis on does NOT) allowing or arranging for the Supporter to have independent access to the resources of the Principle by signing a Power of Attorney or placing the Supporter on the bank account.

THERE ARE NO REGULATIONS PROMULGATED OR ASSOCIATED WITH SUPPORTED DECISION MAKING AT THIS TIME.

- **WHERE CAN I GET MORE INFORMATION?**

Statute: <http://delcode.delaware.gov/title16/c094a/index.shtml>

Information and Form:

https://www.dhss.delaware.gov/dhss/dsaapd/supported_decision_making.html

ABA Materials:

https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/ (Possible broken links, the one to the PRACTICAL Tool is broken, please contact the ABA if necessary)
