SUPPORTED DECISION-MAKING AGREEMENTS IN TEXAS

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I. INTRODUCTION: TIMBERLEY AND TANYA'S STORY

For some high school students and their parents, planning for high school graduation requires planning for the soon-to-be adult to gain

autonomy, dignity, and increased decision-making power.[1] This planning likely involves mental preparation on behalf of the parent because the parent knows that their child will soon need to make their own decisions or need someone to make decisions for them.[2] These decisions will involve finances, living situations, and medical decisions.[3] Such choices have personal consequences, financial consequences, and legal consequences.[4] However, for many parents of eighteen-year-olds with intellectual disabilities, they will confront a long road of planning for "who and whether" is going to make these decisions for their new young adult, not "when and how" their new young adult is going to make these arrangements for themselves.[5]

The circumstances surrounding decision-making illustrate the issues Timberley's mother, Tonya, faced as Timberley was nearing eighteen and preparing to graduate from high school.[6] Timberley and her mother Tonya are from the Dallas-Fort Worth area.[7] Timberley has velocardiofacial syndrome, also known as 22-Q.[8] As Timberley and her mother prepared themselves for this new transition in August of 2018, Timberley's school district encouraged Timberley's mother to apply for a guardianship.[9] If this transition had taken place prior to 2015 or in a state other than Texas, guardianship would have been Timberley and Tonya's only option.[10] However, beginning in 2015, Texas became the first state to adopt a supported decision-making option for families in situations similar to Timberley and Tonya's.[11] Timberley and Tonya's experience illustrates when supported decision-making agreements may be an appropriate alternative to a guardianship.[12] The appropriate circumstances for supported decision-making agreements arise when individuals need extra help making decisions, but do not lack the capacity to make the decisions themselves.[13] Because Texas formally recognized supported decision-making agreements in 2015, Timberley and Tonya now have the option to enter into a legally

1. *See Supported Decision Making in Action: Timberley and Tonya*, DISABILITY RTS. TEX. (Aug. 21, 2018), https://www.disabilityrightstx.org/en/video/supported-decision-making-Timberley-and-tonya/ [https://perma.cc/J688-BR9U] [hereinafter *Timberley & Tonya*].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *See* Dustin Rynders, *Supporting Adults with Disabilities to Avoid Unnecessary Guardianship*, 55 HOUS. L., JAN./Feb. 2018, at 26, 28.

enforceable relationship in which Timberley can choose an individual to help her make certain decisions that she may have difficulty making on her own.[14]

This comment will explain how supported decision-making agreements function in practice and assess the extent that the method has been successful in Texas since the state adopted the technique as a statutory alternative to guardianship in 2015.[15] First, this comment will reflect on the deinstitutionalization movement of the 1960s, when the rights of individuals with disabilities were expanded and the Supreme Court of the United States recognized their right to community-based supports and services.[16] Next, this comment will address guardianship and guardianship reform in Texas, and how policy initiatives led to the legislature formally recognizing Supported Decision-Making Agreements in 2015.[17] Then, this comment will assess whether Supported Decision-Making Agreements are actually effective in protecting the rights of individuals with disabilities by applying a person-centered standard.[18] In doing this, this comment will compare and contrast Texas' Supported Decision-Making Agreement statute to those adopted by several other states since 2015.[19] Lastly, this comment will propose several solutions for improving the functionality and effectiveness of supported decision-making in protecting the rights of individuals with disabilities.[20]

II. HISTORY: DE-INSTITUTIONALIZATION MOVEMENT

The deinstitutionalization movement embraces the idea of the autonomy and the dignity of individuals with disabilities by adopting the "least restrictive" environment center and moving individuals with mental illnesses or other disabilities into appropriate community-based environments.[21] Beginning in the 1960s, the deinstitutionalization movement in America began to remove the negative stigma surrounding individuals with mental illnesses, mental disabilities, and physical disabilities.[22] The deinstitutionalization movement sought to prevent undue and overbroad institutionalization of persons with mental disabilities.[23] Overbroad institutionalization occurs when individuals with disabilities are unjustifiably

14. *See Timberley & Tonya*, *supra* note 1.

15. *See generally* TEX. COUNCIL FOR DEVELOPMENTAL DISABILITIES, *Supported Decision-Making* (last visited Jan. 13, 2020), https://tcdd.texas.gov/resources/guardianship-alternatives/supported-decision-making/ (brief summary of supported decision-making agreements in Texas) [https://perma.cc/DW5B-WX9U].

16. *See infra* Part II; Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 607 (1999).

17. *See infra* Part III; *see also Timberley & Tonya*, *supra* note 1.

18. *See infra* Part IV.

19. *See infra* Section IV.A.

20. *See infra* Parts V–VI.

21. *See Olmstead*, 527 U.S. at 599.

22. *See id.* at 600.

23. *See id.* at 609.

segregated in an institution away from their community.[24] According to the holding in *Olmstead v. L.C. ex re Zimring,* this qualifies as segregation under the Americans with Disabilities Act of 1990 for two reasons: (1) "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and (2) "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."[25] Historically, (and to varying degrees, today) institutionalization primarily affected individuals with various forms of mental illness.[26] These individuals were confined to state-run "insane asylums" and as a result, were segregated from society.[27]

However, since the 1960s, institutionalization of individuals with mental illnesses and disabilities has not vanished—it has merely transformed.[28] Many critics of deinstitutionalization point out "new asylums" such as state-run hospitals, nursing homes, prisons, and chronic homelessness as evidence that deinstitutionalization has failed.[29] Critics note that, as a result of closing mental hospitals and institutions, many individuals with mental illnesses who need serious care now go without, and instead are subjected to cycles of poverty, incarceration, and homelessness.[30] With such poor consequences, it is fair to ask, "is deinstitutionalization worth it?"[31] Does forgoing care outweigh suffering through discrimination and the accompanying injustices?[32] In light of the perceived short-comings of a policy movement with intentions focused on integrating individuals with disabilities into the community, it is important to remember that society should always move towards less segregation and discrimination, and more towards integration and inclusion.[33]

Because we now live in a modern democratic society, one is constantly torn between giving up their rights in exchange for benefits such as order and

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24. *See id.* at 600.
25. *Id.* at 600–01.
26. *See id.* at 600.
27. *See generally* E. Fuller Torrey, *Out of the Shadows: Confronting America's Mental Illness Crisis*, chapters 1 and 3 (New York: John Wiley & Sons) (1997), https://www.pbs.org/wgbh/pages/frontline/shows/asylums/special/excerpt.html [https://perma.cc/6KF6-5QEK].
28. *See id.*
29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.*
33. *See id.*

safety.[34] Guardianship is a form of intangible institutionalization of the person that must also be subject to the "least restrictive" standard adopted during the deinstitutionalization movement.[35] For individuals with disabilities who require specialized supports and services to live full lives, the rights that they must give up are far more extreme than some people can comprehend.[36] As a result of the work achieved by advocates for de-institutionalization, many of these facilities where individuals with various disabilities were "cared for" were closed and replaced by state-run hospitals.[37]

However, there is still much work left to be done for the de-institutionalization movement.[38] The goals of the deinstitutionalization movement can be broken down into three categories: (1) to increase the standard of care for individuals with disabilities to a person-centered standard; (2) to remove the stigma surrounding individuals with disabilities and the care that they need to receive; and (3) to increase the individual autonomy of the individual receiving care by using the least restrictive means available.[39] More broadly, the goal is for the affected person to be cared for.[40]

The landmark case embodying the goals of the deinstitutionalization movement is the 1999 Supreme Court case *Olmstead v. L.C. ex rel. Zimring*.[41] The case involved two women with mental disabilities who were medically deemed capable of receiving treatment in a "community-based setting," but were retained in the mental institution regardless of the recommendations of a treating psychiatrist.[42] Both women, L.C. and E.W., were diagnosed with intellectual disabilities.[43] Specifically, L.C. had schizophrenia and E.W. had a personality disorder.[44] At issue in the case was "whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions."[45] Justice Ginsberg for the Supreme Court held:

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34. *See* Sean Burke, *Person-Centered Guardianship: How the Rise of Supported Decision-Making and Person-Centered Services Can Help Olmstead's Promise Get Here Faster*, 42 MITCHELL HAMLINE L. REV. 873, 877 (2016).

35. *See* Jonathan Martinis & Jessalyn Gustin, *Supported Decision-Making as an Alternative to Overbroad and Undue Guardianship*, ADVOC., Jan. 2017, at 41, 42.

36. *See Olmstead*, 527 U.S. at 601.

37. *See* Torrey, *supra* note 27.

38. *See id.*

39. *See id.*

40. *See id.*

41. *See Olmstead*, 527 U.S. at 587.

42. *Id.* at 593.

43. *Id.* at 582.

44. *Id.*

45. *Id.* at 587.

> [U]nder Title II of the ADA, States are required to place persons with mental disabilities in community settings rather than in institutions when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[46]

Olmstead's holding potentially applies to more than just a person's physical setting when receiving care.[47] While *Olmstead* speaks to a disabled individual's least restrictive environment, the spirit of the holding can reach further—a Supported Decision-Making Agreement encompasses and recognizes that the individual's decision-making capacity, something intangible, should not be unjustifiably segregated or discriminated against.[48]

Twenty years have passed since the *Olmstead* decision.[49] Many legal scholars, practitioners, and disability rights advocates criticize guardianship for similar reasons institutionalization was criticized.[50] Texas' Supported Decision-Making Agreement Act is one of the results of a wave of guardianship reform that can be traced to the de-institutionalization movement embodied in the *Olmstead* decision in 1999.[51]

Much like deinstitutionalization's goal to give rights back to individuals with disabilities resulting in some unfortunate consequences, the goal of guardianship is to protect the person lacking decision-making capacity.[52] Guardianship law has developed a dark reputation of abuse.[53] Unfortunately, some peoples' experience with guardianship involves the principal suffering from overreaching, exploitation, and neglect.[54] This unfortunate truth results from the many different interests involved in guardianship that overshadow the proposed ward's interests.[55] Families can find themselves facing the possibility of guardianship in a variety of scenarios: when the individual has an intellectual or developmental disability, the individual is an elderly person

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46. *Id.* at 582.
47. *See id.*
48. *See infra* Part IV.
49. *See Olmstead*, 527 U.S. at 587.
50. *See* Martinis & Gustin, *supra* note 35.
51. *See id.*; *Olmstead*, 527 U.S. at 587.
52. *Texas Guardianship Reform. Protecting the Elderly and Incapacitated*, TEX. CTS. (Jan. 2019) https://txcourts.gov/media/1443314/texas-guardianship-reform_jan-2019.pdf [https://perma.cc/9938-NFST].
53. *See* Patrick Michels, *Out of Reach*, TEX. OBSERVER (Apr. 3, 2017), https://www.texasobserver.org/texas-guardianship-neglect/ [https://perma.cc/HM6S-B82X] [hereinafter Michels, *Out of Reach*]; Patrick Michels, *Who Guards the Guardians?*, TEX. OBSERVER (July 6, 2016, 8:00 AM), https://www.texasobserver.org/texas-guardianship-abuse/ [https://perma.cc/VB5N-LPP6].
54. *See* Michels, *Out of Reach*, *supra* note 53.
55. *See* Rynders, *supra* note 13, at 27.

who can no longer make decisions for themselves due to a lack of capacity as a result of Alzheimer's or Dementia, or some other tragic accident or injury that causes someone to no longer have the requisite capacity to make legal decisions for themselves.[56]

The principles of *Olmstead* can carry forward into the guardianship context.[57] In both circumstances, a person's rights are being restricted in the name of the best interests of the ward.[58] Additionally, both circumstances present the potential for undue restrictions resulting in discrimination and unjustified segregation.[59]

III. GUARDIANSHIP IN TEXAS

Guardianship law is a matter of state law.[60] Each state approaches guardianship differently.[61] Guardianship is a legal proceeding divesting an adult of their rights (removing the adult from the legal majority) and the capacity to make decisions of legal consequence.[62] As a result, the proposed ward's guardian assumes the legal right to make decisions on behalf of the ward.[63] A uniform standard for decision-making in guardianship does not exist; however, common standards have emerged among the states.[64] "Substituted decision-making" is an example of a common standard.[65] Under the substituted decision-making standard, the guardian attempts to make the same decision that the proposed ward would make under the same circumstances.[66] Another standard for decision-making is the "best interest standard."[67] Similar to the best interest standard in family law, the guardian attempts to make the decision that is in the proposed ward's best interest by balancing various factors.[68] In reality and in practice, most guardians end up

56. *Id.* at 26.
57. *See* Burke, *supra* note 34, at 874.
58. *Id.* at 877.
59. *See id.*
60. *State Laws*, ELDERS AND COURTS, http://www.eldersandcourts.org/guardianship/guardianship-basics (expand "State Laws" from topic list) (last visited Oct. 25, 2019) [https://perma.cc/G7GE-D8KA].
61. *See* Eleanor Crosby Lanier, *Understanding the Gap Between Law and Practice: Barriers and Alternatives to Tailoring Adult Guardianship Orders*, 36 BUFF. PUB. INT. L.J. 155, 172 (2019).
62. *See* Meta S. David, *Legal Guardianship of Individuals Incapacitated by Mental Illness: Where Do We Draw the Line?*, 45 SUFFOLK U. L. REV. 465, 475–76 (2012).
63. National Guardianship Association, *Standards of Practice*, GUARDIANSHIP (2013) https://www.guardianship.org/wp-content/uploads/2017/07/NGA-Standards-with-Summit-Revisions-2017.pdf [https://perma.cc/HD4Y-JZTT].
64. *See id.*
65. *Id.*
66. *See id.*
67. *Id.*
68. *See id.*

using a combination of both substituted decision-making and the best interest standard.[69]

Texas' guardianship statutes are located in the Texas Estates Code and indicate that the purpose of the guardianship over an "incapacitated person" is to "encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person."[70] Accordingly, "incapacitated person" could mean any of the following: "(1) a person who is mentally, physically, or legally incompetent; (2) a person who is judicially declared incompetent; (3) an incompetent or an incompetent person; (4) a person of unsound mind; or (5) a habitual drunkard."[71] Unfortunately, Texas' guardianship statutes still use antiquated anti-person-centered language that does not reflect or uphold the dignity of the proposed ward.[72]

A. Plenary Guardianships versus Limited Guardianships

There are two levels of guardianships—plenary and limited.[73] Plenary guardianships divest the proposed ward of all of their rights, reducing the proposed ward's legal status to that of a minor.[74] Plenary guardianships are "total" in their effect and consequences and extend for the life of the proposed ward or until an action is brought and the ward's rights are restored.[75] Restoring the ward's rights is very difficult to achieve because of the high standard that must be met.[76] On the other hand, limited guardianships divest the ward of their rights for a fixed duration.[77] Depending on the circumstances, only some of the proposed ward's rights are divested in a limited guardianship.[78]

With this in mind, a national survey was conducted in 2019 identifying the gaps between the goals of limited guardianships and whether or not they are effective in practice.[79] The survey received responses from a variety of individuals in twenty-nine states intimately involved in a guardianship who identified significant practical barriers to the success of limited

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69. *See id.*
70. TEX. EST. CODE ANN. § 1001.001(b).
71. *Id.* § 1001.003.
72. *See id.*
73. J. Matt Jameson et al., *Guardianship and the Potential of Supported Decision Making with Individuals with Disabilities*, J. SAGE PUB (March 1, 2015), http://montanayouthtransitions.org/wp-content/uploads/2014/10/Research-and-Practice-for-Persons-with-Severe-Disabilities-2015-Jameson-1540796915586189.pdf [https://perma.cc/243F-A7E7].
74. *Id.*
75. *Id.*
76. *See* Lanier, *supra* note 61, at. 186–87.
77. *Id.*
78. *See* Jameson et al., *supra* note 73.
79. *See* Lanier, *supra* note 61, at 172–76.

guardianships.[80] Many responses expressed significant concern with "the lack of information and clear forms available to the public to understand the available options [at all levels of the court process] and determine whether a limited guardianship would be appropriate."[81]

Another similar response went further and expressed "the need for more information to determine whether a limited guardianship would be an option."[82] A concern arises when individuals are executing plenary guardianships over individuals when limited guardianships would be more appropriate; the same is likely true for individuals executing plenary guardianships when a supported decision-making agreement would likely work just as well.[83] However, the lack of information available to everyone involved in the process is concerning, and it will continue to result in mass execution of plenary guardianships to the detriment of wards.[84]

Texas' guardianship statute favors limited guardianships over plenary guardianships.[85] The policy statement of the statute states that the type of guardianship should be administered according to "the incapacitated person's actual mental or physical limitations and only as necessary as to promote and protect the well-being of the incapacitated person."[86] Section (b) of Texas' guardianship statute admonishes the guardian to "encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person."[87] Texas' guardianship statute sets a standard that presumes a limited guardianship to be in the best interest of the incapacitated person.[88] Furthermore, Texas' guardianship statute explicitly presumes that "the incapacitated person retains capacity to make personal decisions regarding the person's residence."[89]

Accordingly, Texas' supported decision-making agreement statute uses similar language favoring the least intrusive method possible to assist people in making their day-to-day lives easier in the context of a contractual agreement which forms a fiduciary relationship.[90] Texas' supported decision-making agreement purpose section explicitly states "the purpose of this chapter is to recognize a less restrictive alternative to guardianship for adults with disabilities who need assistance with decisions regarding daily living but who are not considered incapacitated persons for the purposes of

80. *See id.*
81. *Id.* at 202.
82. *Id.*
83. *See id.*
84. *See id.*
85. *See* TEX. EST. CODE ANN. § 1001.001.
86. *Id.* § 1001.001(a).
87. *Id.* § 1001.001(b).
88. *See id.* § 1001.001.
89. *Id.* § 1001.001(b).
90. *See id.* § 1357.

establishing a guardianship under this title."[91] The standard articulated by Texas' guardianship statute and the standard articulated by Texas' supported decision-making agreement essentially work together.[92] These statutes include complementary standards working together to achieve the least restrictive assistance possible for an individual with diminished capacity but not so severely diminished that would warrant an adjudicated plenary guardianship.[93] Eleanor Crosby Lanier argues in the conclusion of her study for the importance of statutory language.[94] The language used in guardianship statutes signifies the present need for continued study and assessment because "it personifies the significance of striking the balance between protection and autonomy in a way that protects our fundamental constitutional rights."[95]

While Texas' guardianship statute explicitly favors a tailored approach to adjudicating guardianships, whether that actually happens in practice remains another question altogether.[96] A look at some past and more recent cases will shed some light on these issues.[97]

B. Barriers to Limited Guardianships

Very little data exists indicating the success of supported decision-making agreements in Texas.[98] In order to really know if this method is being seriously considered and utilized in Texas, it is necessary to assess if more guardianships are being adjudicated and whether there is an increase in restorations of protected persons' rights.[99] Scholars note that a barrier to guardianship reform is the notorious lack of information from the courts regarding the number of guardianships entered into and whether or not alternatives were thoroughly and seriously considered beforehand.[100] Alternatives to guardianship, including supports and services, are generally not considered until a ward petitions for a restoration.[101] Additionally, many attorneys are uneducated or poorly educated regarding supports and services available for individuals with disabilities.[102]

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91. *Id.* § 1357.003.
92. *See id.* §§ 1001.001, 1357.
93. *See id.* § 1357.
94. *See* Lanier, *supra* note 61, at 209.
95. *Id.*
96. TEX. EST. CODE ANN. § 1001.001.
97. *Id.*
98. *See* Texas Judicial Branch's Annual Statistical Report, *infra* note 120.
99. *Id.*
100. Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1128 (2013).
101. *Id.*
102. *Id.*

In general, plenary guardianships are imposed as the rule, not the exception, in severe cases.[103] Therefore, it is useful to identify the legal barriers that exist which prevent a limited guardianship from being imposed on an individual over a plenary guardianship.[104] Because a supported decision-making agreement is a less restrictive alternative to a plenary guardianship, many of the legal barriers that apply to limited guardianships will likely apply in supported decision-making agreement situations as well.[105]

Six independent—yet not mutually exclusive—legal barriers from guardianship case law currently exist, hindering advocates' success in obtaining limited guardianships on appeal.[106] These six legal barriers are: (1) standard of review; (2) lack of clarity in rights removed or retained; (3) interconnected nature of decision-making ("all or nothing" approach); (4) consensual guardianship; (5) compensation; and (6) conflict with family law doctrine.[107] Any one of these barriers alone can adversely affect the execution of a limited guardianship, but together, they pose a substantial barrier to advocates seeking limited guardianships on appeal.[108]

The case *In re Guardianship of the Person and Estate of Ryan Keith Tonner* illustrates the barriers to limited guardianship.[109] Here, Mr. Tonner applied for full, or at least partial, restoration of his capacity upon the death of his guardian.[110] The case was appealed to the Supreme Court of Texas, in which the Court, in a per curiam opinion, affirmed the ruling of the appellate court, but for different reasons.[111] In this case, Mr. Tonner was represented by Disability Rights Texas.[112] Mr. Tonner was appointed a guardian of his person and estate, Beatriz Burton, at the age of seventeen by Howard County because he was incapacitated due to an intellectual disability.[113] Mr. Tonner lived at a state supported living center, and the center testified that Mr. Tonner was capable of making "informed decisions regarding his residence, contractual obligations, employment, applications for government assistance, bank accounts, voting, and marriage."[114]

However, contrary to this testimony, a court-appointed psychiatrist testified that "Tonner's condition had not changed, that he could not make

103. *See* Lanier, *supra* note 61, at 180–81.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 185.
108. *Id.*
109. *In re* Guardianship of the Person and *In re* Est. of Tonner, 513 S.W.3d 496, 497 (Tex. 2016).
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *See id.* at 498.

financial decisions for himself, and that he would always require assistance and supervision."[115] The Supreme Court of Texas granted Mr. Tonner's petition for review and affirmed the judgment of the court of appeals.[116]

The lack of discussion regarding supports and services, despite the state-supported living center's testimony as to Mr. Tonner's requisite capacity regarding various other rights, is troubling.[117] No witness such as a guardian ad litem, attorney ad litem, nor a court-appointed investigator offered testimony.[118] This case provided special circumstances, considering Mr. Tonner's guardian had passed away, which gave the court time to order supports and services be implemented in some manner.[119]

A review of available statistics highlights the need for more information regarding plenary guardianships versus limited guardianships.[120] According to the Texas Judicial Branch's Annual Statistical Report on County-Level Courts Activity Summary from September 1, 2012 to August 31, 2013, 4,759 new cases for guardianship of an adult were filed.[121] Of those cases, only 918 were dismissed or denied.[122] This is the most recent report before Texas adopted statutory supported decision-making agreements.[123] No annual statistical report exists for the 2015-2016 year.[124] However, from September 1, 2016 to August 31, 2017, 4,575 new cases for guardianship of an adult were filed.[125] Of these new cases filed, only 318 were dismissed or denied.[126] From September 1, 2017 to August 31, 2018, 4,307 new cases were filed for guardianship of an adult.[127] Of these new cases filed, only 411 were either dismissed or denied.[128] These statistics indicate Texas grants an overwhelming majority of guardianships.[129] From 2012 to 2018, the amount of new guardianships filed only decreased by 452 new cases in six years.[130]

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115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. Tex. Jud. Branch's Ann. Stat. Rep. on Cty.-Level Courts Activity, at 83 (Sept. 1, 2012–Aug. 31, 2013), https://www.txcourts.gov/media/467863/2013-Annual-Report9_26_14.pdf [https://perma.cc/GS 5S-EYTX].
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*; County-Level Courts Guardianship Case Activity by County, Ann. Stat. Rep. for the Tex. Judiciary Sept. 1, 2017 to Aug. 31, 2018, at 10 (2018) https://www.txcourts.gov/media/1442848/3-guardianship-activity-by-county.pdf [https://perma.cc/G2HZ-QTVB].
128. *Id.*
129. *Id.*
130. *Id.* (illustrating significant data shifts over time in comparison to prior referenced statistical reports).

What the data does not capture, however, is the actual people behind the numerical statistics.[131] The data fails to capture whether those 452 new cases were dismissed or denied in favor of limited guardianships, alternatives to guardianships, supports and services, or because no guardianship was necessary at all.[132]

The Texas case *In the Matter of the Guardianship of Croft* illustrates the difficulty that protected individuals face when attempting to restore their rights.[133] In *Croft*, the Court of Appeals in Houston affirmed the trial court's finding by a preponderance of the evidence that the protected person, Mr. Croft, was still incapacitated.[134] In Texas, sections 1202.154 and 1202.155 of the Estate Code provide general and additional requirements for a court to consider when modifying or terminating a protected person's guardianship, which results in a restoration of some or all of his rights.[135] Determining a protected person's capacity is a threshold determination.[136] Before a trial court reaches the question of whether the protected person's rights can be restored by applying the factors in section 1202.155, the trial court must first determine whether the protected person remains incapacitated.[137]

For example, in *Croft*, the Houston Court of Appeals explains the statutory scheme applicable for restoring a protected person's capacity.[138] There, Mr. Croft suffered severe injuries from a motor vehicle accident, including a traumatic brain injury and amnesia that lasted three days.[139] Mr. Croft appealed the factual sufficiency of the evidence finding that he was still an incapacitated person, asking the court to discharge the guardianship over his estate.[140] The appellate court considered testimony from Mr. Croft, two doctors, and the report of Mr. Croft's guardian ad litem.[141] The testimony from these expert witnesses concluded that Mr. Croft was no longer legally incapacitated and had the capacity to manage his own estate.[142] Despite the expert testimony, the appellate court held that the aggregate weight of the supporting evidence was "not so weak as to render the challenged findings 'against the great weight and preponderance of the evidence.'"[143] The appellate court explained that under section 1202.155, if the protected

131. *Id.*
132. *Id.*
133. *In re* Guardianship Croft, 560 S.W.3d 379, 384 (Tex. App.—Houston [14th Dist.] 2018).
134. *Id.* at 390.
135. TEX. EST. CODE ANN. §§ 1202.154, 1202.155.
136. *See Croft*, 560 S.W.3d at 384.
137. *Id.*
138. *Id.*
139. *Id.* at 381.
140. *Id.*
141. *Id.* at 385.
142. *Id.* at 389.
143. *Id.* at 390 (quoting Green v. Alford, 274 S.W.3d 5, 23 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

person's incapacity is a result of a mental condition, the order must find that "the ward's mental capacity is completely restored."[144] This is a finding of fact, and the protected person has the burden to disprove the finding of fact made by the trial court.[145] In Mr. Croft's case, he was unsuccessful in meeting this burden and proving that his capacity was "completely restored."[146] In fact, under a "complete restoration" standard, it may be impossible for him to ever meet this burden.[147]

C. Tensions Between Protection and Advocacy

America's adversarial system causes guardianship proceedings to be quite complicated.[148] Attorneys must be cognizant of who their client is in order to avoid running into conflicts of interest.[149] In Texas, a guardianship proceeding may be initiated by "any person. . .by filing a written application in a court having jurisdiction and venue."[150] Because of this, a third party can drag the proposed ward to a lawyer's office, proclaim that the proposed ward is incompetent, and demand that the proposed ward needs a guardian.[151] In this situation, the lawyer must keep in mind who their client is because that will guide which person's interest the lawyer will be advocating for.[152]

Because of these competing interests in a guardianship proceeding, once the petitioner and the proposed ward arrive at court, "the court shall appoint an attorney ad litem to represent the proposed ward's interests."[153] The attorney ad litem advocates on behalf of the ward.[154] Additionally, at any time the proposed ward may retain his own attorney as long as he retains contractual capacity.[155] Furthermore, any other interested person petitioning for guardianship can retain counsel as well.[156] These options for representation highlight the numerous interests at conflict in guardianship proceedings.[157]

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144. *Id.* at 384 (quoting TEX. EST. CODE ANN. § 1202.155).
145. *Id.*
146. *Id.*
147. *Id.*
148. *See* Pamela B. Teaster, et. al., *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 207–09 (2007), http://supporteddecisionmaking.com/sites/default/files/wards_of_the_state.pdf [https://perma.cc/WNJ2-U52N].
149. *Id.*
150. TEX. EST. CODE ANN. § 1101.001(a).
151. *Id.*
152. *Id.*
153. *Id.* § 1054.001.
154. *Id.* § 1054.004.
155. *Id.* § 1054.006.
156. *Id.* § 1054.001.
157. *Id.*

In Texas, for a judge to adjudicate a guardianship, a doctor must evaluate the proposed ward and sign off on a recommendation that the proposed ward is incompetent and in need of someone to care for them and make decisions on the proposed ward's behalf.[158] In cases in which it is likely that a proposed ward would benefit from guardianship, but has not yet been adjudicated incompetent, it may be difficult to satisfy the requirement that a doctor sign off on a medical evaluation.[159] The difficulty with such is the result of HIPAA and other legal barriers designed to protect the proposed ward's privacy.[160]

These legal gray zones indicate that alternatives to guardianship may offer some favorable options to the proposed ward and those concerned for his safety.[161] However, several of the available alternatives to guardianship are most effective when the proposed ward has a family that is involved in his life and is committed to working with his best interests and well-being in mind.[162] Furthermore, many states have organizations dedicated to offering services and resources to help individuals with and without a familial and supportive system around them to help them make legal and non-legal life-decisions.[163]

In scholarship, guardianship has been described as making individuals "legally dead," by "unperson[ing]" them.[164] While on its face, this description may sound harsh, it is not entirely inaccurate.[165] A guardianship is the most drastic legal measure with the highest consequences at stake.[166] When a guardianship proceeding has been carried out, the proposed ward is completely stripped of all of their legal rights and reduced to the legal equivalent of a child.[167] There are many scenarios in which this may be the only option for the individual and their family.[168] The difficulty in adjudicating guardianships is that, in reality, the interests of many different entities are at stake.[169] Not only must the interests of the proposed ward be considered, but the interests of the proposed ward's family, and frequently, the interests of the state must be considered as well.[170] Ideally, all of these interests will be working for the ward's best interest, but that is not always the case.[171]

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158. *Id.* § 1101.103(a)(2).
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* § 1002.0015.
163. *See Timberley & Tonya*, *supra* note 1.
164. Teaster, et. al. *supra* note 148, at 196.
165. *Id.*
166. *Id.*
167. *Id.*
168. *See* Rynders, *supra* note 13.
169. *Id.*
170. *Id.*
171. *Id.*

Currently, the statutory alternatives to guardianship in Texas include the following:

> (1) execution of a medical power of attorney under Chapter 166, Health and Safety Code;
> (2) appointment of an attorney in fact or agent under a durable power of attorney as provided by Subtitle P, Title 2;
> (3) execution of a declaration for mental health treatment under Chapter 137, Civil Practice and Remedies Code;
> (4) appointment of a representative payee to manage public benefits;
> (5) establishment of a joint bank account;
> (6) creation of a management trust under Chapter 1301;
> (7) creation of a special needs trust;
> (8) designation of a guardian before the need arises under Subchapter E, Chapter 1104; and
> (9) establishment of alternate forms of decision-making based on person-centered planning.[172]

These nine statutory guardianship alternatives focus on taking a very narrow and limited amount of decision-making power away from the proposed ward or incapacitated individual.[173] Notably, only two of these nine alternatives to guardianship directly involve protection of the proposed ward, while the other seven alternatives relate in some way to the ward's property or finances.[174]

D. An Attractive Option: Supported Decision-Making and Increased Independence

Individuals can end up in guardianships in a variety of ways.[175] A number of practitioners and legal scholars note the problem with guardianships is not the idea of the guardianship itself, but instead "unnecessary and overbroad guardianships."[176] Many parents of children with intellectual disabilities are confronted with the decision of entering into a guardianship as their child approaches age 18 and they begin planning for his or her transition to adulthood.[177] Parents often report that their child's school only offers information and advice to obtain a full guardianship over

172. TEX. EST. CODE ANN. § 1002.0015.
173. *Id.*
174. *Id.*
175. *See* Rynders, *supra* note 13, at 28.
176. *Id.* at 27.
177. *Id.*

their child.[178] Timberley and her mother Tonya faced this same situation.[179] A concern that arises is that the child is still growing and learning when parents obtain plenary guardianships over their child with an intellectual or developmental disability turning 18 years old.[180] By taking away a young adult's legal power to make their own decisions, parents concern that the effect may hinder their child's growth and learning process.[181]

IV. SUPPORTED DECISION-MAKING AGREEMENTS IN TEXAS

On September 1, 2015, Texas became the first state to formally recognize supported decision-making agreements as an alternative to guardianship.[182] These types of agreements allow adults with disabilities to retain their decision-making authority through the use of formal supports.[183] At the time of writing, Texas has formally recognized supported decision-making agreements for four years.[184] Texas' supported decision-making agreement statute includes a model form for parties to use when entering into their own agreements.[185]

Supported decision-making agreements allow individuals with disabilities to maintain their autonomy, independence, and dignity regarding legal and non-legal decisions that impact their daily lives.[186] As such, supported decision-making agreements will look different for each individual, depending on the facts of their specific situation.[187] However, despite the variation and uniqueness, the purpose behind the idea remains consistent.[188] Texas' supported decision-making agreement act states its purpose is to avoid unnecessary guardianships and provide assistance to individuals with disabilities using the least restrictive means possible.[189]

In order for the principle to maintain maximum independence, the supported individual retains their decision-making capacity.[190] Under the act, an adult with a disability may enter into a supported decision-making agreement "voluntarily, without undue influence or coercion," authorizing the supporter to support the adult with various kinds of assistance.[191] Because

178. *Id.*
179. *Id.*
180. *See* Burke, *supra* note 34, at 42.
181. *Id.* at 890.
182. *See* TEX. EST. CODE ANN. § 1357.001–.102.
183. *See id.* § 1357.051(1)–(4).
184. *See* Rynders, *supra* note 13.
185. TEX. EST. CODE ANN. § 1357.056(a).
186. *Id.*
187. *Id.*
188. *Id.* § 1357.003.
189. *Id.*
190. *Id.* § 1357.051.
191. *Id.*

the principal is entering into a contractual agreement with the supporter, the principal must have contractual capacity.[192] Contractual capacity proves to be an issue in contested guardianship cases or restoration cases.[193] For an individual to have contractual capacity, he must understand the nature of the agreement and its consequences.[194] In cases when contractual capacity is questionable, supported decision-making agreements will likely not be an option.[195] Under this kind of contractual relationship, the supporter only has the authority granted to them under the Supported Decision-Making Agreement.[196]

The key to the success of a supported decision-making agreement is the relationship between the supported and the supporter.[197] Section 1357.052 of the Texas Estates Code states, "the relationship between an adult with a disability and the supporter with whom the adult enters into a supported decision-making agreement: (1) is one of trust and confidence; and (2) does not undermine the decision-making authority of the adult; once a supported decision-making agreement is executed, it extends until either party chooses to terminate it or if termination is provided by the terms of the agreement.[198] Additionally, the agreement terminates upon a finding by the Department of Family and Protective Services that the supported adult "has been abused, neglected, or exploited by the supporter;" the supporter is found criminally liable for abuse, neglect, or exploitation, or "a temporary or permanent guardian of the person or estate appointed for the adult with a disability qualifies."[199]

The main difference between a guardianship and the alternatives to guardianship, prior to September 1, 2015, is that guardianship and the available alternatives all use the method of substituted decision-making, which as much as it would like to account for the needs and desires of the disabled individual, ultimately fails to do so.[200] Therefore, substituted decision-making addresses the personal needs of individuals who do not require a plenary guardianship, but still need services, by engaging the principal and involving them in the decision-making process.[201] As a result, the gaps in disability law that led to deinstitutionalization policy movements

192. *In re* Guardianship of A.E., 552 S.W.3d 873, 892 (Tex. App.—Fort Worth 2018, no pet. h.).

193. *Id.*

194. *See* TEX. EST. CODE ANN. § 1101.101(a)(2)(D).

195. Brief of Appellant, *In re Guardianship of A.E.*, 552 S.W.3d 873 (2018) (No. 02-17-00189-CV), 2017 WL 35211512, at *28.

196. *See* TEX. EST. CODE ANN. § 1357.052(a).

197. *See id.* § 1357.052(c).

198. *Id.* § 1357.053(a).

199. *Id.* § 1357.053(b)(1-3).

200. *See generally* Mary Jane Ciccarello & Maureen Henry, *WINGS: Person-Centered Planning and Supported Decision-Making*, 27 UTAH B.J. 48, 52 (2014) (explaining the practical issues of surrogate decision-making role).

201. *Id.* at 49.

are the same policy waves that are seen in the guardianship reform movement.[202]

In light of this progress, and the benefits flowing from Texas and several other states embracing SDMAs as an alternative to guardianship, there lacks a common standard for what "person-centered planning" means as referenced in Texas Estates Code section 1002.0015.[203]

Texas case law provides examples of circumstances when a supported decision-making agreement is not the most appropriate option.[204] Notably, the cases illustrate how guardianship determinations are fact-intensive and factor-intensive inquiries, resulting in outcomes that are left to the discretion of the court.[205] In *Guardianship of A.E.*, the appellate court reversed the trial court's denial of the appellant's application for guardianship of his disabled, adult daughter.[206] The trial court denied the parents' application for guardianship because the appellants failed to show by clear and convincing evidence that alternatives to guardianship were infeasible.[207]

There, the proposed ward had moderate encephalopathies and a moderate intellectual disability.[208] At the guardianship hearing, the trial court heard testimony from A.E.'s parents, A.E.'s treating physician, the court investigator, and the attorney ad litem.[209] The court relied on testimony indicating whether A.E. could understand the consequences of her decisions, ultimately concluding that because A.E. lacked the capacity to execute a power of attorney or a Supported Decision-Making Agreement, she was sufficiently incapacitated for the purposes of a guardianship.[210] In this case, the attorney ad litem called A.E. as a witness and asked A.E. questions to "show the Court that, you know, [A.E.] has really pretty minimal understanding of the concept of guardianship as a whole." A.E.'s minimal understanding coupled with A.E.'s "tendency to agree with whatever is said to her without understanding what she is being asked" demonstrated to the court, beyond clear and convincing evidence, that A.E. was incapacitated and

202. *See generally* Eliana J. Theodorou, *Supported Decision-Making in the Lone-Star State*, 93 N.Y.U. L. REV. 973, 988–94 (explaining the policy movement towards guardianship reform in Texas).

203. *See* Rynders, *supra* note 13; *see also* A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 UTAH L. REV. 1541, 1547 (2012); *see generally* Ciccarello & Henry, *supra* note 200, at 51–52 (explaining the practical issues of surrogate decision-making role).

204. *See generally In re Guardianship of A.E.*, 552 S.W.3d 873, 892 (Tex. App.—Fort Worth 2018, no pet. h.) (holding that clear and convincing evidence demonstrates the principal's interests will be protected by her guardian).

205. *See id.* at 891 (discussing that the probate court abused its discretion by not finding the principle to be incapacitated).

206. *Id.* at 892.

207. *Id.* at 891.

208. *Id.* at 876.

209. *Id.* at 878–82.

210. *Id.*

unable to care for herself and manage her property, necessitating a guardianship.[211]

Regarding the insufficiency of supports and services, the court referred to the definition of "supports and services" as defined in the Estates Code.[212] The court noted that supports and services are available to enable the supported individual to meet his needs, not to "enable another person to make personal decisions for the individual."[213] It is this distinction and the amount of evidence indicating A.E.'s lack of capacity that established that

> resources would not enable A.E. to meet her needs, care for her health, manage her finances, or make the personal decisions prioritized by the Estates Code. Her needs and health must be managed *for her* because she cannot understand her options to make those decisions for herself, even when they are explained to her.[214]

Regarding alternatives to guardianship, the court concluded that such methods were not feasible and no evidence presented supported a contrary finding.[215] The court discussed the definition of "supported decision-making" and its purpose as it applies to this case, and determined that A.E. would not benefit from supported decision-making because she is considered an incapacitated person for the purposes of establishing a guardianship.[216] The court held that the trial court abused its discretion denying H.E. and P.E.'s guardianship application.[217] This case reflects the difficulties courts have in considering and weighing alternatives to guardianship, and the high threshold that must be reached to overcome the need for a guardianship.[218]

Compare *Guardianship of A.E.* to *In re Peery*, a Pennsylvania case from 1999 which discusses facts where a guardianship is inappropriate but an individual with a disability still requires support.[219] The Pennsylvania court in *In re Peery* took a different approach from the Texas court, not putting less weight on whether the individual was incapacitated to find that a guardianship was necessary, but holding both a finding of incapacitation and a need for plenary guardianship services are required.[220] The Pennsylvania court denied the application for guardianship because the Pennsylvania guardianship statute only provides for a guardianship "upon a finding that the

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211. *Id.* at 881.
212. *Id.* at 883.
213. *Id.*
214. *Id.* at 884.
215. *Id.* at 890.
216. *Id.* at 886.
217. *Id.* at 891.
218. *See id.* at 892.
219. *In re* Peery, 556 Pa. 125, 127–28 (1999).
220. *Id.* at 129–30.

person is totally incapacitated *and* in need of plenary guardianship services."[221] In *In re Peery*, the individual with disabilities had a low I.Q. and was successful in meeting her needs with the help of her family.[222] The court concluded that the issue of capacity is irrelevant without a finding that the individual with disabilities is in need of plenary guardianship services; therefore, if the individual with disabilities was incapacitated, but there was not a need for plenary guardianship services, they would not meet the test for requiring guardianship.[223]

Both cases concern the construction of the state's guardianship statute, not the construction of the supported decision-making statute.[224] In practice, unless a family is preparing to avoid guardianship, a discussion regarding supported decision-making only arises in a contested guardianship hearing.[225] Even then, as evidenced by cases such as *Guardianship of A.E.*, "supports and services" discussions arise only peripherally, and courts typically defer to the trial court's discretion.[226] This lack of preparation can be avoided, specifically in situations where young adults with intellectual or developmental disabilities are preparing to leave high school.[227]

This paradigm has both positive and negative consequences.[228] There are several benefits to a supported decision-making discussion occurring in a guardianship hearing: a formal record is made, expert witnesses present evaluations, witness testimony, and a formal capacity adjudication.[229] Furthermore, there is a benefit that if a guardianship is properly denied or improperly granted, that decision may be appealed.[230] However, just as the appeals process can be a positive consequence, it can also be a negative one.[231] Litigating guardianship issues, such as the capacity of the proposed ward, can be a lengthy, expensive, and traumatic process.[232] Oftentimes it is not in the best interest of the proposed ward to be called as a witness or even

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221. 20 PA. STAT. AND CONS. STAT. ANN. § 5512.1(c) (West 2019).

222. *See In re Peery*, 556 Pa. at 129–30.

223. *Id.*

224. *See id.*; *In re Guardianship of A.E.*, 552 S.W.3d 873, 877 (Tex. App.—Fort Worth 2018, no. pet. h.).

225. *See In re Guardianship of A.E.*, 552 S.W.3d at 876.

226. *See id.* at 877.

227. *Id.*; *see* Sheida K. Raley, et al., *Age of Majority and Alternatives to Guardianship: A Necessary Amendment to the Individuals with Disabilities Education Improvement Act of 2004*, J. DISABILITY POL'Y STUD. 1, 4 (2020).

228. *See* Kristen Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 164–65 (2012).

229. *Id.*; *In re Guardianship of A.E.*, 552 S.W.3d at 877.

230. *In re Guardianship of A.E.*, 552 S.W.3d at 877.

231. *Id.*; *see* Alison Patrucco Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care*, 41 EMORY L. J. 633, 680 (1992).

232. Barnes, *supra* note 231, at 680.

be present in the courtroom.[233] Guardianship determinations, as illustrated by the case law, are fact-intensive, factor-intensive inquiries that change the daily lives of the proposed ward, guardians, and others.[234]

A. Person-Centered Planning

Texas Estates Code section 1002.0015 states that a supported decision-making agreement will be based on person-centered planning.[235] However, nowhere in the statute is person-centered planning defined.[236] Generally, person-centered planning is a "philosophy that applies the principle of self-determination" by which the disabled individual is included in the process of making decisions regarding his finances, daily decisions, and health care.[237] The true goal behind guardianship, alternatives to guardianship, and any other measure that limits the rights of individuals with disabilities should be the protection of the individual.[238] The idea of the state doing the protecting returns to the idea of *parens patriae*, where the state steps in as the parent and limits individual rights for the sake of protecting society.[239] Ideally, the supported decision-making paradigm will be person-centered, but no common definition of person-centered planning exists.[240] Cornell University's ILR School of Employment and Disability Institute describes person-centered planning as:

> a process-oriented approach to empowering people with disability labels. It focuses on the people and their needs by putting them in charge of defining the direction for their lives, not on the systems that may or may not be able to serve them. This ultimately leads to greater inclusion as valued members of both community and society.[241]

The Administration for Community Living defines person-centered planning as "a process for selecting and organizing the services and supports that an older adult or person with a disability may need to live in the

233. *Id.*
234. *Id.*; *see In re Guardianship of A.E.*, 552 S.W.3d at 882-83.
235. TEX. EST. CODE ANN. § 1002.0015(9).
236. *Id.*
237. *See* Johns, *supra* note 203, at 1548.
238. *Id.* at 1542.
239. *Id.*
240. *See* TEX. EST. CODE ANN. § 1357.002.
241. PEARSON CENTERED PLAN., *Person Centered Planning Education Site*, http://www.personcenteredplanning.org (last visited Jan. 29, 2020) [https://perma.cc/VLB2-UVD2] [hereinafter CORNELL U.].

community."[242] The Foundation for People with Learning Disabilities, an organization in the United Kingdom, describes person-centered planning as "a way of helping a person plan all aspects of their life, thus ensuring that the individual remains central to the creation of any plan which will affect them."[243] PACER's National Parent Center on Transition defines person-centered planning as "an ongoing problem-solving process used to help people with disabilities plan for their future."[244]

Notice that each description of person centered planning states that it is a process involving the person needing support.[245] Person-centered planning, at its core, is when the needs and wants of the principal are actively, reasonably, and fairly accounted for, allowing the principal to participate in the planning of their own care.[246] Recognizing the principal's preferences, involving the principle, and engaging the principle increases the principle's self-determination; a crucial element for the principle's self-esteem, development, and cognition.[247] A misconception exists, held by family members and professionals alike, that a person lacking decisional capacity also lacks the ability to be actively involved in the decision-making process.[248] This misconception goes against the widely held theory that capacity is not permanent at the time of determination; it is fluid and can grow and change as the person grows and changes.[249]

However, research indicates that individuals lacking decisional capacity can and desire to provide valuable and important information regarding their care, including preferences, goals, and values.[250] Additionally, individuals lacking decisional-capacity regularly express a desire to be actively involved in the decision-making process regarding their care.[251] Furthermore, research shows that involving individuals lacking decision-making capacity in decisions relating to their care can combat negative consequences caused by guardianship by helping the principle learn to become more self-sufficient,

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242. ADMIN. FOR COMMUNITY LIVING, *Person Centered Planning* (last visited Jan. 29, 2020), https://acl.gov/programs/consumer-control/person-centered-planning [https://perma.cc/45U4-4B9D] [hereinafter ACL].

243. LEARNING DISABILITIES, *Person-Centered Planning (PCP)*, https://www.learningdisabilities.org.uk/learning-disabilities/a-to-z/p/person-centred-planning-pcp (last visited Jan. 29, 2020) [https://perma.cc/4Q8J-ZNT8].

244. PACER, *Person-Centered Planning* (Jan. 29, 2020), https://www.pacer.org/transition/learning-center/independent-community-living/person-centered.asp [https://perma.cc/2M3V-NA4U] [hereinafter PACER].

245. *See* CORNELL U., *supra* note 241; ACL, *supra* note 242.; LEARNING DISABILITIES, *supra* note 243; PACER, *supra* note 244.

246. *See generally* Ciccarello & Henry, *supra* note 200, at 51 (explaining the practical issues of surrogate decision-making role); *see generally* Johns, *supra* note 203, at 1550.

247. Jameson, et. al, *supra* note 73, at 37–39.

248. *See id.*

249. *See* Lanier, *supra* note 61, at 166.

250. *See* Kohn et al., *supra* note 100, at 1140.

251. *Id.*; *see* Burke, *supra* note 34, at 880.

as well as retain cognitive functioning by exercising their cognitive skills.[252] Furthermore, involving the principle in his own care through a formalized process ultimately allows him to maintain his "dignity of risk" in the face of a system primed to divest him of his rights.[253]

Additionally, an individual entering into a supported decision-making agreement does not necessarily lack decisional capacity even if an individual lacks the capacity to contract.[254] Many states' supported decision-making statutes include provisions indicating that a supported decision-making agreement is not evidence of incapacity.[255] Keeping this in mind, the first step is to ensure that a supported decision-making agreement prioritizes person-centered planning.[256] The agreement must start with the drafting.[257] However, that is not where the responsibility ends.[258] It is important that the language of the supported decision-making agreement properly reflects the principal's specific needs and clearly identifies the supporter's duties.[259]

Another area that may help ensure that Supported Decision-Making Agreements are based on person-centered planning is to educate the supporter and the principle regarding the nature of the relationship.[260] In a supported decision-making agreement, the nature of the relationship is a fiduciary relationship.[261] While statute defines the relationship between the principal and the supporter, many supported decision-making agreements are entered into privately and without the assistance of an attorney.[262] Importantly, further education regarding the role of the supporter may be useful to re-enforce the nature of the relationship.[263]

Furthermore, family members often become supporters, and education regarding the transition from a familial relationship to a fiduciary relationship in person-centered planning would more than likely be beneficial.[264] In Texas, there is no case law regarding issues arising from supported decision-making agreements and person-centered planning.[265] The

252. *See* Kohn et al., *supra* note 100, at 1139.
253. *Id.* at 888.
254. *See* ACL, *supra* note 242.
255. *See infra* Section IV.C.
256. *See supra* Section IV.A.
257. *See infra* Section IV.C.
258. *See* Lanier, *supra* note 61, at 166.
259. *Id.*
260. *See* ACL, *supra* note 242.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination for People with Disabilities*, NATIONAL COUNCIL ON DISABILITY (last visited Sept. 13, 2020), [https://perma.cc/3GEF-KGJF].
265. *See generally* Deborah C. Hiser, *Texas is the First State to Recognize Supported Decision-Making as Alternative to Guardianship*, LEXOLOGY (Sept. 15, 2015), https://www.lexology.com/library/detail.aspx?g=ab7879ba-1e16-495d-8bf1-3c74f9eb84ec [https://perma.cc/KS8W-YU38].

restoration cases mentioned above highlight the lack of education and indicate that further education would be beneficial.[266] The supporter must be careful not to overstep his duty to assist, make any decisions for the principal, or unduly coerce the principal.[267] The goal of person-centered planning is to preserve the principal's autonomy and avoid guardianship, similar to the goal of supported decision-making agreements.[268]

B. Supported Decision-Making Statutes Compared

As mentioned above, person-centered planning is undefined in state statutes.[269] This section aims to analyze the relevant statutes in states that have formally recognized supported decision-making agreements for indicators of person-centered planning.[270] Notably, several states have only formally recognized supported decision-making agreements within the past few years. Because of this, a substantial amount of case law does not exist to compare the functionality of the following statutes in practice.[271] However, the statutory language remains crucial and plays a significant role in treating individuals with disabilities and functional impairments.[272]

Importantly, the only real power a supporter gains from a supported decision-making agreement is the power to obtain the principal's confidential records.[273] These records could include medical records, educational records, and financial records.[274] Regardless, a supported contract with the supporter is still necessary for the individual to have this power.[275]

Formal recognition of supported decision-making agreements mandates Texas courts to consider the strategy as an alternative before ordering a guardianship.[276] This formal recognition gives individuals an appealable ground and a potential cause of action for ineffective assistance of counsel if these considerations are not met.[277] However, in practice, these

266. *See supra* Section III.C.
267. *See supra* note 245.
268. *See supra* note 245.
269. *See supra* Section IV.A.
270. *See infra* Section IV.B.1–9.
271. *See infra* Section IV.B.1–9.
272. *See* Jameson, *supra* note 73.
273. *See* TEX. EST. CODE ANN. § 1357.054; ALASKA STAT. ANN. § 13.56.120 (West 2019); DEL. CODE ANN. tit. 16, § 9409A (West 2019); IND. CODE ANN. § 29-3-14-5(c)(5) (West 2019); NEV. REV. STAT. ANN. § 162C.220 (West 2019); 42 R.I. GEN. LAWS ANN. § 42-66.13-6(a)(2) (West 2019); WIS. STAT. ANN. § 52.10(2)–(3) (West 2019).
274. *Id.*
275. *Id.*
276. *See* TEX. EST. CODE ANN. §§ 1002.0015(9), 1101.001(b)(3-a).
277. *See id.* § 1101.001(b)(3-a).

considerations are often not met until the restoration proceeding.[278] Even then, they are often dismissed.[279]

Texas' supported decision-making act provides adults with disabilities, who are not considered incapacitated for the purpose of guardianship, with a less restrictive alternative to guardianship.[280] The important characteristics of supported decision-making agreements in general are as follows: (1) that the agreement is entered into voluntarily, without undue influence or coercion; (2) the relationship between the supported and the supporter is one of fiduciary duty; and (3) that the purpose of the supporter is to aid and assist the supported in making daily life decisions for themselves.[281] Texas prohibits the supporter from making any decisions for the supported.[282]

1. Texas

In Texas, a supporter has a duty to "(1) act in good faith; (2) act within the authority granted in [the supported decision-making agreement]; (3) act loyally and without self-interest; and (4) avoid conflicts of interest."[283] Individuals entering into a supported decision-making agreement are not required to use the model form in the Estates Code. However, a supported decision-making agreement in Texas is only valid if it is substantially similar to Texas' model form.[284] Generally, supporters may provide support to adult individuals with a disability in the form of comprehending the adult's life decisions, accessing information relevant to the decision, and communicating the adult's life decision to "appropriate persons."[285] Notably, the supporter is not to make decisions on behalf of the supported adult with a disability.[286] Additionally, Texas provides explicit protection from abuse and neglect for supported adults with disabilities by terminating the supported decision-making agreement if "the Department of Family and Protective Services finds that the adult with a disability has been abused, neglected, or exploited by the supporter."[287]

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278. *See In re Guardianship of A.E.*, 552 S.W.3d 873, 892 (Tex. App.—Fort Worth 2018, no pet. h.).
279. *Id.*
280. TEX. EST. CODE ANN. § 1357.003.
281. *See* TEX. EST. CODE ANN. § 1357.056; ALASKA STAT. ANN. § 13.56.180 (West 2019); DEL. CODE ANN. tit. 16, § 9410A (West 2019); IND. CODE ANN. § 29-3-14-7 (West 2019); NEV. REV. STAT. ANN. § 162C.200 (West 2019); 42 R.I. GEN. LAWS ANN. § 42-66.13-10 (West 2019); WIS. STAT. ANN. § 52.20 (West 2019).
282. TEX. EST. CODE ANN. § 13557.051(1).
283. *Id.* § 1357.056(a)(1)–(4).
284. *Id.*
285. *Id.* § 1357.056.
286. *Id.* § 1357.102.
287. *Id.* § 1357.053.

Since Texas formally recognized supported decision-making agreements in 2015, several other states have followed suit.[288] The states that have since adopted supported decision-making agreements are Delaware, Alaska, District of Columbia, Indiana, North Dakota, Nevada, Wisconsin, and Rhode Island.[289] These states have not formally recognized supported decision-making agreements for a significant length of time, with several of them having only started formally recognizing supported decision-making agreements within the past year.[290] However, the language in these statutes is worth noting as statutory language sets the tone for how the rights of adults with disabilities are treated in these states.[291]

2. Delaware

Delaware formally recognized supported decision-making agreements soon after Texas in September 2016.[292] Interestingly, Delaware provides that one of the purposes for formal recognition of supported decision-making agreements is to "give supporters legal status to be with the adult and participate in discussions with others when the adult is making decisions or attempting to obtain information."[293] In Delaware's supported decision-making statute, the supported adult is referred to as "the principal."[294] Like other supported decision-making agreement statutes, Delaware provides that the supporter may assist the principal in understanding, accessing, and communicating information.[295]

In addition to these common abilities of the supporter, Delaware provides that a supporter may: (1) make appointments for the principal; (2) "help the principal monitor information about the principal's affairs or support services, including keeping track of future necessary or recommended services"; and (3) "ascertain the wishes and decisions of the principal, assist in communicating those wishes and decisions to other persons, and advocate to ensure that the wishes and decisions of the principal are implemented."[296] These abilities of the supporter indicate that Delaware prioritizes giving the supporter as much ability as possible to support the principal.[297]

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288. *See infra* Section IV.B.2–9.
289. *See infra* Section IV.B.2–9.
290. *See infra* Section IV.B.2–9.
291. *See* Jameson et al., *supra* note 73.
292. DEL. CODE ANN. tit. 16, § 9406A (West 2019).
293. *Id.* § 9402A(a)(2) (West 2019).
294. *Id.* § 9406A (West 2019).
295. *See* TEX. EST. CODE ANN. § 1357.054; NEV. REV. STAT. ANN. § 162C.220 (West 2019); 42 R.I. GEN. LAWS ANN. § 42-66.13-6(a)(2) (West 2019); WIS. STAT. ANN. § 52.10(1)(a)–(d) (West 2019).
296. DEL. CODE ANN. tit. 16, § 9406A(a)(1)–(5) (West 2019).
297. *See id.*

Like Wisconsin, Delaware includes a presumption of capability section in its supported decision-making agreement statute.[298] Delaware provides that "the manner in which an adult communicates with others is not grounds for deciding that the adult is incapable of managing the adult's affairs."[299] This is significant because it indicates that Delaware is directly attacking the ways adults with disabilities are discriminated against.[300] Language such as this protects adults with disabilities by giving them a basis in law to communicate without fear of being presumed to lack the legal capacity to make decisions for themselves.[301] Also like Wisconsin, Delaware provides that "execution of a supported decision-making agreement may not be used as evidence of incapacity and does not preclude the ability of the adult who has entered into such an agreement to act independently of the agreement."[302]

3. Alaska

Alaska formally recognized supported decision-making agreements effective December 2018.[303] Alaska's supported decision-making statute may be the broadest of its kind.[304] In Alaska, "an *adult* may enter into a supported decision-making agreement."[305] Therefore, in Alaska, an adult is not required to have a disability in order to enter into a supported decision-making agreement.[306] Like other supported decision-making statutes, an adult must enter into the agreement voluntarily, without coercion or undue influence, and understand the nature and consequences of the agreement.[307] Alaska's option for any individual to enter into a supported decision-making agreement has the potential to be a useful planning tool for adults.[308]

Compared to Texas' and Delaware's supported decision-making statutes, Alaska uses language that takes the most person-centered and inclusive approach.[309] Instead of distinguishing between individuals with functional impairments, physical disabilities, or mental disabilities, Alaska refers to all adults in need of support or services in the same manner, by referring to them as "adults."[310] The effect of using this language is that any

298. *See infra* Section IV.B.8.
299. DEL. CODE ANN. tit. 16, § 9404A(b) (West 2019).
300. *See id.*
301. *See id.*
302. *Id.* § 9404A(c) (West 2019).
303. ALASKA STAT. ANN. § 13.56.010 (2018).
304. *See id.*
305. *Id.* (emphasis added).
306. *Id.*
307. *Id.*
308. *Id*.
309. *Id.*
310. *Id.*

individual who enters into a supported decision-making agreement has protection under Alaska's law.[311]

The duties of a supporter in Alaska dictate that "a supporter shall act with the care, competence, and diligence ordinarily exercised by individuals in similar circumstances."[312] This section functions as an admonishment regarding the fiduciary duty a supporter owes to the principal.[313] Apart from the duties of the supporter, Alaska enacted a statute regarding the decision-making assistance of the supporter.[314] In Alaska, as with other states formally recognizing supported decision-making agreements, a supporter may assist the principal with accessing and understanding information that is relevant to the decision needing to be made.[315] Alaska further provides that supporters may participate in "ascertaining the wishes and decisions of the principal, assisting in communicating those wishes and decisions to other persons, and advocating to ensure the implementation of the principal's wishes and decisions."[316]

Additionally, Alaska provides that a supporter may "accompany[] the principal and [participate] in discussions with other persons when the principal is making decisions or attempting to obtain information for decisions."[317] These provisions indicate that Alaska takes a person-centered approach to supported decision-making, even without explicitly providing that supported decision-making in Alaska will be based on person-centered planning.[318]

Alaska plainly articulates which activities are prohibited for supporters in section 13.56.110.[319] In Alaska, like in other states, a supporter is prohibited from activities that destroy the autonomy and self-determination of the principal.[320] Such activities include undue influence, making decisions for the principal, signing on behalf of the principal, obtaining information without the consent of the principal, or using information acquired without the consent of the principal.[321] In addition to protecting the principal's self-determination and autonomy, Alaska provides protection for the principal's sensitive information, especially considering the vulnerable state that principals are in.[322] Through Alaska's formal recognition of supported

311. *Id.*
312. *Id.* § 13.56.090 (2018).
313. *See id.*
314. *Id.* § 13.56.100(3) (2018).
315. *Id.*
316. *Id.*
317. *Id.* § 13.56.100(4) (2018).
318. *See id.*
319. *See id.* § 13.56.110 (2018).
320. *See id.*
321. *See id.* § 13.56.110(1)–(5) (2018).
322. *See id.* § 13.56.120 (2018).

decision-making agreements, Alaska holds supporters to a higher standard of duty by taking extra measures to protect and dispose of information collected on behalf of the principal.[323]

Alaska provides further protection for the principal by providing that "a decision that a principal is incapable of managing the principal's affairs may not be based on the manner in which the principal communicates with others."[324]

4. District of Columbia

The District of Columbia formally recognized supported decision-making agreements in May 2018.[325] Notably, the District of Columbia formally recognizes a "covered education agreement," which means "a supported decision-making agreement that is entered into for the sole purpose of providing supported decision-making for the supported person's education."[326] The District of Columbia defines disability to mean "a physical or mental impairment that substantially limits one or more major life activities of a person."[327]

5. Indiana

Indiana formally recognized supported decision-making agreements effective July 1, 2019.[328] Indiana adopted the same definition of supported decision-making as Texas.[329] Both Texas and Indiana define supported decision-making as:

> a process of supporting and accommodating an adult with a disability to enable the adult to make life 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.[330]

In Indiana, there is a presumption of validity regarding a supported decision-making agreement that complies with section 7 of the supported

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323. *Id.*
324. *See id.* § 13.56.150(a) (2018).
325. *See* D.C. CODE ANN. § 7-2131(4) (West 2020).
326. *Id.*
327. *See id.* § 7-2131(5).
328. *See* IND. CODE ANN. § 29-3-14-1 (West 2020).
329. *See id.*; *see also* TEX. EST. CODE ANN. § 1357.002(3) (providing a definition very similar to that of the Indiana statute).
330. *See* IND. CODE ANN. § 29-3-14-1; TEX. EST. CODE ANN. § 1357.002(3).

decision-making agreement chapter.[331] Only actual knowledge of the invalidity of the supported decision-making agreement defeats the presumption.[332] Section 7 of Indiana's supported decision-making statute describes the contents of a valid supported decision-making agreement in Indiana.[333] In Indiana, the contents of this kind of agreement are less strict than the contents of a supported decision-making agreement in Texas.[334] For example, Section 7(a) provides that a supported decision-making agreement in Indiana "must: (1) name at least (1) supporter; (2) describe the decision making assistance that each supporter may provide to the adult and how supporters may work together; and (3) if appropriate, be executed by the adult's guardian."[335]Section 7(c) indicates that "[a] supported decision making agreement must be (1) in writing; (2) dated; and (3) signed by the [supported] adult in the presence of a notary."[336] Section 7(d) provides that the agreement must contain a "separate consent signed by each supporter named in the agreement, indicating the supporter's: (1) relationship to the adult; (2) willingness to act as a supporter; and (3) acknowledgment of the duties of a supporter."[337]

Section 7(b) details what provisions a supported decision agreement in Indiana may contain.[338] In Indiana, a supported decision-making agreement may appoint multiple supporters, alternate supporters, or authorize supporters to share information with other supporters named in the agreement.[339] Additionally, Indiana's supported decision-making statute does not explicitly prohibit the supporter from making decisions for the principle.[340] Instead, the supporter is prohibited from "acting outside the scope of authority provided in the supported decision making agreement."[341]

6. North Dakota

North Dakota adopted supported decision-making agreements in August 2019.[342] However, North Dakota's definition of supported decision-making is more narrow than that of Texas and Indiana because North Dakota identifies specific actions and conduct that constitute "supported decision-making."[343] North Dakota defines "supported

331. *See* IND. CODE ANN. § 29-3-14-10.
332. *Id.*
333. *See id.* § 29-3-14-7.
334. *Compare id.*, *with* TEX. EST. CODE ANN. § 1357.056.
335. IND. CODE ANN. § 29-3-14-7(a)(1)–(3).
336. *Id.* § 29-3-14-7(c).
337. *Id.* § 29-3-14-7(d)(1)–(3).
338. *See id.* § 29-3-14-7(b).
339. *See id.* § 29-3-14-7(b)(1)–(3).
340. *See id.* § 29-3-14-5.
341. *See id.* § 29-3-14-5(c)(4).
342. *See* N.D. CENT. CODE ANN. § 30.1-36-01.
343. *See id.*

decision-making" as assistance from a person of a named individual's choosing:

> (a) to identify, collect, and organize documents that apply to a decision the named individual is considering;
> (b) to identify, collect, and organize information that may be helpful to the named individual when making a decision;
> (c) to help the named individual understand documents;
> (d) to identify choices available for a responsible decision;
> (e) to identify advantages and disadvantages of available choices;
> (f) to communicate any decision by the named individual to others at the request of the named individual; or
> (g) to explain the decision-making process allowed under this subsection to the court in any proceeding to create or modify a guardianship or conservatorship for the named individual.[344]

7. Nevada

Nevada formally recognized supported decision-making agreements in July 2019.[345] Nevada's definition of supported decision-making is likely the most broad because Nevada leaves supported decision-making undefined.[346] Instead, Nevada defines a "supported decision-making agreement" as "an agreement between a principal and one or more supporters that is entered into pursuant to this chapter."[347]

8. Wisconsin

Wisconsin limits supported decision-making agreements to adults with "functional impairments."[348] Wisconsin defines "functional impairment" to mean "any of the following: (a) A physical, developmental, or mental condition that substantially limits one or more of an individual's major life activities, including any of the following: (1) capacity for independent living, (2) self-direction, (3) self-care, (4) mobility, (5) communication, and (6) learning."[349] The scope of Wisconsin's supported decision-making statute explicitly limits the supporter's role to assisting the "adult with a functional

344. *Id.* § 30.1-36-01(3).
345. *See* NEV. REV. STAT. ANN. § 162C.200 (West 2019).
346. *See id.* § 162C.020.
347. *Id.* § 162C.080.
348. *See* WIS. STAT. ANN. § 52.18(1) (West 2019).
349. *Id.* § 52.01(2)(a).

impairment" with making life decisions, "without making decisions on behalf of the adult with a functional impairment."[350]

Wisconsin's supported decision-making statute categorizes the supporter's role into three broad categories for assisting the adult with a functional impairment as follows: (1) understanding options, responsibilities, and consequences of life decisions; (2) accessing information relevant to the life decisions; and (3) communicating the adult's decision to the appropriate individuals.[351] Among the states that formally recognize supported decision-making agreements, Wisconsin appears to use the most person-centered language and the most inclusive language.[352] The scope of Wisconsin's supported decision-making statute explicitly provides that "a supporter is not a surrogate decision maker for the adult with a functional impairment."[353] This language is significant and further distinguishes supported decision-making agreements from other alternatives in Wisconsin.[354]

Furthermore, Wisconsin explicitly provides that a supported decision-making agreement executed in Wisconsin may not be used against the adult with a functional impairment as "evidence of incapacity or incompetency."[355] This language is significant because it is a protection of the principal's right to be the final decision-maker in his life.[356] Additionally, that same statute provides that a supported decision-making agreement in Wisconsin does not prohibit an adult with a functional impairment from "acting independently of the agreement."[357] This language is person-centered because it focuses on the autonomy of the adult with a functional impairment and not the autonomy of the supporter.[358]

Like supported decision-making agreements in other states, supported decision-making agreements in Wisconsin extend until terminated at the option of either party, or if there is proof of neglect, abuse, or criminality on behalf of the supporter.[359] In addition, Wisconsin provides for alternative methods for the principal to revoke the supported decision-making agreement.[360] In Wisconsin, an adult with a functional impairment may revoke the supported decision-making agreement by: (1) physically destroying it; (2) executing a written statement, signed and dated by the adult

350. *Id.* § 52.10.
351. *See id.*
352. *See id.* § 52.10–.20.
353. *Id.* § 52.10(2).
354. *Id.*
355. *Id.* § 52.03.
356. *See id.*
357. *Id.*
358. *Id.*
359. *Id.* § 52.14.
360. *Id.* § 52.14.

with a functional impairment, expressing his intent to revoke the supported decision making agreement; or (3) by the adult with a functional impairment verbally expressing his intent to revoke the supported decision making agreement in the presence of two witnesses.[361] On the other hand, a supporter may revoke the supported decision-making agreement by giving notice to the adult with a functional impairment, unless the agreement provides otherwise.[362]

9. Rhode Island

Rhode Island formally recognized supported decision-making agreements in July 2019.[363] Rhode Island's supported decision-making agreement statute is substantially similar to Delaware's.[364] Rhode Island defines "disability" to mean "a physical or mental impairment that substantially limits one or more major life activities of a person."[365] Additionally, Rhode Island defines "supported decision-making" as

> a process of supporting and accommodating an adult 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 how the adult wants to work, without impeding the self-determination of the adult.[366]

In Rhode Island, a supported decision-making agreement is valid only if: (1) the agreement is in writing and contains all of the requisite statutory elements; (2) the agreement is dated; and (3) in the presence of two adult witnesses or before a notary each party has signed the agreement.[367] This formalized procedure provides greater protection for the principal and provides a data collecting mechanism, potentially solving the lack of data that supported decision-making agreements suffer from.[368]

In general, the states that have since formally recognized supported decision-making agreements use language that allows the principal, or supported person, to manage his affairs and conduct his life as independently as possible.[369] However, because states have only formally recognized

361. *Id.*
362. *Id.*
363. 42 R.I. GEN. LAWS ANN. § 42-66.13-3 (West 2019).
364. *See id.*; *see also* DEL. CODE ANN. tit. 16, § 9406A (West 2019).
365. 42 R.I. GEN. LAWS ANN. § 42-66.13-3(3).
366. *Id.* § 42-66.13-3(8).
367. *Id.* § 42-66.13-5(c)(1)–(3).
368. *Id.*
369. *See* TEX. EST. CODE ANN. § 1357.003; DEL. CODE ANN. tit. 16, § 9406A (West 2019); ALASKA STAT. ANN. § 13.56.010; D.C. CODE ANN. § 7-2131(4) (West 2019); IND. CODE ANN. § 29-3-14-1 (West 2019); N.D. CENT. CODE ANN. § 30.1-36-01 *et. seq.* (West 2019); NEV. REV. STAT. ANN. § 162C.200

supported decision-making agreements for a short period of time, the problems that may arise are yet to be seen.[370]

C. Supported Decision-Making Clinics and Pilot Projects

Various states have implemented pilot projects to assist individuals seeking support in executing supported decision-making agreements.[371] Additionally, several states that have not yet formally recognized supported decision-making have implemented supported decision-making pilot projects.[372] National Resource Center for Supported Decision-Making is a resource individuals seeking to support someone with disabilities can use to access information, resources, tools, and pilot projects in their state.[373] Examples of pilot projects include the National Resource Center for Supported Decision Making, the Center for Public Representation/Nonotuck Resource Associates Supported Decision Making Pilot Project, the Autistic Self-Advocacy Network Supported Decision Making Toolkit, the Texas Council for Developmental Disabilities, Guardianship Alternatives: Supported Decision Making, and many others.[374] These projects help to educate people about their options and give them the power and knowledge to make the right decisions for themselves.[375]

D. How Supported Decision-Making Agreements are Working in Practice

Since becoming formally recognized in Texas in 2015, it is difficult to assess whether supported decision making agreements are being utilized in favor of guardianship.[376] The reality is a lawyer and the court system are not necessary for an individual to execute a supported decision-making agreement.[377] Many forms are available online for individuals to download and fill out themselves.[378] As a result, few lawyers actually have experience

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(West 2019); WIS. STAT. ANN. § 52.18(1) (West 2019); 42 R.I. GEN. LAWS ANN. § 42-66.13-3 (West 2019).

370. *See supra* Section IV.B.

371. NAT'L RES. FOR SUPPORTED DECISION-MAKING, *In Your State*, http://supporteddecisionmaking.org/states (last visited Feb. 5, 2019) [perma.cc/CK7Z-WSP6].

372. *Id.*

373. *Id.*

374. ACLU, *Supported Decision-Making Resource Library*, https://www.aclu.org/other/supported-decision-making-resource-library (last visited Feb. 5, 2019) [perma.cc/8RJ9-X26D].

375. *Id.*

376. *See supra* Section III.B.

377. *See* TEX. EST. CODE ANN. § 1357.056(a).

378. *See* ACLU, *supra* note 373.

with supported decision-making agreements.[379] However, this does not create an enforceability problem regarding supported decision-making.[380]

For example, in Texas, for an individual to execute a supported decision making agreement, it needs to only be substantially similar to the form provided in the Estates Code.[381] The effect of an individual's ability to enter into a supported decision-making agreement independent of counsel is that the cost is minimal, while the benefits are great.[382] Those opposed to supported decision-making agreements argue that supported decision-making agreements are difficult to enforce.[383] However, this argument likely arises from a misunderstanding of how supported decision-making agreements work and function in practice.[384]

A problem that arises in practice is that many probate lawyers representing clients in guardianship proceedings are unaware or have limited knowledge regarding supports and services.[385] As a result, many clients are underserved and may find themselves in overbroad, court-ordered guardianship.[386]

Another area of unsettled law that may pose some problems is whether other parties may be bound by supported decision-making agreements.[387] Areas in which this may come up is in the medical setting or if a principal consults with a lawyer.[388] The issue becomes, is the doctor or lawyer bound by the supported decision-making agreement?[389]

V. PROPOSALS

A. Educate Texas School Districts

More education regarding alternatives to guardianship should occur in Texas public schools as young adults with disabilities transition out of high school.[390] Recalling Timberley and Tonya's story above, Tanya discussed how the only information she received from Timberley's school was information regarding guardianship.[391] Tanya discussed that she only

379. *See* THE NATIONAL RESOURCE CENTER FOR SUPPORTED DECISION-MAKING, *Survey on Supported Decision-Making in Practice* 1, 10–14 (Mar. 31, 2016).
380. *Id.*
381. *See* TEX. EST. CODE ANN. § 1357.056(a).
382. *Id.*
383. Ciccarello & Henry, *supra* note 200, at 52.
384. *Id.*
385. *See* Kohn, *supra* note 100.
386. *Id.*
387. *See* Rynders, *supra* note 13, at 28.
388. *Id.*
389. *Id.*
390. *See Timberley & Tonya*, *supra* note 1.
391. *Id.*

discovered supported decision-making after deciding against guardianship and conducting large amounts of research on her own.[392] Unfortunately, plenary guardianships have become the default option for students with intellectual disabilities transitioning to the age of majority.[393] Oftentimes, in those transition meetings, school administrators encourage parents to apply for guardianship of their children with disabilities.[394] It is important that schools and parents are continually educated on all of the following options: supports and services available to them, alternatives to guardianship, or even limited guardianships.[395]

Texas school districts can begin the education process by inviting organizations such as Disability Rights Texas to speak about supported decision-making agreements, answer questions, or donate pamphlets.[396] Additionally, knowledgeable school lawyers can attend IEP reviews, ARD meetings, and transition meetings to provide information and general legal implications of supported decision-making agreements to parents looking for other options.[397]

There are likely many other families similar to Timberley and Tanya's in Texas and in other states across the U.S. who desire to support a loved one with disabilities or functional impairments and may only need access to information to make an informed decision.[398]

B. Reorganize the Statutory List of Alternatives to Guardianship

The statutory list of alternatives to guardianship should be reorganized.[399] Currently, supported decision-making agreements are the ninth option on the list under the statutory listed alternatives.[400] If the statute is read as a hierarchy, does that indicate that supported decision-making agreements are the last option before guardianship?[401] This particular issue may seem minor, but it is worth considering.[402] In practice, even though consideration of alternatives to guardianship and the utility of supports and services is mandated, it does not always happen in reality.[403] Drafting the

392. *Id.*
393. *See* Jameson et al., *supra* note 73, at 2–3.
394. Erin M. Payne-Christiansen & Patricia L. Sitlington, *Guardianship: Its Role in the Transition Process for Students with Developmental Disabilities*, 43 EDUC. & TRAINING IN DEVELOPMENTAL DISABILITIES, no. 1, 2008, at 15.
395. *Id.*
396. *See supra* Section IV.C.
397. *See supra* Section IV.C.
398. *See Timberley & Tonya*, *supra* note 1.
399. *See* TEX. EST CODE ANN. § 1002.0015.
400. *Id.*
401. *Id.*
402. *Id.*
403. *See supra* Section III.B.

statute in a way that highlights the importance of considering supported decision-making agreements may be helpful.[404] As noted throughout this comment, language is crucial and meaningful.[405] Moving the option of supported decision-making agreements higher on the list of statutory alternatives to guardianship will likely suggest the importance of the option as an alternative.[406]

If in the future data becomes available and the number of guardianships is not decreasing, re-prioritizing the statute may be a wise thing to do.[407] Another reason to re-prioritize the alternatives to the guardianship statute is that it signals to other states considering formally recognizing supported decision-making agreements that Texas values preserving the self-determination of its citizens requiring extra supports and services.[408] This may prompt other states to consider formal recognition of supported decision-making agreements.[409]

Furthermore, it is reflected in the case law that the record of alternatives to guardianship that have been considered, including supports and services, is not often preserved beyond the recommendation of a court-appointed expert.[410] Even then, most often the guidance of the appointed expert is taken and followed by the court.[411] A more substantial and reliable record should be kept and recorded so that it can be better relied upon on appeal.[412] The benefit of supported decision-making agreements is that they are a cost-efficient method of avoiding guardianship that provides the principal with legal protection.[413] However, in the event that a guardianship proceeding occurs, which it often does, thorough investigation and a well-preserved record provides extra protection to the interests of the proposed ward.[414]

C. Include a Definition of Person-Centered Planning

A definition of person-centered planning should be included in the supported decision-making agreement statute.[415] Even though the Estates Code provides that supported decision-making agreements will be based on person-centered planning, it could be helpful to include a definition of what

404. *See supra* Section III.B.
405. *See* TEX. EST. CODE ANN. § 1357.
406. *See id.* § 1002.0015.
407. *See* source cited *supra* notes 120–32.
408. *See supra* Section IV.B.
409. *See supra* Section IV.B.
410. *See* case cited *supra* notes 109–19.
411. *See* case cited *supra* note 133.
412. *See* case cited *supra* notes 204–18.
413. *See supra* Part IV.
414. *See supra* Section III.C.
415. *See supra* Section IV.A.

this will mean.[416] Because supported decision-making agreements are private between two individuals, if they are going to be formally recognized in a statute, it could help to implement a standard by which they should be held instead of leaving it up to the courts.[417] By including a definition of the standard, states can more readily gauge whether or not supported decision-making agreements are working and being entered into by parties.[418]

Noting the six legal barriers to limited guardianships identified by Lanier, the standard of review barrier is the most pertinent to this discussion about supported decision-making agreements in Texas.[419] Lanier notes that under the relevant case law, plenary guardianships are upheld as a result of the high standard of review used by courts.[420] Because the data reflects that tailored orders are not often requested at the trial court level and the high standard of review prevents limited guardianships on appeal, considering supported decision-making agreements, when appropriate, will likely mitigate this barrier by preventing a plenary or more restrictive guardianship from being executed or removed in favor of a more limited guardianship.[421]

D. To Remedy Lack of Data, Formalize the Execution Process for Supported Decision-Making Agreements in Texas

One of the problems frequently identified by scholars is the lack of data available to identify whether supported decision-making agreements are being executed in favor of guardianships.[422] Without this data, it is difficult to determine whether they are effective and enforceable.[423] A problem contributing to the lack of enforceability is the informal nature of the agreements themselves.[424] In response to this problem, an act blending the decorum of a court proceeding with the informality of the agreement would be a compromise to the formality and privacy of an agreement while still providing valuable data for courts, practitioners, and prospective clients.[425] Already, Texas guardianships require guardians to submit annual reports to the court that include updates on the status of the guardianship, improvements, challenges, and financials so that the courts are aware of what is going on with the guardianship.[426] An act requiring supported

416. *See supra* note 230.
417. *See supra* Section IV.B.1.
418. *See supra* Part IV.
419. *See supra* note 61.
420. *See supra* note 61.
421. *See supra* Section III.B.
422. *See supra* Section IV.C.; *see also* Section IV.D.
423. *See supra* Section IV.D.
424. *See supra* Section IV.B.1.
425. *See supra* Part III.
426. *See* TEX. EST. CODE ANN. § 1163.101(a).

decision-making agreements in Texas to be submitted to the court for approval to create a record of how many agreements are being executed would reveal the seriousness of the agreement being executed.[427] Supported decision-making agreements, in theory, do not need formal recognition to be executed or to be effective.[428] However, statutory recognition and codification is a big win for the disability rights community.[429]

In the alternative, Texas could require supported decision-making agreements to be executed in the presence of two witnesses or in the presence of a notary, similar to Rhode Island's process of execution.[430] This procedure would create a record that provides data for organizations, attorneys, and other interested parties to continue to improve available alternatives to guardianship.[431]

VI. CONCLUSION

Since Texas formally recognized supported decision-making agreements in 2015, little data has been collected to conclusively determine the effectiveness of supported decision-making agreements in practice.[432] This lack of data, however, should not deter individuals, educators, administrators, or attorneys from disseminating information, educating, and counselling families regarding supported decision-making Agreements.[433] The cases discussed above teach that the best practice is to execute a supported decision-making agreement if necessary and possible.[434] Otherwise, undoing a guardianship is a fact-intensive inquiry and difficult to achieve.[435] Therefore, more education regarding supports and services is crucial to ensure that supported decision-making agreements are operating according to a person-centered standard.[436] In particular, more education should occur in Texas public schools as students with disabilities transition to the age of majority.[437]

Texas is in a strategic position as a progressive leader regarding supported decision-making agreements and has the ability to set an example for other states to follow.[438] Reviewing supported decision-making statutes

427. *See supra* Part IV.
428. *See supra* Section IV.B.1.
429. *See supra* Section IV.
430. *See supra* note 363.
431. *See supra* note 363.
432. *See supra* note 85.
433. *See supra* note 85.
434. *See supra* notes 109, 206.
435. *See supra* notes 109, 206.
436. *See supra* Section V.A.
437. *See supra* Section V.A.
438. *See supra* section IV.B.

from other states reveals the wide variety of approaches taken.[439] Some states choose to limit supported decision-making agreements to individuals with disabilities, others to those with functional impairments, while Alaska only limits supported decision-making agreements to adults.[440] Despite the approach that a state chooses to take, the language the state uses is still important—legislatures should be mindful of who the statute affects and keep a person-centered approach in mind.[441] Texas appears to take a moderate approach, not overly protective but not so relaxed that individuals needing support end up going without it.[442]

Ultimately, guardianship law impacts the lives of individuals living with disabilities more than those without them.[443] Because of this, attorneys, investigators, and judges owe a higher duty to individuals living with disabilities to provide them with opportunities and options to live without the encumberment of a guardianship.[444] The combination of increased education, re-prioritizing the alternatives to the guardianship statute, and a focus on person-centered planning will improve the quality of life of individuals with disabilities by increasing their self-determination.[445] As a result, courts will be able to focus on guardianship cases needing serious attention and allow more individuals living with disabilities the opportunity to live independently.[446]

439. *See supra* Section IV.B.
440. *See supra* Section IV.B.3.
441. *See supra* Section IV.B.
442. *See supra* Section IV.B.1.
443. *See supra* Part III.
444. *See supra* Part III.
445. *See supra* Part V.
446. *See supra* Part V.