

Department of Legislative Services  
Maryland General Assembly  
2022 Session

FISCAL AND POLICY NOTE  
Third Reader - Revised

Senate Bill 559

(Senator Waldstreicher, *et al.*)

Judicial Proceedings

Judiciary

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Estates and Trusts - Supported Decision Making

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This bill (1) authorizes the use of supported decision making; (2) establishes a process for entering a supported decision-making agreement, and the effect of an agreement; (3) outlines the role of a supporter; (4) establishes specified immunity for third parties; and (5) makes a related change to the definition of “incapable of making an informed decision” under the Health Care Decisions Act.

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Fiscal Summary

**State Effect:** The bill does not directly affect State finances.

**Local Effect:** The bill is not anticipated to materially affect local government finances.

**Small Business Effect:** None.

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Analysis

**Bill Summary:** The stated purpose of Title 18 (Supported Decision Making) of the Estates and Trusts Article, established by the bill, is to assist adults by (1) obtaining support for the adult to make, communicate, or effectuate decisions that correspond to the adult’s will, preferences, and choices and (2) preventing the need for the appointment of a substitute decision maker, including a guardian of the person or property. The title must be liberally construed and applied to promote its underlying purposes and policies.

*Supported Decision Making*

“Supported decision making” means a process by which an adult, with or without having entered a supported decision-making agreement, utilizes support from a series of

relationships in order to make, communicate, or effectuate the adult's own life decisions. An adult may use supported decision making to (1) increase the adult's self-determination; (2) prevent the need for the appointment of a substitute decision maker; or (3) limit or terminate the use of a substitute decision maker.

### *Supported Decision-making Agreements*

A "supported decision-making agreement" means an arrangement between an adult and a supporter or supporters that describes (1) how the adult uses supported decision making to make decisions; (2) the rights of the adult; and (3) the responsibilities of the supporter or supporters. A supported decision-making agreement must be documented in writing, dated, contain specified information, and be witnessed by two adults, as specified. The agreement may appoint more than one supporter and appoint an alternate to act in place of a supporter in circumstances specified in the agreement.

All adults are presumed capable of making a supported decision-making agreement, and the manner in which an adult communicates with others is not grounds for determining that the adult is incapable of making, changing, or revoking a supported decision-making agreement. A supported decision-making agreement may not be used as evidence of incapacity or preclude an adult's ability to act independently of the agreement or access the adult's own personal information without a supporter.

The execution of a supported decision-making agreement may not be a condition of participating in any activity, service, or program. The availability of a supported decision-making agreement is not intended to limit the informal use of supported decision making.

An adult utilizing a supported decision-making agreement may (1) revoke the agreement at any time, orally, in writing, or otherwise, by expressing the adult's specific intent to revoke the agreement and (2) receive any support needed from an individual of the adult's choosing to revoke the agreement.

An adult may voluntarily, without undue influence or coercion, enter into a supported decision-making agreement with a supporter or supporters; however, if a person under guardianship enters into an agreement, the agreement does not supplant the authority of the adult's guardian. However, a court may authorize the limitation or removal of guardianship due to the existence of a supported decision-making agreement. A guardian may not prevent an adult from entering into a valid supported decision-making agreement that does not supplant the authority of the guardian, without good cause. A supported decision-making agreement does not (1) supplant the authority of an agent under a properly executed power of attorney or advance directive or (2) supplant or grant authority or agency powers contemplated by a power of attorney or an advance directive. The availability of a

supported decision-making agreement is not intended to preclude judicial consideration of informal supported decision-making arrangements as a less restrictive alternative to guardianship.

### *Role of a Supporter*

A “supporter” is an individual selected by an adult to provide support in making, communicating, or effectuating the adult’s own life decisions. If an adult voluntarily enters into a supported decision-making agreement with a supporter or supporters, the adult may authorize support in making decisions in any area the adult chooses including (1) gathering information; (2) understanding and interpreting information; (3) weighing options and alternatives to a decision; (4) understanding the consequences of decisions; (5) providing support and advocacy to implement a decision; and (6) under the adult’s explicit authorization, participating in conversations with third parties.

The relationship between the adult and the supporter must be one of trust and confidence that preserves the decision-making authority of the adult. A supporter has specified responsibilities, including avoiding conflicts of interest, maintaining records, and keeping any records and information obtained under a supported decision-making agreement confidential and privileged (subject to testimonial privilege limitations under the Courts Article) and secure from unauthorized access, use, or disclosure. A supporter must also (1) deliver a copy of the supported decision-making agreement to any duly appointed guardian; (2) make a good faith effort to determine if the adult has a fully executed power of attorney, advance directive, or revocable trust agreement; and (3) deliver a copy of the supported decision-making agreement to any agent or trustee, as appropriate, designated under a power of attorney, advance directive, or revocable trust agreement, unless the adult expressly objects to the delivery. A supporter may not:

- make decisions on behalf of the adult;
- exert undue influence on the adult;
- coerce the adult;
- obtain information about the adult without the adult’s consent;
- enforce decisions made by the adult; or
- act outside the authority granted in the supported decision-making agreement.

Certain individuals are disqualified from acting as a supporter, including a minor, an individual against whom the adult has a peace order or protective order, an individual who has been convicted of financial exploitation, and an individual who is the subject of a civil or criminal order prohibiting contact with the adult.

A supporter may resign by written or oral notice to the adult, any remaining supporters, and any third parties who have a copy of the supported decision-making agreement. If a supporter resigns, dies, becomes incapable, or becomes unable to act as a supporter for any other reason and there is no alternate supporter, the authority given to the supporter is suspended.

### *Immunity Provisions*

A third party who in good faith relies on decisions made under a supported decision-making agreement, is not subject to civil or criminal liability, or discipline for unprofessional conduct, for complying with an adult's decision in accordance with a supported decision-making agreement or otherwise complying with a supported decision-making agreement based on a good faith assumption that the supported decision-making agreement was valid when made and not revoked or abrogated. A third party who declines to honor a decision made by an adult utilizing a supported decision-making agreement or fails to comply with a supported decision-making agreement is also not subject to civil or criminal liability, or discipline for unprofessional conduct, if the third party had a reasonable good faith belief that the agreement was invalid, revoked, or abrogated, or a supporter was coercing the adult, unduly influencing the adult, or otherwise acting outside the scope of the agreement. However, a third party does not have immunity from actions arising from other specified allegations.

### *Health Care Decision Making*

The bill establishes, under the Health Care Decisions Act, that a competent adult individual who is able to communicate with support, including supported decision making in accordance with the bill, is not considered incapable of making an informed decision about the provision, withholding, or withdrawal of a specific medical treatment or course of treatment.

**Current Law:** Sections 13-705 and 13-201 of the Estates and Trusts Article establish the process for the appointment of a guardian of the person, and a guardian of the property, of a disabled person, respectively. On petition and after any notice or hearing, a court may appoint a guardian of the person and/or a guardian of the property of a disabled person. A guardian of the person must be appointed if the court determines from clear and convincing evidence that (1) a person lacks sufficient understanding or capacity to make or communicate responsible personal decisions (including provisions for health care, food, clothing, or shelter) because of any mental disability, disease, habitual drunkenness, or addiction to drugs and (2) no less restrictive form of intervention is available that is consistent with the person's welfare and safety. A guardian of the property must be appointed if the court determines that the person (1) is unable to effectively manage the person's property and affairs because of physical or mental disability, disease, habitual

drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, detention by a foreign power, or disappearance and (2) the person has or may be entitled to property or benefits which require proper management.

Under the Health Care Decisions Act, a “competent individual” means a person who is at least age 18 or who has the same capacity as an adult to consent to medical treatment, as specified, and who has not been determined to be incapable of making an informed decision. “Incapable of making an informed decision” means the inability of an adult patient to make an informed decision about the provision, withholding, or withdrawal of a specific medical treatment or course of treatment because the patient is unable to understand the nature, extent, or probable consequences of the proposed treatment or course of treatment, is unable to make a rational evaluation of the burdens, risks, and benefits of the treatment or course of treatment, or is unable to communicate a decision. A competent individual who is able to communicate by means other than speech may not be considered incapable of making an informed decision.

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### **Additional Information**

**Prior Introductions:** None.

**Designated Cross File:** HB 529 (Delegate Pena-Melnyk, *et al.*) - Judiciary.

**Information Source(s):** Judiciary (Administrative Office of the Courts); Register of Wills; Maryland Department of Health; Department of Legislative Services

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