

*20th Annual Changes and Trends Affecting
Special Needs Trusts*



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*Supported Decision-Making Concepts
in an SNT*

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I. Introduction

Supported Decision-Making has become a focus of many advocates for people with disabilities and seniors, typically with the goal of reducing the need for guardianships or conservatorships in favor of the person with a disability or senior making their own decision with assistance. The Supported Decision-Making process allows the senior or person with a disability (commonly referred to as the “Decider”) to select friends, family, or professionals (commonly referred to as “Supporters”) to assist with gathering information in order to assist the Decider in making informed decisions about their own lives. While Supported Decision-Making Agreements may be new to many practitioners, the concept has been in practice for decades in Australia, Canada, Ireland, Israel, Sweden, Bulgaria, Croatia and Peru¹. In particular, Canada is internationally recognized for its leadership in legislated Supported Decision-Making. British Columbia’s *Representation Agreement Act*² is considered pioneer legislation, as it was one of the very first self-contained Supported Decision-Making (SDM) statutes in the world. Additionally, although British Columbia’s *Representation Agreement Act* was primarily developed to support people with developmental disabilities, the act is completely disability-neutral and assists all people with cognitive limitations or diminished capacity.

SDM certainly has its challenges for the Elder Law or Special Needs Trust practitioner. This presentation will focus not only on attorneys, but also fiduciaries, financial planners and other professionals involved in a Decider’s life. The history and scope of SDM will be provided, addressing the challenges that professionals may encounter with SDM. Incorporating the concept of Supported Decision-Making in drafting and administration of Special Needs Trusts (SNTs) will be reviewed, stressing beneficiary empowerment and settlor intent. Even in states that lack a SDM statute, it is prudent for all professionals to be familiar with its principles.

II. Supported-Decision Making: Goals

Putting the Decider at the helm of the decision-making process is a crucial and commendable goal. Understandably, one of the primary objectives of SDM advocates is the empowerment of Deciders, who, in addition to potentially having diminished capacity, may also be vulnerable to undue influence, fraud, or poor decision-making. SDM assists a person with a disability or senior with a cognitive challenge to assess all information about decisions that affect their lives, and have the information gathered by a Supporter whom they trust. In addition to information gathering, Supporters are tasked with communicating the relevant information effectively to the Decider in a manner they can understand. This translation and communication role is pivotal in empowering a Decider to make a fully informed decision, making SDM an effective tool for Deciders to have more control over their lives. For example, some persons with cerebral palsy may have severe challenges in mobility or communication, but be fully capable cognitively. Therefore, having Supporters involved with medical or legal matters may assist the person to better gather information and express their true wishes.

¹ <https://supporteddecisions.org/about-supported-decision-making/sdm-as-an-international-movement/>

² *Representation Agreement Act*, RSBC 1996, c 405

An additional objective of SDM advocates is to encourage less reliance on conservatorships and guardianships (or even agencies under a power of attorney), due to their highly constrictive nature. To support this goal and assist in Decider empowerment, practitioners may consider reducing or limiting the full scope of conservatorship or guardianship arrangements by utilizing Supported Decision-Making agreements. In appropriate situations, an SDM agreement is an effective and less restrictive alternative, and is less costly than a court order or professional review. Dealing with capacity issues is nothing new to most Elder Law or Special Needs Trust practitioners. In fact, most such practitioners commonly provide counsel on estate planning, guardianships, conservatorships, powers of attorney, and health care directives while determining a client's legal or testamentary capacity. Additionally, planners need to be hyper-vigilant in such cases for issues concerning undue influence. Despite the challenges that the Supported Decision-Making process presents, SDM presents practitioners with a myriad of options to better serve their clients and communities.

III. Scope

The American Civil Liberties Union (ACLU) defines Supported Decision-Making as:

“Supported decision making (SDM) is a tool that allows people with disabilities to retain their decision-making capacity by choosing supporters to help them make choices. A person using SDM selects trusted advisors, such as friends, family members, or professionals, to serve as supporters. The supporters agree to help the person with a disability understand, consider, and communicate decisions, giving the person with a disability the tools to make her own, informed, decisions.”³

Historically, many people with disabilities and seniors with cognitive challenges would be forced to rely on guardians or conservators to make decisions about their lives. With SDM, this population may now be able to make their own determinations about what is best for them with the proper support in place. While many states do not have SDM statutes, the concept and process of SDM Agreements may assist in providing guidelines to further empower Deciders.

Internationally, the United Nations Convention on the Rights of Persons with Disabilities has endorsed the concept of Supported Decision-Making designed “to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and promote respect for their inherent dignity.” In the United States, there are a growing group of advocacy organizations that have endorsed the concept of Supported Decision-Making. For example, the National Guardianship Association (NGA) enacted the following position statement on Guardianship, Surrogate Decision-Making and Supported Decision-Making: ⁴

OUR POSITION:

³ https://www.aclu.org/wp-content/uploads/legal-documents/faq_about_supported_decision_making.pdf

⁴ <https://www.guardianship.org/wp-content/uploads/2017/07/SDM-Position-Statement-9-20-17.pdf>

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