TESTIMONY BEFORE THE
SENATE JUDICIAL PROCEEDINGS COMMITTEE
Senate Bill 559: Estates and Trusts - Supported Decision Making
February 17, 2022
Written Testimony Only

POSITION: UNFAVORABLE

On behalf of the members of the Health Facilities Association of Maryland (HFAM), we appreciate the opportunity to offer this testimony and background regarding Senate Bill 559. HFAM represents over 170 skilled nursing centers and assisted living communities in Maryland, as well as nearly 80 associate businesses that offer products and services to healthcare providers. Our skilled nursing members provide the majority of long-term and post-acute care to Marylanders in need.

Senate Bill 559 would authorize the use of supported decision making to assist an adult through the provision of certain support for the adult in making, communicating, or effectuating certain decisions and preventing the need for the appointment of certain substitute decision makers for the adult. It would also authorize an adult to enter into a supported decision-making agreement with one or more supporters under certain circumstances and it provides immunity from civil or criminal liability under certain circumstances.

While support for independent decision-making by individuals is a laudable goal, existing law already addresses this. Senate Bill 559 leaves many questions unanswered and would, if enacted, cause confusion and conflict, particularly in a healthcare context.

Individuals wishing to enlist the support of others in decision-making have various established and recognized tools available to them including powers of attorney (which they can choose whether to make durable and survive incapacity) and advance directives for health care. For those needing support and who have not made such arrangements, there are guardianships of person and/or property and a process for certain family and friends to act as a surrogate decisionmaker under the Health Care Decisions Act (HCDA). Each of these has thought-out processes and protections, which SB 559 lacks.

Examples include:

- The absence of any definition of the kinds of decisions covered by the legislation.
- The absence of any clear process or documentation by which a supported decision maker is appointed or any such appointment can be limited or revoked. In fact, SB 559 provides expressly that the appointment need not require any supported-decision making agreement.
- There are no qualifications, relationship or other protections for who can be appointed. It refers to the appointment of a “person” (not an individual) which can mean the appointment of corporate entities as supporters.
- The legislation refers to an arrangement with a supporter or supporters, meaning that there is risk of disputes between multiple supporters claiming to act for an individual. (This is in stark contrast to the HCDA which outlines a clear process and hierarchy for identifying a surrogate decision maker).

- There is no provision making clear whether or not a supporter's authority is only in effect while the individual has capacity, unlike powers of attorney that may or may not be durable.
- A supporter under such an arrangement appears to be authorized to make decisions for an individual so long as they "correspond" to an individual's "will" (unclear if this means a testamentary document or something else), preferences and choices without clarifying how these are made known. This is the language of SB 559 even though elsewhere the legislation refers to the supporter not making decisions.
- It is unclear why there is a legislatively stated preference for preventing a substitute decision maker (a term for which there is no definition) or guardian. If an individual wishes to avoid any such process, a power of attorney and advance directive is an established way to accomplish this.
- In fact, SB 559 contemplates a supporter having authority to terminate the use of a substitute decision maker (undefined). If the reference to a substitute decision maker would overlap with the term surrogate decision maker under the Health Care Decisions Act, this would be very problematic since surrogates under the HCDA are identified under a clear process and with an established scope of authority when there are findings of incapacity. The risk of conflict making health care provider services difficult is clear.
- SB 559 refers to an individual under a guardianship entering into a supported decision-making agreement, even though this would mean that there would be a process via SB 559 under which an individual who has been determined by a court to lack capacity would nonetheless be entering into an agreement with supporters outside the authority of the court. In fact, SB 559 refers to a supporter having authority to supplant the authority of a judicially appointed guardian for asserted "good cause" (which is also undefined). Conflict is a material risk.
- SB 559 refers to "informal supported decision-making" arrangements without definition or process.
- There is a material internal inconsistency in that the legislation requires the supporter to act within authority granted under an agreement but the definition of supported decision-making states no such agreement is required.
- The lack of a decision-making agreement along with references to informal decision-making arrangements is very problematic since the immunity provisions risk being read to apply those who rely on agreements, which are not required. This places third parties at substantial risk.

For these reasons, we respectfully request an unfavorable report for Senate Bill 559.

Submitted by:

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