
To: Members of Senate Judicial Proceedings Committee

From: MSBA Estate & Trust Law Section

Date: February 17, 2022

Subject: SB 559 – Estates and Trusts - Supported Decision Making

Position: Support With Amendments

The Estate and Trust Law Section of the Maryland State Bar Association (MSBA) **supports with amendments** Senate Bill 559 – **Estates and Trusts - Supported Decision Making**.

Senate Bill 559 seeks to implement a process by which any adult (an “Adult”), whether or not such Adult has capacity, may enter into a Supported Decision-Making Agreement (a “SDM Agreement”) with another adult (a “Supporter”) who may assist the Adult with any life decisions specified by the Adult in the SDM Agreement. For example, these decisions may relate to healthcare issues, medical insurance, personal finances, personal relationships, cell phone plans, changing beneficiaries under the Adult’s will or IRAs, arranging for transportation to doctor’s appointments, or other similar life experiences.

We understand and agree with the concept of a SDM Agreement and understand that it may help prevent the need for the appointment of a guardian when a person may be compromised but still capable of making their own decisions. We also recognize and deeply respect the importance of personal dignity and self-pride that comes with appropriate self-determination. However, there are serious problems with the language of SB559 that could lead to conflicts with powers of attorneys and advance directives, create unnecessary opportunities for abuse of Adults, and create civil and criminal liability for third parties who may, for example, decline to honor the SDM Agreement because they have a reasonable good faith belief that the supporter is unduly influencing the Adult but has no “actual knowledge” of such conduct.

It is also troublesome that although the SDM Agreement is to be documented and witnessed, it does not have to be signed by the Adult or the Supporter. Nonetheless, third parties are required to honor the SDM Agreement unless they have “actual knowledge” that (i) the SDM Agreement was invalid, revoked or abrogated, or (ii) the Supporter was coercing or unduly influencing the Adult or otherwise acting outside the scope of the SDM Agreement. Further, the bill contains no oversight or accountability mechanisms, except between the Adult and the Supporter, and does not require a

copy of the SDM Agreement to be provided to anyone. We are concerned that this may allow for situations where the Supporter may be unduly influencing the Adult in complete isolation of other interested persons.

In order to address these concerns, we respectfully request that SB559 be amended to generally provide that:

1. Neither the existence of a SDM Agreement, nor any provision contained therein, shall (i) authorize the Supporter to act on behalf of the Adult, (ii) supplant the authority of an agent under a validly executed power of attorney or valid advance directive, or (iii) supplant or grant authority or agency powers contemplated to be provided by a power of attorney under the Maryland Power of Attorney Act or a valid advance directive;
2. The Supporter shall make a good faith effort to (i) determine whether the Adult has a validly executed power of attorney, and (ii) if one is found to exist, deliver a complete copy of the fully executed SDM Agreement to the agent under such power of attorney, unless the Adult expressly objects to the same;
3. The SDM Agreement shall state that the Supporter may not (i) make decisions for the Adult, (ii) effectuate transactions on behalf of the Adult, or (iii) enforce the Adult’s decisions;
4. The SDM Agreement is to be signed by the Adult and the Supporter or Supporters with each signature to be witnessed by two adults who are not a Supporter or the Adult, or an employee or agent of the Supporter;
5. A third party may decline to honor a SDM Agreement if they have a reasonable good faith belief (instead of actual knowledge) that the SDM Agreement was invalid, revoked or abrogated, or the supporter was coercing or unduly influencing the Adult or otherwise acting outside the scope of the SDM Agreement; and
6. The language in Section 18-109(a) indicating that a third party may be subject to civil or criminal liability for declining to honor the SDM Agreement would be removed.

We believe that these amendments address our most serious concerns with SB559 without undermining the fundamental elements of the bill that allow for meaningful and effective SDM Agreements.

For the reasons stated above, the Estate and Trust Law Section of the MSBA **urges a committee report on SB559 that is favorable with amendments. For Further Information, Please Contact:**

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SENATE BILL 559

N2

2lr1148
CF HB 529

By: **Senators Waldstreicher, Smith, Lee, Hettleman, Zucker, and Guzzone**
Introduced and read first time: January 31, 2022
Assigned to: Judicial Proceedings

A BILL ENTITLED

1 AN ACT concerning

2 **Estates and Trusts – Supported Decision Making**

3 FOR the purpose of authorizing the use of supported decision making to assist an adult
4 through the provision of support for the adult in making, communicating, or
5 effectuating decisions and preventing the need for the appointment of certain
6 substitute decision makers for the adult; authorizing an adult to enter into a
7 supported decision-making agreement with one or more supporters under certain
8 circumstances; providing immunity from civil or criminal liability under certain
9 circumstances; and generally relating to supported decision making for adults.

10 BY adding to

11 Article – Estates and Trusts

12 Section 18–101 through 18–109 to be under the new title “Title 18. Supported
13 Decision Making”

14 Annotated Code of Maryland

15 (2017 Replacement Volume and 2021 Supplement)

16 BY repealing and reenacting, without amendments,

17 Article – Health – General

18 Section 5–601(a)

19 Annotated Code of Maryland

20 (2019 Replacement Volume and 2021 Supplement)

21 BY repealing and reenacting, with amendments,

22 Article – Health – General

23 Section 5–601(o)

24 Annotated Code of Maryland

25 (2019 Replacement Volume and 2021 Supplement)

26 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
27 That the Laws of Maryland read as follows:

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



Article – Estates and Trusts

TITLE 18. SUPPORTED DECISION MAKING.

18-101.

(A) IN THIS TITLE THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

(B) “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.

(C) “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.

(D) “SUPPORTER” MEANS AN INDIVIDUAL SELECTED BY AN ADULT TO PROVIDE SUPPORT IN MAKING, COMMUNICATING, OR EFFECTUATING THE ADULT’S OWN LIFE DECISIONS.

18-102.

(A) THE PURPOSE OF THIS TITLE IS TO ASSIST ADULTS BY:

(1) OBTAINING SUPPORT FOR THE ADULT IN MAKING, COMMUNICATING, OR EFFECTUATING DECISIONS THAT CORRESPOND TO THE WILL, PREFERENCES, AND CHOICES OF THE ADULT; AND

(2) PREVENTING THE NEED FOR THE APPOINTMENT OF A SUBSTITUTE DECISION MAKER FOR THE ADULT, INCLUDING A GUARDIAN OF THE PERSON OR PROPERTY.

(B) THIS TITLE SHALL BE LIBERALLY CONSTRUED AND APPLIED TO PROMOTE ITS UNDERLYING PURPOSES AND POLICIES.

1 18-103.

2 (A) AN ADULT MAY UTILIZE SUPPORTED DECISION MAKING TO:

3 (1) INCREASE THE ADULT'S SELF-DETERMINATION;

4 (2) PREVENT THE NEED FOR THE APPOINTMENT OF A SUBSTITUTE
5 DECISION MAKER; OR

6 (3) LIMIT OR TERMINATE THE USE OF A SUBSTITUTE
7 DECISION MAKER.

8 (B) ALL ADULTS ARE PRESUMED CAPABLE OF MAKING A SUPPORTED
9 DECISION-MAKING AGREEMENT.

10 (C) THE MANNER IN WHICH AN ADULT COMMUNICATES WITH OTHERS IS
11 NOT GROUNDS FOR DETERMINING THAT THE ADULT IS INCAPABLE OF MAKING,
12 CHANGING, OR REVOKING A SUPPORTED DECISION-MAKING AGREEMENT.

13 (D) EXECUTION OF A SUPPORTED DECISION-MAKING AGREEMENT BY AN
14 ADULT MAY NOT:

15 (1) BE USED AS EVIDENCE OF INCAPACITY; OR

16 (2) PRECLUDE THE ABILITY OF THE ADULT TO:

17 (I) ACT INDEPENDENTLY OF A SUPPORTED DECISION-MAKING
18 AGREEMENT; OR

19 (II) ACCESS THE ADULT'S PERSONAL INFORMATION WITHOUT A
20 SUPPORTER.

21 18-104.

22 (A) EXCEPT AS PROVIDED IN SUBSECTION (B) OF THIS SECTION, AN ADULT
23 MAY VOLUNTARILY, WITHOUT UNDUE INFLUENCE OR COERCION, ENTER INTO A
24 SUPPORTED DECISION-MAKING AGREEMENT WITH A SUPPORTER OR SUPPORTERS.

25 (B) (1) IF A PERSON UNDER GUARDIANSHIP ENTERS INTO A SUPPORTED
26 DECISION-MAKING AGREEMENT UNDER THIS TITLE, THE AGREEMENT DOES NOT
27 SUPPLANT THE AUTHORITY OF A GUARDIAN OF THE ADULT, UNLESS THE COURT

(C) Neither the existence of a Supported Decision-Making Agreement, nor any provision contained therein, shall (i) authorize the supporter to act on behalf of the Adult, (ii) supplant the authority of an agent under a validly executed power of attorney or valid advance directive, or (iii) supplant or grant authority or agency powers contemplated to be provided by a power of attorney under the Maryland Power of Attorney Act or a valid advance directive.

1 AUTHORIZES THE LIMITATION OR REMOVAL OF GUARDIANSHIP DUE TO THE
2 EXISTENCE OF A SUPPORTED DECISION-MAKING AGREEMENT.

3 (2) A GUARDIAN MAY NOT PREVENT AN ADULT FROM ENTERING INTO
4 A VALID SUPPORTED DECISION-MAKING AGREEMENT THAT DOES NOT SUPPLANT
5 THE AUTHORITY OF THE GUARDIAN WITHOUT GOOD CAUSE.

6 (D) (E) IF AN ADULT VOLUNTARILY ENTERS INTO A SUPPORTED
7 DECISION-MAKING AGREEMENT WITH ONE OR MORE SUPPORTERS, THE ADULT MAY
8 AUTHORIZE A SUPPORTER TO PROVIDE SUPPORT TO THE ADULT IN MAKING
9 DECISIONS IN AREAS OF THE ADULT'S CHOOSING, INCLUDING:

10 (1) GATHERING INFORMATION;

11 (2) UNDERSTANDING AND INTERPRETING INFORMATION;

12 (3) WEIGHING OPTIONS AND ALTERNATIVES TO A DECISION;

13 (4) UNDERSTANDING THE CONSEQUENCES OF MAKING OR NOT
14 MAKING A DECISION;

15 (5) PARTICIPATING IN CONVERSATIONS WITH THIRD PARTIES WITH
16 THE ADULT'S EXPLICIT AUTHORIZATION; AND

and advocacy

17 (6) PROVIDING THE ADULT WITH SUPPORT IN IMPLEMENTING A
18 DECISION.

19 (E) (D) NOTHING IN THIS TITLE OR THE EXISTENCE OF A SUPPORTED
20 DECISION-MAKING AGREEMENT MAY PRECLUDE THE ADULT FROM ACTING
21 INDEPENDENTLY OF A SUPPORTED DECISION-MAKING AGREEMENT.

22 (F) (E) THE AVAILABILITY OF A SUPPORTED DECISION-MAKING AGREEMENT IS
23 NOT INTENDED TO LIMIT THE INFORMAL USE OF SUPPORTED DECISION MAKING OR
24 TO PRECLUDE JUDICIAL CONSIDERATION OF INFORMAL SUPPORTED
25 DECISION-MAKING ARRANGEMENTS AS A LESS RESTRICTIVE ALTERNATIVE TO
26 GUARDIANSHIP.

27 (G) (F) EXECUTION OF A SUPPORTED DECISION-MAKING AGREEMENT MAY NOT
28 BE A CONDITION OF PARTICIPATING IN ANY ACTIVITY, SERVICE, OR PROGRAM.

29 18-105.

30 (A) A SUPPORTER SHALL:

(7) Make a good faith effort to (i) determine whether the Adult has a validly executed power of attorney, and (ii) if one is found to exist, deliver a complete copy of the fully executed Supported Decision-Making Agreement to the agent under such power of attorney, unless the Adult expressly objects to the same.



1 (1) SUPPORT THE WILL AND PREFERENCE OF THE ADULT AND NOT
2 THE SUPPORTER'S OPINION OF THE REASONABLENESS OF THE ADULT'S WISHES,
3 PREFERENCES, OR CHOICES;

4 (2) ACT HONESTLY, DILIGENTLY, AND IN GOOD FAITH;

5 (3) ACT WITHIN THE AUTHORITY GIVEN IN THE SUPPORTED
6 DECISION-MAKING AGREEMENT;

7 (4) AVOID CONFLICTS OF INTEREST;

8 (5) MAINTAIN RECORDS, WHICH THE SUPPORTER SHALL MAKE
9 AVAILABLE TO THE ADULT ON REQUEST, CONCERNING:

10 (I) THE SUPPORTER'S ACTIONS UNDER THE SUPPORTED
11 DECISION-MAKING AGREEMENT; AND

12 (II) HOW THE ADULT COMMUNICATES AND EXPRESSES
13 OPINIONS TO THE SUPPORTER; AND

14 (6) KEEP ANY RECORDS AND INFORMATION OBTAINED UNDER A
15 SUPPORTED DECISION-MAKING AGREEMENT:

16 (I) SUBJECT TO THE LIMITATIONS UNDER TITLE 9, SUBTITLE 1
17 OF THE COURTS ARTICLE, CONFIDENTIAL AND PRIVILEGED; AND

18 (II) SECURE FROM UNAUTHORIZED ACCESS, USE, OR
19 DISCLOSURE.

20 (B) THE RELATIONSHIP BETWEEN THE ADULT AND THE SUPPORTER SHALL
21 BE ONE OF TRUST AND CONFIDENCE THAT PRESERVES THE DECISION-MAKING
22 AUTHORITY OF THE ADULT.

23 (C) A SUPPORTER MAY NOT:

for effectuate transactions



24 (1) MAKE DECISIONS ON BEHALF OF THE ADULT;

25 (2) EXERT UNDUE INFLUENCE ON THE ADULT;

26 (3) COERCE THE ADULT;

1 (4) OBTAIN INFORMATION ABOUT THE ADULT WITHOUT THE ADULT'S
2 CONSENT;

3 (5) ENFORCE DECISIONS MADE BY THE ADULT ~~WITHOUT THE ADULT~~
4 ~~BEING PRESENT, UNLESS THE ADULT EXPLICITLY AUTHORIZES THE SUPPORTER TO~~ ✓
5 ~~ENFORCE THE DECISION; OR~~

6 (6) ACT OUTSIDE OF THE AUTHORITY GRANTED IN THE SUPPORTED
7 DECISION-MAKING AGREEMENT.

8 18-106.

9 (A) EXCEPT AS PROVIDED IN SUBSECTION (B) OF THIS SECTION, A
10 SUPPORTER MAY BE ANY PERSON CHOSEN BY THE ADULT.

11 (B) THE FOLLOWING INDIVIDUALS ARE DISQUALIFIED FROM ACTING AS A
12 SUPPORTER:

13 (1) A MINOR;

14 (2) AN INDIVIDUAL AGAINST WHOM THE ADULT HAS OBTAINED A
15 PEACE ORDER;

16 (3) AN INDIVIDUAL WHO HAS BEEN CONVICTED OF FINANCIAL
17 EXPLOITATION UNDER TITLE 13, SUBTITLE 6 OF THIS ARTICLE; AND

18 (4) AN INDIVIDUAL WHO IS THE SUBJECT OF A CIVIL OR CRIMINAL
19 ORDER PROHIBITING CONTACT WITH THE ADULT.

20 (C) A SUPPORTER MAY RESIGN AS A SUPPORTER BY WRITTEN OR ORAL
21 NOTICE TO THE ADULT, ANY REMAINING SUPPORTERS OF THE ADULT NAMED IN THE
22 AGREEMENT, AND ANY THIRD PARTIES WHO HAVE THE AGREEMENT ON FILE.

23 (D) IF A SUPPORTER RESIGNS, DIES, BECOMES INCAPABLE, OR BECOMES
24 FOR ANY OTHER REASON UNABLE TO ACT AS A SUPPORTER AND THERE IS NO
25 ALTERNATE SUPPORTER, THE AUTHORITY GIVEN TO THE SUPPORTER IS
26 SUSPENDED.

27 18-107.

28 (A) A SUPPORTED DECISION-MAKING AGREEMENT MAY BE IN ANY FORM
29 CONSISTENT WITH THE REQUIREMENTS UNDER THIS SECTION.

(9) State that the Supporter cannot make decisions for the Adult nor effectuate transactions on behalf of the Adult.

(10) Contain a statement that neither the existence of the Supported Decision-Making Agreement, nor any provision contained therein, shall (i) authorize the supporter to act on behalf of the Adult, (ii) supplant the authority of an agent under a validly executed power of attorney or valid advance directive, or (iii) supplant or grant authority or agency powers contemplated to be provided by a power of attorney under the Maryland Power of Attorney Act or a valid advance directive.

(1) BE DOCUMENTED;

(2) BE DATED;

(3) NAME AT LEAST ONE SUPPORTER;

(4) DESCRIBE THE DECISION-MAKING ASSISTANCE THAT EACH SUPPORTER MAY PROVIDE THE ADULT;

(5) DESCRIBE HOW THE SUPPORTERS MAY WORK TOGETHER IF THERE IS MORE THAN ONE SUPPORTER;

(6) DESCRIBE HOW ANY PERCEIVED OR ACTUAL CONFLICT OF INTEREST BETWEEN THE SUPPORTER OR SUPPORTERS AND THE ADULT SHALL BE MITIGATED;

(7) DOCUMENT HOW THE ADULT SELECTED THE SUPPORTER OR SUPPORTERS;

(8) BE APPROVED BY THE COURT IF THE ADULT HAS BEEN APPOINTED A GUARDIAN OF THE PERSON OR PROPERTY AND THE SUPPORTED DECISION-MAKING AGREEMENT AFFECTS THE AUTHORITY OF THE GUARDIAN;

(11) ~~(9)~~ CONTAIN AN ATTESTATION THAT THE SUPPORTER OR SUPPORTERS AGREE TO HONOR THE RIGHT OF THE ADULT TO MAKE DECISIONS AND THAT THE SUPPORTER OR SUPPORTERS WILL NOT MAKE DECISIONS FOR THE ADULT; AND

Signed by the Adult and the Supporter or Supporters with each signature to be

(12) ~~(10)~~ BE WITNESSED BY TWO ADULTS WHO ARE NOT:

(I) A SUPPORTER FOR THE ADULT; OR

(II) AN EMPLOYEE OR AGENT OF A SUPPORTER NAMED IN THE SUPPORTED DECISION-MAKING AGREEMENT.

(C) A SUPPORTED DECISION-MAKING AGREEMENT MAY:

(1) APPOINT MORE THAN ONE SUPPORTER; AND

(2) APPOINT AN ALTERNATE TO ACT IN THE PLACE OF A SUPPORTER IN CIRCUMSTANCES SPECIFIED IN THE AGREEMENT.

1 18-108.

2 AN ADULT UTILIZING A SUPPORTED DECISION-MAKING AGREEMENT MAY:

3 (1) REVOKE THE SUPPORTED DECISION-MAKING AGREEMENT AT
4 ANY TIME ORALLY, IN WRITING, OR OTHERWISE BY EXPRESSING THE ADULT'S
5 SPECIFIC INTENT TO REVOKE THE AGREEMENT; AND

6 (2) RECEIVE ANY SUPPORT NEEDED FROM AN INDIVIDUAL OF THE
7 ADULT'S CHOOSING TO REVOKE THE AGREEMENT.

8 18-109.

9 (A) A THIRD PARTY WHO IN GOOD FAITH ACTS IN RELIANCE ON THE
10 DECISIONS MADE BY AN ADULT UTILIZING A SUPPORTED DECISION-MAKING
11 AGREEMENT ~~OR WHO IN GOOD FAITH DECLINES TO HONOR A SUPPORTED~~
12 ~~DECISION-MAKING AGREEMENT~~ IS NOT SUBJECT TO CIVIL OR CRIMINAL LIABILITY
13 OR DISCIPLINE FOR UNPROFESSIONAL CONDUCT FOR~~X~~

14 ~~(1) COMPLYING WITH AN ADULT'S DECISION IN ACCORDANCE WITH A~~
15 ~~SUPPORTED DECISION-MAKING AGREEMENT BASED ON AN ASSUMPTION THAT THE~~
16 ~~SUPPORTED DECISION-MAKING AGREEMENT WAS VALID WHEN MADE AND NOT~~
17 ~~REVOKED OR ABROGATED~~~~OR~~

18 (B) ~~(2) DECLINING TO COMPLY WITH A SUPPORTED DECISION-MAKING~~
19 ~~AGREEMENT BASED ON ACTUAL KNOWLEDGE THAT:~~

A third party may decline

a reasonable good faith belief

20 (i) THE AGREEMENT WAS INVALID, REVOKED, OR ABROGATED;
21 OR

22 (ii) A SUPPORTER WAS COERCING OR UNDULY INFLUENCING
23 THE ADULT OR OTHERWISE ACTING OUTSIDE THE SCOPE OF THE AGREEMENT.

24 (B) THIS SECTION MAY NOT BE CONSTRUED TO PROVIDE IMMUNITY FROM
25 ACTIONS ALLEGING THAT A THIRD PARTY HAS:

26 (1) CAUSED PERSONAL INJURY AS A RESULT OF A NEGLIGENT,
27 RECKLESS, OR INTENTIONAL ACT;

28 (2) FAILED TO GIVE EFFECT TO AN ADULT'S DECISION MADE IN
29 ACCORDANCE WITH A VALID DECISION-MAKING AGREEMENT;

1 **(3) FAILED TO PROVIDE INFORMATION EITHER TO THE ADULT OR A**
2 **SUPPORTER OF THE ADULT THAT WOULD BE NECESSARY FOR INFORMED CONSENT;**
3 **OR**

4 **(4) OTHERWISE ACTED INCONSISTENTLY WITH APPLICABLE LAW.**

5 **Article – Health – General**

6 5-601.

7 (a) In this subtitle the following words have the meanings indicated.

8 (o) (1) “Incapable of making an informed decision” means the inability of an
9 adult patient to make an informed decision about the provision, withholding, or withdrawal
10 of a specific medical treatment or course of treatment because the patient is unable to
11 understand the nature, extent, or probable consequences of the proposed treatment or
12 course of treatment, is unable to make a rational evaluation of the burdens, risks, and
13 benefits of the treatment or course of treatment, or is unable to communicate a decision.

14 (2) For the purposes of this subtitle, a competent individual who is able to
15 communicate by means other than speech **OR WITH OTHER SUPPORT, INCLUDING**
16 **SUPPORTED DECISION MAKING IN ACCORDANCE WITH TITLE 18 OF THE ESTATES**
17 **AND TRUSTS ARTICLE**, may not be considered incapable of making an informed decision.

18 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
19 October 1, 2022.