

Conservatorship and Supported Decision Making

A Presentation to TN-NADD Annual Conference

August 20, 2020

By The Conservatorship Association of Tennessee (CAT)

The Conservator Association of Tennessee exists because we care about and support Persons with Disabilities. CAT's specific interests in Conservatorship are as follows.

- To serve as a principal resource for all those involved in Conservatorship, including families, individuals with disabilities, professional and advocacy organizations, state and local agencies, and the legal community;
- To increase awareness, knowledge and expertise about Conservatorship and related topics through developing informational materials, training, and educational opportunities;
- To offer a forum for analysis and discussion of key issues, such as alternatives to Conservatorship;
- To establish standards of practice; and
- To advocate to improve policies, processes, and practices related to Conservatorship in Tennessee.

Issues of Interest

We are especially pleased to have a presence in this conference because we value the work you do and wish to be a resource for you in any way we can. Some of what we feel we can bring to the table is a hard-earned expertise in Conservatorships. Conservatorships are never to be entered into without due care and thought. They should only be proposed when the person in question is in need of protection.

Recently, several advocacy groups have promoted the idea to parents and to the public that Supported Decision Making (SDM) is an alternative to Conservatorship. More than that, the same groups are proposing legislation in Tennessee making Supported Decision Making and Supported Decision Making Agreements (SDMA) legal alternative to Conservatorships.

We take no issue with Supported Decision Making when appropriate. Our area of concern is Conservatorships. CAT does challenge the assertion that Supported Decision Making is an alternative to Conservatorship once there is a need for a conservatorship. If a person has the capacity to enter into SDM, they do not need a conservatorship. If a person lacks the capacity to enter into a SDM, conservatorship becomes the only option to protect the person. This presentation is to explain our positions and it reflects conclusions of the CAT Board after review of the findings of a CAT committee assigned to research these topics.

In this presentation we will discuss

- The concepts of Conservatorship and Supported Decision Making (SDM)
- The reason why SDM is not an alternative to Conservatorship
- The pivotal role of capacity

- The protections and accountability offered by Conservatorship
- The openness to manipulation and exploitation of people in an SDM relationship
- The danger of lack of acceptance of SDM by third parties
- The lack of legal standing by SDM

Conservatorship and Supported Decision Making

Conservatorship

Guardianship/Conservatorship has a long historical presence. Early kings recognized that there were persons whose disabilities resulted in an inability to care for themselves and the king took those persons under the protection of the court. The concept of the king's court evolved into the courts of the government as society continued to reflect the responsibility to protect those whose disability resulted in their being incapable of making informed decisions in their lives. **The concept of protection of persons from making decisions harmful to themselves and from the exploitation of others is foundational in Conservatorship law.**

Until 2013 Tennessee law provided that a conservator “provides partial or full supervision, protection and assistance ...of the person or property, or both, of an adult.” This was essentially the same language as used for guardianship of a child. In 2013 Tennessee law changed to reflect more clearly the distinctions between

adults and children. Guardianship for minors is custodial in nature and reflects the appointment of an adult to supervise and protect the minor. Conservatorship of an adult is not custodial in nature. It reflects the transfer of rights to make certain decisions from an adult to a conservator. Conservatorship is defined in T.C.A. §34-1-101 (4) (B) as:

"Conservatorship" is a proceeding in which a court removes the decision-making powers and duties, in whole or in part, in a least restrictive manner, from a person with a disability who lacks capacity to make decisions in one or more important areas and places responsibility for one or more of those decisions in a conservator or co-conservators;

A conservator is defined in T.C.A. §34-1-101 (4) (A) as:

"Conservator" or "co-conservators" means a person or persons or an entity appointed by the court to exercise the decision-making rights and duties of the person with a disability in one or more areas in which the person lacks capacity as determined and required by the orders of the court;

"Conservatorship" is a proceeding in which a court removes the decision-making powers and duties, in whole or in part, in a least restrictive manner, from a person with a disability who lacks capacity to make decisions in one or more important areas and places responsibility for one or more of those decisions in a Conservator or co-Conservators;

Conservatorship Process and Due Process

Removing or restricting a person's rights without their consent is a serious matter in our society. A person's right to make decisions about his/her life is fundamental to a

free society and is a foundation of the person's sense of well-being. Removal of a person's rights to make decisions is so important that it requires a high level of Due Process and, in Tennessee, clear and convincing evidence.

As reflected above, the removal of important rights from a person must be accompanied by significant procedural due process. In Tennessee, this "due process" minimally includes the following:

- right to a hearing before an impartial official,
- notice of that hearing,
- right to obtain counsel,
- right to present evidence and witnesses and to confront witnesses and evidence,
- right to a written decision and right to appeal.

The role of capacity in Conservatorship

With regard to Conservatorships, the courts have examined with specificity the question of the requisite incapacity an individual must be proven to have before their rights are removed. A person with a disability is defined in part as a person over age eighteen (18) who is:

...in need of partial or full supervision, protection, and assistance by reason of mental illness, physical illness or injury, developmental disability, or other mental or physical incapacity...T.C.A. §34-1-101 (14)

In the instance of a Conservatorship action, the capacity standard was expressed in State Dept. of Human Services v. Northern, 563 S.W.2d 197 (Tenn. Ct. App. 1978).


"Capacity means mental ability to make a rational decision, which includes the ability to perceive, appreciate all relevant facts and to

reach a rational judgment based on those facts.”

These abilities to absorb and retain information, to understand the implications of a decision – to connect the desired outcome with a particular task – are evaluated by the court. The court utilizes medical testing for assistance in determining capacity and the need for Conservatorship.

If a Conservatorship is established, the court will issue a written order which instructs the clerk of the court to issue letters of Conservatorship to the person or agency appointed as Conservator. These letters empower the Conservator to work with third parties to protect the respondent's rights. Conservatorship law requires the order to specify which rights are to be removed from the person. The rights that have not been specifically transferred to the Conservator remain with the person.

Several concepts here deserve being highlighted because of their relevance to the protection of the person in a Conservatorship.

1. The first is that the Conservator should always use the Least Restrictive Means of conducting the Conservatorship. That means that the desires and preferences of the person in the Conservatorship are meaningful and valued as a matter of law. Courts can, and do, hold accountable Conservators who are more restrictive than necessary. At the same time, the Conservator is to make a decision that is in the person's "best interest", even if it is not  what the person wants, where safety and wellbeing are at issue.

An example of this concept at work is worth mentioning. Some of our

members have dealt with a woman in a conservatorship in a jurisdiction where conservatorship is governed by SDM-like principals. The person was clearly insane and incapable of making reality based decisions. Because the law there gave the ward the final say so in housing, the person lost her house, was deported and ended up in the US without a legal framework to protect her. A conservatorship had to be created on an emergency basis. While she stayed safe, it cost thousands upon thousands of dollars and, unsurprisingly, she is no happier in the US than where she was. It was bad enough then, imagine what it would be like in the time of Covid -19.

2. The second concept is that the Conservatorship is governed and monitored by a court. Conservators can be required to have to make an inventory, formulate a property management plan, and make annual reports on status and accountings. People who think the Conservator is acting incorrectly can alert the court and the court will address the grievance. The person in the Conservatorship can communicate with the court and ask for help.
3. The third concept is that in a Conservatorship the person and assets of the person are protected. Conservators who have control over property have to post a bond; essentially an insurance policy that will pay out if the Conservator inappropriately spends the money of the person in the Conservatorship.
4. The fourth is that courts do not enter into Conservatorships lightly and the person over whom the Conservatorship is sought has the right to be heard and defend against the Conservatorship. The person may even have a lawyer appointed for them if they desire.

5. Finally, a person in a Conservatorship has an advocate and protector who has the power of the law and the courts to protect the interests of his/her ward. .

SUPPORTED DECISION MAKING (SDM)

Supported Decision Making has been defined by the American Bar Association as follows: “Supported decision making is a process by which individuals with disabilities choose a trusted person or persons to support them in making their own decisions and exercising their legal capacity.” Broadly conceptualized, SDM may be seen as an attempt to formalize a process that is practiced routinely and informally by individuals in daily life, regardless of disability status.

While protection of the person with a disability is the reason and the goal of a Conservatorship, maintaining the autonomy of the person and their ability to control their lives is at the forefront of SDM. Advocates of SDM see Conservatorship as demeaning and devaluing the worth of the person while they see SDM as promoting self- respect and autonomy. SDM utilizes the techniques of active listening and teaching problem-solving skills in an atmosphere of respect to develop the person’s ability to make consequential decisions.

For the most part, SDM models, share these primary characteristics: 1) the individual in need of support has not lost decision-making authority or been deemed to lack capacity; 2) the individual in need of support understands the

nature and scope of the SDM relationship and agreement; 3) the relationship is freely entered into and can be terminated at will; and, 4) the individual in need of support actively participates in decision-making and ultimately makes the decisions.

Concerns and Conclusions regarding the assertion that Supported Decision Making is an Alternative to Conservatorship

Concerns

Overreach and Substitute Decision Making.

It can be too easy to persuade someone whose capacity is in question to sign a Supported Decision Making Agreement (SDMA). It can be too easy to use that SDMA to take over that person's life without any court supervision. A good percentage of Conservatorships happen when someone has taken over the life of a vulnerable person with the purpose of gaining access to their money. Where there is no supervision, even the best intentioned supporter can find themselves making decisions that are more about their own needs rather than the needs of the person they are supposed to be helping. When the person they are helping has capacity and only needs guidance, there is not much of an issue. When the vulnerable person does not have capacity, or loses capacity, whoever is helping that person needs to have someone looking over their shoulders.

An example would be the placement decision within a DIDD provider agency. It is

the person's choice where to live. In most cases, the person's Supported Decision Maker will be an employee of the agency. Knowing that the financial survival of the agency could rest on filling an empty bed, that knowledge would likely, even unconsciously, be disproportionately represented in the information supplied to the person. Therefore, Supported Decision Making becomes Substitute Decision Making where the decision is actually made by the supporter and not the person. The person's constitutional rights to make his/her own decisions are violated. In this situation, the person's rights have been removed without due process of law.

The role of respect

The tacit argument of the SDM community is that Conservatorships are demeaning and disrespectful to a person's autonomy, whereas the SDM is cooperative and interactive. We believe that a supporter who is leading a person towards their own conclusion – which the supportive guide has already decided beforehand – represents an intrusion into a person's autonomy while pretending that the decision was a collective one. This is truly demeaning because the supporter has effectively removed the person's right to make decisions without the benefit of due process and protection of the law and has violated a person's right to autonomy. Saying the decision as a mutual one generated by active listening and kind interactions alone is misleading.

Capacity

A foundational assumption of SDM is that the person being supported has capacity to make the decision(s) under question. However, it is not defensible to assume that all people with a disability who have not been ruled by a court to be incompetent or lack capacity do, therefore in fact, have capacity to make rational decisions. Also, it has been shown that a person with lowered capacity has a greater susceptibility to

exploitation and manipulation.

Accountability

There are no standards of performance, or accountability, for the Supporters in the SDM model. While the model claims that the decision is that of the person and not the Supporter, there are those who see the Supporter as holding liability for the decision.

Third Party acceptance

Third parties as doctors, landlords and bankers, are hesitant to accept a parent's signature when it appears to the third party that the parent is not authorized to sign and the person with disabilities appears not able to make an informed decision. In many cases, this leads to the appointment of a Conservator who under law, can decide what is in the person's best interest and give consent to the third party. It is problematic that the credibility of the person will be accepted just because they are part of an SDM.

Conclusion

Conservatorship cases are often fraught with challenges for families and persons on the edge of their mental capacities. In these cases, the process and procedures which have been placed into law offer a security, formality, and dignity which is of benefit to respondents. The overarching consideration weighed by the courts is what actions would be in the best interests of the respondent, and there are no

comparable systems which offer such rigorous review. A purported substitute or alternative for this process that impairs the rights of an adult to make decisions without these protections makes a mockery of an individual's inherent rights to autonomy.

Supported Decision Making can represent one person imposing their views on another, no matter how kindly oriented the imposition is described. Any process which diminishes a person's civil rights, however limited, deserves a legal process which has inherent checks and balances. The unique features of Conservatorships, which are not present in proposed alternatives such as SDMs, include:

- The process is under the supervision of the appointing court;
- The individual or entity appointed Conservator is investigated and selected by the court and its agents;
- The Conservator must serve as a fiduciary, which requires that his/her decisions be in the best interest of the person with disabilities;
- The Conservator is legally responsible for decisions;
- Conflicts of interest are considered and should be addressed;
- Conservator misconduct can be punished by the court;
- Bonds, inventory, and accountings protect the property of the person;
- Status reports are filed with the court ; and
- Conservator powers can be modified, reduced, or revoked as needed.

A major concern addressed in this paper is that SDM is portrayed as an alternative to Conservatorship. This is not possible. The thesis of SDM seems to be that a person with a disability can choose a SDM supporter to guide, teach and mentor

them towards making an informed decision. Without clear evidence of capacity, SDM presents the real danger that *de facto* decisions will be made by the SDM supporter and provides the opportunity to bend the person to their will. This system generates the possibility of reducing autonomy while the original intent of the instrument is to bolster it. Additionally, this methodology infringes on fundamental rights to due process.

- Conservatorship pertains to the population of Disabled Persons who have been found by the court to lack the Capacity to make rational decisions in their lives.
- Supported Decision Making pertains to the population of Disabled Persons who are presumed to have capacity because they have not been found by a court to lack the capacity to make rational decisions in their lives.
 - Therefore
- SDM is not dealing with the same population of Disabled Persons as those served by Conservatorship and therefore cannot be seen as an alternative to Conservatorship. Furthermore, it is a disservice to promote this assertion that SDM is an alternative to Conservatorship to parents and other members of the general public.

Does Supported Decision Making need to become law in Tennessee?

Proposed Legislation

In 2018 CAT and other members of the disability community were surprised to learn that advocates were lobbying legislators to introduce legislation designed to

codify Supported Decision Making (SDM) and Supported Decision Making Agreements (SDMAs). Among the stipulations, the proposed legislation placed a duty on the person with a disability to involve the supporter by 1) alerting the supporter to the need for assistance; 2) listening to the information provided by the supporter and to ask questions; 3) considering the information provided by the supporter when making the decision; and 4) accepting personal responsibility for the decision made. Among other things, the legislation appeared to attempt to shield the supporter and third party entities from liability for any decisions made by the person.

When a person asks for assistance, no law requires the responding person to listen and ask questions, but that is our societal trend. Persons already have the right to ask others questions, invite them to IEP meetings, invite them to doctor's appointments, share medical records with them, and ask questions about what they think they should do. The stipulations in the legislation proposed appear to be misplaced given these already available options.

After education of legislators by CAT and other members of the disability community, no legislation was passed that mentioned Supported Decision Making or Supported Decision Making Agreements. In 2018 the Tennessee General Assembly defined the term "least restrictive alternatives." T.C.A. section 34-1-101(11). While some advocates of SDM claim that to be a victory, that same term had been a part of T.C.A. section 34-1-127 since the new Conservatorship law was enacted in 1992.

If there is going to be SDM legislation, perhaps it ought to center around the person in need, rather than the advisor.

Other existing tools are available under law

Even if SDMAs were able to sidestep the challenge of capacity, both Powers of Attorney and Trusts utilize traditional fiduciary liability to offer security for abusive behaviors by the fiduciaries. With Durable Powers of Attorney, for example, there are numerous protections in the “Uniform Durable Power of Attorney Act” to ensure that the principal is not exploited or abused. The most important of these protections is that the principal with capacity may revoke the Durable Power of Attorney at any time. *See* § T.C.A. § 34-6-101.

Conclusion and Concerns regarding SDMA

- 1) The concept of capacity is central to this discussion. Society has a long history of recognizing that there are people who do not have the capacity to make decisions appropriate for their own care and well-being. To protect these people, the process of Conservatorship was established. In Tennessee, the minimum rights necessary for the person’s protection are assigned to a Conservator through the due process of law.
- 2) While there are laws in Tennessee that govern Conservatorship, Trusts, and Powers of Attorney, there are no laws that either acknowledge the existence of SDM or SDMAS or govern their use. Therefore, neither the person nor the person’s supporters nor any third party acting on the person’s decisions, have any protection under the law.
- 3) There is no empirical data that supports whether Supported Decision-Making works. The Penn State Law Review reached the following

conclusions after extensive research into Supported Decision-Making (Nina A. Kohn, et al., “*Supported Decision-Making: A Viable Alternative to Guardianship?*” 117 PennSt.L.Rev. 1111, 1117-18 (2013).:

We conclude that, although supported decision-making presents an appealing alternative to guardianship and therefore policymakers in the United States should give serious consideration as to how it might be incorporated into public policy, there is currently insufficient empirical evidence to know the extent to which (or the conditions under which) it can remedy the problems posed by surrogate decision-making processes. Specifically, we find that, despite years of use, there is almost no evidence as to how decisions are actually made in supported decision- making relationships; the effect of such relationships on persons in need of decision-making assistance; or the quality of the decisions that result. Without more information, it is impossible to know whether supported decision-making empowers persons with cognitive and intellectual disabilities. Furthermore, there is reason to be concerned that supported decision-making might have the opposite effect, disempowering such individuals or making them more vulnerable to manipulation, coercion, or abuse.

Conclusion

The distinction in requisite capacity is the critical factor when considering whether SDMAs can be proposed as a solution for decision making with people who have a disability. Any person with a disability in Tennessee already has the right to invite someone into doctor’s appointments, to request and share their own medical and school records, and to get advice and support from any number of individuals who care about them. The SDMA model references interactions such as active listening

and critical thinking, which are inherent to persons in this service industry.

To the extent this type of interaction is codified into a legal instrument, CAT views the described interaction as open to dominating another's will without their consent. CAT's position is that such behavior is unethical and illegal in the absence of a strong, formal, and dignified processes held before a court. These processes include a natural judicial review, the opportunity to raise a defense and present evidence in court, the requirement of reaching clear and convincing medical proof of disability, the availability of a Guardian ad Litem to review the situation, an Attorney ad Litem to defend a respondent, and, finally, an active and ongoing court review which opens up the full scope of legal remedies in the event a problem is found or a problem needs to be addressed in a near costless manner. CAT does not anticipate SDMAs as having these available protections for the foreseeable future.

A Conservatorship in Tennessee is also, by definition, a limited instrument. Conservators are required to provide services in the least restrictive means necessary. Tennessee has excellent safeguards in our current process for the individual who lacks capacity. To the extent an individual retains their own capacity, a Power of Attorney is an available tool to provide protection. This instrument is well known to the legal and third-party institutions this CAT interacts with regularly. To CAT, the additional tool of SDMAs do not appear to be necessary.

At least thirty-three states have introduced some sort of legislation that relates to SDM. Seventeen states have passed legislation or resolutions that explicitly reference SDM. Of those, nine states have passed legislation codifying SDMAs. The CAT

Committee has reviewed a variety of problems that have been encountered.

Perhaps other states considering SDMA legislation have much more pressing needs than Tennessee. Tennessee should not be the 10th state in the country to enact legislation that has not been proven to be worthwhile in other states and may have very harmful unintended consequences for the persons with disabilities whom it is intended to benefit.