

# Supported Decision Making and Individuals with Disabilities

**July 19, 2023**  
**Noon-1:00 pm ET**

**2023 Webinar Series**



**NASHIA**

# Welcome!

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**Maria Crowley, MA, CRC**

Director, Professional Development

NASHIA

Moderator



# Webinar Information

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# About NASHIA

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Nonprofit organization created to assist State government in promoting partnerships and building systems to meet the needs of individuals with brain injury and their families.





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# Today's Webinar

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- Handouts and SW CEs/Certificate of Attendance:
  - Available after the webinar
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- Archived Recording:
  - nashia.org > Training U > Trainings On Demand

# Today's Presenter:

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**Stephen R. Elville, Esq.**  
**Elville and Associates**



**STEPHEN R. ELVILLE &  
ELVILLE AND ASSOCIATES PRESENT:  
SUPPORTED DECISION MAKING FOR  
LOVED ONES WITH DISABILITIES –  
BREAKING THROUGH**

**By: Stephen R. Elville, J.D., LL.M.**

**Managing Principal and Lead Attorney**

**Elville and Associates, P.C.**

**Wednesday, July 19, 2023**



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AND ASSOCIATES**



# DISCLAIMER

The following presentation is meant for education only and is not intended as, nor can it be construed as, legal advice, or as a substitute for legal counseling.



# Overview of Today's Presentation

1. Understanding Supported Decision Making (SDM) – what is it and what is its purpose?
2. Recent Maryland SDM Legislation – effective October 1, 2022
3. What is the promise of SDM?
4. What SDM is not – and what is SDM's relationship to powers of attorney, advance medical directives, and guardianship?
5. How SDM works, and how it can benefit persons living with disabilities
6. A review of recent Maryland Legislation – effective October 1, 2022 – as one example for discussion
7. Next Steps



# What Is Supported Decision Making and What Is Its Purpose (and Promise)?

- Supported Decision Making (SDM) *is*:
  - A tool where a person with disabilities can be empowered and supported in the process of making their own decisions – to whatever extent possible
  - A simple written agreement (or no agreement)
  - A formalization of authority for the supported decision maker to be recognized as such
  - An alternative to adult guardianship
  - A potential addition to a financial power of attorney and advance medical directive
  - A potential tool in adult guardianship
  - Part of a paradigm shift
  - A new world of self-determination for the disabled, young or old



# Recent Maryland SDM Legislation – Effective October 1, 2022

- A triumph for persons with disabilities in Maryland
  - Key players such as Megan Rusciano, Esq., of The Arc of the United States advocated and promoted SDM for Maryland over many years leading up to the 2022 legislative session and passage in the Maryland General Assembly
  - Maryland follows the lead of several states, including its neighbors in Delaware and the District of Columbia, as well as Texas, Indiana, Alaska, Wisconsin, and others
  - Fulfills need for long-overdue change in approach



# Brief History of SDM

- British Columbia
- United Nations
- Alaska, Texas, Indiana, Wisconsin, Delaware, District of Columbia, and more
- Maryland – recent SDM legislation just passed
- Represents a departure from:
  - Old paradigm
    - Difficult for lawyers and legislators to understand
    - Fear of change
    - Fear of fraud and abuse



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# Why Is SDM So Needed?

- No good alternative to guardianship versus a power of attorney
- No formalized way for a person with disabilities to be supported
- No annual review of private guardianship
- No clear way for all alternatives to adult guardianship has been explored and implemented
- Inconsistency in judicial application of existing law
- Old notions of traditional guardianship inequitable and no longer needed
- Culture of paternalism and risk minimization hurt the potential of persons with disabilities



# What Were the Available Tools for Persons with Disabilities Prior to SDM?

- Appointment of financial agents under financial power of attorney
- Appointment of health care agents under an advance medical directive
- Representative Payee (Social Security)
- Joint ownership of financial assets
- Surrogate decision making (health care)
- Guardianship of the property
- Guardianship of the person
- Consent Orders (settlement agreements) in guardianship



# Understanding What SDM Is *NOT*

- Supported Decision Making (SDM) *is not*:
  - A financial power of attorney
  - A way for a 3<sup>rd</sup> party to make decisions for a disabled person
  - Giving authority to a third party to do what they deem appropriate for a person
  - A mechanism by which a person with disabilities gives up their rights
  - Adult Guardianship



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# What Are the Differences Between SDM and Adult Guardianship?

- Adult Guardianship
  - Removal of rights to property
  - Removal of rights to person
    - Place of abode
    - Health Care
    - Voting
  - No *legal* choice
  - Paradigm of protectionism - no recognition of right to take risks – fear of failure
  - No review (private)
  - Unspoken consensus of permanency



# What Are the Differences Between SDM and Adult Guardianship? (continued)

- SDM
  - No removal of rights
  - Potential for restoration of rights
  - Rights to property and person remain vested in the individual
  - Paradigm of individual risk – right to fail
  - Can be part of guardianship if necessary
  - Addition to financial power of attorney
  - Addition to advance medical directive



# Financial Powers of Attorney and Advance Medical Directives Versus SDM - Explained

- Financial Power of Attorney and/or Advance Medical Directive
  - Agent acts on behalf of principal according to:
    - Powers provided to the agent
    - When power becomes effective
  - Agent acts when principal can no longer act for themselves
  - Fiduciary responsibility for agent
    - Accountability
  - Can be terminated by principal – in writing
  - Substitute for guardianship of property and person



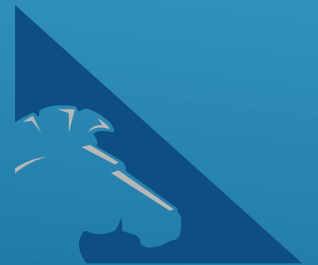
# Financial Powers of Attorney and Advance Medical Directives Versus SDM – Explained (continued)

- SDM
  - No agency relationship
  - Power of principal remains vested in them
  - Principal alone makes decisions (their own) with help from supported decision maker
  - No authority for supported decision maker to act for or on behalf of the agent
  - Accountability
    - Extent depends on jurisdiction
  - Supporting decision maker's role can be changed/terminated
  - Substitute for guardianship



# Self-Determination Continuum

- Power of Attorney and Advance Medical Directive
  - I am the Principal and can and will make my own decisions
    - And if I cannot, my agent(s) will step into my shoes and make my decisions for me
- Supported Decision Making
  - I can and will make my own decisions to whatever extent possible – provided that I have the support to do so
- Guardianship
  - I cannot make my own decisions and need the protection of a guardian
    - I may be able to have a supported decision maker even though I am a ward under guardianship

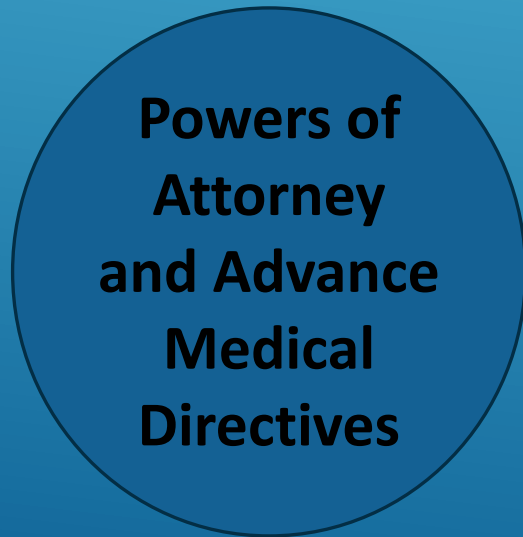


# Self-Determination Continuum

“I can make my own decisions; but if I cannot, my agent will make my decisions for me.”

“I will make my own decisions to whatever extent possible, provided that I have the support to do so.”

“I cannot make my own decisions and need the protection of a guardian. I may possibly have a supported decision maker under guardianship.”



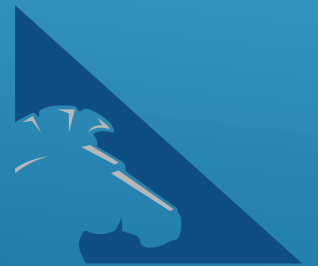
# Problems and Challenges

- Some persons with disabilities understand and appreciate their new expanded rights of self-determination under SDM
- Some persons with disabilities do not understand these expanded rights of self-determination under SDM
- Some parents are enthusiastic about SDM and its possibilities for their loved one with disabilities
- Some parents are indifferent and do not understand the utility and/or value of SDM
- Some people ask: who will be willing to step in and be a Supporter for my loved one with disabilities without compensation?
- Without vast public education on the subject, how will Supporters know the extent of their responsibilities?
- How will the public be educated?



# Review of Recent Maryland SDM Legislation

- Definitions
  - Supported Decision Making (defined):
    - *“with or without SDM written agreement”*
    - *“series of relationships”*
    - *“to make, communicate, or effectuate the adult’s own life decisions”*
  - Supported Decision Making Agreement (defined):
    - Plural - *“arrangement with supporter or supporters”*
    - Describes *“how the adult uses SDM to make their decisions”, “rights of the adult”, “responsibilities of the supporter”*





# Review of Recent Maryland SDM Legislation

- Definitions
  - Supporter (defined):
    - *“individual selected by adult”*
    - *“to provide support”*
    - *“to provide support in making, communicating, or effectuating the adult’s own life decisions”*



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# Review of Recent Maryland SDM Legislation

- Purpose
  - To assist adults:
    - *“By obtaining support – in making, communicating or effectuating decisions – corresponding to the will, preference, and choices of the adult”*
  - To prevent:
    - *“Appointment of substitute decision maker for the adult, including a guardian”*



# Review of Recent Maryland SDM Legislation

- APPLICATION

- Adult may use SDM to:
  - *“Increase the adult’s self-determination”*
  - *“Prevent the need for a substitute decision maker” (agent or guardian)*
  - *“Limit of terminate the use of a substitute decision maker”*
- ALL adults are presumed capable of making an SDM agreement

**TO BE CONSTRUED LIBERALLY!**



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# Review of Recent Maryland SDM Legislation

- APPLICATION

- Manner of communication – “not ground for determining the adult’s capability for making, changing, or revoking an SDM agreement”
- SDM agreement cannot be used as evidence of incapacity (no risk in signing), and cannot restrict the adult from acting independently or accessing their personal information
- Guardianship:
  - Person under guardianship may enter into an SDM agreement
  - Court may limit or remove guardianship due to existence of SDM agreement
  - Guardian cannot prevent without “*good cause*”



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# Review of Recent Maryland SDM Legislation

- APPLICATION

- “Support” is defined as:

- Gathering information
- Understanding and interpreting information
- Weighing options
- Understanding consequences -- pros and cons of a decision
- Participation in conversations with third parties
- Providing support to the adult in implementing a decision



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# Review of Recent Maryland SDM Legislation

- APPLICATION

- Responsibilities of the Supporter:

- Support the will and preference of the adult – without insertion of supporter’s opinion about reasonableness of the adult’s wishes, preferences, or choices
    - Act honestly, diligently, and in good faith
    - Act within the scope of the SDM agreement
    - Maintain records and make them available regarding:
      - Supporter’s actions
      - How the adult communicates and expresses opinions
      - Records and information obtained
      - Maintain safety and security of such records
    - Relationship is one of trust and confidence



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# Review of Recent Maryland SDM Legislation

- APPLICATION

- A supported decision maker may NOT:
  - Make decisions for 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 outside of the adult's presence, unless authorized by the adult to do so
  - Act outside the authority of the SDM agreement



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# Review of Recent Maryland SDM Legislation

- APPLICATION

- Who may NOT be a supporter:

- A minor
    - A person against whom the adult has obtained a peace order
    - A person who has been convicted of financial exploitation

- Resignation of Supporter:

- Must be orally given or in provided in writing to the adult, and to all other named supporters and third parties who have the Agreement on file
    - Authority of supporter ends upon their incapacity or death



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# Review of New Maryland SDM Legislation

- APPLICATION

- Requirements of Form of SDM Agreement:

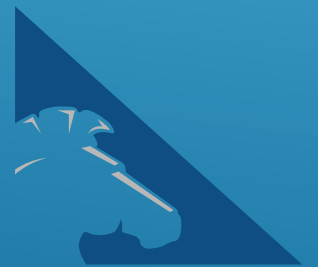
- Any form consistent with the Statute is acceptable
    - Must be:
      - Documented, dated, and witnessed by two adults who are not the supporter, an employee or agent of the supporter
      - Name at least one supporter
      - Describe the decision-making assistance the supporter (or each supporter) may provide the adult
      - Describe how supporters may work together
      - Describe any potential conflict(s) of interest and how they might be mitigated



# Review of Recent Maryland SDM Legislation

- APPLICATION

- Requirements of Form of SDM Agreement (cont'd):
  - Document how the adult selected the supporter(s)
  - Be approved by the Court if adult has a guardian and the SDM agreement affects the authority of the guardian
  - Contain an attestation about the adult's independence in decision making



# Review of Recent Maryland SDM Legislation

- APPLICATION

- Adult can revoke SDM agreement orally or in writing and can obtain support from an individual of the adult's choosing to revoke the agreement
- Third parties may rely on the SDM agreement in good faith
- Third parties may also decline to comply with an SDM agreement on the following grounds:
  - Actual knowledge of invalidity, revocation, or abrogation; or coercion or undue influence of a supporter

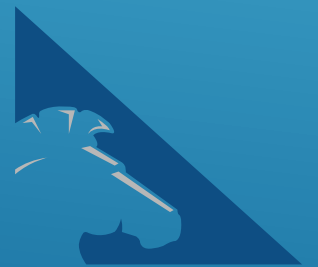


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# Review of Recent Maryland SDM Legislation

- APPLICATION

- Third parties may be held liable for the following:
  - Causing personal injury as a result of negligent, reckless, or intentional acts
  - Failing to give effect to an adult's decision made in accordance with a valid SDM agreement
  - Failing to provide information to the adult or supporter of the adult that would be necessary for informed consent
  - Actions otherwise inconsistent with the SDM law



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# How Can SDM Benefit Persons Living with Disabilities?

- Persons living with disabilities no longer strictly limited by their diminished capacity
- Paradigm of risk should encourage ideal of independence during road to recovery
- New empowerment and recognition of continued rights of self-determination
- New and legally articulated role for supporter(s)
- New legal path forward – a psychological shift
- Not limited – should not be pigeonholed
- Ideals of independence and rights of self-determination not diminished by real need for guardianship
- New protections from guardianship



# What We Suggest You Do Now – A Path Forward

- Set a consultation with your attorney
- Complete an elder law questionnaire
- Relax and understand there is nothing to fear
- Bring your current estate planning documents for a complete review
- Consider whether you have an advisory team which includes your financial advisor and CPA
- Prepare any questions or concerns you may have for discussion
- Take the *time to think* - decide what is important to you and what your goals are
- Depending on your individual needs, develop a Supported Decision Making Agreement



# THANK YOU!

Should you have any questions whatsoever, please contact Steve at [steve@elvilleassociates.com](mailto:steve@elvilleassociates.com) or 443-393-7696 x108; or Community Relations Director Jeff Stauffer at [jeff@elvilleassociates.com](mailto:jeff@elvilleassociates.com) or 443-393-7696 x117.

Stephen R. Elville & Elville and Associates Present:

Supported Decision Making for Loved Ones Living with Disabilities – Breaking Through

Presented by: Stephen R. Elville, J.D., LL.M. – Managing Principal and Lead Attorney

Elville and Associates, P.C.

Wednesday, July 19, 2023



# Questions?

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# Other Training Events

**On Demand Training at  
[www.nashia.org](http://www.nashia.org)**

**NASHIA 2023 Webinar Series:**

October 4, 2023

***Intimate Partner Violence: A Panel  
Discussion***

Panelists: Kim Gorgens, PhD,  
Anne DePrince, PhD  
Noon-1:15 pm ET

**Workshops-2023:**

October 11 and 18, 2023

***Trauma-Informed Meditation,  
Breathwork, and Psychoeducation for  
Brain Injury***

Instructor: Kyla Pearce, MPH, PhD, CBIS

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December 1, 2023

Noon – 3pm ET

***Leading Groups in Virtual Spaces:  
Becoming a Better Facilitator: Part 2***

Instructor: Amanda Tower

# Other Training Events

## SOS Conference

<https://www.nashia.org/sos2023>

**Guiding Systems  
Toward Change**

*34TH ANNUAL  
STATE OF THE  
STATES IN BRAIN  
INJURY CONFERENCE*

September 11-14, 2023  
Minneapolis, MN

Virtual Preconference:  
September 7, 2023

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# Thank you!

growing leaders.

