

The background of the cover is a puzzle made of pieces of US dollar bills. A large blue puzzle piece is in the center, containing the title text. A silver compass rose is positioned on the left side of the blue piece, pointing North. The puzzle pieces show various parts of the dollar bills, including portraits of George Washington and Benjamin Franklin, and the words 'FEDERAL RESERVE NOTE' and 'ONE DOLLAR'.

Supported Decision-Making for Adults with Disabilities

By Joel A. Mendler

Louisiana has adopted a Supported Decision-Making Agreement Act to provide a less restrictive option over interdiction for adults with disabilities who need assistance with making their own decisions regarding daily living.¹ Supported decision-making (SDM) is a process of supporting and accommodating such individuals to make their own life decisions without impeding their right of self-determination, including decisions related to where the adult wants to live, the services and support the adult wants to receive,² with whom the adult wants to live, where the adult wants to work, and management of financial and medical affairs. Judges, lawyers and disability and elder rights advocates should consider SDM as the alternative to a court-based interdiction in appropriate circumstances to avoid unnecessary deprivation of the independence, autonomy and inclusion of adults with disabilities within the limitations of their decision-making abilities.

Interdiction is a harsh remedy, depriving the interdict of personal decision-making in favor of the substituted judgment of a curator based upon the curator's own determination of the interdict's best interests, not necessarily upon the interdict's own values and preferences. Full interdiction requires clear and convincing evidence due to an infirmity that the adult is unable to consistently make reasoned decisions (or communicate those decisions) as to both the adult's personal care and property.³ It has been characterized as a pronouncement of civil death and as a last resort.⁴ A limited interdiction may be available if the adult, due to an infirmity, is unable to consistently make reasoned decisions (or communicate those decisions) as to either personal care or property matters, or any aspect of either.⁵ However, both types of interdiction are unavailable if the court determines that the adult's interests can be protected by less restrictive means.

The petition in a full interdiction proceeding must state with particularity why a limited interdiction is inap-

propriate.⁶ Furthermore, the petition in any interdiction now must set forth, to the extent known after making a reasonable effort to obtain such information, a description with particularity of the petitioner's efforts to use less restrictive means before seeking the interdiction, including all of the following: (a) the less restrictive means for meeting the defendant's needs that were considered or implemented; (b) if a less restrictive means was not considered or implemented, the reasons why; and (c) the reason a less restrictive means is insufficient to meet the defendant's needs.⁷

Some less restrictive alternatives include:

- ▶ powers of attorney;⁸
- ▶ trusts (supplemental needs trust, asset management trust or an *inter vivos* trust);
- ▶ representative payeeship for Social Security or SSI benefits;
- ▶ consumer credit counseling;
- ▶ reverse mortgage;
- ▶ prepaid credit cards (True Link Financial VISA);
- ▶ medical consent laws;⁹
- ▶ home healthcare services;
- ▶ community mental health center programs or partial hospitalization programs;
- ▶ Alzheimer Association services;
- ▶ adult daycare or other daycare programs;
- ▶ Council on Aging programs (transportation, companion services, homemakers, Meals on Wheels);
- ▶ programs sponsored by religious institutions;
- ▶ pharmacy and grocery delivery services;
- ▶ assistive technology devices;
- ▶ service animals; and
- ▶ Louisiana's Adult Protection Services (for cases of abuse, neglect or financial exploitation).¹⁰

The American Bar Association has urged states to require that SDM be identified and fully considered as a less restrictive alternative to guardianship and has urged courts to consider SDM before granting guardianship as well as grounds for termination of guardian-

ships and restoration of rights.¹¹ Several states have adopted SDM laws which widely vary on the requirements of an SDM agreement (SDMA). Louisiana's SDMA Act (a/k/a Dustin Gary Act) is designed to allow an adult with a disability¹² to choose a trusted person or persons (supporter) to support the adult in making the adult's own decisions and exercising the adult's legal capacity by authorizing the supporter to gather and present relevant information, to help the adult understand and weigh decisions, including potential risks, options and likely outcomes and consequences, and to communicate the adult's decisions to third parties and/or assist in implementing such decisions.¹³ The execution of a SDMA does not preclude the ability of the adult to act independently of the agreement.¹⁴ It should be noted that the fact that an adult with disabilities makes an imprudent or poor decision as to his or her person and/or property does not mean that the adult is unfit to make decisions altogether. The supporter does not make decisions on behalf of the adult with a disability but is required only to support the will and preference of the adult and not the supporter's opinion of the adult's best interests.¹⁵ The supporter is limited to exercising only the authority granted under the SDMA.¹⁶ The SDMA can specify the decisions about which the adult does not want the supporter's assistance.

The SDMA must be by authentic act signed by the adult and must contain a separate declaration signed by each supporter named in the agreement indicating the supporter's relationship to the adult, willingness to act as a supporter, and acknowledgement of the duties of the supporter.¹⁷ Sample SDMAs used in other states can be downloaded from the Internet. The SDMA may be revoked by authentic act at any time by the adult or by a supporter.¹⁸ The adult can change the SDMA as needed, such as by adding or eliminating supporters or by having a different type of help in making certain kinds of decisions. The SDMA terminates under a variety of circumstances, including by the adult's execution of a

valid power of attorney (except to the extent the power expressly continues, in whole or in part, the SDMA) or by a competent court's appointment of a temporary or permanent curator for the adult (unless the court's order of appointment expressly modifies but continues the SDMA and limits the powers and duties of the curator).¹⁹

The SDMA may grant the supporter access to personal information, including protected health and educational records, relevant to a decision authorized under the SDMA.²⁰ The supporter must ensure all information is kept privileged and confidential, as applicable, and is not subject to unauthorized access, use or disclosure.²¹ A supporter is prohibited from obtaining information acquired for a purpose other than assisting the adult in making a specific decision authorized by the SDMA unless the adult consents.²² Likewise, the adult's consent is required for the supporter to obtain nonpublic personal financial information furnished by the adult to a financial institution.²³

One concern about SDM is that the supporter could use a SDMA to unduly influence or exploit the adult decision-maker. However, the adult with a disability must voluntarily enter into the SDMA without undue influence or coercion.²⁴ The supporter is required to act honestly, diligently and in good faith within the scope set forth in the SDMA and to avoid conflicts of interest.²⁵ The supporter is prohibited from exercising undue influence upon the adult or acting outside the scope of authority provided in the SDMA.²⁶ A competent court may terminate the SDMA if it determines that the supporter has used it to commit financial exploitation, abuse or neglect of the adult.²⁷ Finally, if a person who receives a copy of the SDMA or is aware of its existence and has cause to believe that the adult is being abused, neglected or exploited by a supporter, then such person is required to report the alleged abuse, neglect or exploitation to the appropriate authorities, such as Adult Protective Services.²⁸



Conclusion

A SDMA is one of several less restrictive alternatives to an interdiction. It has the advantage of potentially increasing the self-determination of certain adults with disabilities, empowering them to retain their dignity and personal autonomy in some or all of the decisions regarding their daily lives. The SDMA should be coupled with springing health care and financial powers of attorney which become effective upon the adult's inability to make his or her own decisions, even with the advice and assistance of designated supporters.²⁹

FOOTNOTES

1. La. R.S. 13:4261.101-301, *et seq.* (Act No. 258 2020).
2. Support services means a coordinated system of social or other services supplied by private, state, institutional or community providers designed to help maintain the independence of an adult with a disability, including homemaker-type services (including house repair, home cleaning, laundry, shopping and meal provisions), companion-type services (including transportation, escort and facilitation of written, oral and electronic communications), visiting nurse and attendant care, healthcare provisions, physical and psychological assessments, legal assessments and advisement, and hands-on treatment of care, including assistance with activities of daily living and care planning.
3. La. Civ.C art. 389.
4. *Doll v. Doll*, 156 So.2d 275, 278 (La. App. 4 Cir. 1963); Revision Comment (e) to La. Civ.C. art. 389.
5. La. Civ.C. art. 390.

6. La. C.C.P. art. 4541A(4).
7. La. C.C.P. art. 4541A(11), as amended by Act No. 258 (2020).
8. La. Civ.C. arts. 2989 *et seq.* (mandate); La. R.S. 9:3890 (conditional procurement); La. R.S. 28:223 (mental health advance directive); La. R.S. 9:3861 *et seq.*
9. La. R.S. 40:1159.1, *et seq.*
10. La. R.S. 15:1501, *et seq.*
11. ABA Resolution 113 and 105, adopted Aug. 14, 2017, and Aug. 3-4, 2020, and accompanying Report to ABA House of Delegates.
12. An adult with a disability is broadly defined under the Americans with Disabilities Act of 1990 (42 U.S.C. § 12102) as either a person who has a physical or mental impairment that substantially limits one or more major life activities, who has a history of such impairment or who is perceived by others as having such impairment.
13. La. R.S. 13:4261.201.
14. La. R.S. 13:4261.102(3)(c).
15. La. R.S. 13:4261.201(1) and 13:4261.203(1).
16. La. R.S. 13:4261.203(3).
17. La. R.S. 13:4261.205C and D.
18. La. R.S. 13:4261.206A and B.
19. La. R.S. 13:4261.207.
20. La. R.S. 13:4261.208A and B.
21. La. R.S. 13:4261.208B.
22. La. R.S. 13:4261.204(2).
23. La. R.S. 13:4261.204(4).
24. La. R.S. 13:4261.201.
25. La. R.S. 13:4261.203(2) and (4).
26. La. R.S. 13:4261.204(1) and (3).
27. La. R.S. 13:4261.207A(5).
28. La. R.S. 13:4261.302. Any person who knowingly and willfully fails to report to APS may be subject to criminal penalties. La. R.S. 14:403.2A. Provisions related to immunity from civil and criminal liability for good faith supporters and third parties in H.R. 361 were deleted in the final bill.
29. La. R.S. 13:4261.207A(7).

Joel A. Mendler is a member in the New Orleans office of Baldwin Haspel Burke & Mayer, LLC. He is a board-certified tax specialist and estate planning and administration specialist, as certified by the Louisiana Board of Legal Specialization. He counsels families and their attorneys on financial and legal planning for persons with disabilities, including preservation of governmental benefits with special needs trusts, interdictions and Medicaid eligibility. (jmendler@bhmlaw.com; Ste. 3600, 1100 Poydras St., New Orleans, LA 70163)

