

COMPARISON MADE 3/30/2021

INFORMAL & IN PROGRESS

DIFFERENCES:

* Much of the Florida law is dealing with Developmental Disability. Mine deals with all cognition disability as “vulnerable persons.”

* Prohibiting adults from entering into supported decision making agreements unless specified conditions are met.

* Authorizing decision makers to designate a supporter to act as a preneed guardian (mine doesn't give guardian powers.)

* Providing that a person is not subject to criminal or civil liability and has not engaged in professional misconduct for certain acts and omissions under specified conditions. (I should consider adding a form of this)

* Providing immunity from certain actions to certain health care providers and public and private entities, custodians, and organizations, under certain conditions; requiring educational agencies and institutions to allow supporters to participate in certain school functions and meetings and have access to educational records under certain conditions; providing construction; creating s. 746.1014, F.S. (Evaluate this. Line 82)

* Requiring public schools to provide information about supported decision making agreements under certain conditions.

* Requiring public schools to ensure that certain informational materials include information relating to supported decision making.

* Requiring public schools to provide information about supported decision making agreements under certain conditions.

* Requiring public schools to provide information and training to specified staff members.

* Conforming a cross reference; providing an effective date.

* State the petitioner's efforts to use alternatives to guardianship, before seeking the appointment of a guardian advocate, including all of the following: 1. Alternatives to guardianship which were considered and implemented. 2. If alternatives to guardianship were not considered or implemented, the reason why the alternatives to guardianship were not considered or implemented.

* If the vulnerable person has executed an advance directive, a or durable power of attorney, or a

supported decision making agreement, the court must consider and find whether the documents will sufficiently address the needs of the person with a developmental disability for whom the guardian advocate is sought. **(In my version the court does NOT get to decide this. The court is compelled to assess whether a doctor's opinion satisfies criteria as an expert witness., and to then order that the powers of Decision maker assistant be awarded.)**

* If an interested person seeks to contest a supported decision making agreement executed by a vulnerable person, the interested person shall file a verified statement. The verified statement shall include the factual basis for the belief that the supported decision making agreement does not sufficiently address the needs of the person for whom a supported decision making agreement is sought, or that the person with authority is abusing his or her power.

* If a supported decision making agreement exists, the court may not suspend any part of the supported decision making agreement unless there is an abuse of power by any of the supporters. **(Not in mine because the court has deferred authority to the individual and the doctor. A third party's behavior should not affect the rights of the individual).**

* An adult may not enter into a supported decision making agreement unless the adult does both of the following: (a) Enters into the agreement voluntarily and without coercion or undue influence. (b) Understands the nature and effect of the agreement. **(My disagreement is that a person should have the inherent right to do this regardless of any outside influence other than a doctor indicating it would place them or another in harm's way. The court may take action against a third party who attempts to coerce or use "undue influence).**

* An adult, with or without a disability, is presumed to be capable of managing his or her affairs and to have capacity unless otherwise determined by a court. **(My disagreement is that a court should NEVER have the power to decide this. Only a professional trained in making such determinations should have the ability to make such a determination, and the court's role should only be in determining if the professional has done the proper assessment, is credible, and to have the power to provide the SDM Assistant the legal authority to act.)**

* An adult with a disability who is under guardianship or guardian advocacy may enter into a supported decision making agreement if his or her guardian or guardian advocate grants approval in writing of the supported decision making agreement. The adult with a disability does not need approval from the guardian or guardian advocate if the supported decision making agreement will only affect rights that were not removed by the court. **(This is a major flaw. The guardian may be the exploiter, so allowing the guardian the right to allow or deny the SDM Agreement means the individual's rights can be denied without reason. When a guardian seeks to retain power against the interests**

of the individual, this law would give them a wrongful power. Regarding rights covered, the doctor's documented opinion should govern what rights are under the SDM Agreement, and the individual's right not to lose any other rights must be accepted.)

FROM FL. BILL FOR ME TO CONSIDER ADDING:

*Prohibiting an adult's execution of a supported decision making agreement from being used as evidence of his or her incapacity.

*Specifying that decision makers are considered to have capacity even if capacity is achieved by receiving decision making assistance.

* Providing for the duration of supported decision making agreements.

* Providing that a person is not subject to criminal or civil liability and has not engaged in professional misconduct for certain acts and omissions under specified conditions. (I should consider adding a form of this)

* "Alternative to guardianship" means an approach to meeting a person's needs which preserves more of his or her rights than would the appointment of a guardian. Alternatives to guardianship include, but are not limited to, an advance directive, a durable power of attorney, a representative payee under 42 U.S.C. s. 1007, a trust instrument as defined in s. 736.0103, the designation of a health care surrogate, or a supported decision making agreement.

* Each guardian of the person must file with the court an annual guardianship plan which updates information about the condition of the ward. Each plan for an adult ward must address the issue of restoration of rights to the ward and include: (a) A summary of activities during the preceding year that were designed to enhance the capacity of the ward, including whether supported decision making was implemented. If supported decision making was not implemented, the plan must have a statement explaining the reason or reasons why supported decision making was not implemented.

* The manner in which an adult with a disability communicates with others is not grounds for deciding that the adult is incapable of managing his or her affairs. (I thought this was a no-brainer, but it is worth inclusion).

* A supporter shall act with the care, competence, and diligence ordinarily exercised by individuals in similar circumstances, with due regard either to the possession of, or lack of, special skills or expertise.

* A supporter is not a fiduciary of the decision maker, unless the supporter has been appointed as such in another legal document, including, but not limited to, a power of attorney.

* The decision maker and the supporter must sign the supported decision making agreement in the

presence of two subscribing adult witnesses or must sign the agreement before a notary public. Or- A decision maker or a supporter who is unable to physically sign the supported decision making agreement may, in the presence of two subscribing adult witnesses, direct another person to sign the decision maker's or supporter's name. If the supported decision making agreement is acknowledged before a notary public, the notary public may sign the decision maker's or supporter's name.

* The decision maker and the supporter may not act as a subscribing adult witness to the execution of the supported decision making agreement. At least one person who acts as a subscribing adult witness must be a person other than the decision maker's spouse or a blood relative.

* A supported decision making agreement remains in effect until terminated by either party, by the terms of the agreement, or by a court order.

* A supported decision making agreement may be terminated by the decision maker by giving notice to the supporter orally, in writing, through an assistive technology device, or by any other act showing a specific intent to terminate the agreement.

* A supported decision making agreement may be terminated by a supporter by providing written notice of the supporter's resignation to the decision maker and all other supporters appointed in the agreement. If the decision maker cannot understand a written notice, notice must also be provided in the decision maker's preferred method of communication. If a supported decision making agreement includes more than one supporter, a supporter can terminate the agreement only as to that supporter.

* A supported decision making agreement may be terminated by any additional method specified in the agreement.

* If a person initiates judicial proceedings to determine the decision maker's incapacity or for the appointment of a guardian advocate, the supported decision making agreement remains in effect until the court enters an order determining otherwise.

* A supported decision making agreement must provide instructions on how to report abuse, neglect, or exploitation of the decision maker.

* A supported decision making agreement must state the duration of the supported decision making agreement.

* A supported decision making agreement may include written approval from a guardian or guardian 533 advocate, if appropriate. **(My disagreement is because the guardian no longer exists in my**

* A supported decision making agreement may do any of the following:

(b) Appoint an alternate to act in the place of a supporter under circumstances specified in the agreement.

(c) Authorize a supporter to share information with any other supporter or other person named in the

agreement.

(d) Refer to other legal documents, such as a power of attorney.

* Authority to act: Recognition of supporters.—A decision or request communicated with the assistance of a supporter must be recognized for the purposes of any provision of law as the decision or request of the decision maker, and may be enforced by the decision maker or supporter on the same basis as a decision or request of the decision maker. **(The FL HB 681 makes the language too complicated).**

* A person is not subject to criminal or civil liability and has not engaged in professional misconduct for an act or omission if the act or omission is done in good faith and in reliance upon a supported decision making agreement.

* Any health care provider who provides health care based on the consent of a decision maker, made with a supporter provided through a duly executed supported decision making agreement, or who respects and acts consistently with the authority given to a supporter by a duly executed supported decision making agreement is immune from any action alleging that the agreement was invalid unless the entity, custodian, or organization had actual knowledge or notice that the decision maker had revoked such authorization or that the agreement was invalid.

* Any public or private entity, custodian, or organization that discloses personal information about a decision maker to a supporter who is authorized to access or assist the decision maker in accessing that information is immune from any action alleging that it improperly or unlawfully disclosed such information to the supporter, unless the entity, custodian, or organization had actual knowledge that the decision maker had revoked such authorization.

* This section may not be construed to provide immunity from actions alleging that an entity or a person has done any of the following:

(a) Caused personal injury as a result of a negligent, reckless, or intentional act.

(b) Acted inconsistently with the expressed wishes of the decision maker.

(c) In the case of a health care provider, failed to provide information to either a decision maker or the decision maker's supporter which would be necessary for informed consent.

(d) Otherwise acted inconsistently with applicable law.

* The existence or availability of a supported decision making agreement does not relieve any entity or person of any legal obligation to provide services to persons with disabilities, including the obligation to provide reasonable accommodations or auxiliary aids and services such as interpretation services and communication supports to individuals with disabilities under the Americans with Disabilities Act.

SIMILARITIES:

- *Alternative to guardianship sought before guardianship appointment.
- *Requiring courts to determine whether a person with a developmental disability has executed a supported decision making agreement in proceedings in which a guardian advocate is appointed.
- * Providing a presumption of capacity for adults.
- * Specifying that the manner in which an adult with a disability communicates with others is not grounds for deciding that the adult is incapable of managing his or her affairs.
- *Authorizing a decision maker to make, change, and revoke supported decision making agreements even if he or she does not have the capacity to independently manage his or her health care, legal matters, and financial affairs.
- * Authorizing adults with disabilities to enter into supported decision making agreements with supporters.
- * Provide supported decision making, including assistance in understanding the options, responsibilities, and consequences of the decision maker's life decisions, without making those decisions on behalf of the decision maker.
- * Assist the decision maker in understanding the information.
- * Assist the decision maker in communicating his or her decisions to appropriate persons.
- * Perform specified actions under such agreements. Assist the decision maker in accessing, collecting, and obtaining information that is relevant to a given life decision, including medical, psychological, financial, educational, or treatment records, from any person or entity.
- * A supporter shall exercise only the authority expressly granted to the supporter in the supported decision making agreement.
- * A supporter may access the decision maker's personal information only to the extent authorized in the supported decision making agreement.
- * Authorizing adults with disabilities who are under guardianship or guardian advocacy to enter into supported decision making agreements under certain conditions.
- * Providing that supported decision making agreements may refer to or be used in conjunction with other legal documents.
- * Providing requirements for execution of a supported decision making agreement.
- * Providing for the termination of supported decision making agreements.
- * Authorizing supporters to assist decision makers with obtaining certain information.
- * Requiring decision makers to provide specific consent before a supporter provides such assistance.

- * Providing duties for supporters 68 relating to such information.
- * Specifying elements of supported decision making agreements.
- * Specifying provisions that may be included in such agreements.
- * Providing a suggested form for supported decision making agreements.
- * Requiring that decisions and requests communicated with the assistance of a supporter be recognized as decisions and requests of the decision maker.
- * Providing that persons who are provided with supported decision making agreements may rely on such agreements.
- * State the reason or reasons why the alternatives to guardianship are insufficient to meet the needs of the person and to allow that person to exercise his or her own rights.
- * Specify the exact areas in which the person lacks the decision making ability to make informed decisions about his or her care and treatment services or to meet the essential requirements for his or her physical health or safety.
- * Specify the legal disabilities to which the person is subject.
- * A guardian advocate may not be appointed if the court finds that the supported decision making agreement provides an alternative to the appointment of a guardian advocate which will sufficiently address the needs of the person.
- * Pursuant to the grounds listed, the court, upon its own motion, may, with notice to the health care surrogate and any other appropriate parties, modify or revoke the authority of the health care surrogate to make health care decisions for the person. (In my version this happens automatically unless a doctor's order indicates otherwise.)
- * The court may not suspend any part of the supported decision making agreement unless it determines that the supported decision making agreement is invalid.
- * All adults, with or without disabilities, should be able to choose to live in the manner they wish.
- * All adults, with or without disabilities, should have the ability to be informed about and participate in the management of their affairs.
- * Adjudicating a person totally incapacitated and in need of a guardian deprives the person of all of his or her civil and legal rights, and that this deprivation may be unnecessary.
- * Supported decision making is recognized as a lessrestrictive alternative to guardianship and guardian advocacy.
- * List of Definitions (See FL HB 681, lines 329>)
- * A supported decision making agreement must be signed voluntarily, without coercion or undue influence, by the decision maker and the supporter.

* The supporter shall ensure that all information collected on behalf of the decision maker under this section is kept privileged and confidential, as applicable; is not subject to unauthorized access, use, or disclosure; and is properly disposed of when appropriate.

* A supported decision making agreement must do all of the following:

- (a) Identify the decision maker.
- (b) Name at least one supporter.
- (c) Describe the decision making assistance that each supporter may provide the decision maker.
- (d) *State the duration of the supported decision making agreement (I'm adding this) and how it can be terminated or changed.*
- (e) Provide a notice to third parties describing the purpose of the supported decision making agreement.
- (f) *Provide instructions on how to report abuse, neglect, or exploitation of the decision maker (I'm adding this).*
- (g) Include, for each supporter, a signed declaration of the supporter(s).

* A supported decision making agreement may do any of the following:

- (a) Appoint more than one supporter.

* Suggested form.—A supported decision making agreement must contain the elements described in s. 746.109. 538 Although the form provides for two supporters, the decision maker may alter the form to include additional supporters. A supported decision making agreement may, but need not, be in the following form:

STATUTORY FORM FOR
SUPPORTED DECISIONMAKING AGREEMENT
SUPPORTED DECISIONMAKING AGREEMENT OF ...(print name)...

This is the Supported Decision making Agreement of ...(print name)...., date of birth, of ...(city)...., Florida.

(SEE THE FORMAT ON FLORIDA HB 681 page 23, Line 551 through page 36, Line 897.

My form has not been created yet. My form would save the legal talk for where it counts on the form and the statutes, but the description of the agreement must be written in plain language for the vulnerable person to understand. It must also be short enough not to be overwhelming. The Florida document works from a legal standpoint, but lacks the design to effectively communicate to a non-attorney.