


Oops....The Legislature Did it Again!!



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TODAY'S DISCUSSION







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- AB 1663 newly enacted Bill which makes revisions and additions to certain statutes
- Discuss the need for the Bill
- Dissect the codes which comprise Supportive DecisionMaking
- Discuss how to create a Supportive DecisionMaking Agreement
- Discuss benefits and potential issues for Estate Planners

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California Celebrities Placed under Conservatorship


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Free Britney

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AB - 1663

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• Supported Decision-making is part of a bill which:

- Amends portions of the Probate Code
- Adds sections to the Probate Code
- Amends portions of the Health & Safety Code;
- Adds sections to the Welfare & Institutions Code



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Nationwide Response....not just California

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Supported Decision-making is Found in the Additions to the Welfare & Institutions Code

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Supported Decision-making is found in Welfare & Institutions Codes 21000-21008

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Welfare & Institutions Code 21000-21008

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DEFINITION OF "SUPPORTED DECISIONMAKING" W&I Code § 21001(c)

(c) "Supported decisionmaking" means an individualized process of supporting and accommodating an adult with a disability to enable them to make life decisions without impeding the self-determination of the adult.

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Welfare & Institutions Code 21000

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The Legislature finds and declares all of the following:

- (a) Adults with disabilities, including older adults with disabilities, are presumed competent and to have the capacity to make decisions regarding their day-to-day health, safety, welfare, and social and financial affairs, unless otherwise determined through legal proceedings.
- (b) All adults, to the best of their ability and with supports they choose, should be able to be informed about, and participate in, the management of their affairs.
- (c) Like adults without disabilities, adults with disabilities may use a wide range of voluntary supports to help them understand, make, and communicate their own decisions. These voluntary arrangements should be encouraged and recognized as a valid way for people with disabilities to strengthen their capacity and maintain their autonomy.
- (d) The capacity of an adult should be assessed with any supports, including supported decisionmaking, that the person is using or could use.
- (e) Supported decisionmaking offers adults with disabilities a flexible way to maintain autonomy and decisionmaking authority over their own lives by developing and maintaining voluntary supports to assist them in understanding, making, communicating, and implementing their own informed choices.
- (f) Supported decisionmaking can be a way to strengthen the capacity of an adult with a disability.
- (g) Supported decisionmaking is one of several options available to adults with disabilities to understand, make, and communicate decisions and to express preferences, including, but not limited to, medical and financial powers of attorney, authorized representative forms, health care directives, release of information forms, and representative payees.

(Added by Stats. 2022, Ch. 894, Sec. 16. (AB 1663) Effective January 1, 2023.)

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Welfare & Institutions Code 21001

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The following definitions apply for purposes of this division:

- (a) "Adult with a disability" means an adult with any disability, including an older adult with a disability or an age-related disability. Disability includes, but is not limited to, an intellectual or developmental disability, cognitive disability, communication disability, psychiatric disability, physical disability, sensory disability, learning disability, dementia, cognitive impairment, Alzheimer's disease, major neurocognitive disorder, or chronic illness or condition.
- (b) "Life decision" means any decision that affects the adult with a disability, including, but not limited to, a decision regarding any medical, psychological, financial, educational, living arrangement, access to home and community-based services, social, sexual, religious, or occupational matter.
- (c) "Supported decisionmaking" means an individualized process of supporting and accommodating an adult with a disability to enable them to make life decisions without impeding the self-determination of the adult.
- (d) "Supported decisionmaking agreement" means a voluntary, written agreement, written in plain language accessible to the adult with a disability and in conformance with Section 21005. A supported decisionmaking agreement shall be signed in conformance with subdivision (b) of Section 21005 and may be revoked orally or in writing at any time by either party. A supported decisionmaking agreement may include images, be read aloud, or be video or audio recorded, in addition to the written version.
- (e) "Supporter" means one or more adults who meet the requirements in Section 21002 and who enter into a supported decisionmaking agreement to help the adult with a disability make decisions.

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Welfare & Institutions Code 21002

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- (a) A supporter is bound by all existing obligations and prohibitions otherwise applicable by law that protect adults with disabilities and the elderly from fraud, abuse, neglect, coercion, or mistreatment. This division does not link a supporter's civil or criminal liability for prohibited conduct against the adult with a disability, including liability for fraud, abuse, neglect, breach of fiduciary duty, if any exists, coercion, or mistreatment, including liability under the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9), including, but not limited to, Sections 15636 and 15637.
- (b) An individual shall not be selected as a supporter or continue as a supporter of an adult with a disability in any of the following circumstances:
 - (1) The adult with a disability previously made, or makes, an allegation against the supporter under the Elder Abuse and Dependent Adult Civil Protection Act.
 - (2) The adult with a disability has obtained, or obtains, an order of protection from abuse against the supporter.
 - (3) The supporter is the subject of a civil or criminal order prohibiting contact with the adult with the disability, or is subject to a restraining order with respect to the adult with a disability.
 - (4) The supporter has been removed as the conservator of the adult with a disability, based upon a finding that they did not act in the conservatee's best interest.
 - (5) The supporter is found criminally, civilly, or administratively liable for abuse, neglect, mistreatment, coercion, or fraud.

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Welfare & Institutions Code 21002..cont'd

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(c) A supporter shall do all of the following:

- (1) Support and implement the direction, will, and preferences of the adult with a disability.
- (2) Respect the values, beliefs, and preferences of the adult with a disability.
- (3) Act honestly, diligently, and in good faith.
- (4) Act within the scope identified by the adult with a disability.
- (5) Maintain confidentiality of any information obtained by a supporter, unless the adult with a disability specifically authorizes its disclosure.
- (d) (1) A supporter shall not coerce an adult with a disability.
- (2) Unless the supporter has a valid legal authorization to do so and the action is within the scope of their authority, a supporter shall not do either of the following:
 - (A) Make decisions for, or on behalf of, the adult with a disability.
 - (B) Sign documents on behalf of the adult with a disability.
- (3) A supporter shall not obtain information not reasonably related to matters with which the adult with a disability has requested assistance, and shall not use or disclose information for any purpose other than supporting the adult with a disability.
- (4) A supporter shall not participate in any life decision in which they have a conflict of interest. This includes, but is not limited to, any decision in which the supporter has a financial or other tangible stake in the outcome.

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Welfare & Institutions Code 21003

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- (a) An adult with a disability may choose to enter into a supported decisionmaking agreement with one or more chosen supporters. Support may include, but is not limited to, helping the adult with a disability obtain and understand information related to a life decision, communicating the decision to others, and assisting the individual to ensure their preferences and decisions are honored.
- (b) An adult with a disability's signing of a supported decisionmaking agreement does not preclude the adult with the disability from acting independently of a supported decisionmaking agreement and shall not be used by a court or other entity as evidence of incapacity. This subdivision does not limit the admissibility of evidence pursuant to Section 28 of Article 1 of the California Constitution.

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Welfare & Institutions Code 21004

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- (a) Notwithstanding any other provision of this division, an adult with a disability is entitled to have present one or more other adults, including supporters, in any meeting or discussion, or to participate in any written communication, including, but not limited to, individual planning meetings required by state or federal law, service and care planning meetings, discharge planning meetings, meetings with health care providers and individuals who provide residential services or long-term services and supports, and communications with a bank, financial institution, or financial planner.
- (b) An adult with a disability may indicate that they wish to have one or more adults attend a meeting or discussion or participate in any written communication through oral statement, gesture, or any augmentative or alternative communication method used by the adult with a disability.
- (c) A third party may only refuse the presence of one of more adults, including supporters, if the third party reasonably believes that there is fraud, coercion, abuse, or other action by the individuals requested to be included that the third party is required to report pursuant to the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 3).
- (d) The Legislature finds and declares that this section is declaratory of existing law.

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Welfare & Institutions Code 21005

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- (a) A supported decisionmaking agreement shall be written in plain language accessible to the adult with the disability and shall include, but not be limited to, all of the following:
- (1) A list of the areas in which the adult with a disability requests support.
 - (2) A list of the areas in which the supporter agrees to provide the support.
 - (3) The supporter's agreement that they meet each of the requirements specified in Section 21002.
 - (4) Information advising the adult with a disability about their right to file a report under the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9), including, but not limited to, Sections 15656 and 15657.
 - (5) Information and copies of other supported or substituted decisionmaking documents the adult with a disability has in place, including, but not limited to, powers of attorney, authorizations to share medical or educational information, authorized representative forms, or representative payee agreements.
- (b) A supported decisionmaking agreement shall be signed by the adult with a disability and each supporter in the presence of two or more attesting and disinterested witnesses who are at least 18 years of age, or a notary public. The adult with a disability may use reasonable modifications, such as assistive technology or physical assistance, to sign the agreement.
- (c) A supported decisionmaking agreement should be reviewed by all supporters and the adult with a disability every two years and updated as needed. An updated agreement shall be signed as required in subdivision (b).

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Welfare & Institutions Code 21006

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- (a) (1) A supported decisionmaking agreement is effective until it is terminated in one of the following ways:
- (A) By the adult with a disability.
 - (B) By all supporters.
 - (C) By the terms of the agreement.
 - (D) By the death of the adult with a disability.
 - (E) All supporters are no longer eligible to serve pursuant to Section 21002.
- (2) Any party may choose to terminate their participation in the agreement at any time by providing written or oral notice of the termination to all parties to the agreement. An adult with a disability may terminate a supported decisionmaking agreement by other conduct intended to communicate termination, including by canceling, defacing, obliterating, burning, tearing, or otherwise destroying the supported decisionmaking agreement or directing another in the presence of the adult with a disability to destroy the supported decisionmaking agreement.
- (b) If there is more than one supporter, the termination by one supporter does not terminate the supported decisionmaking agreement with respect to other supporters.

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Welfare & Institutions Code 21007

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This division does not apply to CARE court proceedings or to a CARE supporter trained and appointed under the Community Assistance, Recovery, and Empowerment (CARE) Act (Part 9 (commencing with Section 5970) of Division 5).

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Developmentally Disabled vs. Elderly - Code Suggests a Review every 2 Years

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- Still developing minds
- Learning new skills
- More independence & review to assess



- Brain function may decline with age
- Brain injuries brain functions may improve
- Undue Influence? Presence or Disappearance
- \$\$\$\$ Make a Difference... More Assets... More Potential for Abuse?



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Elements of a Good Supportive Decision-Making Agreement

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 $1+1=2$

List of areas the adult with disability
requests support

+

List of areas which the supporter
agrees to provide support

=

Supportive Decision-Making Agreement

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Possible Issues - W&I §21002(d)(3) & (4)

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(3) A supporter shall not obtain information not reasonably related to matters with which the adult with a disability has requested assistance, and shall not use or disclose information for any purpose other than supporting the adult with a disability.

(4) A supporter shall not participate in any life decision in which they have a conflict of interest. This includes, but is not limited to, any decision in which the supporter has a financial or other tangible stake in the outcome.

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Drafters' Perspective

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- How does a Supportive Decision-Making Agreement correlate with an Immediate DPA?
- How does a Supportive Decision-Making Agreement correlate with an Immediate Health Care Directive?
- HIPAA?
- Do Supporters have a Fiduciary Duty?
- Review OC Local Form L-3016 - ADL Assessment of the Proposed Conservatee for ideas on creating a Supportive Decision-Making Agreement
- Does a Supportive Decision-Making Agreement become part of your EP Package?
