

Reinforcing Autonomy and Displacing Guardianships with SDMs

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Nina A. Kohn, [Legislating Supported Decision-Making](#), 58 **Harv. J. on Legislation** 313 (2021).

In *Legislating Supported Decision-Making*, Professor Nina Kohn tackles the deficiencies of the supported decision-making paradigm, beginning with its definition, which varies tremendously depending on who you ask. She defines it as “an umbrella term for processes by which an individual who might otherwise be unable to make his or her own decisions becomes able to do so through support from other people.” (P. 4.) Supported decision-making (or SDM) represents a fundamental shift in the fields of elder law and disability rights. It is an extension of the people-centered approach. SDM promoters claim that it enhances the dignity of individuals with cognitive limitations by permitting decisions to be made *with* them—rather than *for* them.

States can and should use SDM in many contexts. Individuals under a guardianship ought to be empowered to participate in decisions about their lives, their healthcare, their financial affairs, and so on. SDM can thereby permit more limited guardianships. Moreover, for higher functioning individuals, SDM can provide an alternative to a guardianship proceeding altogether. Because SDM is less restrictive alternative, it should be preferred to a guardianship whenever feasible.

However, Kohn argues, SDM has fallen short of its aim of providing an alternative to guardianship in several respects. Indeed, SDM agreements may even erode autonomy by limiting the rights of individuals with cognitive limitations to revoke the agreements. In addition, SDM legislation typically treats SDM supporters as non-fiduciaries while providing few if any remedies or rights for the supported individual—while creating “new legal rights for the *supporters*” (P. 21) (emphasis in original) and third parties.

Kohn’s indictment of SDM implementation is compelling. She notes the convergence of political interests underlying the widespread support for SDM legislation – legislation which, by authorizing SDM agreements, gives them an official imprimatur. She then proceeds to critique the existing ‘ shortcomings. Finally, she frames five coherent and straightforward proposals to remedy those failings. I’ll highlight three of them.

First, Kohn proposes, state guardianship statutes ought to “be amended to explicitly prohibit the use of guardianship where supported decision-making would meet the individual’s needs.” (P. 39.) This approach is embedded in the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (or [UGCOPAA](#)) approved by the Uniform Laws Commission in 2017, but so far, is enacted in only two states.

Second, Kohn explains: “Despite the common rhetoric used to promote them, [most existing guardianship] statutes do not provide individuals with a right to use supported decision-making.” (P. 18.) Kohn’s point rests on a reality of the legal landscape: The majority of individuals under a guardianship retain a host of rights, including the right to contract. Thus, no enabling statute is required

to permit the exercise of this right. Formal legal status (i.e., legislation) is redundant. SDM-enabling legislation can suggest that individuals with cognitive limitations lack the power to make decisions for themselves *unless* a formal SDM contract appointing a supporter is in place. As a result, legislation which expressly authorizes individuals under guardianships to utilize SDM can actually have the effect of diminishing their autonomy and authority over their own lives.

Thus, Kohn's second proposal is to promote SDM agreements through the dissemination of forms *without* any enabling legislation. Stakeholders, state agencies, and non-governmental advocates can simply encourage SDM agreements. A useful form, for example, would identify the parties (the supported party and his or her supporter), address compensation, impose duties, describe the decisions with which the supporter will assist, identify the type of assistance to be provided (e.g., with identifying different options; with evaluating them, etc.), and clarify the overlap between multiple supporters. The form should also – contrary to some examples of SDM legislation – permit the supported person to revoke the agreement at will.

Third, Kohn advances the idea of constructing a public system for supporters, designed along the lines of public guardianship programs. Supporters could be trained and any individuals with disabilities who lack a network of trusted family members could use staff from publicly funded programs for their SDM agreements. Indeed, Kohn suggests, doing so might already be *required* by federal law pursuant to the mandates of Title II of the Americans with Disabilities Act ([ADA](#)). She notes, “Arguably, when a public entity provides decision-making support to individuals with disabilities only if those individuals are subject to guardianship, the entity violates the ADA by not offering a less restrictive alternative.” (P. 45-46.)

Kohn's article is a rousing call to action accompanied by a comprehensive battle plan. It should be required reading for disability rights advocates, elder law attorneys, and state legislators everywhere. It is practical, meaningful, and important scholarship.

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