

# “BEST PRACTICES IN ASSISTING PEOPLE WITH LARS”

Jeffrey Miller, JD  
Disability Rights Texas

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## Supporting Daily and Major Life Decisions



### TOADAY

- Self-Determination
- Decision Making Supports
- Legally Adequate Consent
- Guardianship
- Alternatives to Guardianship/Supports and Services
- Supported Decision Making

Image Description: an upside down triangle that reads: Supports and Services; No Guardianship; Supports and Services & Limited Guardianship; Full Guardianship

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## Supporting Daily and Major Life Decisions



Image Description: an upside down triangle that reads: Supports and Services; No Guardianship; Supports and Services & Limited Guardianship; Full Guardianship

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### RIGHTS = CHOICES

- Choices = Self-Determination
- Self-Determination = Life Control
  
- People's ability and opportunity to be "causal agents . . . actors in their lives instead of being acted upon"
- -Wehmeyer, Palmer, Agran, Mithaug, & Martin, 2000

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### What is Self-Determination?

- Self determination is believing you can control your own destiny.
- Self-determination is a combination of attitudes and abilities that lead people to set goals for themselves, and to take the initiative to reach these goals.



[Image Description: a small heart with the word yourself under.]

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### Benefits of Self-Determination



People with greater self determination are:

- Healthier
- More independent
- More well-adjusted
- Better able to recognize and resist abuse

[Image Description: A girl with down syndrome squatting on a yoga mat with her hands together.]

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### Why is Self-Determination Important?

When denied self-determination, people:

- “[F]eel helpless, hopeless, and self-critical” (Deci, 1975).
- Experience “low self-esteem, passivity, and feelings of inadequacy and incompetency,” decreasing their ability to function (Winick, 1995).
- When a person experiences the above mentioned emotions and mental states, there is a strong likelihood of a person’s physical (and mental) health to be projected into a state of decline.

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### Consequences & Dignity of Risk

- Practicing self-determination also means one experiences the consequences of making choices.
- Sometimes the consequences or risk of failure is worth the potential for success!



Image Description: A drawing of person using a wheelchair pushing a wheelbarrow with boxes labeled 'DIGNITY' around them and a sign that says 'Risk'. The person is pushing the wheelbarrow towards the sign.

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### Important Things to Remember

- Texas law presumes that adults have decision-making capacity – this applies to everyone, including people with disabilities.
- Decision-making is a learned skill – people with disabilities need opportunity, experience and support to learn to make well-informed decisions.
- There are legal ways to assist people with decision-making that do not restrict, limit, or remove their rights.

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# Decision-Making Supports

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## Continuum of Decision-Making Supports

- Supported Decision-Making
- Advance Directive
- Power of Attorney
- Representative payee
- Other Substitute or Surrogate Health Care Decision
- Court-appointed Guardian and/or Conservator
- General/Plenary or Limited Guardianship

These are examples. There are many more

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## Legally Adequate Consent

- In general, adults with disabilities have the right to control their own lives and make their own decisions.
- Individuals must give consent to have limitations placed on their activities, or to participate in events that involve risk.
- For example, consent is necessary for medical operations or in order to participate in a program or activity.

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### Requirements of "Legally Adequate Consent"

Three general requirements for legally adequate consent:

- (a) Legal Capacity;
- (b) Information and Understanding; and
- (c) Voluntariness.

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### Legal Capacity

A person has legal capacity to give consent if they:

- Are over the minimum legal age (usually, age 18) AND
- Have not had a guardian appointed by a court to handle her personal affairs or no previous guardianship is in effect.

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### Information and Understanding

The person giving the consent MUST BE TOLD and MUST UNDERSTAND:

- The nature, purpose, consequences, risks, benefits of, and alternatives to the procedure for which legally adequate consent is needed; AND
- That refusing or taking away the consent will not risk future care and services.

**Note:** A person who does not speak English will be unable to give legally adequate consent unless the information is provided in her native language.

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### Voluntariness

- This means that the person gives her consent freely, and not because she is forced or pressured into it.

**NOTE:** A person does not need to be able to talk, read, or write to give legally adequate consent, so long as the requirements are met and the person can communicate her consent.

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### Legally Authorized Representative (LAR)

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### Legally Authorized Representative (LAR)

- A Legally authorized representative (LAR) is an individual or judicial or other body authorized under applicable law to make decisions on behalf of another individual. LARs may, for example, provide consent to treatment or participation of another person.

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### Legally Authorized Representative (LAR)

- Texas law allows surrogate consent for treatment for an adult who is incapacitated, or otherwise mentally or physically incapable of communication.”
- “Incapacitated” is defined as “lacking the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to any proposed treatment decisions.

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### Who can serve as the Legally Authorized Representative (LAR)?

- First and foremost, agents have the authority to act as the LAR, unless the court order and/or document(s) granting such authority contain limitations regarding healthcare or research:
- (1) a patient’s parent or legal guardian with the authority to make decisions regarding medical treatment; or
- (2) a person designated as a surrogate decision-maker by the patient in a medical power of attorney or Advance Directive.

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### Legally Authorized Representative

- (A) a parent or legal guardian if the patient is a minor;
- (B) a legal guardian if the patient has been adjudicated incapacitated to manage the patient’s personal affairs;
- (C) an agent of the patient authorized under a medical power of attorney;
- (D) an attorney ad litem appointed for the patient;
- (E) a person authorized to consent to medical treatment on behalf of the patient under Chapter 313;

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### Legally Authorized Representative

- (F) a guardian ad litem appointed for the patient;
- (G) a personal representative or heir of the patient, as defined by Chapter 22, Estates Code, if the patient is deceased;
- (H) an attorney retained by the patient or by the patient's legally authorized representative; or
- (I) a person exercising a power granted to the person in the person's capacity as an attorney-in-fact or agent of the patient by a statutory durable power of attorney that is signed by the patient as principal.

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### Advance Directives

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### Types of Directives

Texas law provides four directive forms:

- Directive to Physicians and Family;
- Medical Power of Attorney;
- Out-of-Hospital Do-Not-Resuscitate Order (DNR)
- Declaration for Mental Health Treatment(DMHT).

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### Declaration for Mental Health Treatment (DMHT)

- Located in Chapter 137 of the Civil Practice and Remedies Code, the DMHT allows an individuals who is not incapacitated to state their preferences and instructions regarding consent to or refusal of mental health treatment
- These documents can be a powerful tool for an individual to provide relevant and important information to mental health providers when they present in perceived crisis.
- Individuals can explain in the document what medications are effective, ineffective, or even harmful. They can also provide nonmedical information that is helpful such as persons they want to be notified and nonmedical techniques that can help deescalate a perceived crisis.

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### Kinds of Treatment you can give Instructions about in PAD

- What psychotropic medications you do or do not want;
- If you do or do not want electroconvulsivreatment (ECT); and
- If an emergency comes up, how you would like the doctors and staff to try to calm you down (i.e. let you read a book, give you a shot of medication, and then try seclusion).

**Note:** You can also list conditions and limitations in which you include exactly what you want in regard to the three MH treatments listed above.

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### Witnessing a Declaration of Mental Health Treatment

A witness to a declaration for mental health treatment may not be:

- (1) A person's health or residential care provider or an employee of that provider;
- (2) The operator of a community health care facility providing care to the patient or an employee of an operator of the facility;
- (3) A person related to the patient by blood, marriage, or adoption;
- (4) A person entitled to any part of the estate of the patient on the death of the patient under a will, trust, or deed in existence or who would be entitled to any part of the estate by operation of law if the principal died without a will; or
- (5) A person who has a claim against the estate of the patient.

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# Guardianship

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### What Is Guardianship?

■ Guardianship is a legal mechanism whereby a substitute decision-maker (a person, family member, institution, or agency) is appointed by the Probate Court to make decisions for and act on behalf of a person who has been judicially determined to lack the mental capacity to manage their person, estate, or both.

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## GUARDIANSHIP

Guardianship is a legal process to determine if a person is "incapacitated."

■ A court decides if, due to a physical or mental condition, an individual is substantially unable to:

- manage their financial affairs,*
- care for their physical health, or*
- provide food, clothing, or shelter for themselves.*

■ Under a guardianship, someone is appointed to make decisions on behalf of the incapacitated person, referred to as the "ward."

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### What Does Guardianship Do?

- Removes the person's freedom of choice, self-determination and independence.
- Removes some or all of a person's decision-making rights.
- Gives decision-making power to someone else, known as the guardian.



[Image Description: Image that reads Guardianship not required.]

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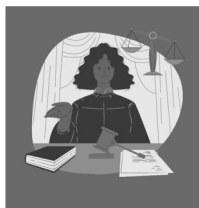
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### Guardianship Process

1. Find an attorney  
*\*There are not many no cost or low cost options*
2. Attorney files an application for guardianship with the county Court
3. A doctor must evaluate and certify that the individual is incapacitated
4. An attorney ad litem will be appointed to represent the interests of proposed ward
5. A guardian ad litem may also be appointed to advocate for the best interest of the person with a disability.
6. Court holds a guardianship hearing
7. Guardian is or is not appointed



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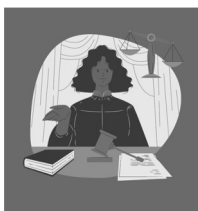
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### Guardianship and the Court



- Requires a court order to establish and **ongoing** court oversight.
- Expensive – attorney fees, court costs, annual bond.
- May be difficult to terminate or modify.
- Annual accounting and reports on the condition of the ward.

[Image Description: A drawing of a judge.]

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### Types of Guardianship

- Full or Limited
  - Guardian of the person
  - Guardian of the estate
- Guardian of the person and estate
- Temporary guardianship



[Image Description: The words All or Nothing with a circle and a line across the words.]

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### Guardianship and the Law

The Texas legislature mandated that courts consider **alternatives to guardianships** and **supports and services** before a guardianship is created.



[Image Description: A chalkboard with the words 'Alternatives to Guardianship' and five branches leading to: Supported Decision Making, Representative Payee, Power of Attorney, Trusts and Special Accounts, and Estate Planning.]

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### Supporting Daily and Major Life Decisions



[Image Description: An inverted triangle with three levels: 'Supports and Services No Guardianship', 'Supports and Services & Limited Guardianship', and 'Full Guardianship'.]

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## ALTERNATIVES TO GUARDIANSHIP

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### LARs and other Surrogate Decision Making

- Legal Documents that give another person the right to make decisions on your behalf.
  - *Medical Power of Attorney*
  - *Durable Power of Attorney*
  - *Declaration for Mental Health Treatment (PAD)*

Image Description: An upside down triangle that reads Supports and Services No Guardianship, Supports and Services & Limited Guardianship and Full Guardianship.

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### Medical Power of Attorney

- Allows an individual to delegate the authority to make health care decisions to a third party in the event the person becomes incapable of making choices.
- Allows the principal to give written instructions regarding the type of treatment they do and do not want to receive.
- The Individual continues to make medical decisions as long as they are capable of doing so and the designee's authority begins when a physician certifies that the principal lacks the capacity to make health care decisions.
- A medical power of attorney can be revoked by the individual at any time.

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**limitations on a person who holds a Medical Power of Attorney**

• Under Texas law, a person who has your Medical Power of Attorney (your agent) cannot consent to the following:

- Voluntary inpatient mental health services;
- Convulsive treatment;
- Psychosurgery; or
- Abortion.

**NOTE:** An agent may not agree to neglect someone through the omission of care.

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**Durable Power of Attorney (DPOA)**

A DPOA appoints a person (agent) to conduct transactions and make decisions for another person (principal).

- A “durable” power of attorney stays valid even if you come unable to handle your own affairs (incapacitated).
- If you don’t specify that you want your power of attorney to be durable, it will automatically end if you later become incapacitated.
- A DPOA can be changed or canceled at any time if a person has capacity.

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**Declaration for Mental Health Treatment (DMHT)**

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### Other Alternatives

#### ■ Representative Payee

- A representative payee is a person or an organization that receives Social Security or SSI benefits for anyone who can't manage his or her benefits.
- A payee must keep records of expenses and report when requested by SSA.

#### ■ Joint Bank Account

#### ■ Special Needs Trust

# MONE



[Image Description: The words money with pictures of a credit card, calculator, money and a piggy bank.]

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## SUPPORTS AND SERVICES

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### Supports and Services

**Formal and informal** resources and assistance that enable an individual to:

- Meet needs for food, clothing, or shelter;
- Care for physical or mental health;
- Manage financial affairs; or
- Make decisions regarding where to live, voting, driving, and marriage.



[Image Description: figures holding letters in a rainbow of colors to read support.]

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### Common Supports and Services

- Your "Community" like supportive and Trusted Individuals, Family Members and Friends
- Waivers
- Case Management Services
- Person Centered Planning
- Free or Reduced Price Meals, Foods and Prescription Delivery



[Image Description: a quote bubble with the words employment, independent living, self advocacy and public benefits.]

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### Common Supports and Services

- **Free or Reduced Price Transportation** – Taxi vouchers, van services, and public transit for appointments when mobility and safety are concerns.
- **Daily Call or Home Visit Services** – Volunteer making daily calls to individual, get help if needed, and provide social contact.
- **Utility Companies** – Notify third party if individual does not pay on time.
- **Technology** – Devices such as smart phones and tablets can help the individual become and remain independent (e.g. timers to remind when to take medication, turn off stove, and lock the door.)

[Image Description: a quote bubble with the words employment, independent living, self advocacy and public benefits.]

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### Common Supports and Services

- **Credit Union and Banking Services** – Provide services for individuals that may need assistance with money management. Some options are:
  - **Direct Deposit:** Income or government benefits (e.g. SSI) can be directly deposited into an account and regular payments for rent, utilities etc. can be made from the account.
  - **Joint Accounts:** An account where at least two people have access to the funds either to make a deposit or withdrawal. A co-signer account requires both people to sign documents in order to authorize withdrawals.
- **Debit Cards** – Reloadable cards can be used as a money management tool to help the individual

[Image Description: a quote bubble with the words employment, independent living, self advocacy and public benefits.]

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THE SUPPORTED  
DECISION-MAKING  
AGREEMENT ACT

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*WHAT IS SUPPORTED  
DECISION-MAKING?*

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**What Is Supported Decision Making?**

A process of **supporting and accommodating** an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, **without impeding the self-determination of the adult.**

Tex. Est. Code § 1357.002(3)

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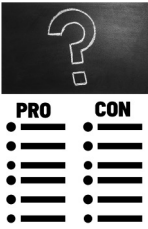
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### Supported Decision-Making

It generally occurs when people get support from one or more TRUSTED friends, family members, professionals or advocates to help them understand the situations they face and choices and options they have so they can make their own decisions.



[Image Description: a question mark, above two lists, one list titled pro and one titled con.]

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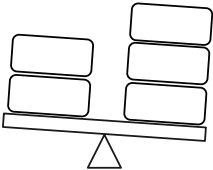
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### Supported Decision-Making

Good Decision

Bad Decision



- The right to make decisions through supported decision-making is based on the constitutional right of a person to make his or her own decisions.
- That right should not be dependent on the quality of any decision made.

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### Three Core Elements of Supported Decision-Making

1. It recognizes the person's right to make decision on an equal basis with others;
2. It recognizes that people can create a decision-making process that does not result in the removal of decision-making rights; and
3. It recognizes that people will often need assistance in decision-making through various means.

■ (Dinerstein, 2012)

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### How Can Supported Decision-Making Help People with Disabilities?

- Understand the options, responsibilities, and consequences of their decisions.
- Obtain and understand information relevant to their decisions.
- Communicate their decisions to the appropriate people.

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### What is a Supported Decision Making Agreement?

- Formalized, written agreement between an adult with a disability and a supporter.
- Legally recognized.
- Can be revoked at any time.
- RESOURCE: <https://www.disabilityrightstx.org/en/category/sdm/>



[Image Description: a piece of paper with a pen.]

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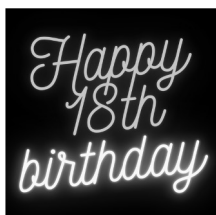
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### Who Can Enter a Supported Decision-Making Agreement?

- Someone OVER 18 who has a physical or mental impairment that substantially limits one or more major life activity.
- A person must have sufficient capacity to agree to the supporter assisting him or her in making particular decision.



[Image Description: A square with the words Happy 18<sup>th</sup> Birthday]

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### Who Can Be the Supporter?

**Any Adult**

- The supporter is selected **by the person with a disability.**
- **The supporter should be someone they trust.**
- Often times it is a family member, relative or friend

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### What Legal Duties Does the Supporter Have to the Person with a Disability?

- A supported decision making agreement creates a statutory fiduciary relationship between the supporter and the person with a disability, (Tex. Est. Code § 1357.052).
- When a person agrees to provide support to an adult with a disability under a supported decision-making agreement, the supporter has a duty to:
  - Act in good faith
  - Act loyally and without self-interest; and
  - Avoid conflicts of interest.
- A supporter could be held liable for violating these duties.

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### Supported Decision Making is Voluntary



[Image Description: two hands, one with the word yes and one with the word no written on it.]

- An adult with a disability decides they need supports with decisions.
- The person with a disability and supporter enter into the agreement voluntarily, just like a power of attorney.
- Does not require going to court.

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### How are SDMAs Different from a Power of Attorney?

- It does not allow someone else to make the decisions for a person.
- In a supported decision-making agreement, the person with a disability retains the right to make decisions.



[Image Description: a picture of three lollipops, one that looks like orange, that looks like a lime and one that looks like a lemon.]

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### What Can a Supporter Do?

- A supporter may help the person
- 1) understand options, responsibilities and consequences of life decisions;
  - 2) access, collect and obtain medical, psychological, financial, educational and treatment records;
  - 3) understand information; and
  - 4) communicate their decision.

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### What About Confidential Information?

- A supported decision-making agreement creates a confidential relationship between the supporter and a person with a disability because the person with a disability trusts and relies upon the supporter.
- The supporter is expected to keep confidential information confidential, including medical and financial information.



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### A Supported Decision-Making Agreement ends:

- 1) When terminated by the individual or the supporter;
- 2) By the terms of the agreement;
- 3) If DFPS finds abuse, neglect or exploitation by the supporter; or
- 4) The supporter is found criminally liable for the abuse, neglect or exploitation of the adult with a disability.



[Image Description: A box with the words "when will it end?"]

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### What are the Requirements for the Supported Decision-Making Agreement form?

- The adult with a disability and the supporter must sign the agreement voluntarily in the presence of two witnesses over 14 or a notary public.
- A simplified supported decision-making agreement form is available on DRTx's website at <https://www.disabilityrightstx.org/en/publication/supported-decision-making-agreement-sample-form/>

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### Reliance Upon a Supported Decision-Making Agreement

- A person shall rely upon the original or a copy of the supported decision-making agreement.
- A person is not subject to criminal or civil liability or professional misconduct for an act or omission done in good faith and in reliance upon the supported decision-making agreement.

Tex. Est. Code § 1357.101

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### What If Someone Suspects Abuse or Exploitation?



If a person has cause to believe that an adult with a disability is being abused, neglected or exploited by the supporter, the person shall report the abuse, neglect or exploitation to Department of Family and Protective Services (DFPS).

[Image Description: Logo for the Texas Department of Family and Protective Services.]

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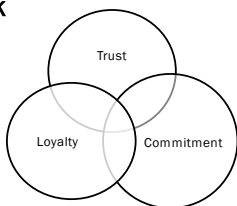
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### Supported Decision-Making is Hard Work

- Supporter is not the decider with no contact with person with a disability.
- Requires building and maintaining a trusting relationship between person with a disability and the supporter.
- This requires time, commitment and open communication.



[Image Description: Overlapping circles with the words Trust, Loyalty, Commitment.]

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### Questions

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THANK YOU

Disability Rights Texas

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