



Guardianship is not the ONLY Option

Guardianship should always be approached as a last resort. But what do you do if someone you work with is deemed incapacitated but may be able to make and communicate decisions? What if the person has friends, family members, or professionals who help them understand and make choices? What if you are not sure?



In those situations, it may not be appropriate, ethical, or consistent with South Carolina law to file a petition seeking to put the person under guardianship. Instead, you should consider and attempt, or encourage your client to attempt, a less restrictive alternative that preserves autonomy and legal rights to the maximum extent possible.

This brochure provides attorneys and their clients with information and resources to help them explore and consider less restrictive alternatives to guardianship



What South Carolina Law Says

In South Carolina, people should only be ordered into guardianship if they are incapacitated and if a guardianship is “necessary.”¹ Before the Court can consider the “necessity” of guardianship, the Petitioner must plead and prove that there are no “less restrictive alternatives” that could provide the assistance the person needs “in lieu of guardianship.”²

Therefore, by definition, if a person can use a “less restrictive alternative,” guardianship is not “necessary” and should not be sought or ordered.



What this Means for Attorneys

It means that guardianship is NOT the only option for people with disabilities. It also means that if you are counsel for the Petitioner, you should explore whether “less restrictive alternatives” could help the person before seeking guardianship.

What are “Less Restrictive Alternatives”?

There are many “less restrictive alternatives” that can help people understand, make, and communicate decisions and direct their lives in lieu of guardianship.³ These include, but are not limited to, Supported Decision Making, General and Healthcare Powers of Attorney, General and Psychiatric Advanced Directives, and Representative Payee arrangements. Notably, Supported Decision-Making (SDM) has been gaining in recognition and use in the last decade.⁴ People use SDM when they work with people they choose who help them understand the situations and choices they face, so they may make their own decisions and direct their lives without a guardian.





In this way, SDM mirrors how attorneys must work with their own clients who have disabilities. Under South Carolina Ethical Rule 1.14, if a client has diminished capacity, the attorney must “as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” Comments to the Rule state that “The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters” and that clients may want “family members or other persons [to] participate in discussions with the lawyer.”

This ethical rule describes a textbook example of SDM: clients with disabilities working with their lawyer and others they choose to take part in and make decisions regarding their legal representation. Indeed, people with intellectual and developmental disabilities have been found to be able to use SDM to engage in legal representation,⁵ consent to and take part in medical and mental health care,⁶ and choose whether to engage in social and romantic relationships.⁷ In another study, people with serious mental illness were found to be able to use SDM to make decisions in life areas including financial management, healthcare, and housing.⁸

How Can I Learn More about and Explore Less Restrictive Alternatives?



There are many resources available to help you and your clients learn about and explore less restrictive alternatives to guardianship. These include the American Bar Association's PRACTICAL tool, which provides a step-by-step process attorneys can follow to help determine if guardianship or a less restrictive alternative is available and appropriate.⁹

We can help!

If you have questions about less restrictive alternatives to guardianship, please call Able South Carolina at 803-779-5121 or the Southeast ADA Center at 404-941-9001. We can help you identify information and resources that can help you and your clients decide if a less restrictive alternative is available and appropriate.

[1] S.C. Code Ann. § 62-5-304

[2] S.C. Code Ann. § 62-5-303

[3] The same is true for conservatorship

[4] e.g. Martinis, J. (2015). Supported decision-making: Protecting rights, ensuring choices. *Bifocal: The Journal of the American Bar Association Commission on Law and Aging*, 36(5), 107-110;

[5] e.g. Arstein-Kerslake, A., Gooding, P., & McSherry, B. (2021). Supported decision-making in criminal proceedings: A sociolegal empirical study. *Journal of Disability Policy Studies*, doi: 10442073211026332.

[6] e.g. Kokanovic, et al. (2018). Supported decision-making from the perspective of mental health service users, family members supporting them, and mental health practitioners. *Australian and New Zealand Journal of Psychiatry* 52(9), 826.

[7] e.g., Boni-Saenz, A. (2015). Sexuality and incapacity. *Ohio State Law Journal*, 76, 1201. Harris, J. (2015).

[8] Hyensi, F., Martinis, J, et al. (2025, in press). “I want to be interdependent”: An exploratory study on the use of Supported Decision-Making for people with serious mental illness. *The Journal of Law, Medicine, and Ethics*.

[9] American Bar Association (2016). The PRACTICAL tool. Available at:

https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/

You can locate our website at this address for resources and more:

scsupporteddecisionmaking.org

Or you can use this QR code to access the website right on your phone:

