

Supported Decision-Making and Financial Decisions

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About CPCIDD

The California Policy Center for Intellectual and Developmental Disabilities (CPCIDD) is a non-partisan, non-profit organization established to identify best-practices that inform, support, and improve upon statewide policies that impact the lives of people with IDD in California.

- CPCIDD has been awarded a grant from **the State Council on Developmental Disabilities (SCDD), Supported Decision-Making Technical Assistance Program**, to develop and provide training to professionals in the financial sector specific to the use of Supported Decision-Making in the Financial Sector.

Decision-Making from Least Restrictive to Most Restrictive for People with Intellectual and Developmental Disabilities



Supported Decision-Making - supporter provides assistance to the person with an IDD so they can make their own decision

Shared Decision-Making - the person with an IDD makes a joint decision with another person

Substitute Decision-Making - someone else makes the decision for the person with an IDD

Legal Requirements/Documentation Required for the Different Types of Decision-Making

- **Supported Decision-Making** – no legal requirements for documentation, but it is best practices to have a written Supported Decision-Making Agreement
- **Shared Decision-Making** – the most common documentation is a jointly signed informed consent that clearly documents the discussion and agreed upon course of action
- **Substitute Decision-Making** – requires legal documentation such as power of attorney, advanced health care directive, or proof of conservatorship



What is Supported Decision-Making?

Supported Decision-Making is 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. *Welfare and Institutions Code, Section 21001(c)*

- “Life decisions” are decisions that affect the adult with a disability, including, but not limited to decisions about medical, psychological, financial, educational, living arrangement, access to home and community-based services, social, sexual, religious, or an occupational matter.
- Provides flexibility for adults with IDD to maintain autonomy and decision-making authority over their own lives and assist them in understanding, making, communicating, and implementing their own informed choices



What is a Supported Decision-Making Agreement for People with IDD?

A SDM Agreement is private agreement between a person with an intellectual or developmental disability, who has the legal right to make decisions for themselves, and a trusted supporter that outlines what type of assistance the individual wants or needs to support them in making important life decisions. A SDM agreement can be formal (written) or informal (verbal) but if it is formalized it must be done so in a written agreement that is in plain language and accessible to the adult with a disability.



What is Required to be in a SDM Agreement?

A written SDM agreement **must** include at least the following:

- A list of areas with which the person requests support
- A list of areas with which the supporter agrees to provide support
- The supporter's agreement to be bound by existing obligations and law
- Information advising the individual with a disability of their rights under the Elder Abuse and Dependent Adult Civil Protection Act
- Information and copies of other substitute, shared or supported decision-making documents [i.e. powers of attorney, authorizations to share medical or educational information, authorized representative forms, or representative payee agreements]
- Signature of the individual with a disability and signatures of two disinterested witnesses at least 18 years old, or a notary
 - The adult with a disability may use reasonable modifications, such as assistive technology or physical assistance, to sign the agreement

Who Can Be a Supporter and Do They Have Any Legal Authority?

A **supporter can be** a trusted adult, such as a friend, family member, professional, etc., chosen by the individual with a disability.

The role of the supporter is to help the adult with a disability understand information so they can make an informed decision. 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:

- Make decisions for, or on behalf of, the adult with a disability.
- Sign documents on behalf of the adult with a disability.

All supporters must comply with all existing obligations and prohibitions under any other law that protects individuals with disabilities and seniors from fraud, abuse, neglect, coercion, or mistreatment.

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.

Who Cannot Be a Supporter?

An individual cannot be a supporter for an adult with a disability if any of the following apply:

- The adult with a disability previously made, or makes, an allegation against the supporter under the Elder Abuse and Dependent Adult Civil Protection Act.
- The adult with a disability has obtained, or obtains, an order of protection from abuse against the supporter.
- The person 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.
- 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.
- The supporter is found criminally, civilly, or administratively liable for abuse, neglect, mistreatment, coercion, or fraud.

How Long Does a Supported Decision-Making Agreement Last?

The SDM agreement lasts until it is terminated by the individual or the supporter(s). However, it should be reviewed by the individual and all supporters every 2 years and updated as needed. NOTE: the updated agreement has the same signature requirements as the original agreement.

A SDM Agreement can be terminated at any time in the following ways:

- The adult with a disability terminates the agreement
- The supporter(s) terminate their agreement by communicating that they no longer want to be a supporter, **however**, it is important to note that if there is more than one supporter, termination by one supporter does not terminate the agreement made by the other supporters
- The agreement can be terminated by terms of the agreement
- Death of the adult with a disability



How can a Supported Decision-Making Agreement be Terminated?

Any party to the agreement can decide to terminate the agreement at any time in the following ways:

- Written or oral notice to all parties to the agreement
- The adult with a disability may also terminate the agreement by other conduct that shows an intent to terminate the agreement.
 - Other conduct that shows an intent to terminate the agreement can include acts such as canceling, defacing, obliterating, burning, tearing, or otherwise destroying the supported decision-making agreement or directing another in the presence of the adult with a disability to destroy the supported decision-making agreement.

Do Supporters Have Fiduciary Duties?

A fiduciary relationship is a legal or ethical relationship that creates legal duties owed to another person, involves a high level of trust and confidence, and requires the fiduciary to act with the utmost good faith for the benefit of the other person.

CA law does not require supporters to be fiduciaries or hold fiduciary duties, however, supporters are required to do all of the following:

- Support and implement the direction, will, and preferences of the adult with a disability.
- Respect the values, beliefs, and preferences of the adult with a disability.
- Act honestly, diligently, and in good faith.
- Act within the scope identified by the adult with a disability.
- Maintain confidentiality of any information obtained by a supporter, unless the adult with a disability specifically authorizes its disclosure.

People with IDD - Decision-Making Capacity

Adults with IDD, including older adults with IDD, 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 proceeding. *Cal. Welf. and Inst. Code § 21000*

- Capacity of an adult with IDD should be assessed with any supports, including supported decision-making, that the person is using or could use. *Cal. Welf. and Inst. Code § 21000 (d)*

The Banking Balancing Act

- Legal Obligations – Consumer Protections
 - Gramm-Leach-Bliley Act
 - Financial Information Privacy Act
 - Elder Financial Reporting Act of 2005
- Legal Obligations – Equal Access and Anti-Discrimination
 - Americans with Disabilities Act
 - Unruh Civil Rights Act
 - Disabled Persons Act



Requirements to Establish a Bank Account

- Valid Government Photo ID
- Social Security Number or Individual Tax ID
- Proof of Residence
- Initial Deposit
- 18 years or Older

UNLESS....

Bank personnel reasonably believe the person seeking to open the account lacks capacity to contract



Financial Capacity/Financial Decision–Making and Financial Institutions

The **Capacity** to manage money and financial assets in a way that meets the person's needs which are consistent with their values and self-interests.

- Performance (task) + Judgement (cognitive/self-interest) = Financial Capacity
- Declarative Knowledge – ability to describe financial concepts
- Procedural– for example, the ability to write checks
- Judgment – sufficient to make sound financial decisions

Financial Decision-Making: a continuum of financial decisions that can range from basic decisions like buying groceries to complex decisions such as purchasing a house.

Mandated Reporting

- Nearly 35% of reported elder/dependent adult abuse is for financial abuse
- CA, all officers and employees of financial institutions are mandated reporters, including notary public
- Financial professionals are in a unique position to spot financial abuse
 - Unusual spending patterns or withdrawing large sums of money
 - A new person “advising” the individual on how much to take out
 - Reluctancy on the part of the individual account holder
 - Adding someone new to their account
- Mandated Reporter Training - <https://mandatedreportertraining.com>

Do Representative Payees Use or Recognize SDM/SDM Agreements?

- A Representative Payee is a person or entity that the Social Security Administration (SSA) appoints to manage the financial benefits (*SSI, Disability Benefit*) for individuals deemed, by the SSA, to be unable to manage their own finances
- SSA doesn't recognize SDM or SDM Agreements **BUT** that does not preclude rep payees from honoring SDM Agreements or using the principles of SDM in the financial management/decision-making
 - Rep Payee duties include, in part, using the benefits (SSI) to pay for the beneficiary's basic needs – food, shelter, clothing, medical and person items - and save any remaining funds
 - There is a lot of opportunity for financial decision-making within the context of meeting basic needs, as well as how and what to save

Does CA Require a Financial Monitor for SDM Agreements?

A financial monitor is someone who is designated to oversee the financial affairs of the adult with a disability – the monitor cannot be a supporter.

- Some states have a statutory requirement for a financial monitor
- CA does not require a financial monitor, but it is recognized among many subject matter experts believe it is a best practice and can reduce the risks of financial abuse/exploitation

Financial Abuse/Exploitation



Financial Abuse and Financial Exploitation refer to the same act, defined as, when a person or entity does any of the following:

- Takes, or assists in taking...or retaining real or personal property of an elder/dependent adult for wrongful use, or the intent to defraud, or both
- Takes, or assists in taking...or retaining real or personal property of an elder/dependent adult by undue influence

Cal. Welf. and Inst. Code § 15610.30

Financial Abuse and SDM

- Financial abuse of older persons and people w/ disabilities has long been a problem, it continues to be among the fastest growing types of abuse, and is significantly underreported
- One of the most frequently voiced concerns about SDM is that it will become a tool for abuse, especially financial abuse, of older persons and people w/ disabilities
- A literature review of research done within the last 10 years did not find evidence to support an increase of financial abuse for individuals who use SDM. Journals reviewed include:
 - American Journal on Intellectual and Developmental Disabilities
 - Intellectual and Developmental Disabilities
 - Inclusion

Supported Decision-Making or Financial Abuse/Exploitation?

- A supporter's role is **only** to assist the person in gathering/understanding the information or options they have related to their finances so they can make their own informed choice
- Concerns of financial abuse/exploitation arise in circumstances where a person – maybe identified as a supporter – exerts (or attempts to exert) control over decisions made by the elder or adult with a disability, or they try to control the person's decisions through manipulation or coercive tactics ultimately taking away their ability to make their own choice

Scenarios to Consider – SDM or Financial Abuse?

J is a person with an intellectual disability, he chooses his cousin P to be his supporter for financial decision-making

- J loves football and wants to have a Super Bowl party at his home
- He wants to purchase a 92-inch t.v. that costs \$4,000.00 to purchase and install
- J has been saving his money for several years to go on a vacation to Hawaii because he has always wanted to go – he has \$5,000.00 in his savings account
- J asks P what he thinks...

Discussion – SDM or Financial Abuse?

- P thinks it is a terrible idea for J to buy the t.v and tells him he should not do it because it cost too much money
- P also loves football and would love to watch the Super Bowl on a huge t.v. so he tells J that he should just go for it and buy the t.v. even though J is not quite sure, when J asks P “are you sure?” P says all your friends will love it and love hanging out at your house
- P suggests that he and J make a list of pro/cons related to the purchase to make sure J understands all the implications before J makes his decision on whether or not to buy the t.v.

What is the Professional Liability if You Rely on a SDM Agreement and There is a Bad Outcome?

Generally, professionals acting in good-faith and relying on a properly executed SDM Agreement are not liable for decisions made based on that agreement. However, there are circumstances under which liability could arise if the professional in question failed to act reasonably and meet the “prudent and diligent” standard of their profession.

Other important things financial professionals should know related to SDM and SDM Agreements include:

- A third party, including a financial professional, can refuse the presence of one of more supporters if they reasonably believes that there is fraud, coercion, abuse, or other action reportable pursuant to the Elder Abuse and Dependent Adult Civil Protection Act.
- There is no legal requirement in California for a decider and/or supporter to produce the agreement, however, a financial professional can make a request to see the agreement for purpose of verifying the legitimacy of the supporter and the scope of the agreement. It is important to note that requesting to see the agreement may be consider a factor in determining whether the professional met the “prudent and diligent” standard of care.

Where Can You Find Additional Information About Supported Decision-Making?

CA Policy Center for IDD

<https://www.cpcidd.org/supported-decision-making/>

State Council on Developmental Disabilities

<https://scdd.ca.gov/supported-decision-making-resources/>

American Civil Liberties Union

<https://www.aclu.org/documents/supported-decision-making-resource-library>

UC Davis MIND Institute

<https://health.ucdavis.edu/mind-institute/centers/cedd/supported-decision-making>

Questions?

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