SPONSOR: Sen. Hall-Long & Rep. Bentz & Rep. Heffernan
Sens. Ennis, Hocker, Sokola;
Reps. Briggs King, Dukes, Kowalko, Paradee, B. Short, Wilson

DELAWARE STATE SENATE

148th GENERAL ASSEMBLY

SENATE BILL NO. 230
AS AMENDED BY
SENATE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 16 OF THE DELAWARE CODE RELATING TO SUPPORTED DECISION-MAKING.

WHEREAS, individuals with cognitive and physical disabilities currently have numerous options in Delaware when it comes to assistance in decision-making and general assistance, including advanced health-care directives, power of attorneys, and guardianship; and

WHEREAS, supported decision-making agreements allow individuals an alternative in the decision-making process, specifically for individuals who are able to make their own decisions but might need added assistance within specific areas; and

WHEREAS, supported decision-making agreements are not intended to replace existing alternative decision-making options, but to allow further options for Delawareans; and

WHEREAS, the Federal Administration on Aging and the Administration for Intellectual and Developmental Disabilities have promoted the availability of supported decision-making agreements; and

WHEREAS, many, in both the disability community and the aging community, may benefit from the availability of assistance, which is respectful of their autonomy while offering a variety of alternative decision-making options from which they can choose; and

WHEREAS, while the ability to choose a supporter who is a member of one's family or one's friend is valuable, there may be a need for voluntary or paid supporters; and

WHEREAS, individuals who are paid to provide residential or other services shall be limited in time, specific to obtaining healthcare consents, to ensure adequate advisement throughout the care process; and

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WHEREAS, representatives of the Department of Health and Social Services, Office of the Public Guardian, and numerous other stakeholders worked to draft Senate Bill No. 230 and have received additional feedback which has since been incorporated within the legislation.

NOW, THEREFORE:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Part IX, Title 16 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

Chapter 94A. Supported Decision-Making.

§ 9401A. Short title.

This Act may be cited as the Supported Decision-Making Act.

§ 9402A. Purpose; interpretation.

(a) The purpose of this chapter is to do all of the following:

(1) Provide assistance in gathering and assessing information, making informed decisions, and communicating decisions to adults who do not need a guardian or other substitute decision-maker for such activities, but who would benefit from decision-making assistance.

(2) Give supporters legal status to be with the adult and participate in discussions with others when the adult is making decisions or attempting to obtain information.

(3) Enable supporters to assist in making and communicating decisions for the adult but not substitute as the decision maker for that adult.

(b) This chapter is to be administered and interpreted in accordance with all of the following principles:

(1) All adults should be able to live in the manner they wish and to accept or refuse support, assistance, or protection as long as they do not harm others and are capable of making decisions about those matters.

(2) All adults should be able to be informed about and, to the best of their ability, participate in the management of their affairs.

(3) All adults should receive the most effective yet least restrictive and intrusive form of support, assistance, or protection when they are unable to care for themselves or manage their affairs alone.

(4) The values, beliefs, wishes, cultural norms, and traditions that an adult holds should be respected in managing an adult's affairs.

§ 9403A. Definitions.

For the purposes of this chapter:

(1) "Adult" means an individual who is 18 years of age or older.

(2) "Affairs" means personal, health care, and financial matters arising in the course of activities of daily living and includes all of the following:

a. Those health care and personal affairs in which an adult makes his or her own health care decisions, including monitoring his or her own health; obtaining, scheduling, and coordinating health and support services; understanding health care information and options; and making personal decisions, including those to provide for his or her own care and comfort.

b. Those financial affairs in which an adult manages his or her income and assets and its use for clothing, support, care, comfort, education, shelter, and payment of other liabilities of the individual.

(3) "Good faith" means honesty in fact and the observance of reasonable standards of fair dealing.

(4) "Health-care institution" means "health-care institution" as defined in § 2501 of this title.

(5) "Health-care provider" means "health-care provider" as defined in § 2501 of this title.

(6) "Immediate family member" means a spouse, child, sibling, parent, grandparent, grandchild, stepparent, stepchild, or stepsibling.

(7) "Person" means an adult; health-care institution; health-care provider; corporation; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(8) "Principal" means an adult who seeks to enter, or has entered, into a supported decision-making agreement with a supporter under this chapter.

(9) "Supported decision-making agreement" or "the agreement" means an agreement between a principal and a supporter entered into under this chapter.

(10) "Supporter" means a person who is named in a supported decision-making agreement and is not prohibited from acting under § 9406A(b) of this title or under regulations enacted under § 9410A of this title.

(11) "Support services" means a coordinated system of social and other services supplied by private, state, institutional, or community providers designed to help maintain the independence of an adult, including any of the following:

a. Homemaker-type services, including house repair, home cleaning, laundry, shopping, and meal-provision.

b. Companion-type services, including transportation, escort, and facilitation of written, oral, and electronic communication.

c. Visiting nurse and attendant care.

d. Health-care provider.

e. Physical and psychosocial assessments.

f. Financial assessments and advisement on banking, taxes, loans, investments, and management of real property.

g. Legal assessments and advisement.

h. Education and educational assessment and advisement.

i. Hands-on treatment or care, including assistance with activities of daily living such as bathing, dressing, eating, range of motion, toileting, transferring, and ambulation.

j. Care planning.

k. Other services needed to maintain the independence of an adult.

§ 9404A. Presumption of capability.

(a) All adults are presumed to be capable of managing their affairs and to have capacity unless otherwise determined by the Court of Chancery.

(b) The manner in which an adult communicates with others is not grounds for deciding that the adult is incapable of managing the adult's affairs.

(c) Execution of a supported decision-making agreement may not be used as evidence of incapacity and does not preclude the ability of the adult who has entered into such an agreement to act independently of the agreement.

§ 9405A. Supported decision-making agreements.

(a) An adult may enter into a supported decision-making agreement if all of the following apply:

(1) The adult enters into the agreement voluntarily and without coercion or undue influence.

(2) The adult understands the nature and effect of the agreement.

(b) A supported decision-making agreement must include all of the following:

(1) Designation of at least 1 supporter.

(2) The types of decisions for which the supporter is authorized to assist.

(3) The types of decisions, if any, for which the supporter may not assist.

(c) A supported decision-making agreement may include any of the following:

(1) Designation of more than 1 supporter.

(2) Provision for an alternate to act in the place of a supporter in such circumstances as may be specified in the agreement.

(3) Authorization for a supporter to share information with any other supporter named in the agreement, as a supporter believes is necessary.

(d) A supported decision-making agreement is valid only if all of the following occur:

(1) The agreement is in a writing that contains the elements of the form developed by the Department of Health and Social Services as required under § 9410A(a) of this title.

(2) The agreement is dated.

(3) Each party to the agreement signed the agreement in the presence of 2 adult witnesses..

(e) The 2 adult witnesses required by paragraph (d)(3) of this section may not be any of the following:

(1) A supporter for the principal.

(2) An employee or agent of a supporter named in the supported decision-making agreement.

(3) Any person who does not understand the type of communication the principal uses, unless an individual who understands the principal's means of communication is present to assist during the execution of the supported decision-making agreement.

(f) A supported decision-making agreement must contain a separate declaration signed by each supporter named in the agreement indicating all of the following:

(1) The supporter's relationship to the principal.

(2) The supporter's willingness to act as a supporter.

(3) The supporter's acknowledgement of the duties of a supporter under this chapter.

(g) A supported decision-making agreement may authorize a supporter to assist the principal to decide whether to give or refuse consent to care within the meaning of Chapter 25 of this title.

(h) A principal or a supporter may revoke a supported decision-making agreement at any time in writing and with notice to the other parties to the agreement.

(i) An authorization in a supported decision-making agreement may be prospectively limited or abrogated, in whole or part, by a judicial determination that the principal lacks the capacity to engage in the making of specific decisions covered by the agreement despite the assistance of a supporter.

§ 9406A. Supporters.

(a) Except as otherwise provided by a supported decision-making agreement, a supporter may do all of the following:

(1) Assist the principal in understanding information, options, responsibilities, and consequences of the principal's life decisions, including those decisions relating to the principal's affairs or support services.

(2) Help the principal access, obtain, and understand any information that is relevant to any given life decision, including medical, psychological, financial, or educational decisions, or any treatment records or records necessary to manage the principal's affairs or support services.

(3) Assist the principal in finding, obtaining, making appointments for, and implementing the principal's support services or plans for support services.

(4) Help the principal monitor information about the principal's affairs or support services, including keeping track of future necessary or recommended services.

(5) Ascertain the wishes and decisions of the principal, assist in communicating those wishes and decisions to other persons, and advocate to ensure that the wishes and decisions of the principal are implemented.

(b) Except as permitted by regulation promulgated under § 9410A of this title, any of the following are disqualified from acting as a supporter:

(1) A person who is an employer or employee of the principal, unless the person is an immediate family member of the principal.

(2) A person directly providing paid support services to the principal, with the exception of supported decision-making services, unless the person is an immediate family member of the principal.

(3) An individual against whom the principal has obtained an order of protection from abuse or an individual who is the subject of a civil or criminal order prohibiting contact with the principal.

(c) A supporter is prohibited from doing any of the following:

(1) Exerting undue influence upon, or making decisions on behalf of, the principal.

(2) Obtaining, without the consent of the principal, information that is not reasonably related to matters with which the supporter is authorized to assist under the supported decision-making agreement.

(3) Using, without the consent of the principal, information acquired for a purpose other than assisting the principal to make a decision under the supported decision-making agreement.

(d) A supporter shall act with the care, competence, and diligence ordinarily exercised by individuals in similar circumstances, with due regard either to the possession of, or lack of, special skills or expertise.

§ 9407A. Recognition of supporters.

A decision or request made or communicated with the assistance of a supporter in conformity with this chapter shall be recognized for the purposes of any provision of law as the decision or request of the principal and may be enforced by the principal or supporter in law or equity on the same basis as a decision or request of the principal.

§ 9408A. Limitation of liability.

A person who in good faith acts in reliance on an authorization in a supported decision-making agreement, or who in good faith declines to honor an authorization in a supported decision-making agreement, is not subject to civil or criminal liability or to discipline for unprofessional conduct for any of the following:

(1) Complying with an authorization in a supported decision-making agreement based on an assumption that the underlying supported decision-making agreement was valid when made and has not been revoked or abrogated under § 9405A of this title.

(2) Declining to comply with an authorization in a supported decision-making agreement based on actual knowledge that the agreement is invalid or has been revoked or abrogated under § 9405A of this title.

(3) Declining to comply with an authorization related to health care in a supported decision-making agreement because the action proposed to be taken under the agreement is contrary to the conscience or good faith medical judgment of the person or to a written policy of a health-care institution that is based on reasons of conscience.

§ 9409A. Access to information.

(a) A supporter may assist the principal with obtaining any information to which the principal is entitled, including, with a signed and dated specific consent, protected health information under the Health Insurance Portability and Accountability Act of 1996 [P. L. 104-191] or educational records under the Family Educational Rights and Privacy Act of 1974 [20 U.S.C. § 1232g].

(b) The supporter shall ensure all information collected on behalf of the principal under this section is kept privileged and confidential, as applicable; is not subject to unauthorized access, use, or disclosure; and is properly disposed of when appropriate.

§ 9410A. Forms; regulatory authority.

(a) The Department of Health and Social Services shall develop the forms necessary to implement this chapter.

(b) The Secretary of the Department of Health and Social Services may promulgate regulations necessary to implement this chapter.

Section 2. There is established under the Developmental Disabilities Council a committee to investigate the best practices for the selection, training, and oversight of those designated as supporters under this Act and to develop the mechanisms by which such selection, training, and oversight would occur. The committee is to be co-chaired by the Chair of the Developmental Disabilities Council, or a designee appointed by the Chair, and the Executive Director of The Arc of Delaware, or a designee appointed by the Executive Director. Each co-chair shall appoint 8 individuals to serve on the committee. The committee shall report its findings and recommendations to the Secretary of the Department of Health and Social Services for the Secretary's consideration in the development of the initial regulations promulgated under this Act.