Supported Decision-Making: From Justice for Jenny to Justice for All!

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What’s Your Favorite Right?
“I am my choices. I cannot not choose. If I do not choose, that is still a choice. If faced with inevitable circumstances, we still choose how we are in those circumstances.”

- Jean Paul Sartre
- 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
People with disabilities with more self-determination have:

- Better quality of life, more employment and community integration.
  e.g. Powers et al., 2012; Shogren, Wehmeyer, Palmer, Rifenbark, & Little, 2014;
- Improved psychological health including better adjustment to increased care needs.
  - O’Connor & Vallerand, 1994
- Increased health, welfare, and safety
  e.g., Khemka, Hickson, and Reynolds, 2005
Are Your Rights Worth ANYTHING If You’re Not Allowed to Use Them?
Ancient Rome: “Curators” appointed for older adults and people with disabilities.

5th Century Visigothic Code: “people insane from infancy or in need from any age . . . cannot testify or enter into a contract“

Feudal Britain: divided people with decision-making challenges into “idiots” and “lunatics” and appointed “committees” to make their decisions
“Plenary” or “Full” Guardianship

- Gives the Guardian power to make ALL decisions for the person.
- Used in the **VAST** Majority of cases
- “As long as the law permits plenary guardianship, courts will prefer to use it.”

- Frolik, 1998
Guardians and Conservators have “substantial and often complete authority over the lives of vulnerable [people].”
4 NAELA J. 1, 7 (2008).

This includes power to make the most basic health, personal, and financial decisions.
Study after Study shows

- “[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
“The typical ward has fewer rights than the typical convicted felon . . . . By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen.”

- House Select Committee on Aging, H.R. Rpt. 100-641 (opening statement of Chairman Claude Pepper)
Guardianship MAY be Needed:

- In emergency situations when
  - The person is incapacitated and cannot give consent
  - The person did not previously identify how decisions should be made in that situation
  - There is no one else available in the person’s life to provide consent through a Power of Attorney, Advanced Directive, or other means

- To support People:
  - Who face critical decisions and have no interest in or ability to make decisions
  - Who need immediate protection from exploitation or abuse
GUARDIANSHIP IS NEVER NEEDED

JUST

- “Because you have ___”
- “Because you’re ___ years old”
- “Because you need help”
- “Because that’s the way its always been”
- “For your own good”
“Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”

Olmstead v. U.S., 277 U.S. 438 (1928)
Estimated number of adults under guardianship has **tripled** since 1995

- Reynolds, 2002; Schmidt, 1995; Uekert & Van Duizend, 2011.
People under guardianship can experience a “significant negative impact on their physical and mental health, longevity, ability to function, and reports of subjective well-being”

- Wright, 2010
On the Other Hand

Older adults and people with disabilities who exercise greater self-determination have a **better quality of life**, more independence, and more community integration.

- O’Connor & Vallerand, 1994; Powers et al., 2012; Shogren, Wehmeyer, Palmer, Rifenbark, & Little, 2014; Wehmeyer and Schwartz, 1997; Wehmeyer & Palmer, 2003
Women with intellectual disabilities exercising more self-determination are less likely to be abused
- Khemka, Hickson, and Reynolds, 2005
AND

People with Intellectual and Developmental Disabilities who do NOT have a guardian are more likely to:

- Have a paid job
- Live independently
- Have friends other than staff or family
- Go on dates and socialize in the community
- Practice the Religion of their choice

2013-2014
People with Intellectual and Developmental Disabilities who DO NOT have a guardian are MORE likely to:

- Live in their own homes or apartments instead of a group home
- Be involved in making choices about their lives
- Be included in their community
- Have their rights respected
- Have community jobs
- Be able to go on dates or get married

2017-2018
If:

- We KNOW that some people need more support as they age or due to disability
- We KNOW that guardianship can result in decreased quality of life and
- We KNOW that increased self-determination leads to improved quality of life

Then we need a means of INCREASING self-determination while STILL providing support.
Margaret “Jenny” Hatch

Twenty-Nine year old woman with Down syndrome.

- High School graduate
- Lived independently
- Employed for 5 years
- Politically active
THE SITUATION: FEBRUARY 2013

- Court Order putting Jenny in a “temporary guardianship”
- Living in a segregated group home
- No cell phone or computer, Facebook password changed
- Guardians controlled all access to her
- Working up to 5 days a week for 8 months – made less than $1000
Jenny’s Rights
In One Sentence

Guardians had the power:

“[T]o make decisions regarding visitation of individuals with Respondent, Respondent's support, care, health, safety, habilitation, education, therapeutic treatment and, if not inconsistent with an order of commitment, residence.”
On Jenny’s:

- **Independent Living Skills:** “If she had assistance, she may be able to do that”
- **Legal Skills:** “she would need assistance to understand a legal document”
- **Money Management:** She needs “assistance with [a] bank account.”
“She’s going to need assistance to make decisions regarding her healthcare, her living arrangements and such like that, she will need someone to guide her and give her assistance.”
“I believe what would be beneficial to Jenny is that she is afforded the opportunity to have individuals around her who support and love her, who give her the assistance she needs.”
How could Jenny execute a Power of Attorney?

“[N]ot only did Jenny have an opportunity to review the documents, but also the attorney had the opportunity to get to know Jenny and understand her capabilities and limitations in understanding legal documents. Based on this series of observations over several visits, the attorney concluded, and we concurred, that Jenny was capable of understanding these documents.”
What That All Adds Up To

Jenny Needs Support:

- To Understand Legal Issues
- To Understand Medical Issues
- To Understand Monetary Issues
- In her Day to Day Life
JENNY IS A PERSON

We Are All Jenny Hatch
“a recognized alternative to guardianship through which people with disabilities use friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions without the “need” for a guardian.”

- Blanck & Martinis, 2015
How do you make decisions?
What do you do if you’re not familiar with the issue?
- Taxes?
- Medical Care?
- Auto Repairs?

What Do You Do?
So, Supported Decision-Making Is A Lot Of Words For

Getting help when its needed

Just like you and me
Decisions Jenny had made with Support

- Sign Power of Attorney
- Consent to Surgery
- Medicaid Waiver Individual Service Plan
- Application for Paratransit
- Authorization to share medical records
- Assignment of a Representative Payee
First 4 pages justify guardianship.

“However”

- Guardians to be who she wants
- She lives where she wants
- Guardianship for only 1 year – Expired August, 2014
- Only over 2 things – medical and safety
EVEN DURING the 1 year limited guardianship:

“Guardians shall assist Respondent in making and implementing decisions we have termed ‘supported decision making.’”
Jenny Hatch and her attorney celebrate after the court victory. (TWP)

‘I’m so happy to go home today’

Theresa Vargas

Jenny Hatch, a 29-year-old woman with Down syndrome, can live the life she wants after a judge rules she can reside with friends.
Why?

Jenny is Strong, Smart, Determined
AND
She had support from:
- Friends and professionals
- National Organizations and Leaders
- Media
- A Judge who was willing to Listen and Learn
In Other Words

Jenny Got Lucky
Justice and Self-Determination should:

- **NEVER** depend on luck or who you know.
- **ALWAYS** Be the Rule **NOT** the Exception
"Incapacitated person" means an adult who has been found by a court to be **incapable** of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) **meet the essential requirements for his health**, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) **manage property or financial affairs** or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator. A finding that the individual displays **poor judgment alone shall not be considered sufficient evidence that the individual is an incapacitated person** within the meaning of this definition.
Where Do We Go FROM HERE
Think About Capacity

What Does That Mean?

- People can have the ability to do some things but not others
- Or be able to do thing sometimes but not others
- Or only be able to do things if they have help

CAPACITY TO TAKE MEDICATION IS NOT THE SAME AS CAPACITY TO PRESCRIBE IT
If people can only make decisions or take care of themselves with assistance or support, are they "incapable"

ARE YOU?
BEFORE seeking or recommending Guardianship or Conservatorship:

What ELSE Have You Tried?
“Alternatives to guardianship, including supported decision making, should always be identified and considered whenever possible prior to the commencement of guardianship proceedings.”

- National Guardianship Association Position Statement on Guardianship, Surrogate Decision Making and Supported Decision Making, 2015
Supported Decision-Making can help people:

- Understand information, issues, and choices;
- Focus attention in decision-making;
- Weigh options;
- Ensure that decisions are based on their own preferences
- Interpret and/or communicate decisions to other parties.

- Salzman, 2011
There is no “one size fits all” method of Supported Decision-Making. Can include, as appropriate:

- Informal support
- Written agreements, like Powers of Attorney, identifying the support needed and who will give it
- Formal Micro-Boards and Circles of Support

-Martinis, Blanck, and Gonzalez, 2015.
ALL Forms of Supported Decision-Making recognize:

- That EVERYONE has the Right to Make Choices to the Maximum of Their Ability;
- That you can get help exercising your Right to Make Choices without giving it up; and
- That there are as many ways to give and get help as there are people

- Dinerstein, 2012.
“Supported Decision-Making has the potential to increase the self-determination of older adults and people with disabilities, encouraging and empowering them to reap the benefits from increased life control, independence, employment, and community integration”

- Blanck & Martinis, 2015
Guardianship must encourage the person to “participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs”

Va Code 64.2-2019

WHAT ARE YOU TRYING?
**When What You Tried Works:**
**Motion to Terminate**

- If the person is able to make decisions with support or another means
- **THERE’S NO MORE REASON FOR THE GUARDIANSHIP**
- So, the guardian or someone else should ask the Court to end the guardianship, in whole or in part

Va Code 64.2-2012
A Guardian’s job is to work with the person:
- To help the person learn to make his or her own decisions, with support
- To build self-determination
- To “meet essential requirements” for taking care of his or her person and property
- And then ask the Court to terminate the guardianship?

Guardianship as a Way-Station, Not a Final Destination
IT CAN HAPPEN
IT DOES HAPPEN
IT IS HAPPENING

- Projects in South Carolina, Tennessee, New York, Kentucky, California, Nevada, North Carolina, Maine, Massachusetts, Florida, Georgia, and others focused on increasing access to Supported Decision-Making
NOTHING: Not Guardianship, Not Supported Decision-Making is 100% "Safe."

HOWEVER: Supported Decision-Making Increases Self-Determination (Blanck & Martinis, 2015), which is correlated with increased Safety (Khemka, Hickson, & Reynolds, 2005).
Always Remember:

Supported Decision-Making ONLY works if we Recognize, Respect, and Honor EVERYONE’s Right to Make Choices

National Resource Center for Supported Decision-Making
EVERYONE has the Right to Make Choices
EVERY great advance in civil rights fundamentally changed the way “things have always been”
Change is **HARD**

“We were not promised ease. The purpose of life . . . is not ease. **It is to choose, and to act upon the choice.** In that task, we are not measured by outcomes. We are measured only by daring and effort and resolve.”

- Stephen R. Donaldson
“Long after the schools, Vocational Rehabilitation, early interventionist, behavioral consultants, and para-educators have gone. the students will be adults. . . . We [are] ethically, morally, and fiscally responsible for supporting their lives of success and meaning. . . . We have the tools, we have the means . . . we have the vision.”

Gustin, 2015
EVERYONE has the Right to Make Choices
JOIN THE CONVERSATION


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“From Justice for Jenny to Justice for All”: https://www.amazon.com/Supported-Decision-Making-Justice-Jenny/dp/1693400251/ref=sr_1_1?keywords=supported+decision+making+martinis+jenny&qid=1573662603&sr=8-1