

Supported Decision Making and Legal Tools for Decision Making

NOVEMBER 6, 2025

PRESENTED BY THE MINNESOTA ELDER JUSTICE CENTER

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Thank you!

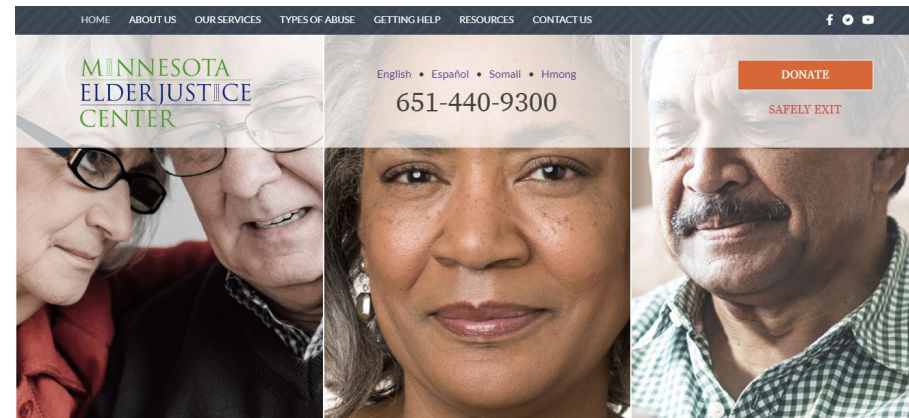
Today, I hope to:

- Review definitions related to advance directives and legal tools to support decision making
- Discuss the role of advance directives in prevention of abuse
- Distinguish between tools used to support various types of decision making
- Share additional resources for caregivers, neighbors and service providers

The Minnesota Elder Justice Center

Mission: To prevent and alleviate abuse, neglect and financial exploitation of older and vulnerable adults.

- › Public Awareness
- › Professional Education
- › Public Policy
- › Direct Service



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The Minnesota Elder Justice Center

Victim Services

- Locate needed resources
- Help make sense of complicated systems and processes
- Make a plan for what comes next
- Legal information

The Minnesota Elder Justice Center

www.elderjusticemn.org

651-440-9300 (Main Line)

651-440-9312 (Victim Services)

All our victim services are provided at no charge.

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Language

Note that many older adults do not prefer to use the terms: “victim” or “survivor” and do not perceive that those terms apply to their situations

- For our purposes, we will use these terms interchangeably, but some older adults prefer that we simply speak to their situation individually whenever possible.

Elder Abuse: toward a definition...

- In general, elder abuse is any knowing, intentional, or negligent act by a caregiver or any other person that causes harm or a serious risk of harm to an older adult.
- Defined by age, relationship, type of abuse
- Victims can be on a continuum of capacity for specific activities and decisions
- 2/3 of perpetrators of elder abuse are family members, trusted individuals and/or caregivers

Types of Abuse

- Domestic or Intimate Partner Violence Later in Life
- Physical abuse
- Emotional abuse
- Sexual assault
- Spiritual abuse
- Financial Exploitation
- Neglect
- Self Neglect

The Gateway Report

Financial Exploitation

- Can be explained
- Can be traced
- Concern for someone's future care
- Closely tied to other forms of abuse:
polyvictimization

What is financial exploitation?

Using a POA to access another's resources for anything other than the principle's well-being

Draining or inappropriately using "joint" bank accounts

Taking loose money in the house

Checks made over, written out to cash, etc.

Reverse mortgages or home loans

Getting a credit card in another's name/misusing credit

Changes in title of real property or stocks

Selling own car; using victim's care to the exclusion of victim's ability to use it

Living rent-free

Minnesota's Statutory Protections

- Definition of “Vulnerable Adult”
- Financial Exploitation

Minnesota's Statutory Protections

Vulnerable Adult: Minn. Stat. 626.5572

- Categorical Definition
 - Inpatient at a Facility
 - Receives services at or from a facility
 - Receives services from a home care provider, or person that acts as a personal care/medical assistant
- Functional Definition
 - Possesses a physical, mental, or emotional infirmity/dysfunction

Minnesota's Statutory Protections

Financial Exploitation of a Vulnerable Adult: Minn. Stat. 609.2335

- Breach of fiduciary duty - i.e. Power of Attorney
- Use of property for something other than the benefit of the vulnerable adult
- Fails to use property for benefit for vulnerable adult
- Deprives vulnerable adult of financial resources

What is a Fiduciary?

We will benefit by understanding this basic definition, and related duties:

A Fiduciary is someone who manages money or property for someone else.

What is a Fiduciary?

A Fiduciary has four basic duties:

- To act only in the best interest of the person he or she is helping.
- To manage the other person's money or property carefully.
- To keep the other person's money or property separate from his or her own.
- And to keep good records.

Types of Fiduciaries

- Attorney in Fact (under a Power of Attorney document)
 - Statutory Short Form
 - General Durable
- Trustee
- Representative Payee
- VA Fiduciary (Veterans' benefits)
- Conservator

Point of interest:

- Others may not understand what fiduciary responsibilities are, or what authority is associated with what role
- People may believe they have more or less authority than they actually have

How do I choose a decision maker?

- Values
 - organized
 - trustworthy
- Communication style
 - With you
 - With other supporters
- Availability

Types of Advance Directives

- Financial Directives:
 - Trusts
 - Power of Attorney
 - Assignments of authority for specific purpose:
 - Rep Payee
 - VA Fiduciary

Types of Advance Directives

- Health Care Directives
 - MN Health Care Directives
 - Living Will
 - Power of Attorney for Health Care
 - Nomination of Guardian
 - POLST
 - DNR/DNI/DNH

Decision Making alongside/with/on behalf of Another Person

Supported Decision Making: involvement of principal

Supported Decision Making

- Supported Decision Making (SDM) is a philosophy that acknowledges that most people are happier and safer when exercising the most autonomy of which they're capable.
- It's an approach that maximizes individual agency and minimizes external decision-making whenever possible.

Supported Decision Making

- Individuals with disabilities use friends, family and professionals as resources for decision making
- Some jurisdictions have enacted legislation around SDM agreements (though MN has not; regardless, individuals are free to create a community of supporters)
- SDM represents a less restrictive alternative to guardianship and conservatorship

Supported Decision Making

For more information about Supported Decision Making in Minnesota, visit:

- The [Center for Excellence in Supported Decision Making](#), a program of VOA-MN-WI
- [WINGS MN](#)
- [Lutheran Social Service of Minnesota: Supported Decision Making](#)
- The [Minnesota Department of Human Services Board on Aging: Supported Decision Making](#)

Less Restrictive Alternatives to Guardianship

- Supported Decision Making / Cooperation with Others' Ideas/Input
- Supporter/Family Involvement
- Ethics Committees / Policies
- Health Care Directive
- Authorized Rep. for Economic Assistance
- County/Private Case Management
- Commitment
- Financial Management

Less Restrictive Alternatives: Conservatorship

- SDM, Family, trusted friend
- Bank Plans: auto pay, direct deposit, co-signers
- Authorized Representative
- Representative Payee
- Power of Attorney
- Trust

The Good News: Preserving Rights, Meeting Needs without Court Intervention

- Supported Decision Making
- Health Care Directives
- Role of Fiduciaries / Financial Management
- Authorized Representatives
- Releases of Information

CESDM

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IN SUPPORTED DECISION MAKING



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Supported Decision Making

Assistance from one or more persons of an individual's choosing in understanding the nature and consequences of potential personal and financial decisions which enables the individual to make the decisions and, when consistent with the individual's wishes, in communicating a decision once made.

Minn. Stat. § 524.5-102 Subd. 16a

SDM: Person is Decision Maker

- Utilizes others to help make decisions: rarely, sometimes, all the time
- Release of Information, banking arrangements, turning to supporters to help person understand decision and impact on person's situation
- Supporters are:
 - Family, friends, trusted others
 - Professionals

Needing Help Does Not Mean Incapable

- Relying on others to understand situation & decisions = good decision making
- Needing help to make decisions or receive necessary care and services does not mean needs guardian
- SDM: making decisions *with* the person, not *for* the person

Principles of Supported Decision Making

- People who have agency (self-determination) have better outcomes
- *No one* is wholly independent
- How we ALL make decisions:
 - What we do when we are struggling with a decision
 - Gathering information to make an informed decision

How Does One Do SDM?

- Less of a process, more of a Philosophical Approach: reframing how we think about abilities of people we serve, regardless of disabilities
- Avoiding ableist / ageist ideas which presume inability/frailty or place all emphasis on safety at cost of life satisfaction and quality of life
- There is no one way to do it: Everything we all do, big or small, formal or informal, to help people make the decision
- Making decisions *with* the person, not *for* the person
- How we *ALL* make decisions

The Good News: Preserving Rights, Meeting Needs without Court Intervention

- ✓ Supported Decision Making
 - Health Care Directives
 - Role of Fiduciaries / Financial Management
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Substitute Decision Making:
no involvement of principal

Decisional Standards: Best Interest

- In general: what would be good for the patient
- What a “reasonable person” would want
- Generic (broad) interpretation
- Can be employed when little or no information exists about the patient
 - Or when the patient never maintained informative capability (f.ex. children)

Decisional Standards: Substituted Judgment

- What patient herself would have wanted
- Possibility for tailored, personalized, precise interpretation
- Can attempt to reconstruct autonomous decision of patient or implement earlier decision (precedent autonomy)
- Utility in scenarios in which a person formerly maintained capability

POA and HCD FAQs

- Questions about scope of authority?
- Any other questions that might arise for you?

Power of Attorney

- Legal document that gives permission for another person (people) to conduct financial business on my behalf
- Principal can continue to assert an independent decision, but agent (POA) empowered to act independent of principal if so inclined – therefor in the “substitute” decision making category
- Me (grantor of permission): “Principal”
- Others named in the document: “Attorney(s) in Fact”

Power of Attorney

- Two primary types in MN:
 - General (Common Law)
 - Statutory Form: MN Statute 523.23
 - Presumption of validity when properly executed
- Out of state documents?
 - Usually interpreted as general (non-statutory) power of attorney

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Power of Attorney

- Opportunities for oversight and control:
 - Gifting clause – specify ability, person
 - Reporting/accounting clause – require periodic reporting, to whom
 - Even without requiring reporting, implications of language demonstrates statutory and common law necessity for record-keeping
 - Fiduciary duties of loyalty, care
 - Revocation and expiration

Power of Attorney

- Expires
 - At expiration date specified in document
 - At the death of the principal
 - In the case of a spouse as an attorney in fact, at the commencement of separation, dissolution or annulment

Power of Attorney

- May be revoked:
- By a written revocation signed by the principal
- Or on behalf of the principal by another (a guardian or conservator)
- Acknowledged by a notary
- Don't forget notification/delivery

Health Care Directive

- Unification of two prior documents:
 - Living Will
 - Durable power of attorney for health care

How did this “power of attorney” form get into my health care directive?

- Legal instruction that gives permission for another person (people) to conduct activity on my behalf
- Grantor of permission: “Principal”
- Comes from old use of “Attorney” to mean “representative.”

Durable power of attorney for health care

- Look for clarification, specificity when people refer to their advance directives
- Each clause in the phrase is important: durable (endures incapacity) power of attorney (nominates decision maker) for health care (in this domain)

Health Care Directive

- MN Statute 145C
- Sample forms available in many places (AG's website, provider orgs, statute itself);
- VA Sample form: Form 10-0137

Health Care Directive

- What about forms from other states (MN Stat 145(c)(4)?
 - Will be honored if forms comply with original state's rules, or with MN Stat 145(c)(3)
 - Will not allow PAD; “assisted suicide”
 - Consider readability, recognition

Agents and Successors

- Can name multiple agents, and must specify...
 - To act independently of one another; or
 - To act jointly (but what is the very important reason?)
- Can name multiple alternates/successors
- Statute requires “reasonable availability”
- No duty for agent to make health decision, but if agent does make health decisions for principal, agent must act in “good faith”

Health Care Directive

- Proper execution: signed in front of a notary or two disinterested witnesses
- Contains nomination of proxy (durable power of attorney for health care), provision of intervention instructions (living will) or both

Health Care Directive

- Revoke by:
 - Preparing written statement of revocation; or
 - Destroying it; or
 - Writing a new Health Care Directive
- Remember copies
- Multiple health care documents? Most recently validly executed controls.

FAQs

- Can the health care agent resign?
- Can the health care agent make financial decisions?
- What happens if one document says one thing, and another document says something conflicting?

POLST

- Provider Order for Life Sustaining Treatment
- Health-specific directive
- Completed by provider with patient
- Ideal under specific circumstances: terminal condition; end of life

POLST – medical order

- Medical order – distinct within healthcare settings
- Instruction from treating physician, licensed independent practitioner, nurse practitioner or other authorized person to members of care team
- Standing orders, order sets, protocols

Context for POLST

- End of life

ABA on POLST:

“The POLST Paradigm is far more than a documentation of code status.” Charlie Sabatino, American Bar Association Commission on Law and Aging

ABA – POLST article

- [Sabatino: “POLST: The Seven Deadly Sins.” Bifocal, Vol 39, Issue 4 \(April-May 2018\).](#)
- 1. Using POLST with people who are too healthy.
 - 1. Not merely code status
- 2. Signing a POLST form without meaningful discussion.

ABA – POLST article

3. Having patients complete their own POLST.
4. Providing incentives for completing more POLST forms.
5. Failing to review POLST forms.
6. Letting POLST disappear.
7. Failing to evaluate systemic use of POLST.

POLST resources

- MN Medical Association on MN POLST:
 - <https://www.mnmed.org/POLST>
 - How-to guide, issue briefs, forms
- National paradigm: <https://polst.org/>
- ABA resources:
https://www.americanbar.org/groups/law_aging/resources/health_care_decision_making/

Guardianship/Conservatorship

- Court supervised
 - Court is involved, from before the guardianship or conservatorship is imposed, until after it concludes
- This is a primary difference between guardianship/conservatorship and other decision making structures such as POA, trusts
 - Violations of duties under those documents may create a cause of action in court or amount to a crime, but the court does not supervise the administration of POA or trustee duties

Guardianship/Conservatorship

- Relationship between incapacitated person and a person who makes decisions:
 - Regarding activities of daily life – Guardian
 - Regarding financial decision-making – Conservator
- Significant imposition on persons' civil rights, autonomy
- Must be no “less restrictive alternatives” – MN Stat 524.5

Guardianship/Conservatorship

- Requirements in imposition:
 - Must be reason to believe the person is incapacitated
 - Diagnosis which may indicate incapacity is not enough
 - Must be actual evidence which supports the belief; i.e. behavior which demonstrates incapacity

AND

- Must be no less restrictive alternative (including supported decision making; legal tools; technological tools)

Guardianship/Conservatorship

- Oversight by court
 - Periodic reporting required
 - Guardianship: annual well-being report
 - Conservatorship: annual accounting
 - Periodic hearings
 - Notification of interested parties
 - Can be terminated: called “restoration”

Guardianship/Conservatorship

Significant imposition on person's civil rights.

Where else, in our legal system, do we see such outcomes as: loss of the right to vote? Loss of the right to determine where to live, or the right to determine with whom to socialize? Or to determine what medical treatment to experience?

Representative Payee or VA Fiduciary

- Roles appointed by government agencies to manage income benefits for another person
- Social Security, Railroad Retirement and the Office of Personnel Management appoint Rep Payees
- Veterans Affairs appoints VA Fiduciaries

Representative Payee or VA Fiduciary

- Manage only the benefits received from appointing agency
- The ability to control other matters results out of legal authority from some other source (POA, trust, court appointment)

Representative Payee or VA Fiduciary

- Rep Payee annual reporting to Social Security
- SSI recipients require additional reporting
- VA Fiduciaries must submit accountings when requested
- Agencies require notification of changes for recipient and fiduciary

Trustees

- A trustee is a person who makes decisions about the money or property in a trust.
- There can be one, or multiple (co-) trustees.
- A “successor trustee” acts when the initial trustee cannot
- Other roles: Principal (settlor, grantor) and beneficiary

Trustees

- A trustee has authority only over property transferred into (owned by) a trust
- A trustee does not have authority over property outside a trust
- To assert decisions over other property, some other grant of authority is required

Trustees

- Roles and responsibilities include all fiduciary duties, as well as other specific responsibilities defined by the language of the trust document itself
- You must review the trust document to understand the breadth of a trustee's responsibilities.

All Advanced Directives:

- Considerations:

- Differences regarding timing of decisional authority
- Multiple decision makers – agreement?
- Clarity of instructions
- Change in perspectives over time – remember, these are living documents
- Coordinate with other planning tools

Reporting and Resources

Systems Navigation

The complex world of vulnerable adult assistance includes:

- Legal representation (private or public)
- Domestic violence programs
- Consumer-based advocacy (AARP, MN Attorney General, OJP, etc.)
- Facility-related responses (OHFC, Ombudsman)
- Guardianship/SDM models
- Adult Protective Services
- ...and more!

If you suspect abuse, neglect or exploitation:

You can contact adult protection or law enforcement. Call the **Minnesota Adult Abuse Reporting Center**:

Single toll-free number: **844-880-1574**

- Available 24 hours per day
- Immediately notifies county agency (EPS); law enforcement (crime); Med Ex, Ombudsman for MH (suspicious death)
- Refers directly to Lead Investigative Agency

Feedback to: dhs.adultprotection@state.mn.us

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If you would like support, information or additional resources:

- Call the Minnesota Elder Justice Center at 651-440-9300
- Visit our website at www.elderjusticemn.org
- We can provide support, and connect you (or your clients) with a range of situation-specific resources

Quick review of available resources:

- The Ombudsman's Office
- Adult Protective Services /MAARC
- OHFC
- Social Security Administration
- Courts
- Banks
- Consumer Financial Protection Bureau
- Other advocacy organizations...

Long Term Care Ombudsmen

- Long Term Care Ombudsmen advocate on behalf of the residents of Medicare/Medicaid licensed nursing facilities, care homes and residences.
- Every state has a full time State Ombudsman; many (like Minnesota) have regional offices
- Ombudsman duties to elder clients are bounded by federal law

The Minnesota Adult Abuse Reporting Center

Mandated reporters are professional or a professional's delegate while engaged in the provision of:

- Social services
- Law enforcement
- Education
- Direct care
- Licensed health and human services professionals
([MS 214.01, subdivision 2](#))
- Employment in a licensed facility
- Medical examiner or coroner activities

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- Online reporting for mandatory reporters

Office of Health Facility Complaints (OHFC)

- Office within MDH
- Investigate quality of life and quality of care complaints including resident rights concerns at MN licensed facilities including:
 - hospitals
 - nursing homes
 - assisted living and home health providers

Social Security

- Contact local Social Security office if you suspect an elder's social security funds are being misused.
- Social Security: 1-800-269-0271 or online at oig.ssa.gov/report
- A “representative payee” can be nominated or changed

Courts

- If an individual requires additional assistance managing money or meeting daily needs, a court may appoint a guardian or conservator (or both).
- County courts and tribal courts
- Contact the court that appointed the guardian or conservator if you suspect misuse of a person's funds or property

Banks and Financial Institutions

- Contact the account-holder financial institution if you suspect misuse of funds or unauthorized or inappropriate access of accounts
- Notification may trigger an internal investigation, but banks are not required to provide “follow up.”
- If possible, direct your report to the security officer of the bank
- But: don’t forget to also notify APS or law enforcement

The Consumer Financial Protection Bureau

- The Consumer Financial Protection Bureau (CFPB) provides resources for individuals serving elders as financial caregivers.
- Financial guides help fiduciaries by:
 - Giving information about responsibilities
 - Alerting about scams
 - Providing information about resources

Other Advocacy Organizations

- Domestic violence advocates
- Sexual violence advocates
- Shelter programs
- Legal Aid providers
- Organizations providing system navigation like the Minnesota Elder Justice Center

Considerations in Safety Planning for Older Victims

- See National Clearinghouse for Abuse in Later Life (NCALL): [Victim-Centered Safety Planning: Key Considerations](#) guide for working with older adults
- Shelter availability (parenting, grandparenting) and accessibility
- Victim mobility
- Victim capacity
- Victim's medical needs

The Minnesota Elder Justice Center

To access a Victim Services advocate:

- Call 651-440-9312
- Victim Services information/request form on website

Thank You!

Questions?

Marit Peterson, JD

Associate director

Marit.Peterson@elderjusticemn.org

651-440-9300

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