

# The Elder Law & Disability Rights Extra

Morris Klein, *Chair*  
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## Message from the Chair

*By Morris Klein, Section Chair 2019-20*

When we celebrated the new year, who could have imagined the challenges soon to come - challenges to our society, to the administration of justice, to our practices, to our clients and their families, and to ourselves and our families, all wrought by Covid-19.

Practicing law remotely, working from home, mastering Zoom and other technologies, learning the ways documents can be legally notarized and witnessed from afar, and dealing with understaffed government offices, are among the new and unexpected challenges we must confront. Above all, we face the sad reality that nursing home residents comprise an out-sized proportion of those succumbing to the virus.

But we must take on the challenges. Our clients still need help, now more than ever. The ravages of dementia do not hit a pause button. The need for care planning does not abate. The quality of care must improve. If anything, Covid-19 has

highlighted the weaknesses in the way our society provides for the elderly and persons with disabilities.

As always, MSBA and the ELDR Section are here to help by sponsoring a number of virtual programs, most without cost, to assist members. MSBA has also served as liaison with the judiciary to disseminate the many emergency directives. We will be there to continue to serve you with CLEs, section meetings and other programs.

When this is all over, it is likely our practices will not be the same as pre-Covid. Herein lies the opportunity to adapt and to improve - both our practices and the ways we can meet the needs of our clients.

Mother Teresa faced enormous challenges, but she was known to inspire others by reminding us that “life is a challenge, we must take it.”

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# Preserving Your Voice Throughout Your Lifetime: Supported Decision-Making as a Best Practice and Alternative to Guardianship

*By Megan Rusciano, Esq.  
Disability Rights Maryland*

Disability is part of the lifespan for many of us. There may come a time when, based on a diagnosis, it is assumed that you are not able to make decisions. At that juncture, decision-making authority about your life becomes the responsibility of others. But what if someone assumes based on your diagnosis of dementia or disability that you are not able to make a decision? What if your partner or close friend was present to help you, you could understand the decision being presented? What if you need just a little support—someone to be in your corner and advocate for you? What legal tool is available then?

The answer that is nationally and internationally gaining momentum as a best practice is supported decision-making (SDM). SDM occurs when people select others who they trust to help them think through and understand the circumstances they face and make decisions.<sup>1</sup> Some people may need extra time to think through a decision or they may have difficulties with communication—with the help of a supporter their preferences and choices can be made clear. SDM is a “series of relationships, practices, arrangements, and agreements, of more or less formality and intensity” that assist a person in making, communicating, and effectuating their decisions.<sup>2</sup> SDM reflects the realities of how most of us engage in decision making. None of us make decisions in a vacuum. Whether it is a medical decision about getting a procedure or a financial decision about investing money, we all ask the people closest to us for their input and advice.

SDM has been codified into law in over a third of states and many courts have terminated guardianships in favor of it.<sup>3</sup> It has been endorsed by many organizations including, The American Bar Association, The National Guardianship Association, The Uniform Law Commission, The US Senate Committee on Aging, and others. The Administration on Community Living has funded a National Resource Center for Supported Decision-Making. It is a tool with which Maryland attorneys must familiarize themselves.

Most states that have passed SDM laws have formalized supported decision-making agreements, which establish how a person can select supporters; what decisions supporters assist with; the requirements for proper execution, including witnessing and declarations; and when third parties can be released from liability. Laws also outline safeguards to protect against undue influence including, limits on who can be supporter; the creation of a fiduciary duty between supporter and individual; and monitors. When formalized in law, SDM is a legal tool that preserves people with disabilities and older adults’ rights and promotes their self-determination. SDM provides a more natural community of support than does guardianship, which is manifest through a formal court proceeding with separate counsel.

While guardianship is a tool in the toolbox, it is inherently restrictive and should be used as a last resort. When a court places a person under guardianship, that person loses the

<sup>1</sup> Jonathan G. Martinis, “Supported Decision-Making: Protecting Rights, Ensuring Choices” 36:5 *Bifocal* (2015).

<sup>2</sup> Robert D. Dinerstein, “Implementing Legal Capacity Under 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making.” *Human Rights Brief*, no. 2 (2020): 8-12, 10.

<sup>3</sup> See generally, <http://www.supporteddecisionmaking.org>. States that have SDM laws include, TX, DE, WI, DC, MO, AK, ND, IN, RI, ME and WA, and others. MD has a narrow SDM law that recognizes it in the context of organ transplant, see MD Code Insurance § 27-915 (2015). Case law terminating guardianship in favor of SDM is found in PA, NY, VA, MA, DC, FL, VT, KY, NV, ME, IN, and MN.

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## Preserving Your Voice...

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authority to make critical decisions about their life including where they live, who they marry or partner with, whether they vote, and their medical care. It removes a person's ability to be the architect of their own life, as our choices form our identity. At Disability Rights Maryland, we see people placed under guardianship because of a diagnosis without regard to their decision-making ability. The National Disability Council has found that people with disabilities end up under guardianship based on stereotypes that undervalue their competency and credibility.<sup>4</sup> Similarly, studies show that many people with dementia can reliably communicate their preferences and decisions about their care, but often these decisions are not respected or accommodated even when they should be.<sup>5</sup> A person's capacities for understanding and decision-making are far more nuanced than their diagnoses.

Research reveals that people who are denied self-determination experience negative life outcomes. Undue guardianship causes a "significant negative impact on ...physical and mental health, longevity, ability to function".<sup>6</sup> People denied self-determination report feeling "helpless, hopeless, and self-critical" and experience "low self-esteem, passivity, and feelings of inadequacy and incompetency".<sup>7</sup> People with dementia report being treated like objects when they are not recognized as being able to think rationally and have their choices respected.<sup>8</sup>

Conversely, exercising self-determination is tied to positive life outcomes. Studies show that when older adults ask for help they experience positive outcomes such as "building relationships and community involvement."<sup>9</sup> By doing so, SDM can combat isolation, which is a "major cause of abuse for people with disabilities and for older adults".<sup>10</sup> In the disability community, increased self-determination is tied to

living independently, being more likely to identify situations of abuse, and having greater community integration.<sup>11</sup> By ensuring that a person drives the dialogue about their life, SDM promotes self-determination.

Many of our legal tools are all or nothing. Powers of attorney give agents the ability to act for us when we are unable to. Surrogate decision-making appoints a substitute decision-maker when we are unable to make medical decisions. Guardianship removes our authority to make decisions and places it in the hands of another. But what happens when you still can make some decisions, but just need support or accommodations? Or when someone presumes that you cannot make a decision based on your circumstance? In these situations, SDM provides a middle ground where people can get the support and advocacy they need and remain in control of their lives.

Given the aging population, there is an inevitable influx of guardianships on the horizon that will weigh heavily on our court system. The Alzheimer's Association has predicted that the number of new dementia cases will double by 2050.<sup>12</sup> This creates a dire need to look to alternatives to guardianship. SDM provides that a person remains engaged and retains a voice in their life decisions. It allows a supporter to step in to assist with communications and determinations.

Returning again to the fact that many of us will experience incapacity during our lifetime, we need to think about how we want to be treated during that time. Would you want to remain engaged and in control of decisions for as long as possible? What would you do if someone questioned your ability to make a decision even though you believed you were still able to make that decision? In these situations and others, supported decision-making provides a critical solution that can preserve your rights and voice.

<sup>4</sup> National Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination* (March 22, 2018) at 89.

<sup>5</sup> Megan S Wright, *Dementia, Autonomy, and Supported Health Decision Making*, 79 *Maryland L Review* 2: 257 (2020) at 273 (citing other studies on this point).

<sup>6</sup> Wright, J. (2010). *Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA*. *International Journal of Law and Psychiatry*, 33(5-6), 350-368. <http://dx.doi.org/10.1016/j.ijlp.2010.09.007>.

<sup>7</sup> Deci, E. (1975). *Intrinsic motivation*. New York: Plenum Press; Winick, B. (1995). *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*. *Psychology, Public Policy & Law*, 1(1), 6-42.

<sup>8</sup> Wright, *supra* note 5.

<sup>9</sup> Dari Pogach (2020). "Supported Decision-Making for Older Adults with Age-Related Cognitive Decline". *American Society on Aging*: <https://www.asaging.org/blog/supported-decision-making-older-adults-age-related-cognitive-decline>.

<sup>10</sup> *Id.*

<sup>11</sup> Peter Blank and Jonathan Martinis, "The Right to Make Choices": National Resource Center for Supported Decision-Making, *Inclusion* 3:1 (2015). See also Bradley, V., St. John, J., Bourne, M.L. (2019). *National Core Indicators Data Brief: What Do NCI Data Reveal About the Guardianship Status of People with IDD?* Retrieved from: [http://www.nationalcoreindicators.org/upload/core-indicators/NCI\\_GuardianshipBrief\\_April2019\\_Final.pdf](http://www.nationalcoreindicators.org/upload/core-indicators/NCI_GuardianshipBrief_April2019_Final.pdf).

<sup>12</sup> Diller, R. 2016. "Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making." *Fordham Urban Law Journal* 43(3): 495-538, 489-499.

# Shrinking the Stretch IRA

By T. Ryan Wilson, Esq.

The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 makes sweeping changes affecting retirement savings accounts, both employer-based plans and Individual Retirement Accounts (IRAs). The SECURE Act affects all employer-sponsored plans. The Act also contains inducements for smaller employers to establish retirement plans, including allowing multiple employer plans, and expands the possibility of tax-favored employer-based retirement savings to other workers who previously may not have had access to such retirement savings. Combined, these changes are expected to present a significant cost to the U.S. Treasury, in the form of reduced tax revenues.

Title IV of the Act, aptly titled Revenue Provisions, is intended to offset those losses in revenue, at least partially. Section 401 of the Act changes rules governing the way most non-spouse beneficiaries must take distributions from an “inherited” defined contribution plan or IRA. This inherited IRA or plan is also known as a “Stretch IRA.” Previously, a Stretch IRA designated beneficiary could stretch distributions from the account over the course of their own lifetime. These distributions are treated as ordinary income to the beneficiary, just as they would have been to the original owner. Thus, Stretch IRAs offered significant tax savings to the beneficiaries as distributions could be spread – or stretched – over a long period of time, or they could be taken at a time when the beneficiary had lower taxable income from other sources.

Section 401(a) of the Act creates a new subset of the designated beneficiary, called an “eligible designated beneficiary.” An eligible designated beneficiary may continue to stretch out distributions in the same manner as a designated beneficiary could before the SECURE Act, which is over the course of the beneficiary’s life. However, a designated beneficiary who is not an eligible designated beneficiary must now drain the account within 10 years after the death of the owner. The five-year draining rule continues to apply for non-designated beneficiaries, such as charities or the decedent’s estate.

The list of eligible designated beneficiaries is short and restrictive. They include: (1) the spouse of the participant or IRA owner; (2) a minor child of the participant or IRA owner, but only during the period when the child is a minor; (3) a beneficiary who is no more than 10 years younger than the participant or IRA owner; (4) a disabled individual, within the meaning of Section 72 (m)(7) of the Internal Revenue Code; and (5) a chronically ill individual within the mean-

ing of Section 7702B(c)(2) of the Internal Revenue Code.

For a spouse, the rules for stretching stay the same as they were before the SECURE Act. They may still stretch distributions throughout their lifetime. Other favorable treatments for a spouse as beneficiary are unchanged by the SECURE Act. In fact, the SECURE Act delays the date by which a spouse-beneficiary must begin taking distributions. Section 114 of the Act changes the age, from 70½ to 72, when an owner must begin taking required minimum distributions; therefore, a spouse as beneficiary will not have to begin taking required minimum distributions until the date when the owner would have turned 72.

Similar to the spouse, the stretching rules remain the same for a beneficiary who is no more than 10 years younger than the owner. Since retirement account owners generally name close relatives as beneficiaries, it is likely that siblings or parents would continue to be able to use the Stretch IRA. One ambiguity is whether the law means exactly 10 years from the decedent’s date of birth or whether the 10 calendar year rule that applies elsewhere in the Internal Revenue Code applies.

A minor child of the owner can stretch distributions during childhood; however, the child ceases to be an eligible designated beneficiary when the child reaches the age of majority, which is 18 under Maryland law. At that time, the child becomes subject to the new 10-year draining rule. Thus, a Maryland child must drain an inherited account by age 28. It should be noted that only a minor child of the account owner is an eligible designated beneficiary. Minor children who are grandchildren or other relatives of the account owner are not eligible designated beneficiaries.

The definition used for a disabled individual under Section 401 is quite restrictive. In order to meet the standard for an eligible designated beneficiary, a disabled individual must be ... “unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration.” The individual must provide proof of the disability. Partially disabled individuals do not qualify under this definition.

The definition used for a chronically ill individual is similarly restrictive. While it uses the standard for chronically

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ill described under Section 7702B(c)(2) as its base, it is, in fact, more restrictive than that standard. Under Section 401, a chronically ill individual must be “unable to perform at least two (without substantial assistance of another individual) of the activities of daily living” for an “indefinite period that there is a certification that, as of such date, the period of inability ... is an indefinite one which is reasonably expected to be lengthy in nature.” The six activities of daily living are eating, toileting, transferring, bathing, dressing, and continence.

The SECURE Act’s restrictions on the use of the Stretch IRA will limit its use as an estate planning tool, but they do not eliminate it entirely. Attorneys advising clients on holistic estate plans will still need to ask their clients the right questions and use the right planning tools for a comprehensive estate plan that meet the client’s needs and desired outcome, but the right tools to use may be different for some of their clients.

# Overview of Social Security Benefits

## **Social Security Retirement Benefits (SSA Retirement)**

The most well-known benefit is clearly SSA Retirement, monthly cash payments that most of us will be using in our retirement years. The budget shortfall in the Social Security Trust Fund is overstated by media, but in 2035 benefits are projected to be decreased by 21% if things don’t change somehow, and down by an additional 5% by 2092. These numbers do not reflect any potential shortfall caused by the COVID-19 crisis.

SSA Retirement can be claimed as early as age 62 if earned income is below \$18,240 per year, with \$1 of benefits being decreased for every \$2 of earnings above that threshold.

Full SSA Retirement is available between ages 66 and 67, depending on the year of one’s birth. Younger people’s full retirement age is closer to 67.

Married couples have significant benefits when it comes to SSA Retirement. A person can apply for benefits based on their spouse’s earnings record after certain triggering events, such as: retirement of both spouses or death of one spouse (after the surviving spouse turns 60, is disabled between 50-60, or continues to care for a child). Children and Disabled Adult Children (DAC) can also receive benefits based on a retired, disabled or deceased parent.

## **Social Security Disability Insurance (SSDI)**

SSDI is essentially a Long Term Disability policy that almost all of us are forced to pay for through payroll taxes. There is a five-month waiting period for benefits, and payment for any given month is made in the following month, meaning that most people are eligible for their first payment in the seventh

month after they become disabled. There is no exception to this waiting period. “Disabled” is defined as the inability to perform substantial gainful activity (SGA) due to a severe impairment that is expected to last more than 12 months or result in death. A person generally earns eligibility for SSDI by earning work credits in 5 out of the last 10 years before becoming disabled, and earning work credits in 10 total years in their lifetime (this rule varies by age and other factors). Eligibility for SSDI, so long as the claimant has the necessary credits, is a Five Step Process:

**Step One:** Is the claimant earning SGA? Note that this is the first step, and if the answer is yes then a claimant is denied regardless of their medical condition. If a claimant is working and earning more than \$1260/month in 2020, the application will almost always be denied. There are exceptions and offsets that are too complex for this discussion, but they rarely apply. If a claimant is not earning SGA, the process continues to Step 2, if they are, the application is denied.

**Step Two:** Does the claimant have a severe impairment that is expected to last 12 months or more or result in death? “Severe impairment” is a very low bar to get over because the medically determinable impairment must only have more than a minimal effect on any one of a claimant’s working abilities (sitting, standing, walking, concentrating, following instructions, etc.). The difficulty is usually in the 12 month requirement – for example, a claimant was treated for breast cancer for 11 months, during which time she could not get out of bed and had multiple surgeries. In the 12th month she made a complete recovery and started looking for work. This claimant is not disabled. If there is a severe impairment, the process continues to Step 3, if not, the application is denied.

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Step Three: Does the claimant meet/equal a Listing? The Adult Listings of Impairments are a group of illnesses, injuries and conditions that make a claimant automatically disabled if the claimant passes Steps One and Two. These “Listings” are extremely rare and difficult to meet/equal.

Between Steps Three and Four, SSA determines a claimant’s Residual Functional Capacity (RFC) – to what extent can the claimant perform Work Related Activities? For example, SSA determines a claimant can lift and carry 10 pounds frequently and 20 pounds occasionally throughout a typical workday. There are numerous work related activities, and SSA makes a determination for all of them, then continues to Steps Four and Five (if necessary).

Step Four: Can the claimant perform Past Relevant Work (PRW)? This Step is fairly self explanatory, if the answer is yes then the claim is denied, if no then the process continues to Step Five.

Step Five: Given the claimant’s age, education and work history, can he/she perform any other job that exists in significant numbers in the national economy? This step is what makes the SSA disability definition so arcane and narrow. A person under 50 must prove that they cannot do any unskilled job that exists in significant numbers in the United States. The claimant has the burden throughout the process, but SSA has the burden of naming the job(s) that a claimant can perform at Step Five.

SSI is in essence a federal welfare program for the Aged, Blind, or Disabled. “Aged” means 65 or older, “Blind” is a complex regulatory definition not appropriate for this presentation, “Disabled” is defined as the inability to perform substantial gainful activity (SGA) due to a severe impairment that is expected to last more than 12 months or result in death (same definition as for SSDI).

The financial requirements for SSI are difficult to remain within – countable income must not exceed \$783 per month (Single) or \$1175 per month (Married Couple), and countable resources must not exceed \$2,000 (Single)/\$3,000 (Married Couple) on the first of any given month.

Medicaid is a tag-along with SSI, but many people are dual-eligible, meaning that they receive SSA Retirement Benefits/SSDI and SSI. Often that means they are Medicare and Medicaid eligible.

Social Security benefits are a robust protection for older and disabled people that should be around for generations. Although they often confer income and medical benefits, the programs can be very complex and difficult to navigate. Therefore we, as professional advocates, need to know the basics and keep supporting non-profit organizations that can help people who need it most.

To learn more, please contact Emmett B. Irwin, Esq. using the contact page at [ebilaw.com](http://ebilaw.com) or his office line 443-839-0818.

## Supplemental Security Income (SSI)

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# Home and Community Based Waiver Services Legislation – Update

*By Elena Sallitto, Esq.  
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## Background

Section 1915(c) of the Social Security Act permits states to request a waiver from the federal requirement that long-term services and supports be provided in an institution and allows the state instead to pay for those services in a home or community-based setting. Md. Code Health-Gen. §15-132(2)(c) caps home and community-based services to 7500

individuals. However, the Department of Health falls short of that number as the exact number of waiver participants is limited by the annual budget. Id. Historically, the Department has offered waiver slots to approximately 4000 individuals each year. As a result, Maryland has a waiting list of almost 21,000 people who can expect to wait as long as 8 years for

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## Home and Community...

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needed services. Maryland boasts the third longest waiting list in the country.

The US Supreme Court established that it is a fundamental civil right to receive state-funded long-term services and supports in the community rather than to force an individual into an institution for those services. *Olmstead v. L. C.*, 527 US 581 (1999). In addition, people prefer to stay home whenever possible. The Elder Law and Disability Rights Section, in conjunction with the MD/DC Chapter of NAELA, has worked tirelessly for many years for legislation that would expand the waiver program and eliminate the waiting list.

In 2019, the Elder Law Bar, along with several like-minded organizations, was successful in expanding the waiver program automatically to include anyone who would have been disenrolled from the Community First Choice waiver program, simply because they became eligible for Medicare due to age or disability. Building on that success, in 2020, the Elder Law Bar advocated for legislation that would have dramatically expanded the waiver list and develop a long-range realistic plan to provide long-term services and supports to individuals in the most appropriate setting.

### 2020 General Assembly: SB 642/HB 1163

SB 642 was introduced in the Senate Finance Committee by the Senator Delores Kelley, the Committee Chair, and Senators Hayes, Lee and West. HB 1163 was introduced in the House Health & Government Operations Committee first by Delegate Cullison, and then co-sponsored by Committee Vice Chair Pena-Melnyk and Delegates Bridge, J. Lewis, and Rosenberg.

The identical bills would have accomplished two goals. First, all 7500 authorized waiver slots would have been funded and filled. Second, the bills created a task force to study and make recommendations regarding:

1. Modernizing Department of Health policies to reflect the State's goal of insuring that care be provided in the most appropriate setting;
2. the use of policies and payment mechanisms to support community based care;
3. improve transparency and efficiency in providing waiver services; and
4. eliminate the waiver waiting list.

Not surprisingly, the fiscal note attached to the proposal concluded that it would cost the State an additional \$27 million in 2020; \$76 million in 2022 and \$103 million in 2023 and every year thereafter to fund and fill all 7500 slots. Notwith-

standing that analysis, the legislators acknowledged during the hearings that other states reported net cost savings with increased waiver services and that Maryland's own studies found that waiver services are far less costly than institutional costs. The proposal establishing the task force seemed to be gaining momentum as it moved through the process.

Unfortunately, the bill did not receive full consideration due to the Coronavirus- forced premature adjournment. However, in the final hours before the General Assembly adjourned *sine die* on March 16, 2020, bill supporters managed to insert into the budget, a Hilltop Institute study into the long-range cost-effectiveness of expanding waiver services. The Hilltop Institute is part of UMBC and conducts data-analytics for Maryland government agencies. It has a long-standing relationship with the Department of Health. Given the current Covid-19 crisis, it is unclear whether or not this study will happen.

### The Current Situation

Under pressure from legislators and with CMS's upcoming regulations requiring transparency, the Department of Health recently published the data revealing the impact of the Coronavirus in nursing homes. Staff and residents account for more than 4000 Covid-19 cases and approximately half of the State's deaths. Infection control is a chronic problem in nursing facilities. The virus has dramatically revealed how dangerous this problem can be. It also establishes another undeniable fact. People are safer at home.

On April 29, 2020, Governor Hogan directed the Secretary of Health to issue directives to nursing home facilities to monitor, treat, prevent, reduce the spread of, and suppress Covid-19. The requirements are to include increased testing, daily medical evaluations of each resident, developing a surge staffing plan, cooperation with health officials and keeping residents, staff, families and the health department apprised of the status of infections. Failure to follow the proposed directives is a misdemeanor and carries a penalty of up to one-year imprisonment or a fine of up to \$5000. It is likely that nursing homes reform measures will follow on the heels of the current crises.

The General Assembly will convene on January 13, 2021. The Elder Law and Disability Rights bar will resume efforts to promote expanded waiver services and eliminate the 8 -year waiting list as well as weigh in on nursing home reform measures. If you are interested in learning more, or getting involved in the process, please contact the author at [Elena@Stavelaw.com](mailto:Elena@Stavelaw.com).