

HB 540 - AS AMENDED BY THE HOUSE

7Apr2021... 0565h

2021 SESSION

21-0716

05/04

HOUSE BILL **540**

AN ACT relative to supported decision-making as an alternative to guardianship.

SPONSORS: Rep. Chase, Straf. 18; Rep. Langley, Hills. 8; Rep. Marsh, Carr. 8; Rep. Weber, Ches. 1; Rep. Cannon, Straf. 18; Rep. Gordon, Graf. 9; Rep. M. Pearson, Rock. 34; Rep. Berch, Ches. 1; Sen. Whitley, Dist 15; Rep. McMahon, Rock. 7; Sen. Rosenwald, Dist 13

COMMITTEE: Judiciary

ANALYSIS

This bill establishes supported decision making as an alternative to guardianship.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears ~~[in brackets and struckthrough]~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty One

AN ACT relative to supported decision-making as an alternative to guardianship.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Statement of Findings. The general court hereby finds that:

2 I. Whenever possible, New Hampshire adults should make their own decisions about how to
3 live their lives.

4 II. The imposition of guardianship necessarily involves the loss of authority over one's own
5 life. Adults with disabilities have a range of strengths and capacities, and guardianship is
6 unnecessarily restrictive in many of those circumstances.

7 III. Guardianship may be necessary in some cases, but when it is imposed upon a person
8 with a disability that could utilize less restrictive alternatives, it can cause negative impacts to
9 mental and physical health and the ability to function independently.

10 IV. Supported decision-making is a process which preserves the self-determination of adults
11 with disabilities by providing them with accommodations and supports to enable them to make life
12 decisions.

13 V. Supported decision-making has in recent years gained recognition and acceptance. It has
14 been promoted as an alternative to guardianship by the National Guardianship Association and the
15 American Bar Association. Nine states have recently adopted statutes which formally establish
16 supported decision-making agreements.

17 VI. The legal recognition of supported decision-making will promote understanding and
18 acceptance of the decisions of people with disabilities. This will assist in effective relationships
19 between people with disabilities and their caregivers, health care providers, and other third parties.

20 2 Guardians and Conservators; Available Alternative Resource. RSA 464-A:2, II is repealed and
21 reenacted to read as follows:

22 II. "Available alternative resource" means alternatives to guardianship including, but not
23 limited to, services such as visiting nurses, homemakers, home health aides, adult day care and
24 multipurpose senior citizen centers; powers of attorney, supported decision-making agreements such
25 as those authorized by RSA 464-D, representative and protective payees; and board and care
26 residential care facilities.

27 3 Guardians and Conservators; Termination of Guardianship. RSA 464-A:40, I is repealed and
28 reenacted to read as follows:

29 I. A guardianship of the person or of the estate shall terminate upon order of the court, the
30 death of the ward, or upon a finding by the court either that the ward is no longer incapacitated or
31 that the ward's needs are met by available alternative resources.

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186-C:3-c Supported Decision-Making. If adult guardianship is being discussed by the IEP team with a student or the student's family, the team shall inform the student and family of the availability of supported decision-making pursuant to RSA 464-D as an alternative to guardianship. This shall be done promptly when guardianship is first discussed. The IEP team shall make available resources to assist in establishing a supported decision-making agreement. If a supported decision-making agreement is executed, the IEP team shall abide by decisions made by the student pursuant to the supported decision-making agreement.

5 New Chapter; Supported Decision-Making. Amend RSA by inserting after chapter 464-C the following new chapter:

SUPPORTED DECISION-MAKING

464-D:2 Construction and Administration. This chapter is to be administered and interpreted in accordance with the following principles:

II. All adults should be able to be informed about and participate in the management of their affairs; and

464-D:3 Presumption of Capacity.

II. The manner in which an adult communicates with others is not grounds for a determination that the adult is incapable of managing the adult's affairs.

1 III. Execution of a supported decision-making agreement may not be used as evidence of
2 incapacity in any proceeding.

3 IV. The execution of a supported decision-making agreement does not preclude the adult
4 who has entered into such an agreement from acting independently of the agreement.

5 464-D:4 Definitions.

6 I. "Adult" means an individual who is 18 years of age or older.

7 II. "Disability" means a physical or mental impairment that substantially limits one or more
8 major life activities of a person.

9 III. "Immediate family member" means a spouse, child, sibling, parent, grandparent,
10 grandchild, stepparent, stepchild, or stepsibling.

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

14 V. "Principal" means an adult who enters into a supported decision-making agreement
15 under this chapter to receive decision-making assistance.

16 VI. "Supported decision-making" means a process of supporting and accommodating an
17 adult with a disability to enable the adult to make life decisions, including, without limitation,
18 decisions related to where the adult wants to live, the services, supports, and medical care the adult
19 wants to receive, whom the adult wants to live with, education, and where the adult wants to work,
20 without impeding the self-determination of the adult.

21 VII. "Supporter" means an adult who enters into an agreement with an adult with a
22 disability to provide supported decision-making.

23 VIII. "Support services" means a system of social and other services supplied by private,
24 state, institutional, or community providers designed to help maintain the independence of an adult,
25 including any of the following:

26 (a) Homemaker-type services, including house repair, home cleaning, laundry, shopping,
27 and the provision of meals.

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

30 (c) Visiting nurse and attendant care.

31 (d) The provision of health care.

32 (e) Physical and psychosocial assessments.

33 (f) Legal assessments and advice.

34 (g) Education and educational assessment and advice.

35 (h) Personal treatment or care, including assistance with activities of daily living such
36 as bathing, dressing, eating, range of motion, toileting, transferring, and ambulation.

37 (i) Care planning.

1 (j) Other services needed to maintain the independence of an adult.

2 464-D:5 Subject Matter of Agreement. A principal may identify any type of decision to be the
3 subject of an agreement under this chapter. Such matters may include, but are not limited to:

4 I. Physical and mental health care.

5 II. Managing and using income and assets.

6 III. Support services.

7 IV. Employment.

8 V. Food and shelter.

9 VI. Assistance with public benefits.

10 VII. Education.

11 464-D:6 Limitations of Agreement.

12 I. An agreement under this chapter may coexist with, but not conflict with, a guardianship
13 or other court order.

14 II. An agreement under this chapter may be for a definite term. In the absence of a
15 provision setting a definite term of the agreement, the agreement shall remain in effect until
16 terminated pursuant to RSA 464-D:16.

17 464-D:7 Form and Content of Valid Agreement.

18 I. In order to be valid under this chapter, a supported decision-making agreement shall
19 include all of the following:

20 (a) Designation of at least one supporter.

21 (b) A description of the types of decisions for which the supporter is authorized to assist.

22 (c) A description of the types of decisions, if any, for which the supporter may not assist.

23 II. A supported decision-making agreement may include any of the following:

24 (a) Designation of more than one supporter.

25 (b) Provision for an alternate supporter to act in place of a supporter in circumstances
26 specified in the agreement.

27 (c) Authorization for a supporter to share information with any other person, including
28 another supporter.

29 III. A supported decision-making agreement is only valid if all of the following occur:

30 (a) The agreement is in a writing that contains the elements of the form contained in
31 RSA 464-D:16.

32 (c) The agreement is dated.

33 (d) The agreement is signed in the presence of 2 adult witnesses, or before a notary
34 public, justice of the peace, or commissioner of deeds.

35 (e) Each party to the agreement has signed the agreement voluntarily and with an
36 understanding of the nature and effect of the agreement.

37 IV. The 2 adult witnesses required by subparagraph III(d) may not be any of the following:

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- 1 (a) A supporter named in the agreement.
- 2 (b) An employee or agent of a supporter named in the agreement.
- 3 (c) A paid provider of services to the principal, unless the person is an immediate family
- 4 member.
- 5 (d) Any person who does not understand the type of communication the principal uses,
- 6 unless an individual who understands the principal's means of communication is present to assist
- 7 during the execution of the supported decision-making agreement.

8 V. A supported decision-making agreement shall contain a separate declaration signed by

9 each supporter named in the agreement indicating all of the following:

- 10 (a) The supporter's relationship to the principal.
- 11 (b) The supporter's willingness to act as a supporter.
- 12 (c) The supporter's acknowledgment of the role of a supporter under this chapter.

13 464-D:8 Termination of Agreement.

14 I. A principal may terminate a supported decision-making agreement at any time. Such

15 termination may be accomplished by any of the following actions by the principal:

- 16 (a) Providing written notice to all of the supporters named in the agreement.
- 17 (b) Verbally expressing the intent to terminate the agreement in the presence of 2 adult
- 18 witnesses.

19 II. A supporter may withdraw from a supported decision-making agreement by providing

20 written notice to the principal. If the principal does not use a written form of communication, actual

21 notice of the supporter's withdrawal shall be provided using the type of communication used by the

22 principal. When a supporter withdraws from a supported decision-making agreement and there is

23 no remaining supporter, the agreement is automatically terminated.

24 III. A supported decision-making agreement is automatically terminated upon the death of

25 the principal.

26 IV. Subject to paragraph V, a supported decision-making agreement is automatically

27 terminated if any of the following events occur:

28 (a) There is a finding by a court or a state or federal agency that the principal has been

29 abused, neglected, or exploited by a supporter named in the agreement.

30 (b) There is a criminal conviction of a supporter for any of the following offenses under

31 New Hampshire law or their equivalent in another jurisdiction:

- 32 (1) Any offense or attempted offense under RSA 630 (homicide).
- 33 (2) Any felony offense or attempted felony offense under RSA 631 (assault and
- 34 related offenses).
- 35 (3) Any offense or attempted offense under RSA 632-A (sexual assault and related
- 36 offenses).
- 37 (4) Any offense or attempted offense under RSA 636 (robbery).

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(5) Any offense or attempted offense under RSA 637 (theft).

(6) Any offense or attempted offense under RSA 638 (fraud).

(7) Any offense or attempted offense under RSA 641 (falsification in official matters).

V. When a supporter is the subject of a criminal conviction or a finding of misconduct under paragraph IV, and there is one or more other supporters named in the agreement who are not the subjects of convictions or findings of misconduct under that paragraph, the agreement does not automatically terminate; however, any supporter who is the subject of a criminal conviction or a finding of misconduct under paragraph IV is disqualified from further actions as a supporter under the agreement.

464-D:9 Duties of Supporters. A supporter is in a fiduciary relationship with the principal and is subject to the following requirements:

I. To act loyally, without self-interest, and in good faith.

II. To act within the authority granted in the agreement and by this chapter.

III. To avoid conflicts of interest.

IV. To disclose to the principal all facts known to the supporter relevant to making a decision.

V. To 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.

VI. To provide sufficient information to a monitor for financial matters designated pursuant to RSA 464-D:13 to allow the monitor to fulfill his or her responsibilities pursuant to this chapter.

464-D:10 Authority of Supporters.

I. A supporter may only exercise the authority granted to the supporter in the agreement.

II. A supporter is not a surrogate decision maker for the principal and is not authorized to sign legal or other documents on behalf of the principal or to bind the principal to a legal agreement.

III. A supporter may only access protected information if expressly authorized to do so by the principal in the agreement or other written document.

IV. A supporter may not do any of the following:

(a) Exert undue influence upon or make decisions on behalf of the principal.

(b) Obtain, without 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.

(c) Use or disclose information, without the principal's consent, for a purpose other than assisting the principal to make decisions under the supported decision-making agreement.

464-D:11 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

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1 provision of law as the decision or request of the principal and may be enforced in law or equity on
2 the same basis as a decision or request of the principal.

3 464-D:12 Persons Ineligible to be Supporters. Any of the following are prohibited from acting as
4 supporters.

5 I. A person who is an employer or employee of the principal, unless the person is an
6 immediate family member of the principal.

7 II. A person providing paid support services, unless the person is an immediate family
8 member of the principal.

9 III. A person against whom the principal has obtained an order of protection from abuse or a
10 person who is the subject of a civil or criminal order prohibiting contact with the principal.

11 IV. A person who has been convicted of any of the following New Hampshire offenses or
12 their equivalent in another jurisdiction, if the offense has not been annulled:

13 (a) Any offense or attempted offense under RSA 630 (homicide).

14 (b) Any felony offense or attempted felony offense under RSA 631 (assault and related
15 offenses).

16 (c) Any offense or attempted offense under RSA 632-A (sexual assault and related
17 offenses).

18 (d) Any offense or attempted offense under RSA 636 (robbery).

19 (e) Any felony offense or attempted felony offense under RSA 637 (theft).

20 (f) Any offense or attempted offense under RSA 638 (fraud).

21 (g) Any offense or attempted offense under RSA 641 (falsification in official matters).

22 464-D:13 Monitors for Financial Matters.

23 I. If a supporter is authorized in a supported decision-making agreement to assist a
24 principal with his or her financial affairs, a principal may designate a monitor.

25 II. A monitor designated under this section shall ensure that the supporter is complying
26 with RSA 464-D:9 and 464-D:10.

27 464-D:14 Reporting of Abuse and Neglect.

28 I. If a person who receives a copy of a supported decision-making agreement or is aware of
29 the existence of a supported decision-making agreement has cause to believe that the principal has
30 been abused, neglected, or financially exploited by the supporter, the person shall promptly report
31 the alleged abuse, neglect, or exploitation to the commissioner of health and human services or the
32 commissioner's authorized representative in accordance with RSA 161-F.

33 II. Nothing in this section shall be construed as eliminating or limiting a person's
34 requirement to report under any other statute or regulation.

35 464-D:15 Access to Information.

36 I. A supporter may assist the principal with obtaining any information to which the
37 principal is entitled, including, with a dated specific consent executed by the principal, protected

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health information under the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, educational records under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. section 1232g, or information related to a substance use disorder protected by 42 U.S.C. section 290dd-2 and 42 C.F.R. Part 2.

II. 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.

464-D:16 Form of Supported decision-making Agreement. A supported decision-making agreement may be in any form not inconsistent with the following form and the other requirements of this chapter. Use of the following form is presumed to meet statutory provisions.

SUPPORTED DECISION-MAKING AGREEMENT

This agreement must be communicated to all parties to the agreement in the presence of either a notary or 2 witnesses. The form of communication must be appropriate to the needs and preferences of the person with a disability. Reading the agreement out loud or using a sign language interpreter may be necessary.

My name is _____.

I want to have people I trust help me make decisions. The people who will help me are called supporters. My supporters are not allowed to make the decisions for me. I will make my own choices, with their support. I am called the principal.

This agreement can be changed at any time. I can change it by crossing out words and writing my initials next to the change. I can also end this agreement at any time by _____.

Signature of Principal

I am making this supportive decision-making agreement because I want people to help me make choices. I know that I do not have to make this agreement. I know that I can change this agreement at any time.

My printed name: _____.

My address: _____.

My phone number: _____.

My email address: _____.

Today's date: _____.

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Supporters

Supporter #1

I agree that_____ (name) will be my supporter. Their contact information is:.

Address: _____.

Phone Number: _____.

E-mail Address: _____.

My supporter may help me with making everyday life decisions relating to the following:.

Obtaining food, clothing, and shelter: Yes ____ No ____

Taking care of my physical health: Yes ____ No ____

Taking care of my mental health: Yes ____ No ____

Managing my financial affairs: Yes ____ No ____

Applying for and managing public benefits: Yes ____ No ____

My education: Yes ____ No ____

Applying for and managing employment: Yes ____ No ____

The following are other decisions that I have specifically identified that I would like assistance with:

_____.

Supporter #2.

I do not have to have more than one supporter. I choose to have _____

(name) also be my supporter. Their contact information is:.

Address: _____.

Phone Number: _____.

E-mail Address: _____.

is my supporter. My supporter may help me with making everyday life decisions relating to the following:.

Obtaining food, clothing, and shelter: Yes ____ No ____

Taking care of my physical health: Yes ____ No ____

Taking care of my mental health: Yes ____ No ____

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1 Managing my financial affairs: Yes ____ No ____

2 Applying for and managing public benefits: Yes ____ No ____

3 My education: Yes ____ No ____

4 Applying for and managing employment: Yes ____ No ____

5 The following are other decisions that I have specifically identified that I would like assistance with:

6 _____

7 _____

8 _____

9 _____

10 _____

11 _____.

12

13 To help me with my decisions, my supporter(s) may do the following things (check all that apply):

14 () Help me access, collect, or obtain information that is relevant to a decision, including medical,
15 psychological, educational, or treatment records;.

16 () Help me gather and complete appropriate authorizations and releases;.

17 () Help me understand my options so I can make an informed decision; and.

18 () Help me communicate my decision to appropriate persons.

19

20 Monitor for Financial Matters

21

22 If I want someone to help me make choices about money, I may also choose someone to make sure
23 my supporters are being honest and using good judgment in helping me with my money. This person
24 is called a monitor. A monitor cannot also be a supporter.

25

26 I agree that _____ (name) will be my monitor. Their contact information
27 is:

28 Address: _____.

29 Phone Number: _____.

30 E-mail Address: _____

31

32 Effective Date of Supported decision-making Agreement.

33

34 This supported decision-making agreement is effective immediately and will continue
35 until _____ (insert date) or until the agreement is terminated by my supporter or me or
36 by operation of law.

37

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1 The date of this agreement is _____.

2

3 Consent of Supporter(s)

4

5 Supporter #1: I, _____ (name of supporter), consent to act as a supporter under this
6 agreement, and acknowledge my responsibilities under RSA 464-D.

7

8 _____.

9 (Signature of supporter) (Printed name of supporter).

10

11 My relationship to the principal is: _____.

12

13 Supporter #2: I, _____ (name of supporter), consent to act as a supporter under this
14 agreement, and acknowledge my responsibilities under RSA 464-D.

15

16 _____.

17 (Signature of supporter) (Printed name of supporter).

18

19 My relationship to the principal is: _____.

20

21 Additional supporters may be added below as necessary.

22

23 Consent of Monitor

24

25 I, _____ (name of monitor), consent to act as a monitor under this agreement, and
26 acknowledge my responsibilities under RSA 464-D.

27

28 _____.

29 (Signature of monitor) (Printed name of monitor).

30

31 My relationship to the principal is: _____.

32

33 Consent of the Principal

34

35 Wait until a notary or 2 witnesses are there to watch you sign.

36

37 _____.

1 (My signature) (My printed name).

2

3 Witnesses or Notary.

4

5 _____.

6 (Witness signature) (Printed name of witness).

7

8 _____.

9 (Witness signature) (Printed name of witness)

10 6 Effective Date.

11 I. Section 4 of this act shall take effect January 1, 2022.

12 II. The remainder of this act shall take effect 60 days after its passage.