

# LIMITED GUARDIANSHIPS, CONSERVATORSHIPS, AND SUPPORTED DECISION MAKING

## *Bench Card*

***This Bench Card has been created by the Administrative Office of the Court as a resource for judges. Bench Cards do not represent statements of law by the Idaho Supreme Court and do not constitute legal advice.***

### PURPOSE

Idaho Code requires:

1. Idaho citizens be treated in a manner consistent with their legal rights in a manner no more restrictive than for their protection and the protection of society, for a period no longer than reasonably necessary for diagnosis, care, treatment and protection.<sup>1</sup>
2. The least restrictive form of guardianship to assist persons who are only partially incapable of caring for their own needs. Recognizing that every individual has unique needs and differing abilities, the public welfare should be promoted by establishing a guardianship that permits incapacitated persons to participate as fully as possible in all decisions affecting them and that accomplishes these objectives through providing the form of guardianship that least interferes with legal capacity of a person to act in his own behalf.<sup>2</sup> and
3. The court shall exercise its authority to encourage the development of maximum self-reliance and independence of the incapacitated person, and make appointive and other orders only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations or other conditions warranting the procedure.<sup>3</sup>

### DEFINITIONS

**Limited Guardianships and Conservatorships:** Relationship in which the guardian or conservator is assigned only those duties and powers that the individual is incapable of exercising.<sup>4</sup>

**Supported Decision-Making:** 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.<sup>5</sup>

**Supported Decision-Making Agreement:**<sup>6</sup> The person with a disability chooses people to support him or her in various areas, such as finances, health care, and employment, and the supporters agree to support the person in his or her decisions, rather than substituting their own.<sup>7</sup>

### CASE LAW

The least restrictive alternative principle was first recognized by the U.S. Supreme Court in *Shelton v. Tucker*, and has been applied in a number of contexts, including institutionalization and guardianship, to limit state deprivation of individual rights and liberties only to the extent necessary to achieve the state's legitimate purposes.<sup>8</sup>

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<sup>1</sup> IC §66-401; IC § 15-5-304(a)

<sup>2</sup> IC §15-5-303(a)

<sup>3</sup> IC §15-5-304(a)

<sup>4</sup> Bruce D. Sales, Matthew Powell, Richard Van Duizans & Associates, *Disabled Persons and the Law: State Legislative Issues* (ABA 1982)

<sup>5</sup> Blanck & Martinis, 2015

<sup>6</sup> *Id.* (citing the supported decision-making agreement, designated a "Representation Agreement," was first legislatively recognized in British Columbia 30 years ago. Representation Agreement Act, R.S.B.C., ch.405 (1996). See Elizabeth Pell, *Supported Decision Making Pilot: A Collaborative Approach, Pilot Evaluation Year 1 Report* (Human Services Research Institute, Nov. 30, 2015), [http://supporteddecisions.org/wp-content/uploads/2015/04/SDM-Evaluation-Report-Year-1\\_HSRI-2015.pdf](http://supporteddecisions.org/wp-content/uploads/2015/04/SDM-Evaluation-Report-Year-1_HSRI-2015.pdf).

<sup>7</sup> *Id.*

<sup>8</sup> ABA Comm. on Aging, Guardianship and Supported Decision-making, Resolution 113, August 2017, [https://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice.html](https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html) citing *Shelton v. Tucker*, 364 U.S. 479, 493-94 (1960)

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### **COURT RULES**

Court visitors and the Idaho Department of Health and Welfare Evaluation Committee reports are required to include recommendations on “[w]hether a guardianship or conservatorship is necessary and why less intrusive alternatives are not appropriate; [and w]hat alternatives to guardianship or conservatorship have been explored or tried.”<sup>9</sup>

### **EXAMPLES OF LIMITED GUARDIANSHIPS AND CONSERVATORSHIPS**

Rights retained by an individual to:<sup>10</sup>

1. Determine living arrangements.
2. Spend a set amount of money.
3. Initiate and follow a schedule of daily and leisure activities.
4. Determine religious and/or social activities.
5. Establish personal relationships.

### **STEPS IN SUPPORTED DECISION-MAKING<sup>11</sup>**

1. Presume guardianship is not needed.
2. Consider whether the individual can meet some or all of the following needs:
  - Money Management
  - Health care
  - Relationships
  - Community Living
  - Employment
  - Personal Safety
3. Ask if a triggering concern may be caused by temporary or reversible conditions.
4. Determine if concerns can be addressed by connecting the individual to family or community resources and making accommodations.
5. Identify areas of strengths and limitations in decision-making.
6. Limit guardianship or conservatorship to what is absolutely necessary and state how guardian or conservator will engage and involve the person in decision making
7. Reassess periodically for modification or restoration of rights

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<sup>9</sup> ICAR 54.4(14)(A) & (B); ICAR 54.5(13)(A) & (B)

<sup>10</sup> ABA Commission on Law and Aging, American Psychological Association, & National College of Probate Judges, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings*, A Handbook for Judges

<sup>11</sup> Adapted from the PRACTICAL Tool for lawyers: Steps in Supporting Decision-Making, American Bar Association Commission on Law and Aging. Can be found at: [https://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice/practical\\_tool.html](https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html)