




DRNJ DISABILITY RIGHTS
NEW JERSEY

Introduction to Supported
Decision-Making and
Guardianship in New Jersey


Who We Are

- ▶ DRNJ is a private, non-profit, consumer-directed organization established to:
 - ▶ Advocate for and advance the human, civil and legal rights of citizens of New Jersey with disabilities;
 - ▶ Promote public awareness and recognition of individuals with disabilities as equally entitled members of society;
 - ▶ DRNJ is New Jersey's designated protection and advocacy system for people with disabilities






Who We Are


- ▶ Advise and assist persons with disabilities, family members, attorneys and guardians in obtaining and protecting the rights of individuals with disabilities; and
- ▶ Provide education, training and technical assistance to individuals with disabilities, the agencies that serve them, advocates, attorneys, professionals, courts and others regarding the rights of individuals with disabilities
- ▶ Member of National Disability Rights Network



Decision-making

- ▶ What is a decision?
- ▶ Who makes decisions?





Not making a decision is still a decision.

Supported Decision-Making for Persons With a Disability

- ▶ With the right supports, many people that might otherwise be legally incapacitated can manage their own affairs.
 - ▶ The individual retains authority to make decisions with support from a trusted network of advisors. May be formal or informal.
 - ▶ The role of the supporters is to help the individual understand choices and to analyze benefits or burdens.
 - ▶ Supporters may also help communicate the decision, but do not decide for the individual.

New Jersey's Framework for Supported Decision-Making

- ▶ In New Jersey, there is no legal framework for supported decision-making
 - ▶ Individuals can craft *ad-hoc* supported decision-making arrangements to meet their specific needs.
- ▶ Respecting an individual's decision without the protection of a statute.
 - ▶ ADA Title III requires reasonable accommodations from businesses, doctor's offices, hospitals, and other places of public accommodation.
 - ▶ NJ LAD similarly prohibits discrimination against people with disabilities in places of public accommodation.
 - ▶ Would a doctor be liable under ADA or LAD for refusing to treat a patient because of the patient's disability?

Enter: Guardianship

- ▶ "'Incapacitated individual' means an individual who is impaired by reason of mental illness or intellectual disability to the extent that the individual lacks sufficient capacity to govern himself and manage his affairs." N.J.S.A. 3B:1-2.
- ▶ Courts may appoint a limited or general guardian after finding that an individual is incapacitated. N.J.S.A. 3B:12-24.1.
- ▶ Courts should consider a limited guardianship before instituting a general guardianship. *Matter of M.R.*, 135 N.J. 155, 171 (1994)
- ▶ In a limited guardianship, the court must make specific findings about the areas where the individual retains legal capacity or where the guardian's authority is limited. N.J.S.A. 3B:12-24.1(b).
 - ▶ Eg: Residential, educational, medical, legal, vocational, and financial decision-making.

If an individual can manage their affairs with a supported decision making apparatus, are they incapacitated for purposes of N.J.S.A. 3B:1-2?

Case Law Context: Reproductive Rights In re Grady, 85 N.J. 235 (1981)

- ▶ "The trial court should be reluctant to substitute its consent for any person who may be capable of making a decision for himself." In re Grady, 85 N.J. 235 (1981).
- ▶ In attempt to balance right of incapacitated person to be sterilized with right to be free from involuntary sterilization, courts must make a specific finding (supported by clear and convincing evidence) that the individual lacks the capacity to consent or withhold consent. Only then can "best interests" test be applied.

Case Law Context: Self-determination Matter of M.R., 135 N.J. 155 (1994)

- ▶ "We are reminded also that the mere fact that a person is generally incompetent does not mean that person is incompetent for all purposes. A person who is generally incompetent can still make choices about specific matters."
 - ▶ "We recognize the argument that as a decision increases in importance, so should the right of the affected person to make that decision. [...]Our goal is to permit developmentally-disabled people to make as many decisions as possible, while protecting them from the harmful effects of bad decisions that they do not fully understand."
- Matter of M.R., 135 N.J. 155, 169 (1994).

Takeaways from M.R.

- ▶ Absent specific findings by the trial court, individuals subject to general guardianship retain fundamental rights of self-determination derived from the NJ Constitution.
- ▶ Counsel for the alleged incapacitated person has a duty to zealously advocate for the individual's subjective expressed interests short of the patently absurd or pose undue risks of harm. The guardian *ad litem* is responsible for reporting on objective best interests.
- ▶ See N.J. Court Rule 4:86-7; NJRPC 1.14

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