

SESSION OF 2021

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2122

As Recommended by House Committee on
Judiciary

Brief*

HB 2122 would create the Supported Decision-Making Agreements Act (Act) allowing adults, or “principals,” to enter into supported decision-making agreements to receive decision-making assistance with the adult’s affairs from one or more other adults, or “supporters.”

Principals

The bill would define a “principal” as an adult who enters into a supported decision-making agreement under the Act to receive decision-making assistance.

Supporters

A “supporter” would be defined by the bill as an adult who enters into a supported decision-making agreement and provides decision-making assistance.

A supporter could not be a person against whom a protective order or restraining order has been entered by a court at the request of or on behalf of the principal.

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

Supporters would be required to:

- Act with the care, competence, and diligence ordinarily exercised by individuals in similar circumstances; and
- Keep information collected on behalf of the principal:
 - Confidential;
 - Protected from unauthorized access, use, or disclosure; and
 - Only for the use authorized by the principal.

Supporters could provide the principal with assistance:

- Making decisions, communicating decisions, and understanding information about, options for, the responsibilities of, and consequences of decisions;
- Accessing, obtaining, and understanding information relevant to decisions necessary for managing the principal's affairs:
 - This would include medical, psychological, financial, educational, treatment, and other records; and
 - Supporters could also use dated consent to assist the principal in obtaining protected health information or educational records;
- Ascertaining the wishes and decisions of the principal, assisting in communicating those wishes and decisions to others, and advocating to ensure implementation of the principal's wishes and decisions; and
- Accompanying the principal and participating in discussions with other persons when the principal

is making decisions or attempting to obtain information for such decisions.

Supporters would be prohibited from:

- Exerting undue influence on the principal;
- Making decisions for or on behalf of the principal;
- Signing for the principal or providing the electronic signature of the principal to a third party;
- Obtaining information not reasonably related to the matters the supporter is authorized to assist the principal with under the agreement, without the consent of the principal; or
- Using information acquired for a purpose authorized under the agreement for a purpose other than assisting the principal with a decision authorized by the agreement.

Supporters acting in good faith and in accordance with the Act would not be liable to the principal or a third party for injuries, damages, or other losses arising from a decision made by a principal in which the supporter assisted or was otherwise involved.

Entering Agreements

The bill would require supported decision-making agreements to be entered into voluntarily and without coercion or undue influence, and the adult entering into one (the principal) would have to understand the nature and effect of the agreement. Such agreements could not be entered into if they encroach on the authority of a guardian or conservator of the adult making the agreement, unless approved in writing by the guardian or conservator.

The bill would specify adults who enter into supported decision-making agreements could act without the decision-making assistance of the supporter, and the execution of a supported decision-making agreement would not constitute evidence that the principal does not have capacity.

Requirements for Agreements

The bill would require supported decision-making agreements to:

- Name one or more adults to provide a principal with decision-making assistance;
- Describe the assistance each supporter may provide the principal;
- Contain a notice to third parties that summarizes the rights and obligations of each supporter under the agreement and expressly identifies the provisions of the Act; and
- Contain a separate declaration by each supporter or alternate supporter, signed by the supporter, stating:
 - The supporter's relationship with the principal;
 - The supporter's willingness to act as a supporter for the principal; and
 - The supporter acknowledges the duties of a supporter under the Act.

Validity of Agreements

A supported decision-making agreements would be valid if:

- It is dated;

- It is in writing;
- It is signed by the principal and each named supporter or alternative supporter and then notarized or signed in the presence of two witnesses who also sign the agreement:
 - Witnesses must be adults who understand the means of communication used by the principal, or an individual who understands the means of communication used by the principal must be present; and
 - Witnesses cannot be named supporters or employees or agents of a supporter named in the agreement;
- A guardian or conservator, if any, has been notified of the agreement by the principal; and
- The agreement otherwise complies with the provisions of the Act.

Supported decision-making agreements would be required to be substantially in compliance with a form the bill would direct the Judicial Council to establish.

Terminating Agreements

Supported decision-making agreements could indicate their effective dates and duration. If no effective date is specified, the agreement would become valid immediately. Principals would be able to terminate all or any portion of an agreement at any time. Supporters would be able to terminate all or a portion of their obligations under the agreement at any time.

If no duration was specified, the agreement would be effective until a dated termination is made in writing and signed by the terminating party.

The bill would require notice of a termination be given to the other party (supporter or principal) in person, by certified mail, or by electronic means.

If a portion of the agreement is terminated and the termination is consistent with the provisions of the Act, the remainder of the agreement would remain in effect.

Effect of Agreements

Decisions or requests made or communicated with the assistance of a supporter under the Act would be recognized as a decision of the principal and could be enforced in law or equity on the same basis as a decision or request of the principal.

Persons who act in good faith would not be subject to civil or criminal liability or discipline for unprofessional conduct for:

- Complying with an authorization pursuant to a supported decision-making agreement based on an assumption the agreement is valid and not terminated;
- Declining to comply with an authorization based on actual knowledge that the agreement is invalid or has been terminated; or
- Declining to comply with an authorization related to health care if the person declines because the action proposed is contrary to the good faith medical judgment of the person declining or a written policy of a health care institution based on reasons of conscience.

Application of the Act

The bill would specify that, in the application of the Act, a decision that a principal is incapable of managing the principal's affairs could not be based on the manner in which the principal communicates with others and a principal is considered to have capacity even if the capacity is achieved by the principal receiving decision-making assistance, unless a court has determined that the principal does not have capacity.

Definitions

The bill would define, for purposes of the Act, these terms in addition to "principal" and "supporter": "adult," "affairs," "capacity," "conservator," "decision," "decision-making assistance," "good faith," "guardian," "immediate family member," "person," and "supported decision-making agreement."

Criminal Penalties

Violation of the Act would be added to the crime of mistreatment of a dependent adult or an elder person, which would carry felony or misdemeanor penalties, depending on the amount of financial resources involved. The bill would also make a technical amendment to this section to ensure consistency in statutory phrasing.

Background

The bill was introduced by the House Committee on Federal and State Affairs at the request of Representative Barker.

House Committee on Judiciary

In the House Committee hearing on March 11, 2021, the Long-Term Care Ombudsman; representatives of Disability Rights Center of Kansas, Kansas Council on Developmental Disabilities, Kansas Mental Health Coalition, and Self Advocate Coalition of Kansas; and two private citizens testified as **proponents** of the bill. Proponents stated the bill would provide individuals with a mid-level option for individuals needing assistance with decision-making to receive support while still remaining as independent as possible. Representatives of AARP Kansas, Alzheimer's Association, KanCare Advocates Network, Kansas Advocates for Better Care, Kansas Coalition Against Sexual and Domestic Violence, and the National Guardianship Association, as well as two private citizens, provided written-only proponent testimony.

A representative of the Kansas University Center on Developmental Disabilities submitted written-only neutral testimony.

No **opponent** testimony was provided.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget, the Office of Judicial Administration indicates enactment of the bill could create litigation surrounding the agreements and related matters, requiring more time spent by court employee and judges processing and hearing cases, but a fiscal effect cannot be estimated until the Judicial Branch operates under the bill's provisions.

The Office of the Attorney General states enactment of the bill could increase cases referred to its Fraud and Abuse Litigation Division, but it cannot estimate the number of additional cases or expenditures.

The Kansas Sentencing Commission indicates enactment of the bill may have an effect on prison admissions and beds, but it cannot estimate the effect.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2022 Governor's Budget Report*.

Supported Decision-Making Agreements Act