HOUSE . . . . . No. 4949

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES, August 5, 2024.

The committee on Children, Families and Persons with Disabilities, to whom was referred the petition (accompanied by bill, House, No. 1485) of Michael J. Finn, Sean Garballey and others relative to authorizing supported probate law decision-making agreements for certain adults with disabilities, reports recommending that the accompanying bill (House, No. 4949) ought to pass.

For the committee,

JAY D. LIVINGSTONE.

FILED ON: 7/30/2024

HOUSE . . . . . No. 4949

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Third General Court
(2023-2024)

An Act relative to authorizing supported decision-making agreements for certain adults with disabilities.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 6A of the General Laws is hereby amended by inserting after section 16F the following section:-

Section 16F½. The executive office of health and human services shall establish a training program on supported decision-making. The training program shall include instruction by state agencies including, but not limited to, the department of developmental services, the department of mental health and the executive office of elder affairs. The training program shall be provided to any supporter or decision-maker pursuant to section 5-601 of chapter 190B and shall include instruction on the rights and obligations contained in section 5-602 of chapter 190B and dispute resolution. The executive office of health and human services shall consult with the executive office of elder affairs, the department of developmental services, the department of mental health, the department of public health, the Disability Law Center, the Massachusetts Health and Hospital Association, the Massachusetts Medical Society, the Massachusetts Bankers Association and adults who receive supported decision-making assistance and supporters who

assist in decision-making pursuant to a supported-decision making agreement in the development of the training. The training shall be in a format accessible to the individuals receiving the training.

SECTION 2. Section 2 of chapter 71B of the General Laws, as appearing in the 2022 Official Edition, is hereby amended by inserting, in line 86, after the word “sec.” the following paragraph:- The department of elementary and secondary education shall promulgate regulations in consultation with the department of higher education requiring school districts, as part of their transitional planning process for students with disabilities, to inform students and their families of the availability of supported decision-making as an alternative to adult guardianship for students with disabilities that are receiving services at age sixteen. The department shall provide supported decision-making agreement training to schools and post all training materials on the department’s website including a sample form for a decision-maker to request the release of educational records.

SECTION 3. Section 3 of said chapter 71B of the General Laws, as so appearing, is hereby amended by inserting, in line 301 after the word “program.” the following paragraph:- At the first IEP meeting after a student has turned age sixteen or older, the IEP team shall inform the student and their family or guardian, of the availability of supported decision-making agreements as an alternative to guardianship. The IEP team shall assist the child and their family or guardian in locating resources to assist in establishing a supported decision-making plan if the child and their family or guardian are interested in supported decision-making.

SECTION 4. Section 5-303 of said chapter 190B, as appearing in the 2022 Official Edition, is hereby amended by inserting, in line 50, after the word “guardianship”, the following words:- or a supported decision-making agreement.

SECTION 5. Subsection (b) of section 5-303 of said chapter 190B, as so appearing, is hereby amended, by inserting after paragraph (9) the following paragraph:-

(9½) a copy of any supported decision-making agreement executed by the person alleged to be incapacitated, if available:-

SECTION 6. Chapter 190B of the General Laws is hereby amended by inserting after section 5-507 the following sections:-

Section 5-601. Definitions:

As used in this section, the following words shall have the following meaning unless the context clearly requires otherwise:

“Adult”, an individual 18 years of age or older.

“Coercion”, the use of force or threats to persuade someone to do something.

“Decision-maker”, an adult who seeks to execute, or has executed, a supported decision-making agreement with 1 or more supporters under this chapter.

“Executed”, a supported decision-making agreement that is signed by both the decision maker and all supporters in accordance with requirements set forth in this chapter.

“Supported decision-making”, the process of supporting and accommodating the decision-maker, without impeding the self-determination of the decision-maker, in making life

decisions, including, but not limited to: (i) decisions related to where the decision-maker wants to live; (ii) the services, supports, financial decisions and medical care the decision-maker wants to receive; (iii) whom the decision-maker wants to live with; and (iv) where the decision-maker wants to work.

"Supported decision-making agreement", a voluntary, written agreement, written in plain language that is accessible and understood by the decision-maker and entered into by the decision-maker with one or more supporters pursuant to section 5-602 used to support decision-making.

"Supporter", an adult who meets the requirements of section 5-602 and has executed a supported decision-making agreement with a decision-maker.

Section 5-602.

(1)(a) A decision-maker may voluntarily enter into a supported decision-making agreement with 1 or more supporters.

(b) The decision-maker may amend or terminate a supported decision-making agreement at any time pursuant to section 5-602(3)(e).

(2)(a) Any person, eighteen years of age or older, may be a supporter.

(b) A person shall not serve as a supporter in a supported decision-making agreement when:

(1) The decision-maker previously made, or makes, an allegation of elder abuse against the supporter.

(2) The decision-maker has obtained or obtains a Protection from Abuse Order against the supporter or a harassment prevention order against the supporter under chapter 258 of the General Laws.

(3) The supporter is the subject of a civil or criminal order prohibiting contact with the decision-maker;

(4) The supporter has been removed as the conservator of the decision-maker, based upon a finding that they did not act in the conservatee's best interest; or

(5) The supporter is found criminally, civilly, or administratively liable for abuse, neglect, mistreatment, coercion, or fraud.

(3)(a) Except as limited by a supported decision-making agreement, a supporter shall do all the following:

(1) Respect the values, beliefs, and preferences of the decision-maker.

(2) Act honestly, diligently, and in good faith.

(3) Act within the scope identified by the decision-maker.

(4) Support and implement the direction, will, and preferences of the decision-maker.

(5) Maintain confidentiality of any information obtained by a supporter, unless the decision-

maker specifically authorizes its disclosure.

(6) Exercise only the authority granted to the supporter in the supported decision-making

agreement.

(b)(1) Except as limited by a supported decision-making agreement, a supporter may, with the consent of the decision-maker, provide to the decision-maker decision-making assistance regarding the decision-maker's affairs, including, but not limited to: (i) communicating decisions and understanding information about, options for, the responsibilities of and the consequences of decisions; (ii) accessing, obtaining and understanding information that is relevant to decisions, necessary for the decision-maker to manage their affairs, including, but not limited to, medical records, including protected health information under the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104-191); psychological and financial records; educational records under the Family Education Rights and Privacy Act of 1974 (20 U.S.C. s. 1232g), or information protected by 42 U.S.C.A. s. 290dd-2, 4 C.F.R. Part 2; as well as other educational records including Individualized Education Programs, transcripts, a transition plan, a student summary of performance and any other materials as requested; (iii) ascertaining the wishes and decisions of the decision-maker, assisting in communicating those wishes and decisions to other persons and assisting to ensure the decision-maker' wishes and decisions are implemented; and (iv) accompanying the decision-maker and participating in discussions with other persons when the decision-maker is making decisions or attempting to obtain information needed to make decisions.

(c) Unless the supporter has a valid legal authorization to do so and the action is within the scope of their authority, a supporter shall not do either of the following: (i) make decisions for, or on behalf of, the decision-maker, or (ii) sign documents on behalf of the decision-maker.

(d) A supporter shall not participate in any life decision in which they have a conflict of interest. This includes, but is not limited to, any decision in which the supporter, his or her immediate family or partner, a business organization in which he or she is serving as officer, director, trustee, partner or employee has a financial interest or other direct and substantial interest in the outcome.

(e) A supporter shall only be authorized to assist the decision-maker in accessing, collecting or obtaining information that is relevant to a decision authorized under the supported decision-making agreement and to which the decision-maker agrees that the supporter should have access pursuant to a written authorization in accordance with the applicable federal or state privacy laws. The decision-maker may withdraw the authorization at any time in whatever manner is authorized by applicable state or federal law. A supporter shall keep confidential any information obtained in the process of assisting the decision-maker.

(f) A decision-maker may bring a civil action for damages and equitable relief, including injunctive relief, resulting from a violation of this section or a regulation promulgated under this section in any court of competent jurisdiction.

(4) The existence of a supported decision-making agreement shall not preclude a decision-maker from seeking personal information without the assistance of a supporter.

(5) To be valid, a supported decision-making agreement shall be signed and dated by the decision-maker and each applicable supporter in the presence of a notary public. The decision-maker may use reasonable modifications, such as assistive technology or physical assistance, to sign the agreement.

(6) Evidence of undue influence or coercion in the creation or signing of a supported decision-making agreement shall render the supported decision-making agreement invalid.

(7) A supported decision-making agreement shall be personalized by the decision-maker to reflect the decision-maker's personal circumstances. A supported decision-making agreement shall:

(a) be in writing in plain language that is accessible and understood by the decision-maker;

(b) identify the decision-maker and all supporters;

(c) describe the types of decisions with which each supporter shall assist the decision-maker. If the decision-maker wants assistance to access their medical records, the agreement must specifically reference that the supporter shall have access to protected health information under the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104-191). If the decision-maker wants assistance to access their education records, the agreement must specifically reference that the supporter shall have access to protected education records under the Family Education Rights and Privacy Act of 1974 (20 U.S.C. s. 1232g) or information protected by 42 U.S.C. a. s. 290dd-2, 4 C.F.R. Part2; as well as other education records including Individualized Education Programs, transcripts, a transition plan, a student summary of performance and any other materials.

(d) indicate that all supporters agree to assist the decision-maker in making such decisions, to respect the decision maker's decisions and to assist the decision-maker in communicating such decisions;

(e) state that supporters shall not make decisions for the decision-maker;

(f) indicate that the decision-maker may amend or terminate the supported decision-making agreement at any time and for any reason subject to the requirements of subsection (e);

(g) list contact information for the disabled persons protection commission, the elder abuse hotline and all programs providing services to the decision-maker; and

(h) include a statement from each supporter that they understand and accept their roles, responsibilities and limitations as outlined in section 5-602(3)(a).

(8) A person who receives the original or a copy of a supported decision-making agreement shall rely on the agreement and recognize a decision, request or communication made with the decision-making assistance of a supporter as the decision, request or communication of the decision-maker. A written confirmation from the decision-maker may be required affirming that the supported decision-making agreement presented is current.

(9) A person or entity that, in good faith, acts in reliance on a decision made pursuant to a supported decision-making agreement shall not be subject to civil or criminal liability or to professional discipline.

(10)(a) The supported decision-making agreement shall remain in effect until it is terminated or expires.

(b) A supportive decision-making agreement shall be terminated as follows:

(1) On any termination date set forth in the agreement but no more than a term of three years, unless extended by agreement, in writing, of the decision-maker and supporters, pursuant to section 5-602 with terms of execution.

(2) A supporter may terminate participation in a supported decision-making agreement at any time, by written notice to the decision-maker and any other supporters to the agreement; provided, however, that if the agreement has more than 1 supporter, the agreement shall remain valid as to all other supporters.

(3) A decision-maker may terminate a supported decision-making agreement at any time by written notice to all supporters to the agreement.

(4) Notice of the suspension of a supporter pursuant to section 5-602 shall be given in writing and delivered in hand to said person or his or her attorney, or sent by registered mail to said person at his or her residence or his place of business. Such notice so given, delivered or sent shall automatically suspend the authority of such person to perform the duties of his or her office or employment until he or she is notified in like manner that his or her suspension is removed.

(5) The death or incapacitation of the decision-maker.

(6) In the event that the decision-maker becomes subject to a guardianship order, the scope of the supported decision-making agreement may be limited in whole or in part by the probate and family court to those decisions reserved for the decision-maker after the issuance of the guardianship order.

(11)(a) The disabled persons protection commission, an elder protective services agency, the department of developmental services, the department of mental health or any person interested in the decision-maker's welfare may petition the probate and family court to revoke or suspend the role of the supporter within one or more supported decision-making agreements on the grounds of abuse, neglect, exploitation or failure of the supporter to follow their roles and

responsibilities resulting in serious physical, emotional, or financial harm to the decision-maker, or on the grounds that the supporter is not qualified pursuant to section 5-602(2)(b). The court shall provide notice to the decision-maker and supporter and provide an opportunity for the decision-maker and supporter to be heard. The court shall revoke or suspend the role of the supporter within the supported decision-making agreement, in whole or in part, if the court makes a finding under any grounds set forth in this paragraph. The court shall not order a supported decision-making agreement to remain in effect over the objection of the decision-maker. If the decision-maker is indigent, the court shall appoint counsel for the decision-maker upon the filing of any petition under this paragraph.

The court shall tally the number of individuals who appear before the court on supported decision-making agreement issues. A report of the court's findings shall be submitted annually, as of June 30, to the clerks of the senate and house of representatives, the joint committee on committee on children, families and persons with disabilities and the senate house committees on ways and means.

(b)(1) If a person who receives a copy of a supported decision-making agreement or is aware of the existence of a supported decision-making agreement has cause to believe that the decision maker is being abused, neglected or exploited by a supporter, the person may report the alleged abuse, neglect or exploitation to the disabled persons protection commission pursuant to chapter 19C or the elder abuse prevention hotline pursuant to chapter 19A.

(2) If a mandated reporter pursuant to subsection (a) of section 15 of said chapter 19A or said chapter 19C has reasonable cause to believe that the decision-maker has been abused,

neglected or exploited by a supporter, the mandated reporter shall make a report to the disabled persons protection commission or an elder protective services agency, as applicable.

(c) Execution of a supported decision-making agreement shall not be a condition of participation in any activity, service or program.

(d) Nothing in this section shall be interpreted to limit or restrict the right of an individual to execute a health care proxy pursuant to chapter 201D or a power of attorney pursuant to this chapter.

SECTION 7. There shall be established pursuant to section 2A of chapter 4 of the General Laws a special legislative commission, known as the Supported Decision-Making Commission, to study, examine and make recommendations regarding: (i) the expansion of an existing state registry to tally the number of individuals with a supported decision-making agreement and that enables providers to verify that the supported decision-making agreement presented by a decision-maker or a supporter is current; and (2) the creation of a new online registry to tally the number of individuals with a supported decision-making agreement and that enables providers to verify that the supported decision-making agreement presented by a decision-maker or a supporter is current.

(a) The commission shall consist of: the chairs of the joint committee on children, families and persons with disabilities, who shall serve as co-chairs; 1 member to be appointed by the senate president; 1 member to be appointed by the speaker of the house of representatives; 1 member to be appointed by the minority leader of the senate; 1 member to be appointed by the minority leader of the house of representatives; the secretary of health and human services or a designee; the secretary of the executive office of technology services and security or a designee;

the commissioner of public health or a designee; the chief justice of the trial court or a designee; 1 member representing the Massachusetts Health and Hospital Association; 1 member representing the Massachusetts Bankers Association; 1 member representing The Arc of Massachusetts; and 1 member representing the Disability Law Center.

(b) State agencies shall make available to the commission any documents, data or materials in a timely manner when reasonably requested by the commission.

(c) The commission shall submit a report of its findings and recommendations to the clerks of the senate and house of representatives, the joint committee on committee on children, families and persons with disabilities and the senate house committees on ways and means not later than June 1, 2025.

SECTION 8. A supported decision-making agreement executed before July 31, 2025, shall be valid until July 31, 2026. Thereafter, only supported decision-making agreements that conform to the requirements of section 5-602 of chapter 190B of the General Laws shall be valid.

SECTION 9. Section 6 shall take effect on July 31, 2025.

SECTION 10. The training program required by section 16F½ of chapter 6A of the General Laws shall be implemented by the department of health and human services no later than 6 months after the passage of this act.

SECTION 11. The department of elementary and secondary education shall promulgate regulations pursuant to section 2 of chapter 71B of the General Laws no later than 6 months after passage of this act.

SECTION 12. The executive office of health and human services shall promulgate regulations no later than 6 months after the passage of this act.