Guardianship laws in most Western societies provide decision-making mechanisms for adults with impaired capacity. Since their inception, the principle of autonomy and recognition of human rights of those that come within guardianship regimes have gained prominence. Today, in Australia and internationally, a new legal model has emerged that seeks to enhance these trends through incorporating ‘assisted decision-making’ models into guardianship laws. Such models legally recognise that an adult’s capacity may be maintained through assistance or support provided by another person, and provides formal recognition of the person in that ‘assisting’ role. This paper situates this latest legal innovation within a historical context, examining the social and legal evolution of guardianship laws and determining whether modern assisted decision-making models remain consistent with guardianship reform thus far. It goes on to identify and critically analyse the different assisted decision-making models that currently exist internationally. Finally it discusses a number of conceptual, legal and practical concerns that remain unresolved. It is argued that these issues require serious consideration before assisted decision-making models are adopted in guardianship regimes in Australia.

INTRODUCTION

The vast majority of Western societies have legal regimes that provide decision-making mechanisms for adults with some kind of impaired capacity.1 Such mechanisms may allow adults to plan decisions in advance, allow close family to make decisions on behalf of the adult, or enable courts to appoint a person as a guardian or administrator for the adult. These legal regimes are collectively referred to as ‘guardianship laws’. Since their humble, property-focussed beginnings, guardianship regimes have become an increasingly important, and often contentious, area of law where different principles such as beneficence and protection, autonomy, and the notion of ‘human rights’ jostle for superiority.

A number of Western jurisdictions are currently considering, or have recently embraced, innovative legislation that allows for another form of decision-making – ‘assisted decision-making’, also known as supported, interdependent or co-decision-making.2 Assistance or support for an adult provided by another person can take many forms including help with accessing information, providing information to the adult, or giving explanations in a manner the adult can understand. It also extends to giving advice, communicating the decision

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1 The term ‘adult’ is used in this paper to refer to those who may come within a guardianship regime due to some kind of decision-making impairment.

2 While Australian audiences may be more familiar with the terminology ‘supported decision-making’, as this is associated with particular legislative models the terminology adopted in this paper is for assisted decision-making to represent the broad concept, which includes ‘supported decision-making’ and ‘co-decision-making’ models used in some jurisdiction’s guardianship legislation. It is noted that in the literature, these terms are often used interchangeably.
made or acting to help implement the adult’s decisions. Modern legislation that recognises or implements this concept remains limited to a small but growing number of jurisdictions internationally. It is this legislative recognition in guardianship regimes that is the focus of this paper

Significantly, legal and practical interest in this concept is growing in Australia. Australia’s ratification of the Convention on the Rights of Persons with Disabilities (CRPD), as well as recent Federal initiatives like the National Disability Insurance Scheme which support providing more choice to those with disabilities and encourage personal management of funding (and which are being mirrored overseas) provide additional support for a new model of decision-making. In 2012, the Victorian Law Reform Commission was the first Australian law reform agency to recommend that a legislative scheme of assisted decision-making be adopted in Victoria. In South Australia and New South Wales, government departments and statutory bodies are piloting trials of assisted decision-making for personal and financial matters. This current impetus domestically for adopting assisted decision-making has not yet been analysed in the Australian legal context. It is important to do so to ensure Australian jurisdictions that choose to enact legislation adopting these models into guardianship regimes are mindful of the potential issues inherent in such schemes, and are aware of the experience of international jurisdictions.

It should be noted that the notion of assisted decision-making discussed in this paper takes a moderate view of the ability and reach of such an approach helping adults; it accepts that assisted decision-making is likely to be accessible and useful only to a limited group of individuals and not all adults coming within a guardianship regime. Such an approach would

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4 See, eg, United Nations, Declaration on the Rights of Disabled Persons, GA Res 3447, 9 December 1975; United Nations, Declaration on the Rights of Mentally Retarded Persons, GA Res 2856, 20 December 1971; Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008). Australia ratified the CRPD on 17 July 2008 with the declaration that it was Australia’s understanding that the CRPD ‘allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards’.


co-exist with, and supplement, the substituted decision-making norm that currently operates in Australia.\(^7\)

This paper examines this latest legal innovation against the backdrop of the historical development of guardianship laws in Western societies. Part 1 charts the social and legal changes which have led to today’s ‘modern’ guardianship regimes. The purpose of this Part is not merely to provide historical description, but to situate the development of modern assisted decision-making schemes and to inform subsequent critical analysis of such schemes. It will show that the concept of assisted decision-making and its subsequent legal recognition – through ‘supported’ and ‘co-decision-making’ models – is a natural evolution of guardianship regimes. Part 2 adopts an international perspective, identifying and examining the different legal models that currently exist in jurisdictions with assisted decision-making mechanisms. Finally, Part 3 investigates some unanswered questions about assisted decision-making schemes. While no particular assisted decision-making model is proposed, this Part does identify a number of unresolved conceptual, legal and practical issues that need to be considered prior to the adoption of any assisted decision-making scheme in Australian jurisdictions.

This paper ultimately cautions against rushing to fully embrace the concept of assisted decision-making through legal recognition (at least in all its manifestations) without due consideration of the potential problems that could result. It highlights the need for empirical research into the legal operation of assisted decision-making and whether such schemes would add any practical benefit to current Australian guardianship regimes.

**PART 1: UNDERSTANDING THE GUARDIANSHIP CONTEXT: FROM PAST TO PRESENT**

Part 1 explains the context in which modern guardianship laws, and new legal guardianship reform, must be considered. Like any laws, modern guardianship laws were not created in a vacuum and have evolved from, and are still shaped by, the social circumstances and values present in Western societies at a given time. An understanding of this is necessary (particularly for those unfamiliar with guardianship regimes) to provide context to the latest call to create statutory assisted decision-making models. This Part demonstrates that the historical and social factors that have led to recognition of individual human rights, and the increasing priority given to the principle of autonomy, also support acceptance of assisted decision-making today.

1.1 Societal changes over time

1.1.1 State powers – control and institutionalisation

Guardianship laws have been present, in a limited form, since Roman times.\(^8\) Historically, the primary aim of guardianship laws was the protection of property – that is financial and

\(^7\) Cf Others have argued more strongly that assisted decision-making could replace, or is inconsistent with, substituted decision-making: see the discussion regarding the drafting of the CRPD in Amita Dhanda, ‘Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future’ (2007) 34 Syracuse Journal of International Law and Commerce 429, 444–6, 448. However, this has less relevance in Australia where express declarations were made on ratification of the CRPD that it is Australia’s understanding that the CRPD: above n 4.

real property interests of those people with impaired capacity. The exercise of the State’s inherent parens patriae jurisdiction granted (and still does today) courts the power to make orders dealing with the vulnerable – in this case adults with impaired capacity – for their perceived protection and benefit. [insert ref to Powel et al The position in England and Wales where the parens patriae jurisdiction no longer exists remains an exception.]

These early forms of guardianship laws were dominated by the view that the monarch or State had a role to play in safeguarding those with impaired capacity through protection of their property and personal interests. However, this was a very limited scheme; those with impaired capacity who had neither property nor family to look after them were often neglected and isolated.

Later, advances in medical thinking led to those with impaired capacity being viewed differently; together with the increasing respect and power of the medical profession came the opinion that those with disabilities, including persons with impaired capacity, were sick and in need of health care. The ‘medical model’, which prevailed at this point, characterised the disabled as being ‘inherently and inevitably pathological’. Mental asylums were established in which persons with impaired capacity (often referred to as ‘lunatics’ or ‘insane’) were housed on a long term basis; this form of institutionalisation dominated well into the 20th century.

The Law Reform Commission of England and Wales noted in their 1995 report that where adults with impaired capacity lived within such ‘highly-regimented institutions, issues about
decision-making or the need for a substitute decision-maker were not likely to arise’. While this was likely to be true of personal decisions, many of those who were institutionalised had a public body, such as the Public Trustee, take control of their finances. These actions could be viewed as being consistent in principle (although perhaps not in practice) with the historical exercise of the parens patriae jurisdiction to ‘control and protect’ the incapable adult. At this time the notion of individual rights, particularly for these adults, was largely a foreign concept.

1.1.2 De-institutionalisation, community care and recognition of rights

Following this period of ‘institutionalisation’, philosophical shifts in thinking from the middle of the 20th century led to ‘de-institutionalisation’ and movement of those residents into community based care. The drivers for this change came from various sources. At this time the disability rights movement emerged and championed a shift in thinking from the ‘medical model’ to a ‘social model’ of disability. This model was based on the understanding that restrictions experienced by those with disabilities were not an ‘inevitable consequence’ of having the disability but were often socially or politically constructed and could therefore be changed by such means.

This recognition that all persons, regardless of disability, had a right to be treated equally as individuals precipitated the shift in how persons with decision-making impairments were viewed and treated. Assumptions that they were dependent and reliant on state welfare were challenged and they began to be viewed in light of a rights based model as individuals with rights. The disability rights movement which started at this time has grown alongside and into the legal recognition of an entitlement to universal human rights for everyone, regardless of impairment (see 1.4.5 below).

Also at this time, it came to be appreciated that not all ‘mentally disabling conditions’ were fixed and unchangeable. It came to be understood that decision-making capacities could be developed, retained or, in some cases, be exercised with assistance. Adults moved from institutions to community care were recognised as being vulnerable; while some were capable of making decisions, many required assistance with making decisions or needed

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16 Carney and Tait, above n 10, 12. See also Gordon and Verdun-Jones, above n 9, 3-58.

17 Salzman, above n 3, 167.

18 This was in part also driven by the civil rights movement, particularly in the United States: Quinn, above n 8, 13–14; Peter David Blanck and Michael Millender, 'Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America' (2000) 52 Alabama Law Review 1, 3; Burningham, above n 8, 141.


21 Robin Creyke, 'Who Can Decide? Legal Decision-Making For Others' (No 19, Department of Human Services and Health Aged and Community Care Division, September 1995) 38.
someone to act on their behalf.\textsuperscript{22} At this point the seeds of recognition for assisted decision-making were sown.

This movement of adults with impaired capacity into the community served, in part, as the catalyst for regulatory mechanisms to be put in place for others to legitimately make decisions on behalf of those with impaired capacity. Decisions regarding health care, finances or accommodation often needed to be made. In the absence of legal recognition a substitute decision-maker could not be formally recognised and concerns about the liability of those who were caring for and treating those with impaired capacity became apparent.\textsuperscript{23}

Coupled with these factors was the challenge that arose to the traditional paternalistic medical model. Until this point it was accepted, and expected, that patients would defer to the medical professions’ expertise. Regarding those with decision-making impairments, this extended to the medical profession having legal power to treat without the need for consent.\textsuperscript{24} However, around this time attitudes gradually changed from one of respected paternalism to one recognising patient rights. The realisation that assessments of capacity were being made by medical professionals without specific training, and often using different tests also arose.\textsuperscript{25} This shift in how health care was conceived also contributed to the push for modern guardianship laws.

\subsection*{1.2 Demographic changes over time}

Up until this point many of the drivers for change came from within the disability sector. However, with the aging “baby boomer” populations in Western societies – such as Australia, the United Kingdom, Canada and particularly the United States – this segment of society also demanded to be heard and contributed to reform.\textsuperscript{26}

The growing number of older citizens pushed for recognition of legal advance planning documents – such as enduring powers of attorney and advance directives – to allow them to plan ahead to a time when they could no longer make decisions.\textsuperscript{27} In addition, in some countries, the growing mobility of citizens resulted in increasing numbers of families living

\begin{itemize}
\item[22] Law Reform Commission, above n 14 [2.32].
\item[23] See, eg, Gordon and Verdun-Jones, above n 9, 1-15.
\item[24] Carney and Tait, above n 10, 15.
\item[27] The initial push for guardianship legislation was galvanised by those advocating on behalf of people with intellectual disabilities, therefore legal recognition of advance planning documents were not initially a priority given that this group may have never initially had capacity. However, the growing number of older citizens led to advance planning documents being legislatively recognised: WR Atkin, ‘Adult Guardianship Reforms - Reflections on the New Zealand Model’ (1997) 20(1) International Journal of Law and Psychiatry 77, 79–80. See also Terry Carney, ‘Abuse of Enduring Powers of Attorney: Lessons from the Australian Tribunal Experiment’ (1999) 18 New Zealand Universities Law Review 481, 482.
\end{itemize}
distant to one another decreasing the level of family support available for some older citizens.

1.3 Inadequacy of existing legal structures

As these two groups – the disabled and the elderly (and those that advocated for them) – pushed for more societal support and recognition, it became apparent that existing legal mechanisms for guardianship were inadequate.

Prior to major reform (that began in some places from the 1970s), archaic legal procedures derived from antiquated English law were relied upon for non-financial guardianship matters. The existing legal framework was inadequate in dealing with these issues. Procedures were generally costly, cumbersome and were not considered ‘user-friendly’; as such they were rarely utilised.

The results of court applications were also inflexible. Generally where a substitute decision-maker was appointed, they were given plenary – that is complete – power and authority to make all decisions on behalf of the person. This ‘all or nothing’ approach completely deprived the person subject to the proceedings of any autonomy to make their own decisions – regardless of their level of incapacity. It also came to be recognised that placing an adult within the guardianship regime – which, at this time, usually meant appointing a plenary substitute decision-maker – could have ‘serious negative consequences’.

Removing the legal right to make one’s own decisions could lead to a ‘vicious cycle’ of decline.

[An] inability to manage one’s affairs diminish[es] the individual’s opportunities to test his or her abilities. The “disuse of decision-making powers” may lead to further decline in the individual’s capabilities and sense or competence to act in the world, leading to further isolation and loss of abilities.

The lack of an accessible judicial system for guardianship, coupled with the growing need for access to such a regime and poor results when access was gained, provided the impetus for the creation of a modern system of guardianship.

The factors discussed above combined to push the agenda for legal reform. Increased recognition of these problems in academia, the media and by politicians led to a wave of

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29 This involved invoking the superior courts inherent parens patriae jurisdiction to appoint a ‘committee’ to look after property and person: Carney and Tait, above n 10, 10–11, 13; Gordon and Verdun-Jones, above n 9, 1-16–1-18; Terry Carney, 'The Limits and the Social Legacy of Guardianship in Australia' (1989) 18 Federal Law Review 231, 235.

30 Gordon and Verdun-Jones, above n 9, 1-20–1-21.


legal reform internationally that started in the mid-1970s. Subsequent ‘waves’ of reform have continued since that time and, arguably, we are riding the current ‘wave’ leading to the incorporation legal assisted decision-making mechanisms.

1.4 Features of modern guardianship laws

The resulting legal reform led to guardianship regimes in most Western societies, including Australia, sharing certain key features. An examination of these fundamental features reveals how assisted decision-making fits well with, or in some cases challenges, the traditional features of modern guardianship regimes.

1.4.1 The role of the law, state and society

What purpose guardianship laws should serve is closely linked to how society views the roles of the public State and the private citizen. Over time there has been a shift in emphasis from the safety and care of those with impaired capacity being the responsibility of the State via a welfare system, to private care by families and non-public institutions. Similarly, the purpose of guardianship laws has shifted from having the primary aim of being protective and ‘reactive’, to having dual functions of protection and facilitating or empowering those with impaired capacity to participate in society (often through ‘proactive’ measures implemented prior to the impairment).

Following de-institutionalisation the role of the State in providing care for those with impaired capacity changed considerably. While previously the State took on the responsibility of housing and general welfare of many of those with impaired capacity, more responsibility began to be placed with families and community.

In modern guardianship regimes, although the State has set up structures that allow people to access public bodies to assist with decision-making, these are envisaged as measures of last resort. Instead, guardianship regimes tend to recognise and legitimise, either expressly or impliedly, that the majority of decision-making takes place informally through a person’s social support networks, often family. The steps taken, or proposed to be taken, in the latest wave of reforms therefore seek to formalise these support networks by providing mechanisms through which these can be legally recognised.

The law also provided mechanisms for proactive planning through legally recognised advance planning documents allowing those with capacity to appoint others close to them to act as decision-makers should they lose capacity. In a similar vein, new assisted decision-making agreements may also join the list of instruments that allows for private proactive planning by individuals. Such an approach recognises the importance of preserving close relationships between the person and their support networks, but it also satisfies the State’s

34 See Johns, above n 12, 1; Gordon and Verdun-Jones, above n 9, 1-9–1-12; Quinn, above n 8, ch 2.
36 Carney and Tait, above n 10, 49.
secondary aim of achieving ‘administrative simplicity; efficacy and efficiency in the care of its citizens’. 38

Even where the guardianship regime was formally engaged with – via advance planning documents or applications to courts for the appointment of substitute decision-makers – the preference has been for people to appoint, or have appointed for them, persons in a close relationship with them. Statutory officials will only be appointed as a measure of last resort. 39 (As shown below at 3.3.4, this trend continues in the context of assisted decision-making.) While this reflects the principle of the least restrictive approach, it has caused some commentators to question whether distributive justice is being achieved within the guardianship system. 40 The burden – in terms of financial cost, time, and effort – of caring or assisting a person who has impaired capacity usually falls to family and friends. The community, in most circumstances, has therefore taken over the responsibility of caring and assisting those with impaired capacity – a role previously undertaken solely by the State, at the State’s cost. Essentially, what was once a public duty exercised by the State has, in the majority of circumstances, become a private duty subject to State over-sight. 41 In the absence of such private social supports, an adult is left particularly vulnerable. The issue of who helps those without an existing support network is discussed below at 3.3.4.

1.4.2 Viewing the individual: autonomy and beneficence

The shift in responsibility from the ‘public’ (State welfare) to the ‘private’ (community/family care) aligns, to an extent, with the view that prizes autonomy over beneficence of the adult. Beneficence, in the form of ‘benign paternalism’ was, until the creation of modern guardianship laws, the predominant guiding principle in Western societies treatment of those with impaired capacity. Today, the emphasis has shifted from protection of those with impaired capacity, to support for and inclusion of those adults in decisions affecting them; that is, promotion of their autonomy.42

Autonomy in this context does not mean simply leaving the adult in question alone to do what they want, but includes support for the adult to maximise the options available to him

39 Frolik, above n 13, 642–3. This was particularly so in the USA where in the past the option of a statutory official of last resort representing the person was frequently not legislatively provided for: Pamela B Teaster et al, above n 28, 16–18.
41 Carney and Tait, above n 10, 49. See also Frolik, above n 13 who makes a similar point: ‘Guardianship came to be seen less as a delegation of state authority and more of an example of the state monitoring the activities of private citizens’. States have, however, maintained obligations of investigation and protection of vulnerable adults (including those with impaired capacity) from abuse, neglect and exploitation. See generally, Robert M Gordon, ‘Adult Protection Legislation in Canada – Models, Issues, and Problems’ (2001) 24 International Journal of Law and Psychiatry 117.
or her. The promotion of autonomy was the primary rationale behind guardianship regimes statutorily recognising legally binding advance planning documents, and it remains a primary driver for enacting assisted decision-making mechanisms. While courts in most Western societies today still exercise their parens patriae power to make decisions on behalf of adults with impaired capacity, the application of the best interests test today incorporates taking into account the known views and wishes of the adult in question. Therefore, today, the best interests test does not ignore the need to consider the individual’s wishes; however, it remains an essentially paternalistic approach.

It is arguable that assisted decision-making models promote autonomy by helping to modify third party’s interactions with adults, allowing them to participate in society even when their decision-making abilities start to diminish. As noted by Salzman the notion of assisted decision-making is predicated on the basic principle that all people are autonomous beings who develop and maintain capacity as they engage in the process of their own decision-making, even if some level of support is needed to do so. In [an assisted] decision-making paradigm, the individual receives support from a trusted individual, network of individuals, or entity to make personal, financial, and legal decisions that must be followed by third parties (such as financial institutions, businesses, health professionals, and service providers).

While in the past informal assisted decision-making may have been successful, arguably Western societies today are increasingly risk averse and many professionals and institutions are concerned with legal liability. As such, where a person has questionable capacity, their ability to participate in day to day activities through necessary transactions is likely to be increasingly questioned. This is particularly likely in transactions that take place commonly in society, i.e. entering into contracts or leases, buying or selling property, dealing with banks, consenting to health

43 Wilkinson, above n 25, 323. In discussing empowerment and capacity Wilkinson notes that empowerment can come about from joint or collaborative decision-making, although she notes that, ‘the complete removal of constraints at the individual level may be more difficult to envisage, even to the extent that such a situation may actually disempower the cognitively impaired individual who requires some support to make decisions’. See also Kathleen Glass, ‘Refining Definitions and Devising Instruments: Two Decades of Assessing Mental Competence’ (1997) 20 International Journal of Law and Psychiatry 5, 30.


45 Other benefits to formalising an assisted decision-making model may include adhering to non-maleficient principles; Glass notes that models of assisted decision-making not only promote autonomy, but also protect against ‘the harm of making an ignorant decision without the necessary assistance or of not being allowed to make a personal decision at all’: Glass, above n 43, 31.

46 Salzman, above n 3, 180.


Problems with informal supporters attempting to access information on behalf of an adult are increasing in a climate of privacy concerns. 

In the absence of some formal recognition of those acting to support those with some impaired capacity, it might be argued that these adults would be socially and legally excluded from many aspects of normal life. Formalising relationships might mean that third parties will have confidence relying upon those legally recognised roles.

In addition such recognition may, in formalising the help of family and friends, act as a way for them to be involved without ‘taking over’ and falling into informal substitute decision-making. It may also increase the time and quality of support received, allowing adults to take more control over their lives.

The persisting influence of beneficence in the law today is, however, evidenced by ‘best interests’ remaining as a guiding principle for those appointed under assisted decision-making schemes (see 1.4.4 below). As discussed in Part 3, a tension therefore continues to exist between acting beneficently and promoting autonomy in adults.

### 1.4.3 The concept of incapacity

Moving from the values underpinning modern guardianship regimes to more concrete legal concepts, one key feature of guardianship regimes is reliance on the concept of incapacity. Guardianship laws generally operate upon a threshold of a person becoming ‘incapacitated’.

Today, the traditional view that capacity was an all or nothing assessment has been rejected; now it is generally acknowledged that the assessment of capacity for decision-making should be decision-specific and time-specific, and assessed based on a ‘functional’ approach. In theory, modifications in court orders can be made to accommodate these limitations while still allowing the maximum extent of autonomy possible. At least in Australia, the practice of tribunals making limited – rather than plenary – guardianship orders where possible is

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49 For example, the proliferation of legislation which legally recognises certain family members as appropriate decision-makers for those with impaired capacity can be seen as a legal response to the concerns expressed by the medical profession regarding their legal liability in providing treatment without legally valid consent. See, eg, Gordon and Verdun-Jones, above n 9, 6-31; Robert G Jones, 'The Law and Dementia - Issues in England and Wales' (2001) 5(4) Aging & Mental Health 329, 329; Carney and Singer, above n 14, 100–1; Frolik, above n 48, 75–6; White, Willmott and Then, above n 44, 199–202 [6.370]–[6.400].


51 See, eg, Lana Kerzner, ‘Paving the way to Full Realization of the CRPD’s Rights to Legal Capacity and Supported Decision-Making: A Canadian Perspective’ (Paper presented at New Foundations for Personhood and Legal Capacity in the 21st Century, Centre for Inclusion and Citizenship at the University of British Columbia, April 2011) 35, 40, discussing British Columbia’s assisted decision-making model.


53 See, eg, Carney and Singer, above n 14, 3–6 discussing the competing goals of maximising the freedom of the individual and protecting the welfare of the individual.

54 Surtees, above n 15, 81. While different methods of assessing capacity (‘status’, ‘outcome’ and ‘functional’ approaches) have been identified, The functional approach to determining capacity is seen as being most respectful to an adults autonomy: White, Willmott and Then, above n 44, 167-169[6.120]–[6.140]; Cheryl Tille et al, ‘Managing Older People’s Money: Assisted and Substitute Decision-making in Residential Aged-Care’ (2011) 31 Ageing & Society 93, 94–5.
generally preferred. This practice is not, however, reflected globally; literature suggests that both at a social/health care and judicial level this approach may not be the usual practice.\textsuperscript{55}

However, the use of incapacity as a threshold concept is being challenged by some assisted decision-making mechanisms.\textsuperscript{56} Indeed, what distinguishes the existing legal mechanisms from the proposed assisted decision-making models is that ‘incapacity’ is not the trigger for operation of these proposed mechanisms. In fact, the assumption is that these operate to assist in maintaining the adult’s capacity for longer than would otherwise be the case.

\textbf{1.4.4 A principle based approach}

Another feature of modern guardianship regimes has been legislation that adopts a principle based approach. Commonly, guardianship legislation expressly states a number of general principles that guide how those acting within the guardianship regime should act.\textsuperscript{57}

Common principles include the presumption of capacity, adopting the least restrictive option, a recognised respect for an adult’s autonomy and an adult’s inclusion as a valued member of their community.\textsuperscript{58} Some guardianship regimes maintain the principle that the adult’s best interests are a primary consideration for those acting in accordance with the legislation. Although these principles overlap and have been expressed in various ways, they remain the core principles on which modern guardianship laws are now shaped.

These principles, in general, favour the concept of assisted decision-making that seeks to maintain an adult’s decision-making capacity for as long as possible. However, as discussed in Part 3, when these principles conflict it presents difficulties for those appointed under assisted decision-making models.

\begin{footnotesize}
\begin{itemize}
  \item See Glass, above n 43, regarding assessments of capacity. See also Lawrence Frolik, ‘Guardianship Reform: When the Best is the Enemy of the Good’ (1998) 9 Stanford Law & Policy Review 347, 354.
  \item In particular the British Columbia representation agreements allow appointment of a person to act in the role of a supporter and substitute decision-maker does not use the traditional concept of capacity as a threshold concept. Instead, a more ‘flexible’ approach is used to determine whether a person can enter into an agreement which includes: communicating the desire to have a representative assist in decision-making, demonstrating choice and an ability to express approval/disapproval of others, awareness of the role of the representative and the existence of a trusting relationship with the representative: Representation Agreement Act, BC 1996, c 405, s 8. While this different version of capacity has been welcomed by some, it also creates uncertainty in the law: Kerzner, above n 51, 39–40.
  \item See, eg, Yokohama declaration art 3(1); Creyke, above n 21, 40–3; Carney and Tait, above n 10, 29; Minister’s Committee Report, above n 35, 25–26; Gordon and Verdun-Jones, above n 9, 6–49–6–50; Kapp, above n 31; Australian Law Reform Commission, Guardianship and Management of Property, Report No 52 (1989) [2.3], [2.6]; Queensland Law Reform Commission, above n 57, vol 1, 40–1; Law Reform Commission, above n 14 [3.2]. See also Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 12.
\end{itemize}
\end{footnotesize}
1.4.5 A human rights approach

Finally, the increased prominence of human rights in guardianship laws must be acknowledged. The disability rights movement that started in the 1970s has developed alongside, and into, a broader human rights approach that now dominates guardianship law reform.\(^{59}\) In some jurisdictions, where human rights charters have been implemented, they have provided an additional base from which guardianship laws have naturally evolved.\(^{60}\) This movement of recognising equal human rights is also reflected at the international level, with the CRPD being the most significant international instrument.

Article 12 of the CRPD provides for equal recognition before the law. Commentators suggest that article 12 marks a ‘paradigm shift’\(^{61}\) from traditional guardianship practices of appointing a plenary substitute decision-maker, to promoting autonomy for as long as possible. It relevantly states:\(^{62}\)

\(\begin{align*}
12.2. \text{States Parties shall recognize that persons with disabilities enjoy legal capacity} & \text{on an equal basis with others in all aspects of life.} \\
12.3. \text{States Parties shall take appropriate measures to provide access by persons} & \text{with disabilities to the support they may require in exercising their legal capacity.}
\end{align*}\)

While subject to fierce debate, article 12 has proved instrumental in providing an additional driver for statutory recognition of assisted decision-making.\(^{64}\) Since the CRPD it has been increasingly recognised that difficulty in decision-making or in communicating a decision is not the same as an inability.\(^{65}\) Article 12 envisages systems put in place by member states that allow an individual’s decision-making to be supported or assisted to preserve their autonomy to the maximum extent.\(^{66}\) There has been a call for legal mechanisms that


\(^{60}\) See, eg, Gordon and Verdun-Jones, above n 9, 1-16, 6-3–6-29.

\(^{61}\) See, eg, A Kanter, above n 33, 560. This terminology has also been associated with the CRPD generally, see Kayess and French, above n 13, 3.


\(^{63}\) See Kerzner, above n 51, 13-15 for a discussion of the term ‘legal capacity’.


provide a ‘sliding scale’ of decision-making options for those who have trouble making decisions alone.67 Indeed, Kerzner has argued that under articles 12 and 5, governments and third parties have obligations to take ‘positive’ steps to facilitate the use of supports.68 Legally recognised assisted decision-making models therefore help society to transition from a view of adults either ‘possessing capacity or not’ and instead allowing legal systems to ‘embrace a view of individuals as possessing a variety of faculties and abilities’.69

Part 1 has demonstrated that the theory of assisted decision-making is consistent with many of the key features of modern guardianship regimes and with the overall trajectory of guardianship law reform to date. The attention that is being directed towards assisted decision-making globally, and within Australia, is therefore not surprising; it is unlikely that assisted decision-making will be abandoned now that interest has been stoked. As such, there is a need for critical legal analysis of how this might be implemented.

Part 2 examines how the theory of assisted decision-making has been incorporated into statutory regimes in overseas jurisdictions. As shown below, a number of different models have been adopted which embrace, to varying extents, the assisted decision-making approach. Part 3 goes on to critically examine the potential problems that arise from these legal approaches.

PART 2: FROM THEORY TO LEGAL REALITY: ASSISTED DECISION-MAKING IN GUARDIANSHIP LAWS

2.1 Different approaches to decision-making

Four different types of decision-making approaches have been identified that broadly correlate with what has been legally recognised in some guardianship regimes:70

1. Supportive decision-making: this presumes that the adult has the ability to make decisions but requires help in executing decisions.
2. Shared decision-making: involves shared decisional responsibility between the adult and another person.
3. Delegated decision-making: relies on delegation through advance planning tools such as enduring powers of attorney and advance health directives to ensure that the adult’s preferences are known if the adult loses capacity.
4. Surrogate decision-making: occurs where the State vests another person with substitute decision-making authority for the adult.71

The third and fourth type of decision-making are already present in most modern guardianship regimes: these approaches mirror the ability to execute advance planning tools and the substituted decision-making norm where an appointed guardian or administrator makes decisions on behalf of the adult. These two approaches are standard in guardianship regimes and will not be discussed further.

67 Kayess and Fogarty, above n 65, 25. See also Lord, above n 66, 573 who also talk about a ‘continuum’ of decision-making. See also Office of the Public Advocate, above n 5, 11–13.
68 Kerzner, above n 51, 62–3.
69 Surtees, above n 15, 82–3
70 Cf Others have included more categories of decision-making models, see, eg, Barbara Carter, ‘Supported Decision-making: Background and Discussion paper’ (Office of the Public Advocate of Victoria, November 2009) 18–19; Bach, above n 6, 4–8.
71 Kathleen Wilber and Sandra Reynolds, ‘Rethinking Alternatives to Guardianship’ (1995) 35 The Gerontologist 248, 249–50. The descriptions of the 4 categories are modified from this paper.
The first and second type of decision – supportive and shared decision-making – are less common in legislation but are garnering increasing interest since the adoption of the CRPD. These two types of decision-making both broadly fit within the concept of assisted decision-making. As noted by Surtees, legal recognition of these different forms of decision-making would allow societies to:

continue the movement that began with the move away from plenary guardianship ... toward limited or tailored guardianship. The next stage in this movement is away from limited guardianship, and where appropriate, toward supported decision-making.\(^{72}\)

While consistent with the aims of CRPD and with the evolution of guardianship laws in general, questions remain about how best to incorporate these concepts into modern laws. A legal mechanism for assisted decision-making would add to existing mechanisms (i.e. enduring powers of attorney and advance health directives) to be used to allow adults to plan ahead and potentially gives courts more flexible options for adults. It fills a legal ‘gap’ by formally recognising the need for assistance in the grey area when an adult is between having capacity and being considered incapacitated. It also gives increased legal recognition to what is accepted in practice: that there is a sliding scale of decision-making capabilities, and not being at the top of the scale does not mean your legal right to make decisions should be denied.

2.2 Current models of assisted decision-making

Currently three major models exist in guardianship legislation which recognise the concept of assisted decision-making.\(^{73}\) These range from implicitly recognising the existence of the practice, through to the extremely novel idea of court imposed co-decision-makers appointed for an adult. It should be emphasised that all of these assisted decision-making models operate when an adult is assumed still capable of making some decisions, albeit with varying levels of support. This fundamentally differs from normal substituted decision-making or advance planning documents which only operate when an adult loses decision-making capacity.

2.2.1 Recognition of assisted decision-making in practice

The first category includes those jurisdictions that recognise the informal practice of assisted decision-making but do no more. The concept of assisted decision-making is by no means foreign to modern guardianship regimes; a number of modern guardianship schemes impliedly support the notion through adoption of the principles of the ‘least restrictive approach’, ‘respect for autonomy’ and ‘presumption of capacity’ (see 1.4.4 above). While not incorporating a full scheme of assisted decision-making, jurisdictions like that in England and Wales implicitly support the notion through one of the legislation’s general principles:\(^{74}\)

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\(^{72}\) Surtees, above n 15, 82–3.

\(^{73}\) Legal recognition and implementation of assisted decision-making comes in many forms. For the purposes of discussion, the different legal mechanisms have been divided into three categories. However, it is noted that in some jurisdictions these mechanisms overlap: see 2.2.2 below.

\(^{74}\) Mental Capacity Act 2005 (Eng & Wales) s 1(3). Also included within the provision on best interests is a requirement for a person acting on behalf of a person with questionable capacity to, ‘so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him: s 4(4). See also Department for Constitutional Affairs, Mental Capacity Act 2005: Code of Practice (The Stationary Office, 2007) 20–2, ch 3.
A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

While provisions such as these recognise and seemingly endorse the practice of assisted decision-making, these jurisdictions have not gone beyond merely recognising the informal nature of this support. The real innovation has come about in those jurisdictions that have created new legal mechanisms to statutorily recognise and empower those that previously acted informally in assisting an adult. These legal models are discussed in what follows.

2.2.2 Legally recognised ‘supported’ decision-making models

Some models – often referred to as ‘supported’ decision-making models – are designed for adults who have capacity to make their own decisions but would like someone, or a number of persons they trust, to help them in the decision-making process. This corresponds to the ‘supportive decision-making’ category. Today, express inclusion of statutorily recognised schemes – that recognise persons who act as ‘assistants’, ‘associates’ or ‘supporters’ – is becoming more pronounced.

Modern assisted decision-making schemes have drawn inspiration from a variety of sources. Scandinavian countries led the way in the 1990s introducing the concept of a legally recognised ‘support person’, whereas in Canada, the concept can be traced back to the Civil Code from the late 1800s. Today it is incorporated as a key part of legislative schemes, particularly in Canadian jurisdictions, but aspects of it are also present in jurisdictions as diverse as Germany and Japan. Hybrid schemes also exist in British Columbia where adults can enter into ‘Representation Agreements’ – a combination of a supported decision-making agreement and an enduring power of attorney – which provide the ‘supporter’ with a wide mandate to assist in decision-making through to making decisions on the adult’s behalf.

The most recent incarnation of statutorily recognised supported decision-making is from Alberta which provides for three levels of decision-making for personal decisions, the first of which is ‘supported decision-making’. A similar regime also exists in Yukon.

Key features of supported decision-making

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77 See generally Representation Agreement Act, BC 1996, c 405. However, there is also the possibility of combined agreements like this leading to confusion regarding the role of the person appointed, therefore such some prefer the ‘purer’ supported decision-making models contained in Yukon and Alberta discussed in this paper: Kerzner, above n 51, 56.

78 Alberta Justice and Alberta Seniors and Community Supports, above n 6, 29-31. The Victorian Law Reform Commission has recently recommended a similar 3 tiered model in its review of guardianship legislation: Victorian Law Reform Commission, above n 5.
While the legislation in Alberta and Yukon is not identical, a number of features can be identified that distinguish supported decision-making models from other assisted decision-making models.

**Private adult controlled agreement:** Under these regimes, an adult who ‘understands the nature and effect’ of the agreement person can appoint a person of their choice to act as a supporter. 79 The agreements can be tailored by the adult to include certain roles or cover certain types of decisions. 80 In Alberta, the legislation provides that the adult is able to terminate the agreement (using a prescribed form) at any time. 81

**Decision remains the adult’s:** Decisions made under these agreements are recognised as being the adult’s decision, not the supporter’s. 82

**No mandatory involvement by supporter:** Generally a supporter need not have offered support for an adult’s decision to be valid. In keeping with its focus on autonomy, there would seem to be no requirement for an adult to consult with their supporter. However, the Yukon legislation takes a slightly different approach; while it does not mandate that an adult consult with a supporter it does allow an application be made to the Court (by the adult or supporter) to declare an agreement between the adult and a third party void if the agreement is ‘within the responsibilities’ of the supporter, and the adult entered into the agreement without consulting their supporter. 83 Here, a clear tension exists between protecting the adult and allowing that adult to make ‘bad’ decisions. 84 This is particularly so because decision-making capacity is explicitly preserved by these agreements.

**Supporter has rights of access:** The supporter has the legal authority to access, collect or obtain information that is relevant to a decision and to assist the person in decision-making and, if necessary, communicating his or her decision. 85

**Supporter has duties:** The supporter has obligations to act in accordance with the general principles of the legislation and may have specific requirements to act diligently, honestly and in good faith in the ‘best interests’ of the adult. 86 In Yukon, in order to avoid liability

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79 Adult Guardianship and Trusteeship Act, A 2008, c A-4.2, s 4(1); Decision-making, Support and Protection to Adults Act, Y 2003, c 21, s 6. Cf A more flexible notion of capacity exists in British Columbia: Representation Agreement Act, BC 1996, c 405, s 8. See also Kerzner, above n 51, 38-9.

80 Adult Guardianship and Trusteeship Act, A 2008, c A-4.2, s 4(2); Decision-making, Support and Protection to Adults Act, Y 2003, c 21, s 9. Ideally the person appointed should be a trusted individual who is familiar with the adult and their communication needs and who is able to offer the support required: Bach, above n 6, 9.


82 Adult Guardianship and Trusteeship Act, A 2008, c A-4.2, s 6(1); Decision-making, Support and Protection to Adults Act, Y 2003, c 21, s 11.

83 Ibid s 12.

84 See discussion at 3.1.2 below.

85 Adult Guardianship and Trusteeship Act A 2008, c A-4.2, s 9; Decision-making, Support and Protection to Adults Act, Y 2003, c 21, s 10. In Yukon the obligation extends to endeavouring to ensure the adult’s decision is implemented: s 5(1)(e).

86 Decision-making, Support and Protection to Adults Act, Y 2003, c 21, s 13(1) (these obligations are stated in the context of the liability of the supporter). See also Adult Guardianship and Trusteeship (Ministerial) Regulation, Alta Reg 224/2009, s 4(1).
supporters must also exercise ‘care… and skill of a reasonably prudent person’. In Alberta there are also specific records which must be maintained by the supporter.

**Liability of supporter generally excluded:** Where a supporter acts in good faith and in accordance with the duties imposed by the legislation, liability for things done while acting in that role is generally excluded.

Supported decision-making models with these features, generally fit quite well within the existing guardianship decision-making paradigm. The notion of support to assist individuals making decisions is already implicitly included in many guardianship laws and taking this further step of legally recognising the role formalises this more explicitly.

### 2.2.3 Legally recognised co-decision-making

The most innovative legal model of assisted decision-making is the concept of co-decision-making which corresponds to the ‘shared decision-making’ model. Legal models exist in a handful of jurisdictions such as the Canadian jurisdictions of Saskatchewan, Quebec and Alberta which have standalone co-decision-making provisions, to hybrid models in Japan, Norway and Denmark. The Victorian Law Reform Commission has recently recommended that a co-decision-making model (together with supported decision-making) be introduced in Victoria.

This model creates a new legal concept whereby joint decision-making between the adult and the appointed co-decision-maker is mandated. The actual decision-making process is therefore no longer a solo enterprise. This is a significant departure from the norm which recognises the individual adult being the decision-maker (albeit with assistance offered to get to that point) or a substitute decision-maker who makes a decision on behalf of an incapacitated adult.

The presumption appears to be that once put in place the adult only has decision-making capacity when the co-decision-maker assists the adult; the corollary being that the adult lacks decision-making capacity if they act alone. This requirement obviously limits the autonomy of the adult, but to a much lesser extent than if even a partial guardian or administrator was appointed. In some ways, co-decision-making orders recognise that decision-making capacity is contingent, in this case on the involvement of another person.

#### Key features of co-decision-making

The Canadian jurisdictions of Saskatchewan and Alberta provide for the most ‘fully-fledged’ co-decision-making schemes. In Saskatchewan, co-decision-making exists instead of a supported decision-making model, whereas in Alberta co-decision-making orders are

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87 *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 13(1)(b).
89 *Decision-making, Support and Protection to Adults Act*, Y 2003, c 21, s 13(1); *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 10.
90 The Quebec model share features from both supported and co-decision-making models and the legislation is relatively brief. However, as it is a court appointed support position, it has more in common with co-decision-making models discussed here. See *Civil Code of Quebec*, Q 1991, c 64, a 291-4.
91 In Japan a hybrid supported/co decision-making model exists, see Arai, above n 76; Doron, above n 76, 373–7. For a discussion of the Scandanavian approach, see generally, Danielsen, above n 75.
92 *Victorian Law Reform Commission*, above n 5, ch 8, 9.
available alongside supported decision-making agreements. A closer examination of the key features of this model is warranted.

**Court appointed arrangement with adult’s consent:** Co-decision-making schemes are generally court ordered with no option for an adult to personally appoint a co-decision-maker. However, in Alberta it requires the consent of the adult and the adult can also end the agreement.

The role of a co-decision-maker is to assist, discuss or ‘advise’ the adult in relevant decisions, and the co-decision-maker is able to do all things necessary to give effect to the decision. Generally, in making an appointment the court must consider:

- it to be in the best interests of the adult;
- that no less restrictive options are available;
- that the adult’s capacity is impaired, but the adult can make decisions if given the support of a co-decision-maker; and
- there is a need for such an appointment.

It can be imagined that courts will face a difficult task in assessing whether the adult has the appropriate level of capacity for such an order to be appropriate. Reliance on medical assessments regarding the level of an adult’s capacity seem likely to become increasingly important.

Courts in both jurisdictions can appoint more than one co-decision-maker and limit the order to specific matters. The court can require the order to be reviewed after a period of time.

Regarding the appropriateness of the person appointed as a co-decision-maker, both Alberta and Saskatchewan require the court to consider the potential co-decision-maker’s ability to carry out their role and duties under the legislation and must take into account their existing

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93 See, eg, Adult Guardianship and Trusteeship Act, A 2008, c A-4.2, s 13; The Adult Guardianship and Co-decision-making Act, S 2000, c A-5.3, s 14(1)(a); Civil Code of Quebec, Q 1991, c 64, 291. This aspect of the scheme has been criticised Kerzner, above n 51, 60. See also Victorian Law Reform Commission, above n 5, [9.51]–[9.57].

94 Adult Guardianship and Trusteeship Act, A 2008, c A-4.2, ss 13(4)(c), 17(8).

95 Ibid s 18(2); The Adult Guardianship and Co-decision-making Act, S 2000, c A-5.3, ss 17(1), 42(1).


97 In considering the adult’s best interests the court is required to consider the factors in Adult Guardianship and Trusteeship Act, A 2008, c A-4.2, s 13(5).

98 See John Chesterman, ‘Supported Decision-making: Options for Legislative Recognition’ (Office of the Public Advocate of Victoria, January 2012) 11. The Victorian Office of the Public Advocate (at 12) suggests as an alternative standard that a co-decision-making order could be made, ‘where the person meets the guardianship criteria but where the tribunal believes that the person has sufficient capabilities to be able to contribute to the particular decisions that need to be made’.

99 The Adult Guardianship and Co-decision-making Act, S 2000, c A-5.3, ss 14(2)(b), 40(2)(b); Adult Guardianship and Trusteeship Act, A 2008, c A-4.2, ss 16, 17(1)-(2). See also Surtees, above n 15, 90-1. Note that the Victorian Law Reform Commission has suggested that only 1 co-decision-maker be able to be appointed under its suggested legislative scheme: Victorian Law Reform Commission, above n 5, [9.67]

relationship with the adult. The Court in Alberta must also consider if any potential conflict of interest creates a substantial risk that the co-decision-maker would not act in the adult’s best interests.

**Decision-making recognised as shared, but decision deemed the adult’s:** The legislation in Saskatchewan deems the decision made with the co-decision-maker to have been taken by the adult. The Alberta legislation remains silent on this point.

**Mandatory involvement by co-decision-maker in some circumstances:** As noted above, the presumption in co-decision-making models is that the adult only has decision-making capacity for specified decisions when the co-decision-maker is involved. Specific provisions in the legislation also give this legal force, albeit limited to some circumstances. (However, it is worth noting that the Victorian Law Reform Commission has recommended this be expressly included in the Victorian legislation).

In Saskatchewan, for the adult to enter into a signed contract, the document is considered voidable unless signed by both the adult and the co-decision-maker. However, the co-decision-maker must not refuse to sign such a document if a ‘reasonable person could have made the decision in question and no harm to the adult is likely to result for the decision’. Unlike the Saskatchewan legislation, the legislation in Alberta only has this effect if the Court has specified in the order that a contract is voidable if not signed by both parties. Where the order does specify it, the same limitation on the co-decision-maker applies (i.e. he/she cannot refuse if a reasonable person could have made the decision). As discussed below, this requirement seems at odds with the purported goal of promoting an adult’s decision-making autonomy; the requirement for ‘reasonableness’ clearly places a restriction on the exercise of autonomy and seems to remove the adult’s right to make ‘bad decisions’.

The mandatory involvement of the co-decision-maker means that the relationship between the adult and the co-decision-maker is particularly important. However, like any relationships, these may deteriorate or break down. Dispute resolution mechanisms are limited to applying to the court to review orders and, in Alberta, the adult is able to terminate the co-decision-making arrangement.

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102 Adult Guardianship and Trusteeship Act, A 2008, c A-4.2, s 14(2).

103 The Adult Guardianship and Co-decision-making Act, S 2000, c A-5.3, ss 23(1), 48(1) states: ‘Any decision made, action taken, consent given or thing done by a [personal/property] co-decision-maker in good faith respecting any matter within his or her shared authority with the adult is deemed for all purposes to have been made, taken, given or done by the adult’. This approach has been adopted by the Victorian Law Reform Commission: see Victorian Law Reform Commission, above n 5, [9.83]–[9.85].

104 See also Civil Code of Quebec, Q 1991, c 64, a 292.

105 Victorian Law Reform Commission, above n 5, [9.86], 165.


107 Ibid ss 17(2), 42(2).

108 Adult Guardianship and Trusteeship Act, A 2008, c A-4.2, 17(5). See also Civil Code of Quebec, Q 1991, c 64, a 294.


110 Bach, above n 6, 9.

111 Adult Guardianship and Trusteeship Act, A 2008, c A-4.2, ss 13(4)(c), 17(8). The Victorian Law Reform Commission has also recommended a mechanism for dispute resolution in circumstances of
Co-decision-maker has rights of access: Co-decision-makers have similar rights of access to information regarding the adult as supporters. 112

Co-decision-maker has duties: The duties of a co-decision-maker in Saskatchewan are the same as that of an appointed guardian to: 113

(a) Ensure that the adult’s civil and human rights are protected
(b) Encourage the adult to
   (i) Participate to the maximum extent in all decisions affecting the adult: and
   (ii) act independently in all matters in which the adult is able to; and
(c) limit the [co-decision-maker’s] interference in the life of the adult to the greatest extent possible.

In Alberta, once a co-decision-maker is appointed their role extends to acting diligently, in good faith and in the adult’s best interests. 114

In Saskatchewan and Alberta a number of general principles of the legislation are applicable to co-decision-makers as well. 115 As discussed below, this leads to an appreciable tension in guiding co-decision-makers between acting paternalistically or in a way that promotes the adult’s autonomy. 116

Liability of co-decision-maker generally excluded: Similar to supported decision-making models, the existing legislation generally excludes liability for a co-decision-maker acting in accordance with the legislation. 117

The novelty and relatively recent introduction of co-decision-making models means we know little about how they operate in practice.

2.3 Legal models of assisted decision-making

This Part has outlined the three main approaches to assisted decision-making that currently exist in guardianship regimes. As already noted, in Australia, the Victorian Law Reform Commission has recommended that the Victorian Government adopt models of supported and co-decision-making based on the Alberta models described above. However, before embracing these models in Australia, it would be wise to consider what issues remain unanswered in these legislative models. Part 3 considers these unresolved issues.

PART 3: UNRESOLVED ISSUES IN ASSISTED DECISION-MAKING MODELS

Despite the theoretical attractiveness of having supported and co-decision-making mechanisms, a number of unresolved issues deserve attention. While supported decision-making models present challenges, the potential problems are amplified when considering a co-decision-making model. The novelty of the concept together with difficult questions regarding the power differential between the adult and his or her co-decision-maker mean serious consideration must be given to the potential issues that may arise.

irreconcilable disagreement, allowing either party to be able to apply to VCAT for review of the order: Victorian Law Reform Commission, above n 5, [9.91]–[9.92], 166-7.

112 See, eg, Adult Guardianship and Trusteeship Act, A 2008, c A-4., s 22.
114 Adult Guardianship and Trusteeship Act, A 2008, c A-4.2, s 18(1).
115 Ibid s 2; The Adult Guardianship and Co-decision-making Act, S 2000, c A-5.3, s 3.
116 See discussion at 3.1.2 below
Unfortunately, lack of empirical research about how the existing schemes operate in practice, mean we do not yet know if the existing models are free from problems. In Australia, where limited guardianship orders are generally preferred, it might also be questioned whether assisted decision-making models would make any practical difference to how those with some impaired capacity make decisions. As such, jurisdictions within Australia wishing to implement such schemes should consider the following issues in the context of their own social and legal environment before rushing to embrace the latest guardianship law innovation.

3.1 Conceptual Issues

3.1.1 Lack of conceptual clarity

The foregoing discussion has demonstrated that supported and co-decision-making models are conceptually (and legally) distinct decision-making paradigms. The literature on this topic has, thus far, tended not to distinguish between these two models in discussing assisted decision-making and rather adopted a broad brush approach. However, given the distinct features of these models, this seems inappropriate and leads to a lack of conceptual clarity and understanding about what assisted decision-making entails.

3.1.2 Autonomy vs Paternalism

Two major unresolved issues within existing assisted decision-making models relate to the underlying principles and purpose of assisted decision-making models. The first concerns the inconsistent principles within the current legislation that place those acting as supporters or co-decision-makers in an untenable situation. The second relates to whether the purpose of assisted decision-making models is truly the promotion of ‘full’ autonomy, or some lesser form of autonomy modified by paternalistic notions.

Inconsistent principles

A significant question for assisted decision-making models is what guiding principles will be used to guide those appointed – beneficence or respect for the adult’s autonomy? As discussed above, while the driver for these models is to preserve the adult’s decision-making autonomy and to offer a less restrictive alternative to appointing a substitute decision-maker, some of the existing provisions only do this to the extent that the adult continues to make ‘reasonable’ decisions. This is at odds with the recognition that those with some level of decision-making impairment have as much right to make ‘bad’ decisions as others. This has been described as the ‘dignity of risk’ and reflects a shift from the paternalistic attitude of protecting an individual from their own ‘unwise choices’ to respecting the autonomy of the individual and their right to choose. These provisions may prevent an

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118 See discussion at 2.2.3 above.
119 Hommel, Wang and Bergman, above n 32, 222. See also Robert Perske, ‘The Dignity of Risk’ in Wolf Wolfensberger (ed), The Principle of Normalization in Human Services (National Institute of Mental Retardation, 1972) 194. See also Substitute Decision-Making Report, above above n 6 [5.87], [5.94], [5.101]; Carter, above n 70, 21. It is explicitly included within modern definitions of capacity that just because a person makes a decision that is unreasonable, eccentric or considered to be a ‘bad decision’, this does not automatically mean that the person lacks capacity: Guardianship and Management of Property Act 1991 (ACT) s 6A; Protection of Personal and Property Rights Act 1988 (NZ) ss 6(3), 25(3) (discussed in Canadian Centre for Elder Law Studies and British Columbia Law Institute, ‘A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario’ (CCELS
adult with the financial means from entering into a particularly risky but high gain investment (and as such might be considered equivalent to high stakes gambling), if the co-decision-maker thinks that no reasonable person would enter into such an agreement and that major financial harm could result to the adult. No such limitation, of course, applies to those deemed fully competent. In this context, the limitation imposed by the need for ‘reasonable’ decisions would seem particularly incongruous as in an assisted decision-making paradigm there is no finding of actual incapacity.\textsuperscript{120}

In addition, the legislation in some jurisdictions continues to state that the best interests of the adult are the predominant guiding principle.\textsuperscript{121} Where no further guidance is given as to how to interpret this phrase, the test is essentially a paternalistic welfare test.\textsuperscript{122} The appropriateness of this as a guiding principle in the context of assisted decision-making is questionable.\textsuperscript{123} While the best interests test as applied by the courts includes consideration of an adult’s views expressed views, decisions by the adult which appear unwise, unhealthy, unreasonable or involve any risk of harm may be difficult for a supporter or co-decision-maker to agree to if one of their duties under the legislation requires them to place the best interests of the adult as the primary consideration. This puts those individuals in an unfortunate and conflicted position. These concerns are amplified in co-decision-making models due to the increased and mandatory involvement of the co-decision-maker. While this may be a way to ensure that co-decision-makers do not go to the other extreme and fail to act for fear that to ‘interfere’ would be against the principles of assisted decision-making, it seems incongruous with the overall intention of such schemes.\textsuperscript{124} This inconsistency in principles needs to be addressed by governments seeking to implement such reforms. It is noted that the recommendations of the Victorian Law Reform Commission attempt to address issue this through adopting new general principles.\textsuperscript{125}

**Promoting ‘full’ autonomy?**

A second and related issue is what the legislation is attempting to achieve. In Part 1, autonomy was recognised as a key principle driving interest in assisted decision-making models. While the assumption has been that such models help to preserve the ‘full’ autonomy of the adult for a longer period than would otherwise be possible, an examination of the current legal models, and in particular the co-decision-making models, show that this is not what is being implemented.

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\textsuperscript{120} See, eg, Gordon, above n 47, 74: ‘[T]here is dignity in the risk that attends poor judgment. Further, no one learns without experiences, both positive and negative’.

\textsuperscript{121} The *Adult Guardianship and Co-decision-making Act*, S 2000, c A-5.3, s 3(a). The first guardianship principle states: ‘adults are entitled to have their best interests given paramount consideration’. See also *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 18(1).

\textsuperscript{122} Creyke, above n 21, 41. But see, eg, in Alberta when examining the adult’s ‘best interests’, consideration must be given to any wishes known to have been expressed by the adult when the adult had capacity and values and beliefs known to have been held by the adult: *Adult Guardianship and Trusteeship Act*, A 2008, c A-4.2, s 2(d).

\textsuperscript{123} Cf Surtees, above n 15, 85.

\textsuperscript{124} Gordon, above n 47, 74 suggests that neglect could occur in a health care situation where:

[A] supported individual refuses to give consent to a treatment that will prevent a worsening of his or her medical condition because the individual does not fully understand and appreciate the consequences of refusal.

\textsuperscript{125} Victorian Law Reform Commission, above n 5, ch 6.
The limitations placed on adults under co-decision-making models (and to a far lesser extent under supported decision-making models) clearly are not applicable to adults exercising ‘full’ autonomy. Arguably, as a consequence, one of two things must occur in order for there to be a clear understanding of what the models are trying to achieve. The first is that those implementing the models must avoid conceptual dishonesty and admit that what is achieved by these models is not ‘full’ autonomy granted to adults under such models but a form of ‘restricted’ autonomy where most, but not all, the decisions made under such a scheme will be legally recognised. The reason for the restriction – i.e. the protection of adults – also needs to be explicitly articulated.

In the alternative, in order to live up to the promise of maintaining ‘full’ decision-making autonomy for those within such models, the limitations on ‘unreasonable’ decisions and considerations of the adult’s ‘best interests’ must be removed. Implementing models like those in Canada without taking either of these steps would arguably be conceptually disingenuous and confusing.

3.2 Legal issues

3.2.1 What happens to informal assistance?

It has been questioned whether in implementing formal assisted decision-making mechanisms existing informal supports will be detrimentally affected. Some adults eligible to use supported or co-decision-making mechanisms may find such measures unnecessary as informal decision-making is sufficient. Any assisted decision-making regime must allow informal decision-making to be concurrently maintained. As supported decision-making agreements are similar to personal advance planning document, like enduring powers of attorney, they should in no way be mandated. In this regard, the British Columbian approach may be useful in ensuring that third parties do not require such appointments to be made. That provision states, ‘[a]n adult must not be required to have [an agreement] as a condition of receiving any good or service’.

3.2.2 Should arrangements encompass personal, health care and financial matters?

A question arises as to the appropriate scope for supported and co-decision-making arrangements. Should they be available for all types of decisions – personal, financial, health care – or should some kind of limitation be imposed? As a matter of maximising the autonomy to the adult, it would seem natural to allow such schemes to extend to all types of decisions. It would be expected that support might be needed in all spheres of life and to limit its availability to only some areas would limit the utility of such arrangements.

Legally, however, implementing these arrangements may raise issues of liability and potential abuse (discussed further below) by supporters and co-decision-makers, particularly in relation to financial decisions. For example, the legislation in Alberta excludes financial arrangements...
decisions from its supported and co-decision-making mechanisms. However, in Australia, pilot studies regarding assisted decision-making in relation to financial matters are underway. Such studies may shed light on whether such restrictions are really needed.

### 3.2.3 Liability under supported and co-decision-making arrangements

To avoid confusion, the legal liability of supporters and co-decision-makers must be dealt with in legislation. If supported and co-decision-making arrangements are simply viewed as an extension to the situation where a competent person exercises their right to make decisions, then the adult should have sole responsibility for the consequences of that action. An argument could certainly be mounted that this is how supported decision-making models should operate; it has been suggested that supporters should not be liable unless they have failed to provide ‘adequate support’ or have a conflict of interest in a decision. However, in co-decision-making arrangements some would argue that the decision-making is shared. As such, there is a stronger argument – both practically and ethically - for the consequences and liability of the action to also be shared.

Of course, where a supporter or co-decision-maker disagrees with an adult’s decision, for them to then be held liable for a decision they did not agree with and advised the adult against, would seem unfair. Some legislation has recognised this problem and offers a solution. For example in Yukon, the legislation removes doubt by explicitly stating that a supporter is not liable for a decision made by an adult if the supporter did not agree with the decision and advised the adult against it. In Victoria, the current recommendations provide that where disagreement exists, recourse can be made to the Tribunal; no decision can be made without the agreement of both parties as the recommendations expressly state that the adult is deemed incapable of making certain decisions without the support of the co-decision-maker.

Outside of a disagreement however, the approach of the legislative models has been to exclude supporters and co-decision-makers from liability incurred when acting in good faith (see 2.2.2-2.2.3 above). Deliberate abuse in such a position would be subject to penalties equivalent to that of guardians and administrators.

A further question arises as to the nature of the relationship between the adult and the supporter or co-decision-maker. While the relationship between an appointed substitute decision-maker (i.e. attorneys, guardians or administrators) and adults with impaired capacity can be characterised as a fiduciary one (although the scope and content of that fiduciary relationship remain unclear), it is not clear whether this would also apply to supporters and co-decision-makers.
Substitute decision-makers appointed by courts have obligations towards the adult they represent as well as obligations to the court that appointed them. It may be questioned whether similar obligations exist, particularly in relation to court appointed supporters or co-decision-makers. The argument against such a fiduciary relationship arising in relation to supporters is that the adult essentially retains full decision-making responsibility. However, the same cannot be said of co-decision-makers.

The Victorian Law Reform Commission has sought to clarify this issue and has recommended that a provision be included which states that a supporter and co-decision-maker’s role is fiduciary in nature. While a general exclusion of liability provision similar to that in Alberta has been suggested in the Commission’s model, the recognition of a fiduciary relationship arguably introduces new uncertainties into the role. For example, traditional fiduciary relationships involve duties of loyalty and to avoid conflict of interests. Some aspects of these duties may sit uncomfortably with the supporter and co-decision-maker’s role particularly where decisions made by the adult may be considered harmful to the adult or have (sometimes inadvertent) beneficial consequences for those appointed. In any new legislation, provisions dealing with liability of supporters and co-decision-makers ought to take these matters into account.

3.2.4 What legal safeguards are needed?

Article 12.4 of the CRPD mandates that certain safeguards should exist to prevent abuse including ensuring that an adult’s exercise of capacity is ‘free of conflict of interest and undue influence’. While some suggest that an ‘adult who has a trusted and skilled friend to assist with making important decisions is often well protected from exploitation’, history suggests that this will not always be the case. From experience with attorneys, guardians and administrators we unfortunately know, and the CRPD is right to anticipate, that there may be those that abuse positions of power. It would be naïve not to expect similar abuses in supported and co-decision-making models. Governments wishing to comply with the CRPD by implementing supported or co-decision-making models must therefore consider how potential abuses can be curbed. Admittedly, the consideration of abuse in this context is very similar to the issues that arise in the context of enduring powers of attorneys.

Obviously with court appointed co-decision-makers, some initial means of ensuring an appropriate person is appointed can be exercised (see 2.2.3 above) and this extends to court monitoring, review and removal of such persons. However, it has been noted that

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140 Frolik, above n 48, 56–7.
141 Victorian Law Reform Commission, above n 5, recommendation 90, 170.
142 Article 12 goes on to state that measures relating to the adult must be ‘proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body’. These safeguards are beyond the scope of this article.
143 Surtees, above n 15, 84.
145 See, eg, in Saskatchewan, property co-decision-makers have obligations to keep records and provide accounting records to the court: The Adult Guardianship and Co-decision-making Act, S 2000, c A-5.3, ss 54–5. Also, in Alberta the court is able to remove persons who have acted improperly or
privately executed agreements may result in undetected abuse: ‘[t]he more private and informal the arrangement the more likely it is that it will go undetected and unresolved if it does occur.’\textsuperscript{146}

While some legislation like that in Yukon explicitly state that supporters ‘shall not exert undue influence upon’ or ‘make decisions on behalf of’ the adult, these provisions lack teeth.\textsuperscript{147} Placing strict reporting and monitoring requirements on these private arrangements may assist,\textsuperscript{148} but could also be seen as ‘imping[ing] on the freedom of action’ of the adult concerned. It may also prevent family or friends from taking on a role that not only requires administering and a significant time commitment, but also the potential to be brought before a court for failing one’s duties under the act. (This goes back to the issue raised at 1.4.1 regarding the burden of responsibility falling to individuals, families and communities, rather than the State.)

In addition, having provisions like that in Alberta, where third parties dealing with adults with supporters may refuse to recognise a decision made if there are reasonable grounds to believe that the supporter exercised undue influence or that there may be fraud or misrepresentation on the part of the supporter may be helpful.\textsuperscript{149} However, this may place an (unrealistic?) onus on third parties to be wary of such exploitation.\textsuperscript{150}

Supported and co-decision-making arrangements become difficult where an adult’s decision-making ability begins to diminish or fluctuates downward.\textsuperscript{151} While it would appear logical that such arrangements would be unable to continue where an adult’s decision-making capacity drops below a certain level the mechanism for detecting this and ending the arrangement is not clear in some legislation. In the current models, a level of responsibility is placed on those appointed, and on third parties to monitor this.

While most co-decision-making arrangements are, or can be made subject to periodic review by courts in Canada, outside of this the onus is presumably on co-decision-makers and third parties to notify the court of concerns or changes in capacity that effect the arrangements.\textsuperscript{152} In Alberta this obligation on co-decision-makers is express, placing an onus on them to approach the court if a change in capacity means that a variation or termination

\textsuperscript{146} Carter, above n 70, 27.
\textsuperscript{147} \textit{Decision-making, Support and Protection to Adults Act}, Y 2003, c 21, s 5(2).
\textsuperscript{148} Such record keeping requirements already exist for supporters: \textit{Adult Guardianship and Trusteeship (Ministerial) Regulation}, Alta Reg 224/2009, s 4.
\textsuperscript{149} \textit{Adult Guardianship and Trusteeship Act}, A 2008, c A-4.2, s 6(2). The Yukon legislation is phrased slightly differently: ‘A decision made or communicated with the assistance of an associate decision-maker shall be recognized for the purposes of any provision of law as the decision of the adult, subject to the laws regarding fraud, misrepresentation, and undue influence: \textit{Decision-making, Support and Protection to Adults Act}, Y 2003, c 21, s 11.
\textsuperscript{150} See also Victorian Law Reform Commission, above n 5, [9.84].
\textsuperscript{151} Cf The Alberta Public Advocate suggests this is not a problem: Victorian Law Reform Commission, above n 5, [9.12].
\textsuperscript{152} However, in Saskatchewan reviews will only be ordered by the court if it is in the best interests of the adult, so there may be circumstances where no review is ordered: \textit{The Adult Guardianship and Co-decision-making Act}, S 2000, c A-5.3, ss 22(1)(b), 47(1)(b). And, for example, in Alberta in 2011, 2 complaints were received about the actions of co-decision-makers, but none were removed as a result of the complaint: Email from Patrick McManus to Shih-Ning Then, 15 May 2012.
of the order may be in the adult’s best interests. Alternatively more general provisions can be relied upon that allow any interested person to apply for a review of co-decision-making arrangements. But, how does the third party, supporter or co-decision-maker know how to assess when a sufficient level of capacity is lost in the adult to make the arrangement no longer legal? Legislation may also provide for termination of arrangements when more restrictive orders are made (i.e. a co-decision-making order or guardianship order) or where an advance directive comes into effect.

Safeguards to overcome some of these issues have been suggested. For example, some advocate:

- That a statutory official’s office, (e.g. each jurisdiction’s ‘Public Advocate’), should have legislative power to investigate allegations that a supporter or co-decision-maker has acted improperly and have responsibility for resolving conflicts within such an arrangement.
- A court should have powers in relation to these arrangements similar to the powers it can exercise in relation to enduring powers of attorney – i.e. the power to revoke an agreement.
- Police checks on court appointed persons.
- Prohibitions on acting in conflict transactions.
- Lodgement of records for financial transactions.

It is noted that monitoring roles by government departments and courts require significant resources and realistically every decision cannot be reviewed by public bodies. As an alternative, ensuring the involvement of more than one person in arrangement may also act as a safeguard. Some suggest appointing at least two persons in such positions or, under the hybrid British Columbian model, adults can appoint ‘monitors’ as well as those to assist them make decisions. The monitors are given power under the legislation to oversee how decisions are made and to ‘monitor’ the actions of the appointed person. Such a model could be adapted to apply to both supported and co-decision-making models and perhaps offers a good middle ground in providing safeguards against abuse of the intentional and non-intentional kind.

3.2.5 Consistency with other laws

A final legal issue relates to how well supported or co-decision-making models fit with existing laws. For example, will any adjustment need to be made to laws regarding execution of wills or advance health directives if there is a co-decision-maker involved? Should there be limitations imposed on supporters or co-decision-makers being appointed as attorneys? New schemes should anticipate and expressly provide for how they will operate with existing laws.

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154 The Adult Guardianship and Co-decision-making Act, S 2000, c A-5.3, s 66; Adult Guardianship and Trusteeship Act, A 2008, c A-4.2, s 21(1).
157 Cf Ibid [9.67].
158 See discussion at 2.2.3 above.
3.3 Practical challenges

3.3.1 Increased complexity and limited utility?

Undoubtedly, adding yet another advance planning tool to the swathe of documents (enduring powers of attorney, advance directives, appointment of health care decision-makers etc.) and layers of legislation and regulation that exist in most guardianship regimes adds an additional layer of complexity to what is already a very complex system. This may present particular problems for the target cohort – adults with some decision-making impairment.

Any legal initiatives to introduce supported and co-decision-making mechanisms therefore need to be buttressed by significant education to the general public but more importantly to those likely to be dealing with supporters or co-decision-makers – e.g., government departments, financial institutions, private accommodation/aged care providers, etc. Despite the existence of enduring powers of attorneys for some time now, there is evidence that segments of the community dealing with adults with impaired capacity still misunderstand the nature and requirements of such documents; similar problems might be expected with new supported or co-decision-making arrangements. The cost of continuously running education sessions to these third parties must also be considered.

If these legal initiatives are introduced without sufficient resources, people will remain unaware of changes and inertia against changing existing culture will not dissipate, and anticipated benefits of reform will not be realised. Critical to the success of these legal reforms is investing sufficient resources and engaging the support of relevant sections of the community.

Even with sufficient resources and cultural change, whether these types of arrangements would be utilised to a significant extent is a difficult question to answer. For some adults, assisted decision-making arrangements may simply not be suitable; Alberta’s approach has been where adults are likely to suffer periods where they cannot communicate or make decisions (e.g. advanced multiple sclerosis, dementia), then guardianship will be preferred. Similarly, those with bi-polar conditions may not be able to utilise co-decision-making as an

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159 Victorian Law Reform Commission, above n 126, [7.80]; Kerzner, above n 51, 35.
160 Kerzner makes this point in the Alberta context referring to problems it may create for those with intellectual disabilities: Kerzner, above n 51, 35. See also community responses in Victorian Law Reform Commission, above n 5, [8.49].
161 Terry Carney, Challenges to the Australian Guardianship and Administration Model? (2003) 2 Elder Law Review 11, 8 (noting the significance of private accommodation/aged care services in Australia). See also Tilse et al, above n 54, 103-4 noting the barriers to supported decision-making in residential aged care facilities.
162 Tilse et al, above n 54, 104.
163 Email from Kelly Cooper to Shih-Ning Then, 12 April 2012. See also comments by Michelle Browning, ‘Report by Michelle Browning 2010 Churchill Fellow: To Investigate New Models of Guardianship and the Emerging Practice of Supported Decision-making’ (Winston Churchill memorial Trust of Australia, 2011), 24, that engaging the health and legal communities has proved challenging in Alberta and the UK. The Victorian Law Reform Commission has also acknowledged these challenges: Victorian Law Reform Commission, above n 5, [9.76]–[9.77].
164 See Salzman, above n 3, 231; Carney, above n 161, 9; Tilse et al, above n 54, 104; Frolick, above n 55 at 352–3.
165 Tilse et al, above n 54, 106; Devi, Bickenbach and Stucki, above n 3, 263.
adult’s delusions of grandeur or persecution during a manic phase will interfere with the co-
decision-making relationship when it is most crucial.  

In those jurisdictions with existing supported decision-making agreements, the actual
number of agreements in existence is unknown. Evidence as to co-decision-making orders
is also limited. In 2010, Surtees reported that less than 7% of applications to the court were
for co-decision-making orders with a total of 30 over a span of 9 years. In Alberta, a total
of 37 co-decision-making applications have been granted by the court since October 2009,
with some guardianship orders being ‘re-issued’ as co-decision-making orders each year.

3.3.2 Third party enforcement

A further practical issue is how to ensure that third parties respect assisted decision-making.
This flows from the need to educate third parties likely to come across such arrangements.
Without such education third parties will be less likely to accept decisions made via an
assisted decision-making paradigm. Paradoxically, Yukon has reported that attempts to
make supported decision-making forms accessible and understandable to adults who may
wish to use them, has raised fears that third parties may refuse to recognise them as they do
not look ‘official enough’.

Establishing registers of supported or co-decision-making arrangements to be held by a
government office as proposed by the Victorian Law Reform Commission may help with such
reluctance but has significant resource implications.

3.3.3 The complexity of the supporter and co-decision-maker role

The role of legally recognised supporters, and in particular co-decision-makers, is novel. As
such, those taking on the role will require education and guidance if they are to successfully
act in such positions. This may not be easy; the concept of co-decision-making in particular
is conceptually, legally and practically difficult to grapple with. This statement by the
Victorian Public Advocate, while applicable to both roles, seems particularly apposite to co-
decision-makers who have a greater role and influence in an adult’s decision-making:

> It is important to not underestimate the difficulty of determining whether a person
is capable of making a particular decision or the difficulty of assisting a person with a
disability to make and communicate their decisions without influencing or
interfering with the final decision and becoming a de facto decision-maker.

While it has been noted that no decision-making process is free from influence, this does
not diminish the danger of coercion or slipping unintentionally into de facto substituted

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166 Email from Patrick McManus to Shih-Ning Then, 15 May 2012.
167 This is because these agreements are usually personal (not court appointed) and no current
requirement to register agreements exists.
168 Surtees, above n 15, 92.
169 Email from Patrick McManus to Shih-Ning Then, 15 May 2012. It was also noted that 9
applications were currently in process.
170 Email from Kelly Cooper to Shih-Ning Then, 12 April 2012.
172 Carter, above n 70, 26. Gordon, above n 47, 74 also notes that it is an ‘immensely difficult task
given the laudable human propensity to protect those perceived to be vulnerable from the exercise of
their own poor judgment.’ See also Burningham, above n 8, 12.
173 See Devi, Bickenbach and Stucki, above n 3, 255; Salzman, above n 3, 233 n 237.
decision-making without the proper authority to do so. This seems most likely where an appointed person lacks understanding of their role or when an adult’s decision-making ability begins to deteriorate.

In addition, the conceptual novelty of a legally recognised ‘shared’ decision-making process, arguably makes explanation of a co-decision-maker’s job even harder. It is difficult to produce a comparable decision-making paradigm that provides an appropriate analogy; other shared or joint decisions – i.e. as joint trustees or joint bank account holders – will involve two equal adults with full decision-making abilities. In supported and, to a much greater extent, co-decision-making models, it is a lopsided relationship.

It is also known that different adults can have very different decision-making styles in making choices (known as ‘metapreferences’) which includes variances in the amount of information collected prior to decision-making, time taken to make a decision and use of intuition.\(^\text{174}\) As such supporters and co-decision-makers need to be mindful not to replace the adult’s decision-making method with their own preferred decision-making style.\(^\text{175}\) Education and training of those proposing to act as supporters and co-decision-makers seems crucial to these models working as intended. In Yukon and Alberta, limited resources have been devoted to providing information and, where possible, adults and their supporters or co-decision-makers are contacted.\(^\text{176}\)

Who will explain their role and educate them as to what is too much or little in this shared decision-making paradigm? How will they know when the adult’s capacity has diminished to the point where the co-decision-making arrangement no longer truly represents shared decision-making? These are difficult and decision-specific questions that place significant responsibility on co-decision-makers. As such, jurisdictions which plan to introduce such positions arguably have a responsibility to appropriately resource, educate and advise those who take on such roles.\(^\text{177}\)

### 3.3.4 What happens when no one is available?

Another pressing question is what happens to people who have no support network and have no one suitable to act as supporters or co-decision-makers? This is particularly relevant in light of the fact that government entities like the Public Trustee or Public Advocate are often excluded from acting as supporters and co-decision-makers.\(^\text{178}\) It seems

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\(^{175}\) Office of the Public Advocate South Australia, above n 52.

\(^{176}\) Email from Kelly Cooper to Shih-Ning Then, 12 April 2012; Email from Patrick McManus to Shih-Ning Then, 15 May 2012.

\(^{177}\) See also Devi, Bickenbach and Stucki, above n 3, 263 who provides a number of examples where it is not clear how supported decision-making models will operate.

\(^{178}\) See, eg, Adult Guardianship and Trusteeship Act, A 2008, c A-4.2, ss 5, 15; Representation Agreement Act, BC 1996, c 405, s 5(1)(b). See also Victorian Law Reform Commission, above n 5, [9.65]-[9.67]. This is consistent with the suggestion by Glass that government and non-government bodies should not be providing these roles where family and friends are available and appropriate: Glass, above n 43, 32. Other jurisdictions may also exclude other categories of persons, see, eg, Decision-making, Support and Protection to Adults Act, Y 2003, c 21, s 7; Representation Agreement Act, BC 1996, c 405, s 5(1).
the problem is quite common for a proportion of adults who might otherwise be eligible to participate in these legislative schemes. In South Australia, where a small scale non-statutory scheme of supported decision-making arrangements is being undertaken, strategies being considered to deal with this problem include programs that develop social networks for people and the use of ‘volunteer’ supporters. If no legislative solution is provided (and adequately funded) for those without appropriate existing social supports, this will essentially deny these legal options to a significant number of individuals who could benefit.

Kerzner suggests that government should have a role to play; however, if such a responsibility exists how should this be actioned? Potential models include governments directly providing such supports (i.e. utilising government funded social workers, health care workers, etc) or funding non-governmental organisations to provide such services.

4. ASSISTED DECISION-MAKING – CONCLUSION

There is little doubt that the goals of assisted decision-making are laudable and consistent with the current trend in guardianship legislation to maximise the autonomy of adults with diminishing capacity. However, this paper has demonstrated that, depending on how assisted decision-making is implemented in legislation, giving legal recognition to these models can lead to a number of conceptual, legal and, in all probability, practical problems. To date, discussion of the different assisted decision-making models and the concepts underpinning them has been relatively scarce, with literature often taking a broad brush approach in discussing potential problems. This paper has situated the new impetus for assisted decision-making within the social and legal historical context of guardianship laws to inform a thorough discussion of its nature and potential. Informed by this exegesis and by analysing international developments this paper has also identified and analysed some key legal, conceptual and practical issues which jurisdictions wishing to implement assisted decision-making models ought to consider in the context of their own guardianship regimes.

Given the unanswered questions about how existing systems operate in practice, empirical research in this area is required to assess how well assisted decision-making models work and whether the aims of legislation are being achieved.

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179 See, eg, Office of the Public Advocate South Australia, above n 52; Email from Kelly Cooper to Shih-Ning Then, 12 April 2012.
180 Office of the Public Advocate South Australia, above n 52.
181 Note that this has been an issue in relation in the context of appointing substitute decision-makers, particularly in the United States: see Carney, above n 161, 4.
182 Kerzner, above n 51, 59 ‘A complete supported decision-making scheme also required that the government assume responsibility for providing supports and assisting in the development of support networks’.
183 See also Carney, above n 161, 2–3.