



**KANSAS BAR
ASSOCIATION**

TO: **The Honorable Susan Humphries, Chair**
 And Members of the House Judiciary Committee

FROM: **Joseph Molina**
 On behalf of the Kansas Bar Association

RE: **KBA Opposition to HB 2345 – Enacting the Supported Decision-Making Agreements Act.**

DATE: **January 17, 2024**

Chairman Humphries and members of the House Judiciary Committee, my name is Joseph Molina and I provide this testimony on behalf of the Kansas Bar Association in **OPPOSITION** to HB 2345, enacting the Supported Decision-Making Agreements Act.

At the outset let me be very clear the KBA supports the underlined purpose of HB 2345. We support the principles of self-determination, personal autonomy, and independence. These are Kansas principles.

However, the KBA believes there are currently adequate alternatives that can meet the needs of those who wish to enter SDM agreements. The KBA is also concerned about the potential for abuse and exploitation due to a lack of oversight of the supporter and the possible confusion dual agreements will have on the parties.

SDM agreements are designed as an alternative to the imposition of a guardian, a tool to assist those with an impairment of some kind in the decision-making process. However, HB 2345 defines a person requesting decision-making assistance as someone who has the capacity to decide if they need help, the capacity to enter into an agreement, the capacity to understand the terms of that agreement and the ability to recognize when the agreement should be terminated. Furthermore, HB 2345 requires the principal to understand the nuances necessary for an SDM agreement to be valid. As drafted, an individual who meets the definition in HB 2345 has the requisite capacity to seek opinions of others without the need of the SDM agreement.

However, if the goal is to have a document that other institutions can rely upon then currently existing documents like Medical and Financial Powers of Attorney language can

be modified to clearly include the intended purposes here without requiring another estate-like document that is untested as to whether it will be honored by all institutions and would survive a court challenge. The Kansas Judicial Council, which is referred to in HB 2345, already has power of attorney forms available to the public for free. Furthermore, our Guardianship Code requires the Guardian to include the individual in the decision-making process to the degree possible and if an appropriate alternative to an adjudication of incompetence is available, then the court shall consider that in making any decision regarding the individual's capacity.

One advantage to using forms based on the guardianship code is the standard of care used. In most guardianships and/or conservatorships the guardian has a fiduciary duty to act in the best interest of the individual. Here the standard of care is lower. It states in Sec. 7(a): "*A supporter shall act with the care, competence and diligence ordinarily exercised by individuals in similar circumstances.*" This is an objective standard for a similarly situated person – as opposed to a fiduciary standard to act in the best interest of the principal.

Should HB 2345 become law users will need to deal with the potential confusion created when more than one entity or group has authority to act. In HB 2345 a principal can enter into an SDM agreement and make legally binding decisions even though they have a court appointed guardian. HB 2345 allows this scenario if the guardian is informed in writing, but the proposal does not require the court that established the need for a guardian to be notified.

Further, HB 2345 requires that supporters be listed, supporters sign a declaration acknowledging their duties as a supporter and affix their signature to the SMD agreement. This creates a situation where one person's advice is legally protected while others are not. It also has the unintended consequence of limiting who can help the principal with decisions.

Even with the issues laid out above, the proponents and many others will argue that the benefits of independence and personal autonomy should outweigh these concerns. I do not discount those voices and believe if answers to some of these concerns can be found we should explore those avenues. As such, the KBA would strongly recommend the Kansas Judicial Council review HB 2345 as they study the Kansas Guardianship Act to determine if HB 2345 can stand alone or should it be woven into the guardianship act. Otherwise, the Kansas Bar Association **OPPOSES** HB 2345 – Supported Decision-Making Agreements Act.

Thank you for your time and attention.

About the Kansas Bar Association:

The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals. Its more than 7,200 members include lawyers, judges, law students, and paralegals. www.ksbar.org