

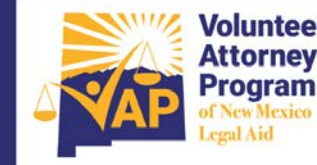
WELCOME TO THE VAP PRO BONO COLLABORATIVE ECHO CLE SERIES

04/23/2024

Adult Guardianship 101

*Part 5: Do You Really Need
a Guardian? Identifying
Decision Making Supports*

Agenda



Introductions - Zac Addison, Esq., VAP Director, New Mexico Legal Aid, Inc.



Announcements for Session: Marissa Gonzalez, VAP Paralegal, New Mexico Legal Aid, Inc.



Topic Presentation: Adult Guardianship 101 – Part 5: Do You Really Need a Guardian? Identifying Decision Making Supports



Topic Presenters: **Alice Liu McCoy** – Executive Director, New Mexico Developmental Disabilities Council;
Joseph Turk – Office of Guardianship Legal Director, New Mexico Developmental Disabilities Council



Overview & Closing Remarks: Volunteer Attorney Program of New Mexico Legal Aid

Do You REALLY Need a Guardian?

Identifying Decision Making Supports

Alice Liu McCoy, Executive Director
Joseph Turk, Office of Guardianship Legal Director
New Mexico Developmental Disabilities Council
NMLA-VAP CLE 4.23.24

Objectives

Today, you will learn how to:

- Evaluate whether a person needs guardianship
- Determine what level of support a person needs
- Identify what alternatives to guardianship will be helpful to a person



What is Guardianship

Guardianship is the legal process in which the court appoints a guardian for an individual that is **unable** to make decisions regarding:

- Healthcare/ Mental Healthcare
- Personal care
- Residential placement
- Finances and/or property
- Reporting abuse, neglect, exploitation, and/or fraud.

Guardianship MUST be least restrictive . . .

Guardianship for an incapacitated person shall be used **ONLY** as is **necessary** to **promote and to protect the well being of the person**, shall be **designed to encourage the development of maximum self reliance and independence of the person** and shall be **ordered to the extent necessitated by the person's actual functional mental and physical limitations**.

An incapacitated person for whom a guardian has been appointed **retains ALL legal and civil rights** except those which have been expressly limited by court order or have been specifically granted to the guardian by the court.

NMSA 1978, § 45-5-301.1

PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making

- Joint ABA product from:
 - ❖ *Commission on Law and Aging*
 - ❖ *Commission on Disability Rights*
 - ❖ *Section on Civil Rights and Social Justice*
 - ❖ *Section on Real Property, Trust and Estate Law*
 - ❖ *With assistance from National Resource Center on Supported Decision-Making:*
 - SupportedDecisionMaking.org
- AmericanBar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html

PRACTICAL Tool – Presume

PRESUME guardianship is not needed

- *Consider less restrictive options like financial or health care power of attorney, advance directive, trust, or supported decision-making*
- *Review state statute for requirements about considering such options*

PRACTICAL Tool – Reason (1 of 3)

REASON: Clearly identify the reasons for concern

Consider whether the individual can meet some or all of the following needs:

- **Money Management:**
 - *Managing accounts, assets, and benefits*
 - *Recognizing exploitation*
- **Health Care:**
 - *Making decisions about medical treatment*
 - *Taking medications as needed*
 - *Maintaining hygiene and diet*
 - *Avoiding high-risk behaviors*

PRACTICAL Tool – Reason (2 of 3)

REASON: Clearly identify the reasons for concern

Consider whether the individual can meet some or all of the following needs:

- **Relationships:**
 - *Behaving appropriately with friends, family, and workers*
 - *Making safe decisions about sexual relationships*
- **Community Living:**
 - *Living independently*
 - *Maintaining habitable conditions*
 - *Accessing community resources*
- **Personal Decision-Making:**
 - *Understanding legal documents (contracts, lease, powers of attorney)*
 - *Identifying someone to represent interests and support with decision-making*
 - *Communicating wishes*
 - *Understanding legal consequences of behavior*

PRACTICAL Tool – Reason (3 of 3)

REASON: Clearly identify the reasons for concern

Consider whether the individual can meet some or all of the following needs:

- **Employment:**
 - *Looking for, gaining, and retaining employment*
- **Personal Safety:**
 - *Avoiding common dangers*
 - *Recognizing and avoiding abuse*
 - *Knowing what to do in an emergency*

PRACTICAL Tool – Ask

ASK if a triggering concern may be caused by temporary or reversible conditions

Look for steps to reverse the condition or postpone a decision until the condition improves.

Are concerns the result of or related to temporary or reversible conditions such as:

- **Medical conditions:** *Infections, dehydration, delirium, poor dental care, malnutrition, pain*
- **Sensory deficits:** *hearing or vision loss*
- **Medication** *side effects*
- **Psychological conditions:** *stress, grief, depression, disorientation*
- **Stereotypes or cultural barriers**

PRACTICAL Tool – Community (1 of 2)

COMMUNITY: Determine if concerns can be addressed by connecting the individual to family or community resources and making accommodations

Ask “what would it take?” to enable the person to make the needed decision(s) or address the presenting concern.

Might any of the following supports meet the needs:

- **Community Supports:**
 - *In-home care, adult day care, personal attendant, congregate and home delivered meals, transportation*
 - *Care management, counseling, mediation*
 - *Professional money management*
- **Informal Supports from Family/Friends:**
 - *Assistance with medical and money management*
 - *Communication assistance*
 - *Identifying potential abuse*

PRACTICAL Tool – Community (2 of 2)

COMMUNITY: Determine if concerns can be addressed by connecting the individual to family or community resources and making accommodations

Ask “what would it take?” to enable the person to make the needed decision(s) or address the presenting concern.

Might any of the following supports meet the needs:

- **Accommodations:**
 - *Assistive technology*
 - *Home modifications*
- **Residential Setting:**
 - *Supported housing or group home*
 - *Senior residential building*
 - *Assisted living or nursing home*

PRACTICAL Tool – Team

TEAM: Ask the person whether he or she already has developed a team to help make decisions

- *Does the person have friends, family members, or professionals available to help?*
- *Has the person appointed a surrogate to help make decisions?*

PRACTICAL Tool – Identify

IDENTIFY abilities: Identify areas of strengths and limitations in decision-making

Can the individual:

- *Make decisions and explain his/her reasoning?*
- *Maintain consistent decisions and primary values over time?*
- *Understand the consequences of decisions?*

PRACTICAL Tool – Challenges

CHALLENGES: Screen for and address any potential challenges presented by the identified supports and supporters

Screen for any of the following challenges:

- ***Possible challenges to identified supports:***
 - Eligibility, cost, timing or location
 - Risk to public benefits
- ***Possible concerns about supporters:***
 - Risk of undue influence
 - Risk of abuse, neglect, exploitation (report suspected abuse to adult protective services)
 - Lack of understanding of person's medical/mental health needs
 - Lack of stability, or cognitive limitations of supporters
 - Disputes with family members

PRACTICAL Tool – Appoint

APPOINT legal supporter or surrogate consistent with person's values and preferences

Determine if any of these appointments could meet the needs:

- *Agent under health care power of attorney or advance directive*
- *Health care surrogate under state law*
- *Agent under financial power of attorney*
- *Trustee*
- *Social Security representative payee*
- *VA fiduciary*
- *Supporter under representation agreement, legally or informally recognized*

PRACTICAL Tool – Limit

LIMIT any necessary guardianship petition and order

If a guardian is needed:

- *Limit guardianship to what is absolutely necessary, such as:*
 - Only specific property/financial decisions
 - Only property/finances
 - Only specific personal/health care decisions
 - Only personal/health care decisions
- *State how guardian will engage and involve person in decision-making*
- *Develop proposed person-centered plan*
- *Reassess periodically for modification or restoration of rights*

Range of Decision-Making Ability

- No decision-making ability (e.g., comatose)
- Provide opinions or preferences
- Make decisions with assistance
- Make decisions independently

Dignity of Risk

Dignity of risk is the idea that self-determination and the right to take reasonable risks are essential for dignity and self-esteem.

- All adults have the right to make their own choices about their health and care, even if healthcare professionals believe these choices endanger the person's health or longevity.
- People achieve better outcomes when they have a personal commitment to decisions affecting their lives.

Alternatives to Guardianships and Conservatorships



MEDICAL



MENTAL HEALTH



FINANCIAL



**SPECIFIC DECISION
AREAS, OR AS
NEEDED**

Medical Decision Making Supports

The Uniform Health-Care Decisions Act supports the individual's choice:

- “Individual Instruction”
- Surrogate for Health Care Decisions
- Power of Attorney for Health Care
 - ❖ *“Advance Health-Care Directive”*

NMSA 24-7A-1 et seq.

Mental Health Decision Making Supports

The Mental Health Care Treatment Decisions Act supports the individual's choice:

- “Individual Instruction”
- Power of Attorney for Mental Health Treatment
 - ❖ *“Advance Directive for Mental Health Treatment”*
 - ❖ *Often known as “Psychiatric Advance Directive”*

NMSA 24-7B-1 et seq.

Financial Decision Making Supports or Substitute Decisions

To preserve the individual's choice:

- Joint account
- Trust
- ABLE account
- Power of Attorney
NMSA 45-5B-301

Without the individual's choice:

- Representative-payee / fiduciary
- Protective arrangement / single transaction
NMSA 45-5-405.1

Power of Attorney (POA) Decision Making Supports

If not judged to be incapacitated,
an individual can set up a POA for
most other functions, with a few
notable exceptions including:

- Health care decisions (covered with separate POAs)
- Voting

NMSA 45-5B-103

Supported Decision Making

Preserves the
individual's
choice

Series of social
interventions to
assist the
individual in
understanding and
implementing
decisions

The Agreement or
Plan is
individualized to
the person, the
needs, and the
available support
system



Importance of Independence for Young Adults

- Development of new skills
- Sense of fulfillment with life
- Better specific health outcomes

**Guardianship
should only be
used as a means of
last resort.**

What level of support do I need?

For each task, what can you do?

- I can do this alone.
- I can do this with support.
- I need someone else to do this for me.

For each decision, what can you do?

- No decision-making ability (e.g. comatose)
- Provide opinions or preferences
- Make decisions with assistance
- Make decisions independently



Definitions



- Supported Decision-Making: A way to get help making choices while you control the final decision that is made.
- Supporters: People who help you understand and make your choices.
- Deciders: The person who makes the final decision, or YOU!

Figure out who is who

- On a piece of paper, write down who potential supporters are.



What kind of choices can you name?

- where you live
- what you will do in school
- where you work
- who you spend time with
- if you want to go to the doctor
- if you want to go on a date
- Anything else?



Speaking of choices...

- Write down the choice that you want to think about and talk about it
- Who made the choice?
 - *I made the choice alone.*
 - *I made the choice, but someone helped me. The people who helped me were:*
_____.
 - *Someone else made the choice for me. The person who made the choice for me is named:*
_____.



What did I do to help me make my choice?

Talk about it. Who did you talk with?

Write down your possible options.

Write down the good and bad things about each choice (pros and cons).

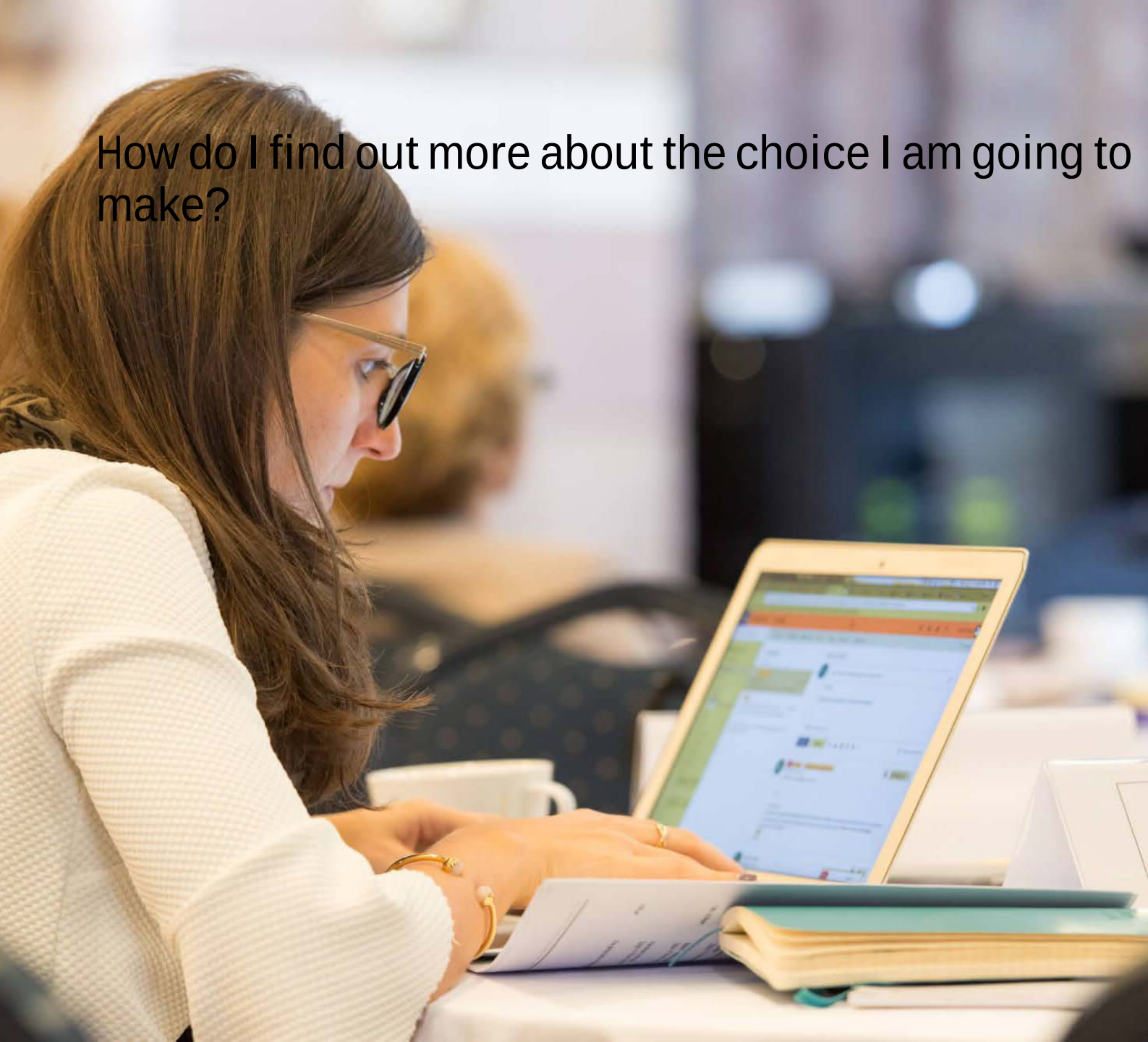
Visit places (like a home, office, or school).

Do research.

Talk to people who had made the same choice before.

How do I understand what I am reading?

- Use of plain language, which is using simple words without jargon or acronyms.
 - *SCA (acronym)*
 - *Sudden cardiac arrest (jargon)*
 - *Heart attack (plain language)*
- Information in pictures
- Someone to explain information to you.



How do I find out more about the choice I am going to make?

-
- Research to learn more about choices.
 - Help knowing what choices you have.
 - Visits and trials to see for yourself what you like and don't like



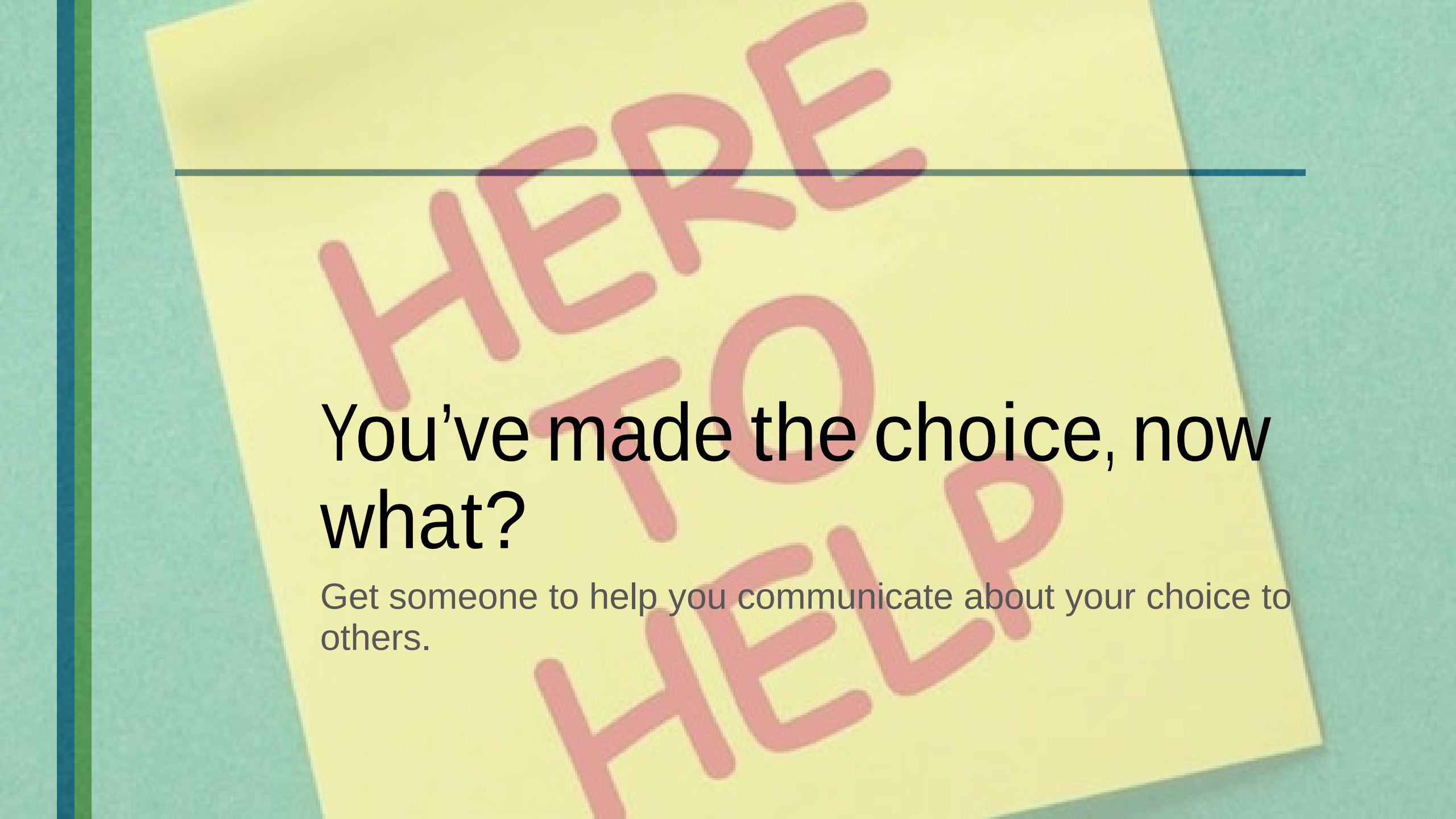
Tips and strategies

- Send reminders of dates and times and have them written or circled somewhere.
- Make a list of the good and bad parts of different choices.
- Have your supporters come to meetings and appointments with you.
- Talk to experts who know a lot about my choice.



More Tips and Strategies

- Take extra time to make decisions.
- Think about your values. Write them down so you look back at them.
- Take classes to learn information.
- Use technology such as phones or computers to help you.



You've made the choice, now what?

Get someone to help you communicate about your choice to others.

What level of support do I need – Communication

- Telling people what I want and don't want
 - I can do this alone*
 - I can do this with support*
 - I need someone else to do this for me*
- Telling people how I make choices
 - I can do this alone*
 - I can do this with support*
 - I need someone else to do this for me*
- Making sure people understand what I am saying
 - I can do this alone*
 - I can do this with support*
 - I need someone else to do this for me*



What level of support do I need – Personal Care

- Choosing what I wear
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Getting dressed
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Choosing what to eat, and when to eat
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



What level of support do I need – Personal Care Continued

- Taking care of my personal hygiene (for example, showering, bathing, brushing teeth)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Remembering to take medicine
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*

What level of support do I need – Staying Safe

- Making safe choices around the house (for example, turning off the stove, having fire alarms)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Understanding and getting help if I am being treated badly (abuse or neglect)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Making choices about alcohol and drugs
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



What level of support do I need – Home and Friends

- Choosing where I live
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Choosing who I live with
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Choosing what to do and who to see in my free time
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



A photograph of a woman with dark, curly hair and a light-colored long-sleeved shirt leaning over a young boy with light brown hair. The boy is wearing a blue turtleneck sweater and is seated in a wheelchair. Both are smiling at the camera. The background is a plain, light-colored wall.

What level of support do I need – Home and Friends Continued

- Keeping my room or home clean
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Finding support services and hiring and firing support staff
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



What level of support do I need – Health Choices

- Choosing when to go to the doctor or the dentist
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Making medical choices in everyday situations (for example, check-up, medicine from the drug store)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Making medical choices in serious situations (for example, surgery, big injury)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Making medical choices in an emergency
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



What Level of Support Do I Need - Partners

- Choosing if I want to date, and who I want to date
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Making choices about sex
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*

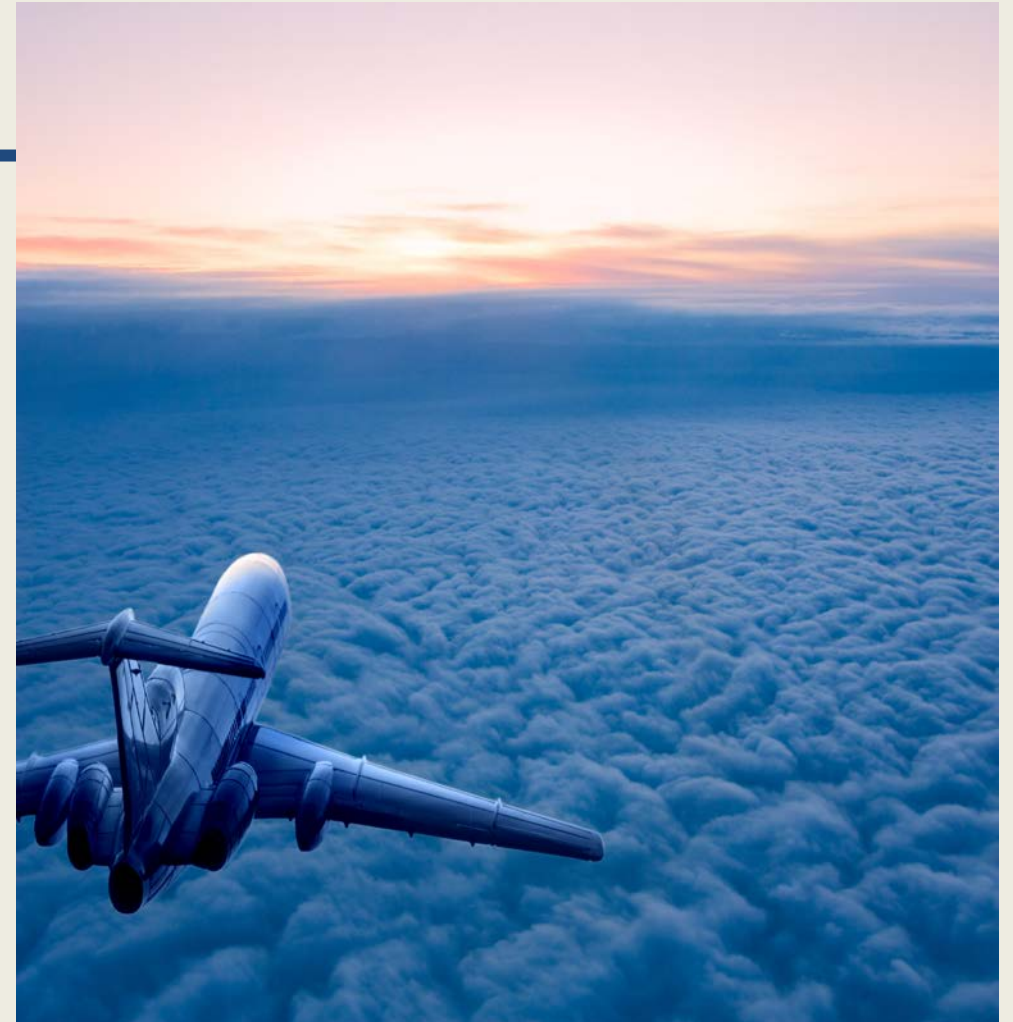


What Level of Support Do I Need – Partners Continued

- Making choices about marriage
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Making choices about birth control and pregnancy
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*

What level of support do I need – Travel

- Traveling to places I go often (for example, getting to work, stores, friends' homes)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Traveling to places I do not go often (for example, doctors' appointments, special events)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



What level of support do I need – Jobs

- Choosing if I want to work
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Understanding my work choices
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Choosing classes or training I need to get a job I want, and taking these classes
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



What level of support do I need – Jobs Continued

- Applying for a job
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Going to my job every work day
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*



What level of support do I need - Money



- Paying the rent and bills on time
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Keeping a budget so I know how much money I can spend
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*

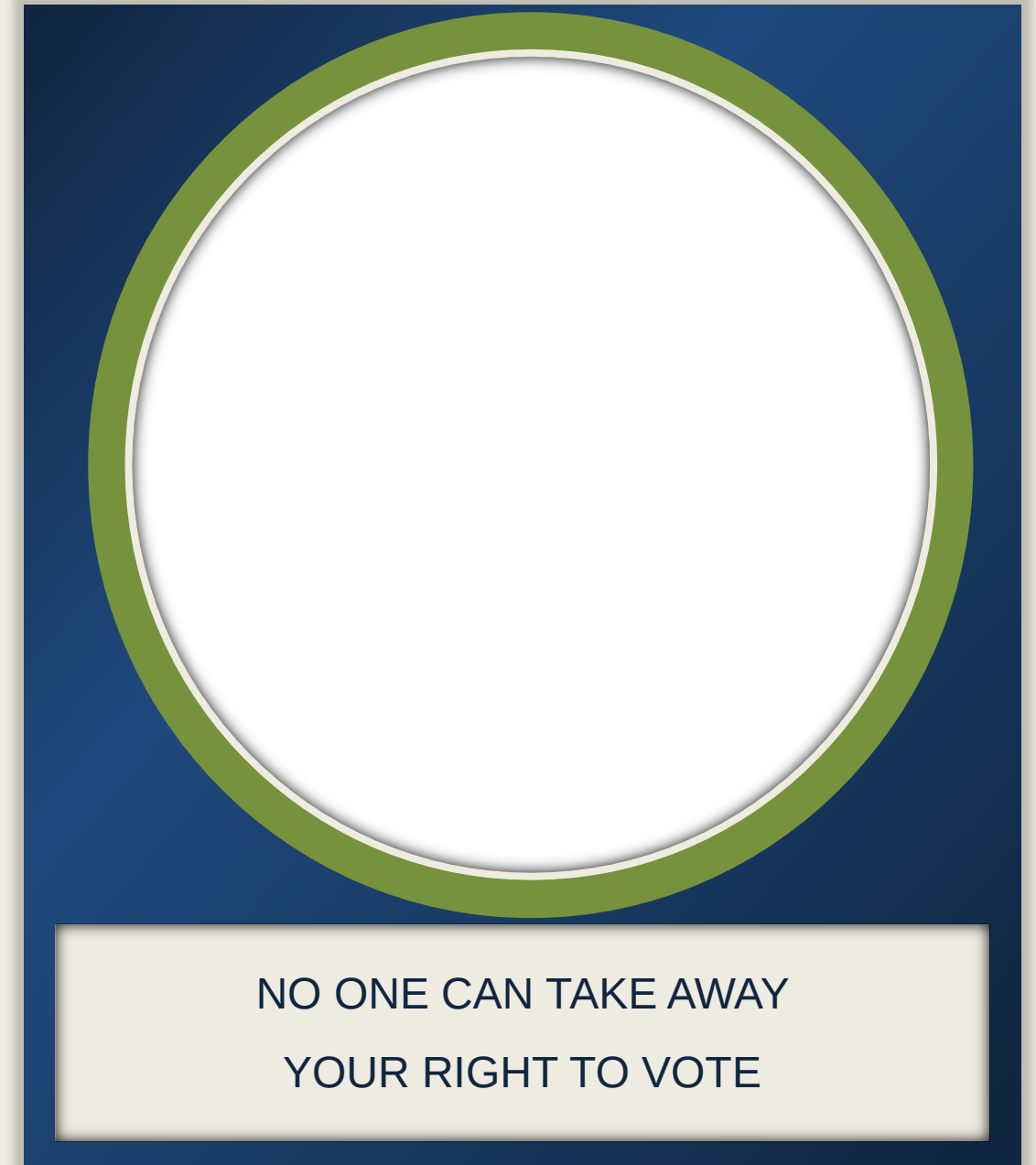
What level of support do I need – Money Continued



- Making big decisions about money (for example, opening a bank account, signing a lease)
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Making sure no one is taking my money or using it for themselves
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*

What level of support do I need - Citizen

- Signing contracts and formal agreements
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*
- Choosing who to vote for and voting
 - *I can do this alone*
 - *I can do this with support*
 - *I need someone else to do this for me*

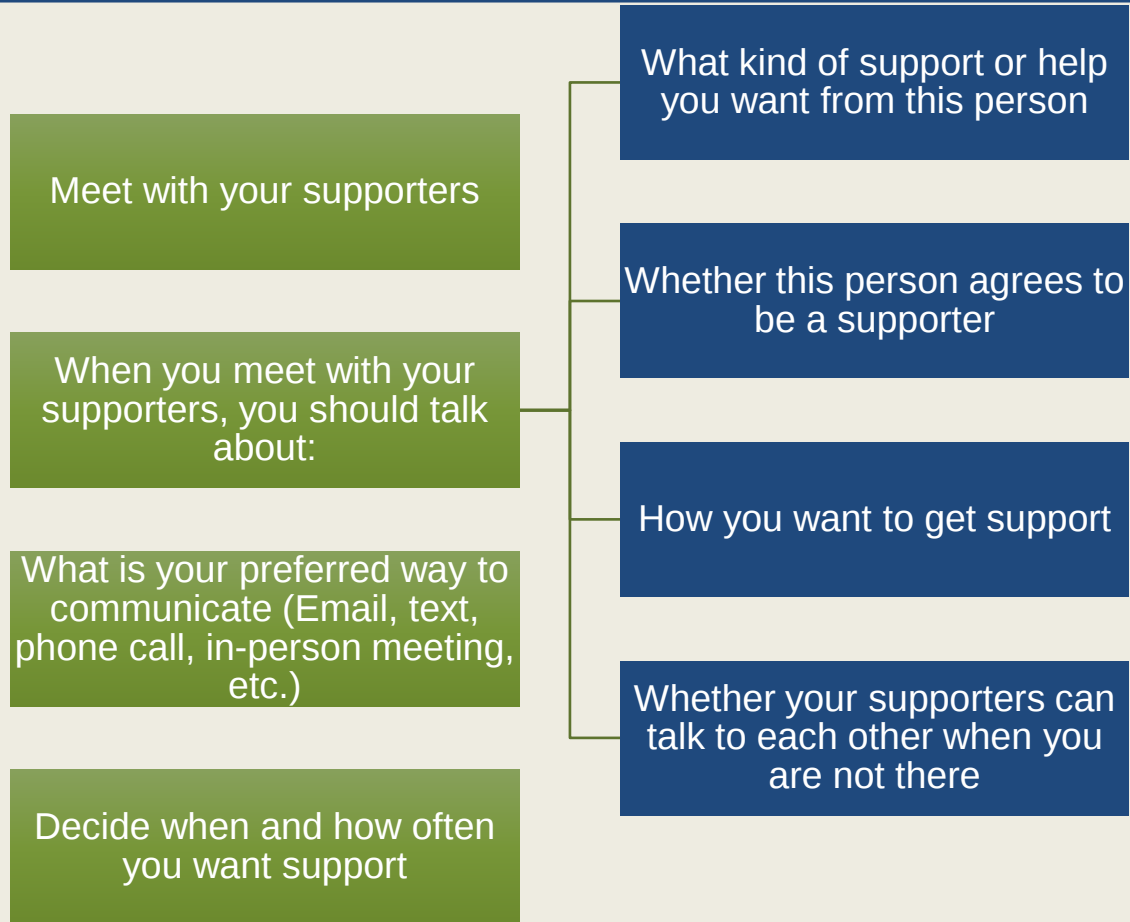


Who are supporters?

- Someone you trust
- Someone who agrees to be a supporter
- YOU CAN CHANGE YOUR SUPPORTERS AT ANY TIME



What to do with your supporters?



Additional Supported Decision Making Resources



- Susan Mizner, ACLU Disability Rights Program smizner@aclu.org 415-343-0781
- Jonathan Martinis, Burton Blatt Institute at Syracuse University jmartin@law.syr.edu
- American Civil Liberties Union Disability Rights Program: www.aclu.org/supported-decision-making-resource-library
- National Resource Center for Supported Decision-Making www.supporteddecisionmaking.org
- Center for Public Representation Supported Decision-Making Pilot Project www.supporteddecisions.org

Tribal Courts

- Guardianship laws and procedures vary by jurisdiction.
- For tribal courts that do not have detailed guardianship laws and procedures, New Mexico guardianship law and procedure could be a helpful guide to the judge.
- The Navajo Nation Guardianship Act allows for appointment of a “court appointed representative” to assist a person when decision making support is needed, or to speak or act on the person’s behalf on specific issues. The court appointed representative does not substitute their decisions or judgment in place of the person’s decisions or judgment. The person can request to void the appointment or name a replacement.



Office of Guardianship Services

- Provides one-time legal services to request the court appoint a guardian for eligible adults;
- Provide professional guardians;
- Provide mental health treatment guardians;
- If any person is not eligible, refer them to other legal providers;



Office of Guardianship Services

- Respond to complaints and investigate complaints against professional guardians contracted with the Office of Guardianship
- Educate the public on guardianship and alternatives to guardianship; and
- Recruit and train guardians, attorneys, and court visitors.



OOG Eligibility

Applicants must meet the following eligibility requirements:

- *New Mexico resident*
- *18 or older*
- *Documented incapacity*
- *Low income*

Obtain an OOG Application

- Call **(505) 841-4519** to request an application, or
- Download and print an application from our website:
 - *English application:*
<https://www.nmddpc.com/media/files/OOG%20Intake%20Form.pdf>
 - *Spanish Application:*
<https://www.nmddpc.com/media/files/APPLICATION%20SPANISH.pdf>

How to Apply for OOG Services

Complete the application and submit the required documents by mail, fax, or email:

- DDC Office of Guardianship
Attn: Intake Coordinator
625 Silver Avenue, SW, Ste 100
Albuquerque, NM 87102
- Fax: (505) 841-4455
- Email: DDPCOOG.Intake@state.nm.us



Questions?

Alice Liu McCoy, Executive Director: alicieliu.mccoy@ddc.nm.gov

Joe Turk, Office of Guardianship Legal Director: joe.turk@ddc.nm.gov

Daniel Ekman, Center for Self Advocacy Program Manager: daniel.ekman@ddc.nm.gov

(505) 841-4519

nmddc.org

Upcoming Session

Navigating Foreclosure & Learning Alternatives for Your Clients –

*Presenter Penelope Quintero, Esq.,
O'Brien & Padilla*

Thursday, June 6, 2024

11:30 A.M. – 1:00 P.M.

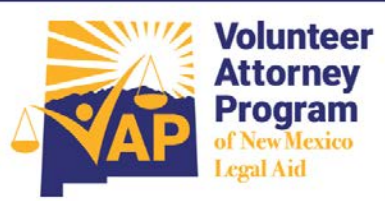
Presenter Needed: Judgment Collections

Upcoming Pro Bono Opportunities

- **Legal Fair in Española:**
Saturday, April 27
- **McKinley County Telephonic Legal Fair:**
Friday, May 3
- **Statewide Teleclinic:**
Thursday, May 16
- **Legal Fair in Ruidoso**
Saturday, May 18

If you are interested in volunteering at an upcoming legal fair or teleclinic, please sign-up [here](#).

Or contact our Statewide Pro Bono Coordinator, Nedia (Bella) Zayani at nediaz@nmlegalaid.org



Thank you for joining today's VAP Pro Bono Collaborative ECHO Session!

Adult Guardianship 101
Session 5
April 23, 2024

Topic Presenters:

- Alice Liu McCoy, Executive Director
aliceliu.mccoy@ddc.nm.gov
- Joe Turk, Office of Guardianship Legal Director
joe.turk@ddc.nm.gov

Facilitated By:

- Zac Addison, Esq., VAP Director, NM Legal Aid
- Marissa Gonzalez, VAP Paralegal, NM Legal Aid
vapecho@nmlegalaid.org