

**SUPPORTED DECISION-MAKING FOR OLDER PERSONS IN ISRAEL:
THE 2015 PRECEDENT AND THE FOLLOWING 2016 REGULATION**

MICHAEL (MICKEY) SCHINDLER* AND MEY TAL SEGAL-REICH**

I INTRODUCTION

Guardianship is a practice relevant to older persons, mostly because of a decrease in function and cognitive ability, dementia and other illnesses, whose frequency increases in advanced age. The appointment of a guardian for an older person severely impinges on one's autonomy. In addition, it has negative therapeutic consequences, such as feelings of helplessness, frustration and low self-esteem which inflicts on one's ability to cope with daily life activities.¹ Due to the stereotypes relating to old age and because of the common labeling of dementia, the decision whether to appoint a guardian is usually a "binary" one, without any thorough examination for tailored legal regime.²

Over a gradual process, it became accepted in theory that appointing a guardian must be as a last resort after exhausting more proportionate measures, using appropriate procedural

* Michael (Mickey) Schindler, B.S.W; LL.B., LL.M., Ph.D (Law); Adv. is a lecturer at the Department of Social Work, University of Bar-Ilan & Ashkelon Academic College, Israel. Director of Yad-Riva Legal Aid For The Elderly, (NGO) which promotes the rights of the elderly. Specializes in Elder Law, Law And Social Work.

** Meytal Segal-Reich, LL.B; LL.M; Ph.D (Law); Adv., Head Manager, Older Person's Representation Unit, Legal Aid Department, Ministry of Justice, Israel; Academic Advisor, Legal Clinic For The Rights Of Older Persons and Holocaust Survivors, Law Faculty, Bar-Ilan University, Israel. Specializes in Elder Law and Legal Ethics.

¹ Leslie Salzman, 'Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act' (2010) 81 *University Colorado Law Review* 157, 169.

² Nina A Kohn, Jeremy A Blumenthal and Amy T Campbell, 'Supported Decision-Making: A Viable Alternative to Guardianship' (2013) 117(4) *Penn State Law Review* 1111, 1118.

protections³ and under clearer tests and criteria.⁴ Thus, from the 1960s, legal systems began to craft legal arrangements dealing with person's legal capacity in a different mode, giving much greater weight to the values of liberty and autonomy and reducing the extent of paternalistic intervention.⁵ In this context, one can point to a number of important developments carrying significant consequences for people with cognitive and mental disabilities, as well as for older persons with decreased cognitive function abilities as a result of disease, such as dementia.⁶

The first development was the use of "tailored guardianship" - partial and temporary.⁷ The second was the alternate decision-making model, based on prevention and advanced legal planning such as durable continuing power of attorney or advance directives that authorize others to make decisions on their behalf according to former instructions and preferences.⁸ The third and most recent development is the supported decision-making model. This model is based on the perception that people have legal capacity and that it is therefore appropriate to assist and support those who have difficulty making decisions and performing legal actions, in lieu of nominating a guardian. This model's purpose is to empower individuals, to assist them to make their own decisions according to their needs and outlooks, thereby

³ Israel Doron, 'Elder Guardianship Kaleidoscope – A Comparative Perspective' (2002) 16 *International Journal of Law, Policy and Family* 368, 390.

⁴ Charles P Sabatino and Erica Wood, 'The Conceptualization of Legal Capacity of Older Persons in Western Law' in Israel Doron and Ann M Soden (eds) *Beyond Elder Law* (Springer, 2012) 35.

⁵ Terry Carney, 'Guardianship "Social" Citizenship and Theorizing Substitute Decision-Making Law', in Israel Doron and Ann M Soden (eds) *Beyond Elder Law* (Springer, 2012) 1.

⁶ Michael Schindler and Yael Waksman 'Restriction of Liberty' In Charles Foster, Jonathan Herring and Israel Doron (eds) *The Law and Ethics of Dementia* (Hart Publishing, 2014) 351.

⁷ Sabatino and Wood, above n 4, 39.

⁸ Doron, above n 3, 390.

preventing an infringement on their autonomy.⁹ The model received recognition by the UN Convention on the Rights of Persons with Disabilities (2006).¹⁰

Although on a theoretical level the model is associated with people with disabilities, the model is highly relevant for the elderly population diagnosed with a functional or cognitive decrease, particularly those diagnosed with early stages of dementia. While this model is already implemented in a number of countries in various forms,¹¹ it is still in its early stages and we have found no documentation of its use as a systematic tool in relation to the elderly and in aging. In Israel, an upheaval in this area began during 2015, starting with a landmark ruling. This precedent ruling applied the model upon an older woman who was diagnosed with Alzheimer's disease and acknowledged it according to the UN Convention. This ultimately had a decisive impact on the legislative process which established the model within Israeli law.¹²

In this article, we seek to describe this process. In the first section, we shall examine the phenomenon of aging, the complexity of assessing legal capacity, and the need for the implementation of the supported decision-making model as an alternative to guardianship. In the second section, we will expand upon the above-mentioned precedent ruling, and in the third section we will present the transition from case law to legislation, namely the establishment of the model in Israeli law.

⁹ Schindler and Waksman, above n 6, 355.

¹⁰ UN Convention on the Rights of Persons with Disabilities (2006).

¹¹ Eilionoir Flynn and Anna Arstein-Kerslake, 'The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?' (2014) 32(1) *Berkeley Journal of International Law* 124, 133-136.

¹² The focus of this article is on the implementation of the support decisions model on the elderly, however it should be noted that the implementation of the model in Israel also has tremendous impact on people with disabilities.

I SUPPORTED DECISION-MAKING MODEL AND ITS IMPORTANCE FOR OLD AGE

A Demographics and Morbidity in Aging

The onset of the 21st century is characterized as a period in which the aging of society is significant, exerting its effect on an international level. The percentage of the elderly population and lifespan across the world rose significantly. The highest growing population is that of those aged eighty and above, meaning that the elderly population itself is aging.¹³

While aging can embrace continued growth and a meaningful life, it encompasses with it a noticeable and gradual decline in medical and functional condition.¹⁴ Additionally, at times it is accompanied by a cognitive and mental reduction which reduces the ability to take care of needs and manage affairs.¹⁵ Such is the case in occurrences of dementia, particularly Alzheimer's, which is one of the main causes of disability amongst older persons.¹⁶ The decline in functionality due to dementia and other illnesses leads in many cases to the examination of the elderly person's legal capacity and the appointment of a guardian.

¹³ An Aging World: 2008, International Population Report (2009) U.S. Department of Health and Human Services National Institutes of Health National Institute on Aging, U.S. Department of Commerce Economics and Statistics Administration U.S. Census Bureau available online at <<http://www.census.gov/prod/2009pubs/p95-09-1.pdf>>.

¹⁴ Neena L Chappell and Heather A Cooke, "Age Related Disabilities – Aging and Quality of Life International Encyclopedia of Revaluation" <<http://cirrie.buffalo.edu/encyclopedia/en/article/189/>>.

¹⁵ N L Chappell and H A Cooke, "Age Related Disabilities – Aging and Quality of Life" in JH Stone and M Blouin (eds.) (2010) *International Encyclopedia of Rehabilitation*. Available online <<http://cirrie.buffalo.edu/encyclopedia/en/article/189/>>.

¹⁶ The prevalence of dementia is estimated at about 10% of those 65 and older and approximately 30% at age 85 and older. Alzheimer's disease is most common among these diseases, with about 60% -70% of all dementia patients. Alzheimer's disease is characterized by a gradual deterioration over 7-10 years (What is dementia? The site of the Ministry of Health, the State of Israel, available online <<http://www.health.gov.il/Subjects/Geriatrics/Dementia/Pages/Background.aspx>>).

B *Legal Capacity, Its Complexity, and the Need for a Supported Decision-Making Model*

In Western and developed judicial systems, the presumption is that adults have legal capacity.¹⁷ Although legal capacity is a controversial concept, one of its accepted definitions is that individuals have the capability to make legal decisions and to perform legal actions. This is based on their ability to exercise rational judgment, that is to evaluate the relevant facts and the different alternatives at their disposal.¹⁸

Determining the legal capacity of a person incorporates great difficulty for several reasons: (A.) As a result of reduction in cognitive or mental capabilities, the ability of any person, as well as the older person, to carry out legal actions does not exist only in the two extremes of either complete or lack of abilities, but rather, often manifest along a continuum between these two extremes.¹⁹ (B.) Diagnosis of ability on a cognitive or mental level often cannot bring about a clear conclusion regarding the ability to carry out a specific action, and thus the theoretical "legal capacity" is neither identical nor equivalent to "medical capacity".²⁰ Thus, for example, it is likely that although the clinical diagnosis of dementia displayed as a partial decline in one's recognition of time, place, and judgment, still, from a legal standpoint, that person will still have the capacity necessary to carry out certain legal actions. This is indicative that there is a possibility that the person will possess the competence ability to

¹⁷ Sabatino and Wood, above n 4, 35.

¹⁸ Warren F Gorman, 'Testamentary Capacity in Alzheimer's Disease' (1996) 4 *Elder Law Journal* 225.

¹⁹ Schindler and Waksman, above n 6, 352.

²⁰ Richard F Spiegle and Spencer J Crona, 'Legal Guidelines and Methods for Evaluating Capacity' (2003) 32(6) *The Colorado Lawyer* 65.

carry out certain legal actions, while not able to carry out others, for instance one may be able to write a will, but not to manage his assets.²¹ (C.) Furthermore, it may be possible that a person will possess the ability to legally act at certain times, and not at others; for example, it is known that Alzheimer's patients can understand and function during specific times of the day, and may be confused and less able to do so or not be able at all at other times.²² In our opinion, the periods in which the person's abilities are preserved represent a just and sound legal basis for a modified legal mechanism of support, which will be suited to the dynamics in state and abilities.

In practice, it is common to rely on a medical evaluation of capability to determine legal capacity.²³ The definition of capability in clinical terms alone may ignore the complexities noted above. A definition of capability that embodies a medical diagnosis ignores the possibility to carry out accommodations in order to bridge "gaps" in capability, especially since it is known that a wide variety of external means can be used to improve abilities, after which there will be a reason to carry out an additional, updated evaluation.²⁴ As reality shows, the two evaluations, those of "capability" and those of "capacity" are general and comprehensive, and do not capture and reflect the wealth and diversity of day to day life²⁵ and consequently lead to the denial of the older person's autonomy. There is particular importance in maximally exhausting the tools for preserving the autonomy of the elderly

²¹ Jalayne J Arias, 'A Time to Step in: Legal Mechanisms for Protecting Those with Declining Capacity' (2013) 39 *American Journal of Law & Medicine* 134, 140.

²² Ladislav Volicer et al., 'Sundowning and Circadian Rhythms in Alzheimer's Disease', 158 *AM. J. PSYCHIATRY* 704, 704–05 (2001).

²³ Kathy Black and Hana Osman, 'Concerned About Client Decision-Making Capacity? Considerations for Practice' 6(2) *Care Management Journals*, NY, 50 (summer 2005).

²⁴ Paul J Moberg and Jacqueline H Rick, 'Decision-Making Capacity and Competency in the Elderly: A Clinical and Neuropsychological Perspective' (2008) 23(5) *Neurorehabilitation* 405.

person, and to assist the person to remain responsible for crafting his or her destiny as much as possible. Only knowledge of the serious implications of a comprehensive evaluation will bring about the implementation of alternative regimes under guardianship, especially support mechanisms,²⁶ The supported decision-making model represents a legal frame work that serves this goal.

C Decision-Supporting Model

The "decision-supporting" model is based upon the notion that all persons, regardless of cognitive or mental decline, possess the right to “legal capacity”, and thus, are eligible for support to practice it.²⁷ This is in lieu of appointing alternative decision-makers, such as a guardian. The model opposes labeling and stereotypes regarding cognitive and mental disabilities and opposes ageism. It strives to find the most suitable support system for each individual according to preference and necessity.²⁸ This model seeks to empower individuals, to help them make decisions for themselves according to their desires and views, and to prevent impinging on their right to autonomy and their well-being.²⁹ Our claim is that this model's objective is to bridge the "gaps" in the individual's capabilities through adjustments

²⁵ Beryl L Thomas, 'Research Considerations: Guardianship and The Vulnerable Elderly' (1994) 20(5) *Journal of Gerontology*, 10.

²⁶ Stanley S Herr, 'Self Determination, Autonomy, and Alternatives for Guardianship' in Stanley S Herr, Lawrence O, Gostin. and Harold Hongju Koh (eds) *The Human Rights of Persons with Intellectual Disabilities* (Oxford University Press, 2003) 440.

²⁷ See fn 10, above.

²⁸ Flynn and Arstein-Kerslake, above n 11, 131.

²⁹ Gerard Quinn and Anna Arstein-Kerslake, 'Restoring the "Human" in "Human Rights": Personhood and Doctrinal Innovation in the UN Disability Convention' in Conor Gearty and Costas Douzinas (eds) *The Cambridge Companion to Human Rights* (Cambridge University Press, 2012).

and support. The "decision-supporting" model exists in a number of countries in different forms such as Canada³⁰ and Sweden.³¹

The "decision-supporting" model is learned from the UN Convention regarding the rights of people with disabilities.³² This convention includes elderly people with disabilities, even though they are not specifically mentioned as a group.³³ The convention states that people with disabilities possess legal capacity equal to others in every facet of life.³⁴ Additionally, states are obligated to provide support for people with disabilities who require it in order to practice their legal capacity.³⁵ The measures aimed to assist will be adapted to the circumstances of individuals, while respecting their wishes and preferences.³⁶ The convention was approved in 2006 and ratified in Israel in 2012, although until the ruling of 2015 it was not recognized *de facto* in Israeli jurisprudence.

The supported decision-making model as opposed to guardianship raises questions about the risk involved. For example, there is a concern that one's supporter will take advantage of the position of supporter. In light of this, there is room for mechanisms to prevent the

³⁰ *Adult Guardianship and Trusteeship Act* (Statutes Alberta, 2008); *Decision Making, Support and Protection to Adults Act* (Statutes of the Yukon, 2003).

³¹ Christer Fjordevik, 'Adult Guardianship Legislation in Sweden: A Chief Guardian's Perspective' in A Kimberley Dayton (ed) *Comparative Perspective on Guardianship* (Carolina Academic Press, 2014) 207.

³² See fn 10, above.

³³ Arlene S Kanter, 'The United Nations Convention on the Rights of Person with Disabilities and its Implication for the Rights of Elderly People Under International Law' (2009) 25 *Georgia State University Law Review* 527, 556.

³⁴ Section 12(2) of the *UN Convention on the Rights of Persons with Disabilities* (2006): 'States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.

³⁵ Section 12(3) of the *UN Convention on the Rights of Persons with Disabilities* (2006): 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.

³⁶ Schindler and Waksman, above n 6, 355.

exploitation of the older person, and in certain circumstances guidance and supervision might be justified. There could be additional specific restrictions in bank accounts, for instance. These can avoid drawing unexpectedly high sums of money that are unusual for this person, unless clarified with this person that this is his or her un-manipulated will. Yet, the significant difference between protective mechanisms implemented in the supported-decision model and the appointment of a guardian is that the defense mechanisms in cases of decision support are based upon the principle of respecting the wishes and preferences of the older person.³⁷

As Flynn and Arstein-Kerslake note, there are various developments of supported-decision making models, but because of the dominance of the guardianship institution, at the practical level, there are only a few examples of how the model is implemented and it is the responsibility of countries to design models that are suitable for their cultural and political structure.³⁸ We will add also to their target population, in identifying the “elderly” as a unique, heterogeneous social group, for the purposing of constructing a support mechanism. Yet, it is important to clarify that the model’s beauty lies in its lack of uniformity and its lack of permanent structures; in fact, it is quite the opposite: it is adapted for each person according to his wishes, needs, and personal circumstances.³⁹ The dynamic quality of one’s personal circumstances requires flexibility in the legal mechanisms, which is what necessitates significant, individual adaptation for every new case. This is an immense challenge, and therein resides the opportunity.

³⁷ Flynn and Arstein-Kerslake, above n 11, 142 .

³⁸ Flynn and Arstein-Kerslake, above n 11, 132.

³⁹ Schindler and Waksman, above n 6, 355.

Last year an upheaval began, and the supported decision-making model became an integral part of Israeli law. The first ruling that recognized the supported-decision making model and applied it to an older woman, relying upon the UN Convention was in April, 2015.⁴⁰ By March 2016, in less than one year from the ruling, after intensive activity in this field, the issue was codified in Israeli legislation.⁴¹

II SUPPORTED DECISION-MAKING FOR OLDER PERSONS:

THE 2015 PRECEDENT

Intense social and legal activity made on behalf of two civil society organizations operating for the promotion of the rights of the elderly: “Yad Riva—Legal aid for the Elderly”⁴² and the Marty Jacob Legal Clinic for the Rights of Older Persons and Holocaust Survivors,⁴³ part of the Faculty of Law at Bar-Ilan University made the precedent possible. The intervention was carried out through Cause Lawyering “from the bottom up” through community empowerment. This was especially done by intensive preliminary work with community social workers, and through specific, individual legal aid.

A Ruling—A Description

⁴⁰ The Haifa Family Court Guardianship Case 43640-01-15 Ward v. Custodian General Haifa and Northern District (April 8, 2015).

אפי 43640-01-15 ב' (חסוי) נ' האפוטרופוס הכללי מחוז חיפה והצפון (חסוי) בבית המשפט לענייני משפחה בחיפה (מיום 8.4.15, פורסם ב"נבו").

⁴¹ Israeli Guardianship and Capacity Act, 1962.

⁴² “Yad Riva—Legal aid for the Elderly” is a nonprofit organization that operates throughout Israel assisting the elderly in need in realizing their rights.

⁴³ The Marty Jacob Legal Clinic for Older Persons and Holocaust Survivors at the Faculty of Law in Bar-Ilan University in Israel, was established to promote the rights of older persons and holocaust survivors, by offering pro-bono legal assistance and by carrying out actions for changing social policies regarding older persons. Law students are educated to offer holistic and sensitive legal intervention to older persons, and practice reaching-out to the older person's community, offering accessible legal aid and consultation.

As described in the landmark ruling mentioned above,⁴⁴ Sarah was in her late 70s, a widow, and her relationship with her family members, most of who lived abroad, was minimal. Her situation reached the welfare services via a medical report indicating cognitive decline due to dementia diagnosis. The medical report noted that Sarah's cognitive decline could affect her ability to manage her financial affairs yet she conducted other affairs independently and was capable of expressing her opinions and her wishes. The social services referred Sarah case to the representatives of elderly rights organizations mentioned above.

In meetings that took place with Sarah, she conveyed that she organizes her house alone, prepares food for herself, but has had difficulty managing her financial affairs for some time and tends to forget and get confused. Sarah expressed strong opposition to the appointment of a guardian over her, and her wish was that her close friend of some sixteen years, Rivka, continues to support and assist her manage her financial affairs. The support given by Rivka focused mainly in managing her financial affairs: in documenting income and expenses; in “organizing” various payments that Sarah has to pay, such as electricity, taxes, and more; in accompanying Sarah to make purchases and plan the day, and even to plan leisure time. The support consists mainly of accessing the information to Sarah, in contrast to making decisions or carrying out activities for her. Because of Sarah's cognitive decline, the welfare department was required to provide assistance, a socio-legal response to Sarah's situation. Until then the only possible and known legal solution was in appointing a guardian

⁴⁴ See fn 40, above.

In all of the meetings, despite signs of forgetfulness and confusion, on one issue Sarah was especially coherent and consistent: she trusts Rivka, and repeatedly requested the support of her friend and the prevention of the appointment of someone else to manage her affairs.

Intensive activity on behalf of the organizations for the elderly with local welfare services led to their collaboration. The decision was made to approach the court and to apply for appointing Sarah a supporter for decision-making, through asking in court for the acknowledgement of the model for the first time, according to the UN convention. By this, avoiding guardianship as a common and "simple" solution.

The two organizations represented Sarah in requesting the court to issue an order for supported decisions in accordance with the above-mentioned convention.⁴⁵ The plea was supported by the social worker in the local welfare department. The court held a comprehensive discussion, including all of the factors related to the issue such as the fact that Sarah suffers from Alzheimer's disease, is not interested in having a guardian considering it to undermine her right to autonomy and wishes her friend to continue support and assist her with her daily activities. The ruling, given by the Honorable Judge Esperanza Alon, approved the request and decreed an order for supported decision-making for Sarah.⁴⁶ For the first time the "support" model was recognized as a legal mechanism in Israel, based on the above-mentioned convention, and was applied to the elderly population. The Honorable Judge wrote in the ruling that:

⁴⁵ The authors of this article, through the Marty Jacob Legal Clinic for Older Person in Bar Ilan University and "Yad Riva" (see above), advocated for this woman in this case, together with adv. Shlomit Baranes from "Yad Riva".

⁴⁶ See fn 40, above.

A ‘decision supporter’ model is consistent with the Convention on the Rights of Persons with Disabilities, that was adopted in the United Nations in 2006 and in 2012 this Convention was ratified by Israel, and thus it is obligated to its implementation. Article 12 of the Convention adopts the approach that every person enjoys (a certain) legal capacity and it is appropriate to support him in exercising this capacity and to prevent, wherever possible, the restriction of legal capacity by the institution of guardianship, all as appears from the language of Article 12(2) –

“States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life” ...

And as appears in Article 12(3) of the Convention, which provides –

“States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”

I examined the proposed model and I can only welcome it...

I should add that from my own judicial experience I have seen that the elderly population is more intensely and generally left without sufficient protection of their rights, to the appointment of a guardian, either at the request of members of family or at the request of the welfare authorities. Restricting legal capacity and the appointment of a guardian is generally carried out by a

permanent appointment and without restriction or supervision over the nature and quality of management. This situation creates fertile ground for actual infringement of the rights and desires of the protected persons by the guardian appointed...

The proposed model has many advantages – it does not deny the Petitioner/Supported Person full control over her life, quality of life and wellbeing. It empowers her, provides her with security, reinforces her sense of independence and does not veto control over her life, as in the principle of “do not cast me off in the time of old age” (Psalm 71:9).⁴⁷

Like any groundbreaking move, a precedent that changes the legal field in terms of capacity and rights under declining competence, awakens opposition. In this case, the vast opposition was from various social services officials (those legally representing the Ministry of Welfare and Social Services to differentiate it from the social workers in the community), who until today have mostly operated using binary tools that the law provided them, from a protective worldview as to the at-risk elderly.⁴⁸ The opposition stemmed from the limited experience around the world in developing this mechanism and because of questions that arise, such as the identity of the supporter, the scope of the supporter’s role, the need for supervision over the supporter, and more. On the other hand, the claim that was raised before the court was that this opposition should not prevent or delay the development of this legal mechanism. Inherently, innovation and conceptual changes that challenge conventions require continuous learning, possible only during implementation. Judge Alon accepted this position, as noted in her words:

⁴⁷ "Do not cast me off in the time of old age; Do not forsake me when my strength fails." Psalms 71:9

Looking to the future, I foresee that the implementation of the model in the field will bring about doubts and difficulties – a blurring of the boundaries between this model and the existing and conservative model – of guardianship, situations of crisis between the supporter and the supported person, whether a professional and external supporter is preferable, or whether priority should be accorded to a familiar figure, whether the proposed model gives guidance which befits cases where the property aspects are more complex or whether it should only be adopted in cases where income is limited and known and other questions which will be raised and brought from the field of experience.

However, I believe that this model should be adopted and implemented, which grants the Petitioner autonomy, respects her dignity and independence, with proportional protection. The nature and quality of the guidance are subject to supervision and control on an ongoing basis. The Petitioner is tailored with a ‘custom suit’ fitted to her needs and she benefits from the personal and close guidance.⁴⁹

As Judge Alon noted during the court hearing relating to the implementation of the Supported Decision-Making Model, the “train” is already “in the station”, and should not be stopped, and learning the mechanism should be ongoing and through motion.

⁴⁸ Our legal practice shows this tendency, which is well known.

⁴⁹ See fn 40, above.

B The Supported Decision-Making Model and Its Integration with Additional Defense Legal Tools

Just as the question of “capacity” moves along a continuum, the supported decision-making model does not “live” in a vacuum but rather is examined in relation to other legal tools aimed to assist the elderly and additional populations who have difficulties managing their affairs. Hence the importance in placing the “supported decision-making” model in a dynamic legal "Toolbox" that provides responses in accordance to the circumstances. The gradient is from extreme to limited interventions. From appointing a plenary guardian as the harshest, most extreme intervention, via “tailored guardianship” to the use of other legal interventions that represent alternatives to guardianship, such as Power of Attorney, limiting in bank the amount of currency that can be used per month to avoid exploitation, and more, and finally the use of the “supported decision-making model”.

The question of which tool from the toolbox to make use of to assist the older person to manage the person’s affairs is a complex one, mainly due to the range of health, functional, cognitive, social, and other conditions that affect their ability. Yet, it is our understanding that the guiding principle needs to be, first and foremost, the use of the support model, and only if it cannot be applied, to turn to other interventions, according to severity and the level of risk in which the older person is exposed to.

Sometimes it is necessary to combine different "tools" from the legal "toolbox", for example, an older man with dementia who is capable and wants to control his own life, but in addition has an apartment in his possession, and there is a concern that because of his situation he might be subject to exploitation. In this sort of case he can be assisted by the support model

and the use of other legal mechanisms which will prevent selling the apartment without court oversight. The focus will be in support, and using other legal tools such as a Caveat Registration, another bank account authorized signatory, all depending on the circumstances.

The unifying principle is the choice to help preserve the independence of every person and to maximize competence,⁵⁰ in every age and regardless of a medical diagnosis, and to assist to carry out the person's wishes and preferences, and to make decisions with respect to the person's life. All appropriate legal responses to declines in ability need, first and foremost, to be examined together with the person, in an accessible, accommodated and optimized manner.

Implementation of the supported decision-making model does not require, as a rule, an appeal to a court. Sometimes there is need to approach the court, mainly for professional agents in the community who deal with elderly people struggling to take care of their needs and manage their affairs and request a judicial ruling which will give a seal of approval to the proposed professional choice. On the other hand, there is also the possibility of the contractual route, in which a person in the community who is experiencing a decline in abilities and needs help in decision making and in carrying those out, can sign a Support Agreement, similar to a Power of Attorney.

⁵⁰ Meytal Segal-Reich, 'Legal Ethics in Representation of Older Persons: The Need for a Unified Framework' (Essay for PhD degree, Haifa University, Israel, 2013).

III 2015-2016: IMPLEMENTATION OF THE SUPPORTED DECISION-MAKING MODEL—
FROM RULING TO LEGISLATION

Since the ruling was delivered in 2015, and to this day, sweeping changes have been done in Israel regarding the implementation of the supported decision-making model. Wide publicity was given to the ruling in main media outlets and professional journalism.⁵¹ Ten additional rulings have been entered that adopted the supported decision-making model, some referring to the elderly, while others referred to younger populations, all relying on the precedent from April, 2015. In all of these rulings the court appointed a supporter for decision-making as an alternative to appointing a guardian, a more proportionate framework, adapted to the individuals, reflecting their wishes and preferences, and thus assisting them to preserve their independence and make use of their right to autonomy.⁵²

Finally, the pinnacle of the change was in codifying the model in the Israeli law. This took place in March 2016, less than a year after the precedent ruling. The codification was done under the framework of Amendment 18 of the Israeli Law on Legal Capacity and

⁵¹ See The Jerusalem Post, Wednesday, 27 May 2015, pg 4.

⁵² The Nazareth Family Court Guardianship Case 34820-03-15 Ward (represented by Israeli Legal Aid Administration in The Ministry Of Justice) v. Custodian General Haifa and Northern District (July 6, 2015), before Judge Asaf Zaguri, Vice President of court.

As noted:

"When the court intends to use the power vested in it to appoint a guardian for a person it is, in fact, taking an invasive measure which strikes at the most fundamental of human rights and restricts it. For this reason, the court must take extra care and review such an application very carefully, as granting it is a violation of a person's most fundamental right. It denies liberty, autonomy and free will. It marks the person as abnormal and as having a severe, extreme disability that undermines his or her ability to manage his or her own affairs, to the point where there is justification for another person to replace this person and make momentous decisions about his or her body and/or property...

(...) The combination of normative tests and the balance of interests lead us directly to the innovative system introduced in the judgment issued by my colleague, Honorable Justice Esperanza Alon in her ground breaking decision of April 8, 2015..." (see pages 6,7)

אפ 15-03-34820 היועמ"ש נ' א.ח. בבמ"ש לענייני משפחה בנצרת (מיום 6.7.15, פורסם באתר פסקדין).

Guardianship, which was originally legislated in 1962.⁵³ This was the result of a complex process involving opposition from a variety of agencies, mainly the Ministry of Welfare and Social Services, the Ministry of the Treasury, and the Court Administration. However, the Constitution, Law, and Justice Committee, the committee responsible in the Israeli Parliament (Knesset) for formulating the final version of the law, recommended, in the end, to codify the model under a legislative framework. In our opinion, this position stemmed to a great degree from the fact that courts recognized the mechanism and approved in the former year, and because it became clear that it was an essential tool in professional practice. The new Israeli law approves, therefore, the continued implementation of support in the manners used since April 2015 (without formal recognition in law). The new Guardianship and Capacity Act recognized the support mechanism and required the court to consider its use when requests for guardianships are submitted, by trying to provide the most proportionate response.⁵⁴ It was also set that within two years, regulations arranged by the Minister of Justice would take effect, which would provide responses to additional issues related to the support mechanism, including training of advocates, situations that justify supervision, and so forth.⁵⁵

The position of older persons was heard clearly in the discussions in Parliament via organizations for the elderly rights and the Legal Aid Department in the Ministry of Justice, which, although it is an institutional actor, expressed an independent and separate position supporting reducing the use of guardianship in favor of more proportionate alternatives- the supported decision-making model. The consortium of civilian organizations and government representatives was innovative in its own right and enabled the advancement of this

⁵³ Amendment 18 of the Israeli Guardianship and Capacity Act, 1962.

⁵⁴ See fn 53, above.

⁵⁵ See fn 53, above.

legislation. Before the legislation change, the Israeli Legal Aid Department of the Ministry of Justice has established in October 2015 a unique department specializing in representation of older persons, and in representation in cases of legal capacity issues. For instance, lawyers in this department represent in cases of appointing "supporters" rather than using the guardianship regime, seeking less restrictive measures and creating legal mechanisms adapted to specific needs. These new innovations in the legal capacity field in Israel can lead the significant assimilation of the supported decision making regime for the older population.

IV SUMMARY

The supported decision-making model is an innovative and groundbreaking frame work representing, in many cases, a suitable alternative to the institution of guardianship. In this article, we clarified the model's relevance for the elderly enabling the elderly to realize their right to autonomy. We presented the dramatic course that took place last year in the Israeli legal system. A course that began with a precedent-setting ruling that, for the first time, applied the decision-making model to an elderly woman who was diagnosed with dementia by relying upon the International Covenant regarding the rights of people with disabilities, continued with additional rulings that adopted the model, and finally the incorporation of the model in the legislative framework. The groundbreaking ruling followed the activity of organizations working to promote the rights of the elderly, in cooperation with local welfare services. Its continuation, especially its legislative codification, was carried out through accelerated activity of civil social organizations—organizations for the promotion of the rights of the elderly and organizations for the advancement of the rights of people with disabilities, government agencies, Members of Parliament who saw great importance in promoting of the subject and especially the Legal Aid Department in the Israeli Ministry of

Justice who established a unique scheme for legal representation of the elderly, with specialization in the area of legal capacity. The process is not yet complete, there is no doubt that much more activity is necessary before the model can be an integral part of the Israeli legal system, but the foundations have already been set.