FREE from Exploitation: Why Adding Supported Decision-Making to the FREE Act Is Essential to Better Prevent Conservatorship Exploitation

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I. INTRODUCTION

How much should someone be trusted to make financial decisions for another person? Consider the following case, in which a son was given legal authority by a court to make financial decisions for his mother via conservatorship.[1] A probate court appointed the son as the sole conservator of his mother's estate,[2] giving him ultimate control over her finances and stripping the mother of any say over such decisions. Almost seven months after his appointment as conservator, the son used his legal authority over his mother's finances to make a self-interested, irrevocable purchase of a $300,000 gift annuity from the Alabama Sports Hall of Fame.[3] Through the annuity, the son would receive automatic monthly installments in the amount of $2,000 after his mother's death for the rest of his life.[4] The court handling this case questioned whether this purchase was a prudent investment for the mother and whether the son should have obtained court consent to proceed with such a large purchase.[5] However, the mother died before any resolution was reached.[6] Ultimately, a third party caught onto this questionable activity and had to step in to freeze the $300,000 transfer as well as petition for the removal of the son as conservator over the estate.[7]

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1. *In re* Estate of Roosen, No. 282979, 2009 Mich. App. LEXIS 1497, at *2 (Mich. Ct. App. July 9, 2009).
2. *Id.*
3. *Id.* at 4.
4. *Id.*
5. *Id.* at 5.
6. *Id.*
7. *Id.* at 5–6.

This case highlights a critical and often overlooked issue in the United States in need of immediate attention: financial exploitation in conservatorships.[8] Although the ability to exercise the fullest extent of one's own legal capacity has been recognized as a fundamental autonomy right in many state courts,[9] this right is often taken away by the imposition of a conservatorship. Most states now require courts to exhaust considerations of least-restrictive alternatives before imposing a plenary conservatorship,[10] but legal scholars have noted that these reforms have been ineffective because many courts still opt for conservatorships out of judicial convenience.[11]

Despite states' differences in conservatorship law,[12] conservatorships generally involve the appointment of one person to make decisions for another person who has been deemed incapacitated

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8. *See* Summary of *H.R. 4545 (117th): Freedom and Right to Emancipate from Exploitation (FREE) Act*, GOVTRACK (Aug. 6, 2021) [hereinafter *Free Act Summary*], https://www.govtrack.us/congress/bills/117/hr4545/summary (noting that Florida democratic representative Charlie Crist called conservatorships "an unending nightmare" that we do not know the fullest extent of).

9. *See, e.g.*, *In re* Guardianship of Dameris L., 956 N.Y.S.2d 848, 856 (Sur. Ct. 2012) (demonstrating a court explicitly recognizing the right to legal capacity as an international right); *In re* Guardianship of Ednord Alcenat, No. A21-0779, 2022 Minn. App. Unpub. LEXIS 303, at *9 (Minn. Ct. App. May 16, 2022).

10. *See* HALDAN BLECHER, LEAST RESTRICTIVE ALTERNATIVE REFERENCES IN STATE GUARDIANSHIP STATUTES 1 (2018), https://www.americanbar.org/content/dam/aba/administauve/law_aging/06-23-2018-1ra-chart-final.pdf
[https://perma.cc/Q484-47AD] (demonstrating that approximately forty states require least-restrictive alternatives to conservatorship or guardianship). A plenary conservatorship gives a conservator complete control over a conservatee's decision-making capabilities, rather than limiting such control. *See infra* note 59 (defining of a plenary conservatorship).

11. *See, e.g.*, Tricia M. York, Note, *Conservatorship Proceedings and Due Process: Protecting the Elderly in Tennessee*, 36 U. MEM. L. REV. 491, 509 (2006) ("[M]any courts still resist using the limited conservatorship. Instead, such courts continue to rely on the more judicially-convenient plenary conservatorships. . . . [D]espite good intentions, many states never actually implemented the new reforms. Moreover, when state legislatures enacted conservatorship reforms, they often emasculated those reforms by granting courts broad discretion to waive the new provisions.").

12. *See* discussion *infra* Section II (discussing differences in states' conservatorship laws and definitions of exploitation).

by a court.[13] Unfortunately, the current state of conservatorship laws has been referred to as "broken" and an "unending nightmare" due to the sheer amount of exploitation in conservatorships.[14] Even more tragically, the number of individuals who are trapped in exploitive conservatorship arrangements in the United States is truly unknown.[15]

A common issue with state conservatorship laws is that, while these laws frequently seek to protect conservatees from financial exploitation,[16] conservatorships often fail to ensure such protection.[17]

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13. *See, e.g.*, MISS. CODE ANN. § 91-23-3(e) (2017) ("'Conservator' means a person appointed by a court to manage the estate of a living individual and includes a guardian appointed by a court to manage the estate of a living individual, and 'conservatorship' includes guardianship of the estate of a living individual."), *and* CAL. PROB. CODE § 3901(d) (West 1990) ("'Conservator' means a person appointed or qualified by a court to act as general, limited, or temporary guardian of a minor's property or a person legally authorized to perform substantially the same functions."). Note that "conservatorship" and "guardianship" are often used as interchangeable terms. Nicole C. Palas, Note, *#FreeBritney: A Social Media Movement Shedding Light on Guardianship Abuse and Oversight*, 50 HOFSTRA L. REV. 895, 899 (2022). However, the expectations of and requirements for conservators and guardians under many state laws carry the same fiduciary duties. *See., e.g.*, MISS. CODE ANN. § 93-13-259 (2020) (noting that conservators carry the "same duties, powers[,] and responsibilities as a guardian of a minor, and all laws relative to the guardianship of a minor shall be applicable to a conservator."); W. VA. CODE § 44A-1-8 (a) (2011) (noting that guardians and conservators both must show a necessary education, suitable background, and appropriate ability to perform the duties collectively of conservators and guardians). Out of convenience, this Note will use the term conservatorship without referencing the frequently interchangeable and overlapping terms "conservatorship" and "guardianship".

14. *See Free Act Summary*, *supra* note 8.

15. *See id.* (statement of Rep. Charlie Crist) ("[W]e don't know how many people are being held captive against their will under the broken guardianship system.").

16. *See, e.g.*, Brown v. MacDonald & Assocs., LLC, 317 P.3d 301, 306 (Or. Ct. App. 2013) (explaining an example of a court holding that clear and convincing evidence of the need for a conservatorship can derive from "risk of exploitation or bad financial management . . . caused by the person's lack of capacity").

17. *See* NAT'L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 101-17 (Mar. 22, 2018), https://www.ncd.gov/report/beyond-guardianship-toward-alternatives-that-promote-greater-self-determination-for-people-with-disabilities/ (download pdf) (providing a comprehensive review of how guardianship claims across the nation are often forgone quickly, denying people in guardianships and conservatorships due process and fundamental civil rights).

State laws are typically out of date concerning exploitation within conservatorships;[18] many courts do not pursue credit check histories or criminal background checks on potential conservators.[19] Even so, it is very difficult for a conservatee to ever end their conservatorship arrangement because conservatorships are usually viewed as permanent by courts.[20] Additionally, there is a lack of safeguards against exploitation in conservatorships at the federal level.[21] With 1.3 million Americans in conservatorship arrangements and around $50 billion in assets being managed under them, the need for safeguards against fraud and exploitation has never been more critical in our nation's history.[22]

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18. *See* Benjamin Orzeske & Diana Noel, Presentation at the National College of Probate Judges: Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (June 9, 2018), https://ncpj.org/wp-content/uploads/2019/05/ugcopaa-presentation-handouts.pdf (describing how most states' laws around conservatorships have not been changed for twenty years.).

19. ADMIN. CONF. OF THE U.S., SSA REPRESENTATIVE PAYEE: SURVEY OF THE STATE GUARDIANSHIP LAWS AND COURT PRACTICES 4 (2014), https://www.acus.gov/sites/default/files/documents/SSA%2520Rep%2520Payee_State%2520Laws%2520and%2520Court%2520Practices_FINAL.pdf. The Administrative Conference of the United States ("ACUS") reported on a nationwide survey of state guardianship and conservatorship laws and court practices (using the phrase "guardians" throughout the review). *See id.* at 3–4. The survey examined family, public, and professional guardians. *Id.* ACUS reviewed criminal background checks and credit reports of prospective guardians. *Id.* at 17. The survey reported that sixty percent of the 762 courts who responded pursued no credit checks on guardians of the estate. *Id.* at 18. Additionally, only twenty-nine percent of courts pursued criminal background checks on all potential guardians. *Id.* at 17. *See also* NAT'L COUNCIL ON DISABILITY, *supra* note 17, at 67–68 (providing a concise review of ACUS's most notable findings from the 2014 SSA Report).

20. *See* ERICA WOOD ET AL., RESTORATION OF RIGHTS IN ADULT GUARDIANSHIP: RESEARCH & RECOMMENDATIONS 20 (2017), https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration-of-rights-in-adult-guardianship.pdf (noting that court-appointed guardianships for adults are usually "assumed to be permanent throughout the life of the individual or until appointment of a different guardian").

21. *See Free Act Summary*, *supra* note 8 (statement of Rep. Charlie Crist) ("We do know, however, that we need federal safeguards to protect persons under guardianship from abuse and exploitation.").

22. *See* U.S. DEP'T OF JUST.: ELDER JUST. INITIATIVE, FINANCIAL EXPLOITATION IN THE CONTEXT OF GUARDIANSHIPS AND OTHER LEGAL

While the need for legal change in this field has been a hot topic of conversation for some time, the imposition of the thirteen-year-long conservatorship upon pop icon Britney Spears sparked the largest public outcry.[23] Britney allegedly faced "loss of financial freedom"[24] and control over her estate, among a host of other hardships in the conservatorship forced upon her.[25] During her time as a conservatee, Britney still successfully performed and excelled in her career in the public eye.[26] However, she was prevented from reaping the fruits of her labor due to her conservatorship.

In direct response to the public outrage concerning the exploitation in Britney's conservatorship, federal legislators introduced the Freedom and Right to Emancipate from Exploitation ("FREE") Act as a bill in July of 2021.[27] The bill proposes remedial measures for exploited conservatees to remedy their financial harm.[28] However, the

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ARRANGEMENTS 26–27 (2017), https://www.justice.gov/file/1064496/download (listing common ways guardianships and conservatorships are exploited).

23. Heather Swadley, *How #FreeBritney Exposes the Need to Disable the Model Rules of Professional Conduct*, 43 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 1, 2 (2022).

24. *See* Berenice Quirino, Comment, *Toxic: The Case of Britney Spears Sheds Light on Issues with California Conservatorship Laws*, 52 GOLDEN GATE U. L. REV. 217, 227-28 (2022) (noting that, while Britney successfully earned millions of dollars in income from her success as a popstar, she was limited to a strict allowance, and her father made millions off of the conservatorship).

25. Swadley, *supra* note 23, at 2. Along with a loss of financial freedom, Britney was allegedly forcibly sterilized with an intrauterine device against her desires. *Id.*

26. *See* Quirino, *supra* note 24, at 227 (noting that Britney performed 248 shows over the course of four years during her conservatorship).

27. Freedom and Right to Emancipate from Exploitation (FREE) Act, H.R. 4545, 117th Cong. (2018) [hereinafter FREE Act], https://www.govinfo.gov/content/pkg/BILLS-117hr4545ih/pdf/BILLS-117hr4545ih.pdf. Rep. Charlie Crist introduced the FREE Act. *See id.*

28. *Id.* § 3(a)(10). Section 3(b)(2) gives conservatees the right to

> petition a court to replace any person who is a legal guardian of, or conservator for, the individual and who is not an employee of the State with a legal guardian or conservator, as the case may be, who is an employee of the State or who the individual has designated in a notarized document signed by the individual to act as such, notwithstanding the terms of the guardianship or conservatorship, as the case may be, and in any proceeding on such a petition, the

bill does not contemplate any least-restrictive alternatives[29] to conservatorships, nor does it guarantee that conservatees will have easy access to any protections provided for by the Act.[30] Due to a lack of support by Congress, the FREE Act was not enacted into federal law.[31] However, the FREE Act or its provisions could be a baseline for an amended bill.[32]

One least-restrictive alternative to conservatorships that has become increasingly popular is the procedure of Supported Decision-Making ("SDM").[33] In SDM arrangements, a person who would have otherwise been forced into a conservatorship retains the ability to make

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> petitioner shall not be required to prove wrongdoing or malfeasance by the legal guardian or conservator, as the case may be, as a condition of having the petition granted.

Id. As section 3(c) of the FREE Act provides, "[a]n individual who is the subject of a legal guardianship or conservatorship established under State law may bring an action in any United States district court to enforce any right provided" under the Act. *Id.* § (3)(c).

29. Least-restrictive alternatives are commonly found in state statutes. *See* BLECHER, *supra* note 10 (showing a table of states which require least restrictive alternatives to conservatorship or guardianship). Least-restrictive alternatives are alternate arrangements to conservatorships (and guardianships) where an individual retains as much decision-making capabilities as possible; least-restrictive alternatives thus do not strip away an individual's decision-making rights to the same extent that conservatorships do. *See* Nina Kohn & David English, *Protective Orders and Limited Guardianships: Legal Tools for Sidelining Plenary Guardianship*, 72 SYRACUSE L. REV. 225, 226 (2022).

30. *See* discussion *infra* Section III.B (discussing that many conservatees will have difficulties accessing or utilizing the remedial measures under the FREE Act due to realistic obstacles of age, health deterioration, disability, or already devastating harm when detected).

31. *Free Act Summary*, *supra* note 8.

32. *See id.* ("[A]lthough this bill was not enacted, its provisions could become law by being included in another bill. It is common for legislative text to be introduced concurrently in multiple bills (called companion bills), re-introduced in subsequent sessions of Congress in new bills, or added to larger bills (sometimes called omnibus bills).").

33. *See, e.g.*, Guardianship of A.E., 552 S.W.3d 873, 887 (Tex. App. 2018) (citing TEX. EST. CODE ANN. § 1002.0015 (2015)) (noting that supported decision-making is a recognizable alternative to guardianships).

his or her own choices, with the aid of support.[34] SDM arrangements allow an individual to remain the final decision-maker over his or her personal or financial affairs.[35] SDM avoids often-exploited and difficult-to-end conservatorships,[36] making SDM a least-restrictive alternative to conservatorships.

This Note demonstrates the need to integrate least-restrictive SDM arrangements into the FREE Act in order to actively prevent financial exploitation and reduce the need to rely on remedial measures after financial harm has occurred.[37] Specifically, this Note will propose a framework and model amendment to add as a fourth section to the FREE Act. This new section would federally mandate the consideration of least-restrictive alternatives and explicitly require SDM as an alternative to conservatorships, while also applying the Act's current remedies to SDM to ensure the protections of SDM are effective and accessible. This addition of SDM to the FREE Act will better prevent conservatorship exploitation by (1) avoiding unfettered third-party access to finances; (2) uniformly mandating courts to consider SDM as a viable least-restrictive alternative to conservatorship at the federal level; and (3) providing for explicit remedial measures for exploitation of an SDM arrangement.

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34. *See In re* Guardianship of Dameris L., 956 N.Y.S.2d 848, 854 (Sur. Ct. 2012) (referencing support in SDM arrangements as "family, friends and mental health professionals" who help a person make their own decisions). *See also* Cathey E. Costanzo et al., *Supported Decision-Making: Lessons from Pilot Projects*, 72 SYRACUSE L. REV. 99, 106 (2022) (explaining that Supported Decision-Making allows the individual to exercise the capacity which they retain when making decisions on their own behalf). Because SDM provides for tailored, carefully chosen support geared toward letting an individual exercise his or her legal capacity, an individual with a partially incapacitating or impairing disability or other impairment is able to make their own decisions where they may not have been without such support. *Id.* Some conservatees may be able to make their own decisions, and supporters help the decision-maker carryout or gauge those decisions. *Id.*

35. Rebekah Diller & Leslie Salzman, *Stripped of Funds, Stripped of Rights: A Critique of Guardianship as a Remedy for Elder Financial Harm*, 24 U. PA. J. L. & SOC. CHANGE 149, 181 (2021).

36. *Id.* at 162 ("[G]uardianships almost never end, except upon the death of the person under guardianship.").

37. *See* discussion *infra* Section IV (discussing the ways the FREE Act does not prevent exploitation and its protections are likely inaccessible to many conservatees).

Part II of this Note will introduce the history of the Spears controversy leading up to the FREE Act and the background of state conservatorship laws and SDM arrangements. Part III will analyze the practical implications of both the FREE Act and SDM and further argue that SDM is a least-restrictive alternative that provides a preventive approach that avoids conservatorship exploitation. Part IV will introduce the solution of this Note: a proposal and model amendment to the FREE Act which would mandate least-restrictive alternatives and SDM at the federal level and apply the existing safeguards and remedies of the Act to SDM arrangements. Part V will briefly provide conclusory comments.

II. HISTORY AND BACKGROUND

This section will introduce the background of the Spears conservatorship controversy and state conservatorship laws as well as the history of the FREE Act and SDM. Although a court commonly imposes conservatorships to protect an individual deemed incompetent,[38] conservators often exploit these arrangements.[39] The widely discussed case of Britney Spears' conservatorship sheds light on the commonality of such exploitation.[40] Directly in response to the Spears controversy, legislators introduced the FREE Act in Congress in 2021, proposing remedies for conservatorship exploitation.[41] Alternatively, SDM arrangements avoid conservatorships and prevent exploitation by avoiding third-party financial decision-making in the first place.[42]

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38. *See, e.g.*, Brown v. MacDonald & Assocs., LLC, 317 P.3d 301, 306 (Or. Ct. App. 2013) (providing an example of a court indicating that conservatorships are often used to protect incapacitated conservatees from exploitation or their own financial mismanagement).

39. U.S. DEP'T OF JUST.: ELDER JUST. INITIATIVE, *supra* note 22, at 26–27 (listing common ways guardianships and conservatorships are exploited).

40. Swadley, *supra* note 23, at 35–36.

41. FREE Act § 3.

42. Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8, 10 (2012), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1816&context=hrbrief.

A. The Conservatorship of Britney Spears: A Movement

Financial exploitation in conservatorships has become a popular topic of discussion in recent years. One case in particular captured a great deal of media attention around 2019—the controversial conservatorship of Britney Spears.[43] Britney is a famous pop star who began her successful music career in 1998 when she released her chart-buster debut album "…Baby One More Time."[44] However, a court placed Britney in a conservatorship in 2008 after multiple instances of appearing mentally troubled in public.[45] At her conservatorship hearing, Britney's father was appointed as conservator of her estate.[46] Britney's conservatorship lasted thirteen years, despite numerous attempts by Britney to end the arrangement.[47] While in her

43. *See* Joe Coscarelli, *Britney Spears Announces 'Indefinite Work Hiatus,' Cancels Las Vegas Residency*, N.Y. TIMES (Jan. 4, 2019), https://www.nytimes.com/2019/01/04/arts/music/britney-spears-cancels-vegas-residency.html (discussing the Britney Spears conservatorship controversy); Dan Clarendon, *Britney Spears' Dad Jamie Becomes Her Sole Conservator After Lawyer Quits*, US WEEKLY (Mar. 4, 2019), https://www.usmagazine.com/celebrity-news/news/britney-spears-dad-jamie-becomes-sole-conservator-after-lawyer-quits/ (providing another example of a 2019 article covering the Spears scandal).

44. Quirino, *supra* note 24, at 223.

45. *See, e.g.*, Aidan Jones, *Court Gives Gather Control of Britney*, THE GUARDIAN (Feb. 1, 2008, 8:58 PM), https://www.theguardian.com/world/2008/feb/02/musicnews.usa (addressing Britney's initial placement into a conservatorship and her care at a psychiatric hospital). Britney allegedly struggled with mental health concerns, which paparazzi documented and released into the public eye. *See* Quirino, *supra* note 22, at 217–19 (describing how the paparazzi created a narrative regarding Britney's mental health). One of the most famous recounts was when Britney shaved her head at the age of twenty-five in February of 2007. *Id.* at 224. In 2007, Britney also publicly attacked a car with an umbrella—sparking a great deal of media attention. Maria Puente, *Why Does Britney Spears Still Have a Conservator? Legal Expert Says Her Case File Suggests Answers*, USA TODAY (Oct. 24, 2019, 5:36 PM), https://www.usatoday.com/story/entertainment/celebrities/2019/10/24/britney-spears-why-does-she-still-need-conservator/2288009001/.

46. Swadley, *supra* note 23, at 2. A conservatorship over one's estate gives the conservator control over the conservatee's finances.

47. *See* Quirino, *supra* note 24, at 218–19 (noting that Britney was unsuccessful in petitioning the court over a period of years to remove her from as conservator). At a 2014 court hearing to remove her father as conservator, Britney recounted a list of grievances she endured from the conservatorship. *Id.* at 229. In

conservatorship, Britney still successfully performed in concerts, earned substantial income, and released hit music.[48] Britney's conservatorship finally ended when her father stepped down as her conservator.[49]

A central reason Britney's conservatorship was so controversial was that she lost control over her financial decision-making rights.[50] Britney's father reportedly controlled her finances, career, and personal life under the conservatorship, despite Britney's continuing success.[51] One major point of criticism was her father's reported misappropriation of finances and self-dealing, which her attorney described to *The New*

2020, Britney again requested the court to end the conservatorship, claiming that she was afraid of her father and his control of her life. *Id.* The court again refused to end the conservatorship. *Id.* It is difficult to identify one central reason why the court denied Britney's requests to end her conservatorship. However, it should be noted that, after the end of Britney's conservatorship, California amended its conservatorship laws to provide guidance for courts to consider a conservatee's preferences regarding his or her own conservatorship. *Id.* at 219.

48. *Id.* at 226–27 (describing how Britney, whilst in her conservatorship, released multiple albums, toured for her concerts, personally appeared on national television multiple times, incurred substantial income, and publicly flourished in her career). "A little more than a month after Judge Goetz made the conservatorship permanent, Britney released the full-length album 'Circus.'" *Id.* at 227. *See also* FREE Act § 3(a)(7) ("Despite the fact that Ms. Spears has been a successful working artist for the past decade, her repeated requests to have her conservatorship removed have been denied.").

49. Anastasia Tsioulcas, *Jamie Spears Agrees to Step Down from Britney Spears Conservatorship*, NPR (Aug. 12, 2021, 6:27 PM), https://www.npr.org/2021/08/12/1027223521/jamie-spears-steps-down-britney-spears-conservatorship.

50. Swadley, *supra* note 23, at 2. While in the conservatorship, Britney was allegedly confided to a strict allowance, despite earning millions. Quirino, *supra* note 24, at 227.

51. Lisa Kay Rosenthal, *Revisiting the Visitor: Maine's New Uniform Probate Code & the Evolving Role of the Court-Appointed Visitor in Adult Guardianship Reform*, 74 ME. L. REV. 141, 152 (2022). Along with a loss of financial freedom, Britney was allegedly forcibly sterilized with an intrauterine device against her desires. Swadley, *supra* note 23, at 2. As well, Britney allegedly was not allowed to have a phone during some parts of the conservatorship. *Free Act Summary*, *supra* note 8. Although there was a lot of backlash over Britney's conservatorship, some commentators alleged that the conservatorship was nonetheless necessary for Britney due to her mental health at the time. Puente, *supra* note 45.

York Times.[52] Because of these reports of her father's misuse of the conservatorship, the "Free Britney" movement was born.[53] Although the movement was aimed at getting Britney out of her conservatorship, "Free Britney" resultingly shed light on a plethora of stories of conservatorship exploitation across the nation.[54] In doing so, many legal scholars have noted that Britney's case helped show that all conservatees are at constant risk of financial exploitation, not just wealthy pop stars.[55]

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52. Liz Day, *Britney Spears Fights Father's Fee Claim, Alleging Financial Misconduct*, N.Y. TIMES (Jan. 18, 2022), https://www.nytimes.com/2022/01/18/business/britney-spears-father-fees.html. Britney's lawyer reported that her father, Mr. Spears, was asking the court to make Britney pay his legal fees surrounding the conservatorship. *Id.* *The New York Times* reported that Britney's lawyer claimed that Britney should not have to pay these fees because Mr. Spears's actions as conservator were financially corrupt because he mismanaged Britney's finances. *Id.*

53. Rosenthal, *supra* note 51, at 153 ("The movement—known as the #FreeBritney movement—advocated for the termination of Ms. Spears's conservatorship on the grounds that she was being held against her will and financially exploited by her father.").

54. Swadley, *supra* note 23, at 35–36 (2022) ("[T]he implications of the #FreeBritney movement reach beyond Britney Spears herself—all too frequently, disabled people experience the injustices of the guardianship system without the platform that Britney has to change her circumstances."). Michael Oher's story is yet another conservatorship that recently gained public attention after the "Free Britney" movement's beginning. Oher is a former NFL player known for his featured story in *The Blind Side* movie. "The Tuohys said they intended on adopting [Oher], but because he was over 18 years of age, they presented him with a conservatorship." Ayana Archie, *A Judge Orders the End of the Conservatorship Between Michael Oher and the Tuohys*, NPR (Sept. 29, 2023, 7:41 PM), https://www.npr.org/2023/09/29/1202776970/michael-oher-tuohys-conservatorship. "Oher alleges that they gave him the impression that by signing it, he would be considered adopted by the Tuohys." *Id.* The judge who ended Oher's conservatorship noted that his conservatorship should never have lasted so long because Oher was not a person with a disability. *Id.*

55. *See, e.g.*, Quirino, *supra* note 24, at 231 (noting that Britney's case shed light on common conservatorship issues, such as the commonly experienced difficulties of replacing a conservator).

B. The Current State of Conservatorship Laws

A conservatorship is a legal arrangement where a court finds a person incapacitated (the "conservatee") and selects a third-party (the "conservator") to make decisions on behalf of the incompetent person. Conservatorships are thus "surrogate decision-making" arrangements because the conservatee's decisions are being made by someone else.[56] The extent to which the conservatee loses his or her decision-making capabilities is generally up to the discretion of a court.[57] Conservatorships frequently take away fundamental liberty rights from the conservatee, including the decision to vote, marry, visit with loved ones, and even ask a court to review his or her conservatorship.[58] Legal scholars have noted that courts are often more inclined to impose a

56. *See, e.g.*, *In re* Guardianship of F.W. Jr., 824 N.W.2d 561 (Iowa Ct. App. 2012) (demonstrating where an Illinois court was deciding whether a conservator was needed to make financial decisions for a potential conservatee); *In re* Guardianship of Dameris L., 956 N.Y.S.2d 848, 878 (Sur. Ct. 2012) (recognizing guardianships and conservatorships as "substituted decision making" arrangements); *see also* York, *supra* note 11, at 492-93 (showing that the phrase "surrogate decision-making" is a commonly referenced term in legal scholarship to describe conservatorships and guardianships, where third parties are given legal rights to make decisions for another person). Generally, any person with personal knowledge or experience of a person's incompetency may petition a court for conservatorship of a person, depending on the state's conservatorship statute.

57. *See, e.g.*, *F.W. Jr.*, 2012 WL 5355801, at *5 (demonstrating a court interpreting a state statute as giving an Iowa court discretion whether to opt for a limited conservatorship based on capacity findings); *see also* York, *supra* note 11, at 508 (explaining that courts can choose to impose a limited conservatorship which only takes away certain rights from the conservatee, or courts may impose plenary conservatorships which completely take away the conservatee's decision-making capabilities).

58. *See In re* Guardianship of O'Brien, 847 N.W.2d 710, 711 (Minn. Ct. App. 2014) (demonstrating a state where a person placed in a guardianship may be unable to legally marry if a court finds that person to lack insufficient capacity to marry); Rosenthal, *supra* note 51, at 152 (illustrating that an abusive guardian may try to limit a person's right to seek legal help, visit friends and family, and other general communication).

plenary conservatorship[59] rather than a more limited one, despite the loss of freedom and autonomy inherent in plenary conservatorships.[60]

Conservatorships are governed by state laws.[61] Due to a variety of state policies and interests, there is considerable variation in the structure and effects of conservatorship laws among the states.[62] For example, some states divide conservatorships into two types: one which controls the conservatee's daily care and personal matters, and another which controls the conservatee's estate and finances.[63] Further,

59. *See* WYO. STAT. ANN. § 3-1-101(a)(x), (a)(xiii) (distinguishing a plenary conservatorship as "a conservatorship in which the appointment by the court carries the full range of duties allowable by law" from a limited conservatorship as "a conservatorship in which the appointment by the court is limited in scope of duties or duration of appointment").

60. York, *supra* note 11, at 509 ("[D]espite the obvious benefits of a limited conservatorship for a partially incapacitated adult, many courts still resist using the limited conservatorship. Instead, such courts continue to rely on the more judicially convenient plenary conservatorship.").

61. Stephany Rohleder, Comment, *Free Britney: How a Pop Culture Icon Brought to Light Guardianship and Conservatorship Inequities and How Kansas Statutes Can Better Prevent Against Them*, 70 U. KAN. L. REV. 791, 794 (2022).

62. *Compare* CAL. PROB. CODE § 1800(b) (West 2023) (referring to surrogate decision-making agreements as conservatorships, as opposed to guardianships), *with* ALASKA STAT. § 13.26.266(c) (2023) (calling these arrangements guardianships, as opposed to conservatorships). *See also* Rohleder, *supra* note 61, at 794 ("With such a long history, laws surrounding guardianships and conservatorships have changed and evolved over time. Guardianships and conservatorships are governed by state law."). Many states require use of least-restrictive measures of conservatorship or guardianship to be used if feasible, while others do not. *See* BLECHER, *supra* note 10 (demonstrating a table of states which require least restrictive alternatives to conservatorship or guardianship). For example, New York calls for courts to consider "least restrictive intervention[s]" before implementing guardianship. N.Y. MENTAL HYGIENE LAW § 81.02 (Lexis Nexis 2018). Florida similarly requires courts implement only the "least restrictive appropriate alternative" to guardianship. FLA. STAT. § 744.2005(3) (West 2023). On the other hand, Idaho requires encouraging maximum independence in conservatorship arrangements "only to the extent necessitated by the incapacitated person's actual mental and adaptive limitations." IDAHO CODE § 15-5304(a) (2023). Likewise, Montana encourages maximum self-reliance "only to the extent that the person's actual mental and physical limitations require it." MONT. CODE ANN. § 72-5-306 (2023).

63. *See e.g.*, *In re* Conservatorship of McQueen, 328 P.3d 46, 48 (Cal. 2014) (demonstrating a case where a conservator was appointed to make decisions for a conservatee's estate only). Some states refer to a guardianship as control over a person's daily affairs, while conservatorships may be referred to when controlling the

nearly forty states have initiated legislative reforms requiring courts to exhaust considerations of least-restrictive alternatives before granting a plenary conservatorship, while others do not.[64] Even when state laws "require" courts to consider least-restrictive alternatives before resorting to conservatorships,[65] legal scholars remark that these reforms have been ineffective because courts are given the discretion to waive, and many courts do waive, consideration of alternatives to conservatorships out of convenience.[66] It goes without saying that conservatorship laws among the states seem to have many different forms and effects.

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person's estate. *See* Rohleder, *supra* note 61, at 795 (explaining the division of personal and financial conservatorships).

64. *See* York, *supra* note 11, at 509 (noting that states began requiring courts to consider limited conservatorships over plenary ones, along with other reforms). "[D]espite good intentions, many states never actually implemented the new reforms. Moreover, when state legislatures enacted conservatorship reforms, they often emasculated those reforms by granting courts broad discretion to waive the new provisions." *Id. Compare* ALA. CODE § 26-2A-105(a) (2023) ("The court shall exercise the authority conferred in this division so as to encourage maximum self-reliance and independence . . . only to the extent necessitated"), *with* DEL. CODE ANN. tit. 16, § 9402A(b)(3) (2023) ("All adults should receive the most effective yet least restrictive and intrusive form of support, assistance or protection"). *See also* BLECHER, *supra* note 10 (providing a list of states whose language in their conservatorship laws require use of only the least restrictive means necessary, while showing that other states implement no such restrictions). ABA Commission on Law & Aging's findings noted that nearly forty states' laws include language which seems to require courts to consider least restrictive alternatives to conservatorships or guardianships, either explicitly or impliedly in their state laws. *Id.*

65. *See, e.g.*, ALASKA STAT. § 13.26.266(c) (2023) ("The court may not assign a duty or power to a guardian unless . . . no *less restrictive alternative* or combination of alternatives is sufficient . . . .") (emphasis added); ARK. CODE ANN. § 28-65-213(c)(1) (West 2023) ("[T]he court shall determine the extent of the incapacity and the feasibility of *less restrictive alternatives* to guardianship to meet the needs of the respondent.") (emphasis added); CAL. PROB. CODE, § 1800.3(b) (West 2023) ("A conservatorship of the person or of the estate shall not be granted by the court unless the court makes an express finding that the granting of the conservatorship is the *least restrictive alternative* needed . . . .") (emphasis added).

66. York, *supra* note 11, at 509 ("[D]espite the obvious benefits of a limited conservatorship for a partially incapacitated adult, many courts still resist using the limited conservatorship. Instead, such courts continue to rely on the more judicially-convenient plenary conservatorship."). Plenary conservatorships are easier to impose because they require less inquiry into an individual's capacity and ability to manage their own affairs. *See id.*

Despite varied state conservatorship laws and policies, the risk of conservatorship abuse is still a prevalent issue.[67] More elders will find themselves forced into conservatorships as the elder population in the United States continues to rise[68]—making conservatorship reform an imminent issue. Yet, even with ongoing exploitation, most state legislatures have not updated their conservatorship laws within the past twenty years to address the instances of ongoing abuse.[69] Additionally, findings from The National Council on Disability's 2018 survey showed that sixty percent of sampled state courts did not perform credit check histories on potential conservators.[70] This study also revealed that forty percent of the sampled courts had not performed criminal background checks on conservators.[71] These findings indicate that the current state of conservatorship laws fails to guarantee that conservatees will be protected from self-interested, exploitive conservators.[72]

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67. *See id.* at 494 (explaining that conservatorships are often imposed where an older individual has lost cognitive ability or suffers from a mental impairment). Modern financial exploitation by conservators has taken on a wide variety of forms including cash withdrawals, taking early inheritance, purchasing vehicles where a conservatee has no ability to drive, and moving into the conservatee's home without his or her permission. U.S. DEP'T OF JUST.: ELDER JUST. INITIATIVE, *supra* note 22, at 26-27.

68. York, *supra* note 11, at 495. The elder population universally is expected to triple between 2020 and 2050. *Ageing and Health*, WORLD HEALTH ORG. (Oct. 1, 2022), https://www.who.int/news-room/fact-sheets/detail/ageing-and-health. People aged sixty-five or older make up the majority of people placed in conservatorships. Kenneth Miller, *What Happens When a Guardianship Gets Contentious*, AARP (Oct. 4, 2018), https://www.aarp.org/caregiving/financial-legal/info-2018/court-ordered-guardianship-separates-family.html.

69. Orzeske & Noel, *supra* note 18.

70. NAT'L COUNCIL ON DISABILITY, *supra* note 17, at 68. Credit check histories can give some insight into how a conservator has been able to manage finances in the past and gauge the risk of financial exploitation of a potential conservatee.

71. *Id.* Criminal background checks reveal a potential conservator's criminal history, including whether the conservator has been convicted of fraud or violent crimes.

72. *Id.* Although conservatorships and guardianships are put in place to protect an individual, these court-appointed arrangements do not offer the protection they often promise. *See id.* Additionally, the protections offered by conservatorships and guardianships risk burdening fundamental freedoms and autonomy. *Id.*

C. The FREE Act: An Attempt to Combat Exploitation in Conservatorships

The Freedom and Right to Emancipate from Exploitation (FREE) Act, a bipartisan federal bill, was introduced in the United States House of Representatives on July 20, 2021, as a direct response to the overwhelming outcry from the Britney Spears conservatorship controversy.[73] The Act is aimed at uniformly protecting the rights of adults deemed legally incompetent and preventing abuse of conservatorships.[74] The Act presents findings of conservatorship and guardianship exploitation and proposes remedies to these issues.[75] Section 2 of the Act lists the requirements for the states.[76] Section 3

73. FREE Act § (3)(a)(6). The Act directly references the Britney Spears situation, pointing out that Britney was unsuccessful in petitioning the court for her conservator's removal. *Id.* On November 1, 2022, the FREE Act was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. *See* Actions of *H.R. 4545 (117th): Freedom and Right to Emancipate from Exploitation (FREE) Act*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/4545/all-actions-without-amendments (last visited May 15, 2024). Many believe the name of the Act—the "FREE" Act—is a "clever nod to the #FreeBritney movement that the pop star herself has embraced." Nina Corcoran, *Lawmakers Introduce Conservatorship Reform Bill Inspired by Britney Spears*, CONSEQUENCE SOUND (July 20, 2021, 4:15 PM), https://consequence.net/2021/07/conservatorship-reform-bill-britney-spears/.

74. *See* FREE Act § 3. The title of section 3 of the FREE Act reads, "Protection of Rights of Legally Incompetent Adults Who Are the Subject of a Legal Guardianship or Conservatorship." *Id.* Rep. Charlie Crist stated that a large reason the bill was introduced was because "[a]busive conservatorships can be an unending nightmare, and tragically we don't know how many people are being held captive against their will under the broken guardianship system . . . ." *Free Act Summary*, *supra* note 8.

75. *See, e.g.*, FREE Act § 3(a)(1)–(2) ("In a November 15, 2019, article, entitled 'Guardian stole more than $500,000 from elderly Pinellas man', the Tampa Bay Times reported on a private guardian who allegedly stole over $500,000 from a ward over 11 months. . . . In an August 2, 2019, article, entitled 'Florida professional guardian Rebecca Fierle: Devoted or dangerous?' the Orlando Sentinel reported on severe cases of alleged adult guardianship fraud and abuse perpetrated by a private guardian, including physical neglect, deliberate isolation of wards from their families, financial exploitation, and using 'do not resuscitate' orders without permission.")

76. *See Id.* § 2(b)(1)–(4), (d), (e)(1)–(5).

lists findings by the legislature which ultimately led to formation of the FREE Act;[77] this section also establishes rights for conservatees.[78]

To demonstrate the grounds behind proposing this bill, the FREE Act first includes alarming findings by Congress and statements about recent guardianship exploitation.[79] Section 3 begins with excerpts from 2019 articles that describe severe cases of alleged financial exploitation and fraud in guardianships.[80] Britney Spears' controversial conservatorship is also explicitly mentioned in Section 3.[81] The Act asserts that many people deemed legally incapacitated by a judge have never even stepped foot in the courtroom.[82] Additionally, the findings included that conservatees often lack authority to replace their conservator.[83] The Act further asserts that current conservatorship laws risk violating conservatees' fundamental rights,[84] and the Act explicitly states that conservatees who cannot petition to replace their conservator are being denied the right to life, liberty, and property under the 14th Amendment—a violation of basic due process.[85]

The Act calls for four steps to prevent conservatorship abuse: (1) issuing grants for the hiring of state-employed caseworkers to aid conservatees should they want to petition for changes to their

77. *Id.* § 3(b)(1)–(2).

78. *Id.* § 3(a)(1)–(10).

79. *Id.* § 3(a)(1), (a)(2). Note that the Act's text references both guardianships and conservatorships, sometimes interchangeably, throughout the entire statute. *See id.* §§ 2, 3. This seems to indicate that the proposed solutions apply in both guardianship and conservatorship cases, alike.

80. *Id.* § 3(a)(2) ("In an August 2, 2019, article, entitled 'Florida professional guardian Rebecca Fierle: Devoted or dangerous?' the Orlando Sentinel reported on severe cases of alleged adult guardianship fraud and abuse perpetrated by a private guardian, including physical neglect, deliberate isolation of wards from their families, financial exploitation, and using 'do not resuscitate' orders without permission.").

81. *Id.* § 3(a)(6) ("Pop icon Britney Spears has unsuccessfully petitioned the judicial system to remove her father as her conservator for years.").

82. *Id.* § 3(a)(4).

83. *Id.* § 3(a)(5).

84. *Id.* § 3(a)(9). This section of the Act states that the allegations of guardianship exploitation discussed at the beginning of section 3 and Britney Spears' inability to free herself from her father's control show that conservatorship laws risk depriving individuals of liberty and property. *Id.*

85. *Id.* § 3(a)(10). *See also In re* Richard S.H., 178 N.Y.S.3d 401, 404 (Sur. Ct. 2022) (explaining that "guardianship is plenary, resulting in a total deprivation of an individual's liberty").

conservatorship;[86] (2) requiring annual reports of the number of conservatorships in each state and maintaining a database of registered conservatorships;[87] (3) allowing conservatees to petition for an alternative state employee to be their conservator without having to prove wrongdoing by the previously assigned conservator;[88] and (4) assuring the right of the conservatee to bring a private action against conservators.[89] Florida Representative Charlie Crist, sponsor of the FREE Act, stated that the caseworkers would also be available to monitor for signs of conservatorship abuse and advise conservatees of their rights;[90] the Act allocates $160,000,000 for states to hire such caseworkers.[91]

The FREE Act eventually got swept aside because it did not gain enough traction in Congress.[92] However, an unenacted bill or its provisions could be used as a baseline and reintroduced later on as an amended bill.[93] Here, with so many members of Congress expressing bipartisan support for the "Free Britney" movement,[94] it is likely that a new bill, which provides for better protections against conservatorship exploitation, could garner more support in Congress in the near future.

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86. *Id.* § 2(d).

87. *Id.* § 2(e).

88. *Id.* § 3(b)(2).

89. *Id.* § 3(c).

90. *Free Act Summary*, *supra* note 8.

91. FREE Act § 2(f)(1)(A).

92. *Free Act Summary*, *supra* note 8. Federal conservatorship reform like the FREE Act often has difficulty gaining traction because of the "hodge-podge nature of conservatorship laws" across nation, indicating that conservatorship law is a hotly debated issue. Rachel Tillman, *What's Next in Britney Spears' Conservatorship Case?*, SPECTRUM NEWS 1 (Aug. 6, 2021, 11:56 AM), https://spectrumlocalnews.com/nys/central-ny/news/2021/07/30/britney-spears-conservatorship-case-legal-expert.

93. *See Free Act Summary*, *supra* note 8.

94. *See id.* ("[I]t had not yet attracted any other cosponsors since — perhaps surprising, considering the widespread bipartisan support for Spears' case that members of Congress have expressed in interviews."). South Carolina Representative Nancy Mace expressed her views that Britney's conservatorship was a nightmare that could happen to any conservatee. Claire Lampen, *Even Congress Wants to Free Britney*, THE CUT (July 20, 2021), https://www.thecut.com/2021/07/congressional-legislation-could-help-free-britney.html.

D. Supported Decision-Making: An Autonomous Alternative to Conservatorships

One alternative to conservatorships which has become increasingly popular but is still only legislated by a minority of states is "Supported Decision-Making," ("SDM").[95] In essence, SDM is "a series of relationships, practices, arrangements, and agreements . . . designed to assist an individual" in forming, communicating, and carrying out his or her own decisions.[96] An individual otherwise subject to a conservatorship (the "decision-maker") avoids conservatorship by forming an SDM agreement with assistive people ("supporters") of his or her choosing.[97] SDM is therefore a least-restrictive alternative to conservatorships because SDM strips away as little decision-making rights from an individual as possible.[98] The policy behind SDM seeks to preserve autonomy over one's personal life choices, which conservatorships inherently strip away.[99]

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95. Texas was the first state to formally introduce SDM into state law in 2015. Eliana J. Theodorou, *Supported Decision-Making in the Lone Star State*, 93 N.Y.U. L. REV. 973, 974 (2018). Other states have similarly adopted SDM alternatives into their laws, including Washington D.C., Wisconsin, and Delaware. *Id*. at 977. Close to twenty states have enacted SDM into law. *See, e.g.*, H.B. 39, 84th Leg., Reg. Sess. (Tex. 2015) (being the first enacted state statute legislating SDM); DEL. CODE ANN. tit. 16, § 9405A (West 2016); H.B. 1378, 68th Leg. Assemb. (N.D. 2023); *see also* David M. English, *Supported Decision-Making in the US: History and Legal Background*, SPECIAL NEEDS ALLIANCE: THE VOICE (Aug. 2022), https://www.specialneedsalliance.org/the-voice/supported-decision-making-in-the-us-history-and-legal-background/ (noting that approximately twenty states have enacted SDM).

96. Dinerstein, *supra* note 42, at 10.

97. *See In re* Guardianship of Dameris L., 956 N.Y.S.2d 848, 854 (Sur. Ct. 2012) (referencing, in dicta, examples of potential supporters in a decision-maker's community, such as "family, friends and mental health professionals"). The individual otherwise subject to conservatorship is often called the *decision-maker* by legal scholars. *See* Nina A. Kohn, *Legislating Supported Decision-Making*, 58 HARV. J. ON LEGIS. 313, 320 (2021) (providing an example of a legal scholar using the phrase "decision-maker" to refer to a person who would be otherwise subject to conservatorship).

98. *See* Kohn & English, *supra* note 29, at 226 (noting that least-restrictive alternatives let an individual retain as many decision-making rights as possible, which conservatorships inherently strip away).

99. *See Dameris L.*, 956 N.Y.S.2d at 856 (recognizing that SDM preserves the internationally recognized right to use one's own legal capacity to the fullest extent

SDM is flexible and does not look the same for every decision-maker. As SDM practices have developed, courts have recognized in dicta that chosen support systems may take on a variety of forms to better suit each decision-maker's situation.[100] While one decision-maker might prefer one single, trusted supporter, another may want a few supporters to provide assistance in specific ways.[101] Similarly, a decision-maker may ask one supporter to assist in making and carrying out financial decisions and ask another supporter to assist in daily lifestyle and health decisions.[102] Thus, a decision-maker decides who will offer support and what kind of support that will be—making SDM a flexible alternative, able to conform to many situations.

Support itself may also take different forms depending on what is desired by the decision-maker and what is ultimately included in the

possible, even if support is needed in order to do so); *In re* Grace J., 176 N.Y.S.3d 450, 455 (Sur. Ct. 2022) (acknowledging that SDM practices essentially require third parties to "recognize [the decision-maker's] decisions on the same basis as others[,]" rather than disregard them just because the decision-maker needs support); *In re* D.D., 19 N.Y.S.3d 867, 875 (Sur. Ct. 2015) (noting that SDM avoids surrogate decision-making—thus, preserving autonomy); Costanzo et al., *supra* note 34, at 103–04 (2022) (noting that surrogate decision-making arrangements strip individuals of the "legal mechanisms necessary to express their will and preferences through decision-making."); Sean Burke, *Person-Centered Guardianship: How the Rise of Supported Decision-Making and Person-Centered Services Can Help Olmstead's Promise Get There Faster*, 42 MITCHELL HAMLINE L. REV. 873, 878 (2016).

100. *See, e.g.*, *Dameris L.*, 956 N.Y.S.2d at 854 (demonstrating where a court noted the importance of analyzing the availability of a support, such as friends, family, or mental health professionals, before imposing a guardianship). *See also* Kristen B. Glen, *Piloting Personhood: Reflections from the First Year of a Supported Decision-Making Project*, 39 CARDOZO L. REV. 495, 510 n.81 (2017) (providing examples of different ways SDM circles of support can function, centered around what a decision-maker wants). For example, one decision-maker may want supporters who meet with them face-to-face, while another decision-maker may want many different supporters who just contact them via instant messaging for phone. *Id.*

101. *See* Kohn, *supra* note 97, at 316 ("[A]ssistance [in SDM] may include help with obtaining information relevant to a decision, explaining issues, identifying and analyzing options, interpreting words or behavior to determine the individual's preferences, and communicating decisions once made."); Glen, *supra* note 100, at 510 n.81 (explaining that some decision-makers may want their supporters to either work together, work separately with the decision-maker in certain areas of the decision-maker's life, or come together as a group for very important decisions).

102. Burke, *supra* note 99, at 882.

agreement.[103] Expectations and requirements of supporters in formal SDM arrangements are set forth in the formal agreement between the decision-maker and the supporter.[104] A decision-maker ultimately dictates the areas and methods of assistance in the formal agreement.[105] The supporter is given notice of these expectations established in a formal SDM agreement and thus has the opportunity to voice concerns and seek adjustments to the agreement before agreeing to offer support.[106]

The decision-maker's situation and desires will also dictate whom he or she chooses as a supporter.[107] Supporters in SDM agreements can consist of trusted family members, professionals, or other third parties who assist in the decision-making process.[108] Many

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103. Kohn, *supra* note 97, at 317.

104. *Id.* Formal agreements are typically tangible, written contracts that identify the supporter and the decision-maker, explain the scope of the agreement, note the consent of the parties, include witness and notary signatures, and discuss repercussions of breaking the fiduciary duty identified in the agreement. *See* Sample of *Supported Decision-Making Agreement*, DISABILITY RTS. TEXAS, https://disabilityrightstx.org/wp-content/uploads/2019/06/Supported-Decision-Making-Agreement-Revised-2018-RL.pdf (last visited Mar. 31, 2023) (providing an example of a formal SDM agreement contract). While informal SDM agreements are not memorialized by a tangible writing, unlike formal SDM agreements, they nonetheless set forth an enforceable agreement between the decision-maker and the supporter.

105. *See Dameris L.*, 956 N.Y.S.2d at 856 (making a distinction between supported decision-making and substituted decision-making). Ultimately, a supporter should aid in "assisting and supporting [the decision-maker's] autonomy, not superseding it."). *Id.*

106. *See* Kohn, *supra* note 97, at 317 (discussing the practical benefits of formal SDM agreements). A formal, written SDM agreement provides an opportunity for dialogue between the decision-maker and the supporter regarding expectations of support. *Id.*; *see also* Anna-Drake Stephens, *"Don't You Know That You're Toxic?" A Look at Conservatorships Through the #FREEBritney Movement*, 45 L. & PSYCH. REV. 223, 232 (2021) (noting that less than twenty percent of sampled courts were found to have provided conservators notice of their duties under a conservatorship).

107. Kohn, *supra* note 97, at 317.

108. *See In re* Eli T., 89 N.Y.S.3d 844, 848–49 (Sur. Ct. 2018) (reasoning that a plenary guardianship should not be imposed where the decision-maker had readily available support from family and professional services). *See also Dameris L.*, 956 N.Y.S.2d at 855 (holding that the decision-maker's family were sufficient supporters to aid in the decision-maker in forming and executing her own decisions in light of her intellectual disability).

SDM agreements have been successfully made with a trusted loved one whom the decision-maker was already communicating with on a regular basis.[109] A close family member or friend may be particularly desirable to take on the role of a supporter because these people may already be familiar with the decision-maker's personal wants and goals.[110] Although a decision-maker retains discretion to choose his or her supporters, these supporters must be available and willing to participate in the SDM agreement.[111]

There are many reasons why SDM may be a desirable alternative to a conservatorship. For example, SDM may be useful when a decision-maker is experiencing the early stages of progressive memory loss, and he or she wants to make important plans for their future care while they still can.[112] In this case, SDM preserves the decision-maker's control of his or her own healthcare and financial decisions[113] so that supporters can help carry out and communicate

109. *See, e.g.*, *Eli T.*, 89 N.Y.S.3d at 848–49 (holding that the decision-maker maintained strong support from family members and was successfully engaging in SDM); *see also* Kohn, *supra* note 97, at 353 (noting that many people have family and friends who can serve as supporters). Although supporters are often referenced as family and friends, it has been noted as being possible to form an SDM agreement with professionals or other volunteers. *Id.* at 354. Although a lack of close relationships may prevent consideration of SDM, it is not entirely impossible. *Id.* at 353–54.

110. *Eli T.*, 89 N.Y.S.3d at 848–49.

111. *See In re* Guardianship of Michelle M., No. 2014, 2016 WL 3981204, at *12 (Sur. Ct. 2016) (demonstrating a court's least-restrictive alternative analysis, which included an inquiry into the availability of resources to assist a decision-maker, including supporters willing and able to participate in an SDM arrangement such as a support network of family or other supportive services).

112. *See* Lauren Padama, Note, *Informed Consent and Decision-Making After Loss of Competency in Dementia Patients: A New Model*, 28 S. CAL. INTERDISC. L.J. 173, 200 (2018) (explaining that individuals with cognitive-degenerative diseases such as Alzheimer's or Dementia disease may use SDM agreements before their condition progresses further). Before people with memory or cognitive-declining diseases reach the point of incapacity, such people may want to plan for their future medical and personal care. *Id.* Such decisions may be largely personal and important to the individual. Further, individuals with memory-loss conditions may be able to utilize their supporters to discuss and convey these wishes to third parties. *Id.*

113. *See id.* at 200 (noting that a person experiencing early Alzheimer's may be able to utilize SDM to plan for the later stages of their disease when they may lose their decision-making capacity).

these decisions when the decision-maker's mental capacity eventually declines.[114] Individuals with enduring developmental or neurodivergent disorders, such as autism, may similarly benefit from SDM.[115] Someone diagnosed with autism may experience difficulties communicating but are nonetheless competent to make decisions for themselves.[116] In this case, some courts have recognized that supporters can help the decision-maker communicate his or her decisions and see them into fruition.[117] SDM is thus versatile and could likely help avoid conservatorships for decision-makers with other kinds of disabilities or enduring conditions such as Post Traumatic Stress Disorder (PTSD), schizophrenia, or Substance Use Disorder.[118]

SDM may not be feasible in some cases—making conservatorships unavoidable for completely incapacitated individuals. For example, some courts have recognized that a decision-maker with a severe cognitive disability may be unable to participate in SDM if the decision-maker is totally incompetent or cannot understand the SDM arrangement.[119] Because SDM agreements center around the decision-

114. *Id.* at 200–01 (2018). By using supporters in the early stages of memory-loss diseases, supporters can remain informed of the patient's wishes until that person becomes incapacitated and is ineligible under SDM to communicate their preferences. *Id.*

115. *See, e.g.*, Estate of Simone A., 2020 NYLJ LEXIS 1604 (N.Y. Sur. Ct. Oct. 23, 2020) (providing an example of a person with autism who was able to benefit from SDM as opposed to a conservatorship or guardianship).

116. *See id.* at *7 (noting that, although Simone experienced some difficulties communicating, she nonetheless possessed decision-making capacity).

117. *See, e.g.*, *id.* at *17 (holding that it was in Simone's best interest to remain in a SDM agreement, rather than substituted decision-making agreement, because supporters could help Simone make and communicate her decisions in light of her autism).

118. Decision-makers with other kinds of enduring disabilities, cognitive impairments, and other conditions would, however, need to be able to drive their own decisions in order to participate in SDM. *See In re* Grace J., 176 N.Y.S.3d 450, 456 (Sur. Ct. 2022) (holding that the decision-maker in question demonstrated enough capacity to be able to retain the right to her autonomous decision-making rights).

119. *See, e.g.*, Guardianship of A.E., 552 S.W.3d 873, 888 (Tex. App. 2018) (holding that that the potential decision-maker in question was unable to participate in SDM because there was overwhelming evidence establishing that she was incapacitated). The court reasoned that because she was wholly unable to make "important life decisions for herself," she would not be able to participate in SDM. *Id.* at 889.

maker's wants and not the wants of their supporters,[120] an incapacitated decision-maker does not have the capacity to drive their own decisions.[121] Thus, SDM will not work in some situations if a decision-maker has a condition that renders him or her unable to drive their own decisions, even with the use of supportive aids.

However, SDM arrangements, when feasible, avoid stripping away control from an individual who still maintains decision-making capacity, even if support is necessary to make those decisions.[122] SDM thus keeps the decision-maker in control over his or her own finances. Although SDM may not work for wholly incapacitated individuals, SDM offers a flexible alternative to conservatorships and can take different forms. Despite the recognized advantages of SDM arrangements[123] and the fact that many state laws require courts to consider least-restrictive alternatives to conservatorship,[124] there is no uniform requirement that courts consider SDM as an alternative to conservatorships or guardianships.[125]

III. IMPLICATIONS OF THE FREE ACT AND SUPPORTED DECISION-MAKING

This Section will discuss the ways in which the FREE Act and SDM provide remedies and protections to conservatorship exploitation, as well as the faults of each approach. The FREE Act guarantees more remedies to conservatees to remedy financial exploitation. Yet,

120. *Id.* at 890.

121. *Id.* (noting that SDM requires the decision-maker be able to take control of the final decision; SDM prohibits the supporter from ultimately making any decisions).

122. *In re* Guardianship of Dameris L., 956 N.Y.S.2d 848, 855 (Sur. Ct. 2012).

123. *See* discussion *supra* Section II.D (discussing how many courts see the advantages of SDM as preserving autonomy and offering a viable alternative to conservatorships).

124. *See* BLECHER, *supra* note 10 (noting that most state laws require courts to exhaust consideration least restrictive alternatives to conservatorship before implementing a conservatorship). Although many states require courts to exhaust least-restrictive alternatives before implementing a conservatorship, not all states have expressly legislated SDM. *Id.*

125. Burke, *supra* note 99, at 892. "[A]s supportive decision-making grows as an alternative, it remains to be seen if jurisdictions will modify statutes to require supportive decision-making as an alternative[.]" *Id.*

conservatees will face practical difficulties in accessing and making use of these remedies, such as (1) declining competency and physical health due to illnesses, aging, or disabilities;[126] (2) devastating financial harm when, and if, such harm is detected;[127] and (3) no alternatives to avoid surrogate decision-making arrangements, such as conservatorships, in the first place.[128] Alternatively, SDM proactively prevents financial exploitation by avoiding surrogate financial decision-making.[129] Even so, without federal oversight and protection of SDM arrangements, SDM may be subject to similar exploitation as conservatorships.[130]

A. The FREE Act's Implications

The FREE Act undoubtedly proposes more remedies for conservatorship exploitation than most state conservatorship laws across the nation;[131] however, such remedial solutions do not always curtail exploitation because these solutions only place a band-aid on damage after a conservatee has faced financial harm. The Act provides what many have been asking for—remedies for exploited conservatees

126. *See* Taylor Lemick, Note, *Society's Response to the "Invisible" Abuse of Elders: Understanding and Addressing the Financial Abuse of Society's Most Vulnerable Citizens*, 23 ELDER L.J. 151, 156 (2015) (noting that financial abuse of elders is often uncovered long after there is anything to do to stop the abuse).

127. *See, e.g.*, *In re* Estate of Roosen, No. 282979, 2009 Mich. App. LEXIS 1497, at *6 (Mich. Ct. App. July 9, 2009) (noting that the court was not timely notified of the conservatee's death, and it took a third-party action to for the $300,000 purchase in question to be returned to the estate); *see also* NAT'L CTR. FOR STATE CTS, BRIEF NO. 1, EXAMPLES OF CONSERVATOR EXPLOITATION: AN OVERVIEW 1 (2018), https://www.eldersandcourts.org/__data/assets/pdf_file/0017/5822/ovc-brief-1.pdf (noting that a conservatee's estate may be "plundered" before financial exploitation is detected).

128. *See generally* FREE Act (providing only remedial measures to conservatorship exploitation).

129. Dinerstein, *supra* note 42, at 10.

130. *See Free Act Summary*, *supra* note 8 (noting that Rep. Charlie Crist, sponsor of the FREE Act, stated in an interview that "we need federal safeguards to protect persons under guardianship from abuse and exploitation").

131. *See, e.g.*, FREE Act § 3(b)(2) (allowing a conservatee to petition for a replacement conservator or guardians who is an employee of the state, rather than a non-state employee).

at the federal level.[132] Under the current Act, conservatees would have the much-needed private right of legal action against exploitive conservators[133] and the ability to petition the court to replace exploitive conservators with a neutral third party of the State.[134] The Act allocates funding for caseworkers to potentially serve as monitors for signs of exploitation and abuse in conservatorships.[135] While the Act's remedies can help rectify exploitation, remedying harm after it has already occurred will be a difficult and devastating task for many conservatees.

Although a conservatee may replace and commence an action against their exploitive conservator under the Act,[136] catastrophic financial harm may have already been occurring for many years.[137] One study funded by the Department of Justice's Office for Victims of Crime found that "[i]n many cases of exploitation, the estate [is] plundered prior to detection of the problem itself or before authorities with the power to intervene [are] notified."[138] Further, there is no guarantee that the Act's proposed caseworkers will be able to discover exploitive conservators before financial harm reaches a devastating point.[139] Thus, these remedies do not proactively prevent conservators from exploiting the power granted to them by the conservatorship.

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132. *See id.* § 3(a)(1)–(2) (listing recent articles regarding instances of guardianship exploitation); Lemick, *supra* note 126, at 176 ("Elder financial abuse is a complex problem that spans nationwide. Addressing the issue at various state levels may likely not be enough to effectively combat the growing exploitation elders encounter. For the most effective systems and procedures to be put in place, support and guidance at the federal level is a must.").

133. FREE Act § 3(c).

134. *Id.* § 3(b)(2).

135. *Id.* § 2(f)(1)(A).

136. *Id.* § 3(b)(2), 3(c).

137. *See, e.g.*, *In re* Estate of Roosen, No. 282979, 2009 Mich. App. LEXIS 1497, at *5–6 (Mich. Ct. App. July 9, 2009) (providing an example where a third-party had to step in after a conservatee's death to remove a conservator who made a $300,000 purchase with the conservatee's estate); *see also* NAT'L CTR. FOR STATE CTS, *supra* at note 127, at 1. (noting that an estate may be greatly harmed before the harm is found out).

138. NAT'L CTR. FOR STATE CTS, *supra* at note 127, at 1.

139. *Id.* (noting that a conservatee's estate may be "plundered" before financial exploitation is detected). Because caseworkers cannot realistically be constantly monitoring a conservator's actions, there is no guarantee that caseworkers will be able to detect the exploitation and fraud of surrogate decision-makers.

Additionally, if a conservatee discovers financial exploitation, the obstacles of daunting court processes and the declining age or competence of the conservatee may make rectifying injuries under the FREE Act arduous.[140] To illustrate, of the 1.3 million adult Americans in conservatorships, around eighty-five percent of conservatees are over the age of sixty-five.[141] Many conservatees are disabled or declining gradually in physical health or mental capacity—making the length and difficulties of court processes to rectify harm a substantial obstacle for many conservatees.[142] Conservatees that are declining in physical health may even die before they or another loved one are able to detect exploitation by conservators.[143] Further, conservatees who become victims of financial harm risk being exploited again after they are appointed another conservator because conservatorships are usually permanent arrangements and alternatives to conservatorships are not contemplated in the current FREE Act.[144]

While the FREE Act contains many useful remedies to exploitation, there is still a need for proactive prevention of both financial exploitation and irresponsible surrogate decision-making on the front end.[145] Although the FREE Act did not proceed for further consideration,[146] this will likely not be the end of legislating protections

140. *See* Lemick, *supra* note 126, at 156 (noting that, as conservatees are often elderly people, these victims may be unable to take action to remedy financial exploitation within their lifetimes).

141. Miller, *supra* note 68.

142. *See* Lemick, supra note 126, at 156 (noting that "[b]ecause most elders are unaware of this financial abuse, the results are overwhelming, damaging and often irreversible" within the lifetime of the conservatee).

143. *See, e.g.*, *In re* Estate of Roosen, No. 282979, 2009 Mich. App. LEXIS 1497, at *4 (Mich. Ct. App. July 9, 2009) (providing an example where a conservatee died before a conservatee's $300,000 transaction was returned to the estate).

144. *See* Stephens, *supra* note 106, at 226 ("A conservatorship is usually permanent but can be amended or terminated."). Conservatorship arrangements are generally difficult arrangements to end. *See id.* at 231–32.

145. *See* Free Britney L.A. (@freebritneyla), TWITTER (July 20, 2021, 2:00 PM), https://twitter.com/freebritneyla/status/1417559979486187521 (last visited Nov. 12, 2023) (tweeting that the Free Britney L.A. movement cannot support the current state of the FREE Act because it is a "legislation that [still] empowers professional guardians").

146. *See Free Act Summary*, *supra* note 8 (providing that the FREE Act was not passed because it did not have enough support). The Act did not go to the Floor for voting. *Id.*

for conservatees at the federal level. The Act's current provisions could be changed, added to, and reintroduced later on as an amended bill.[147]

B. Supported Decision-Making Implications

SDM agreements are flexible[148] arrangements that have become increasingly used in place of traditional conservatorships and guardianships at the state-level.[149] Many courts have recognized that SDM avoids unnecessary conservatorships where a decision-maker could continue to make their own decisions with the assistance of supporters.[150] Thus, SDM directly aligns with the majority view among the states, which requires least-restrictive alternatives prior to imposing a conservatorship.[151] With an SDM agreement in place, a decision-maker has the final say over his or her own financial decisions, even if the assistance of personally chosen supporters is necessary to help make or carry out those decisions.[152] SDM thus better

147. *See id.*

148. The expansion of SDM in different states has led to a national recognition that each decision-maker may need a personalized arrangement for their specific situation, making SDM a flexible alternative to conservatorships. *See In re* D.D., 19 N.Y.S.3d 867, 875 (Sur. Ct. 2015) (explaining how SDM in D.D.'s case functioned with an informal support network, rather than a formal agreement). These variations have included arrangements anywhere from informal support systems within an individual's personal circle of loved ones to formal, contractual agreements with family members or professionals. *Id.*

149. *See* Blecher, *supra* note 10.

150. *See, e.g.*, *In re* Dameris L., 956 N.Y.S.2d 848, 856 (Sur. Ct. 2012) (recognizing that SDM arrangements should continue where substituted decision-making can be avoided). Sometimes, an individual may not necessarily need a conservatorship yet, or they may not need one at all. *See* Kohn, *supra* note 97, at 314 ("Supported decision-making is a process by which an individual who might otherwise be unable to make his or her own decisions becomes empowered to do so through support from others."). Avoiding unnecessary conservatorships better prevents financial abuse by removing third-party financial decision-making.

151. *See* discussion *supra* Section I, note 29 (introducing and defining least-restrictive alternatives).

152. *See*, *In re* Dameris L., 956 N.Y.S.2d at 856 (recognizing a right to exercise one's own legal capacity and how a decision-maker in SDM is able to make his or her own choices, with the help of supporters).

prevents opportunistic surrogate decision-makers from exploiting these arrangements because the decision-maker is the only individual with final authority over his or her own assets.[153]

Skeptics of SDM question if these arrangements can realistically provide any more protection from financial exploitation than can traditional conservatorships.[154] These critics often contend that decision-makers may still be at risk of undue influence or manipulation by supporters who want to exploit the arrangement for their own benefit.[155] Legal scholars have noted that most state statutes legislating SDM do not account for "meaningful check[s]" on SDM agreements.[156] Because decision-makers are typically elderly or may experience cognitive or intellectual disabilities,[157] critics of SDM argue that these vulnerable populations are particularly at risk of being taken advantage of by supporters.[158] Thus, while many advocate for SDM as a safeguard against exploitation,[159] the counterargument is that

153. *See Supported Decision-making: Why the Right to Make Choices with Support Matters*, ASAN, https://autisticadvocacy.org/actioncenter/issues/choices/sdm/ (last visited Mar. 26, 2023) (explaining that, even if a decision-maker needs a lot of support, the policy of SDM protects the right of the decision-maker to make their own choices).

154. *See* Padama, *supra* note 112, at 194 (discussing how the risks of exploitation associated with surrogate decision-making arrangements are still present in SDM). "Given the frequent discussions between the patient and the supporter, a patient may come to adopt the views of the supporter, even if it contradicts the patient's true preference." *Id.* Alternatively, supporters may impose their own views on the decision-maker so that the decision-maker makes otherwise ill-advised choices in favor of the supporter. *Id.*; *see also* Kohn, *supra* note 97, at 335 (arguing that SDM and surrogate decision-making essentially leaves someone exposed to the exact same risks).

155. *See* Kohn, *supra* note 97, at 335.

156. *Id.*

157. *See* discussion *supra* Section III.A.

158. *See* Kohn, *supra* note 97, at 335 ("By giving legal status to supporters, [state] statutes provide supporters with new tools that can be used to control and exploit individuals with disabilities."). "For example, a person named as a supporter could, acting in bad faith, insist that third parties act on 'decisions' that benefit the supporter, financially or emotionally." *Id.*

159. *See id.* (noting that many SDM advocates suggest replacing surrogate decision-making arrangements with SDM, in light of anti-autonomous arrangements).

unmonitored SDM agreements might leave decision-makers prone to the same exploitation as conservatorships.[160]

However, formal agreements generally safeguard against exploitation by explicitly requiring supporters to agree to enumerated duties as contractual fiduciaries.[161] Formal agreements are written contracts that put supporters on notice of their duties and are the safest and most desirable method of protection, as opposed to informal agreements.[162] To further rebut the skepticism of SDM, a pilot study of SDM arrangements showed that sampled decision-makers "reported that their preferences and decisions were respected," and participants were not financially exploited or abused.[163] The study focused on seventy-two decisions in which SDM was utilized.[164] Decision-makers expressed overwhelming consensus that their wishes were respected, partially because they felt they were given the chance to carefully choose their supporters.[165]

Yet, SDM agreements are not flawless. As discussed above, SDM procedures do not require access to monitors for abuse; nor does SDM generally provide accessible resources to decision-makers for guidance on how to modify the SDM agreement.[166] Results of SDM

160. *See id.* (arguing that SDM agreements and traditional conservatorships and guardianships are essentially the same thing in terms of risk of exploitation).

161. *See* Donna S. Harkness, *Supported Decision Making: The Missing Piece in the Puzzle of Planning for Clients with Diminished Capacity*, 54 TENN. BAR J. 19, 22 (2018); Megan S. Wright, *Dementia, Autonomy, and Supported Healthcare Decisionmaking*, 79 MD. L. REV. 257, 288 (2020) (explaining that many state's SDM laws such as those from Texas and the District of Columbia confine the supporter's powers to only those authorized in the express SDM agreements).

162. *See Supported Decision-making*, *supra* note 153. A written SDM agreement puts supporters on notice of their duties because a written enumerates such duties. *See supra* note 104 and accompanying text.

163. Costanzo et. al., *supra* note 34, at 121 (noting that participants in a SDM pilot study found that being involved in their own decisions with personally selected supports made them feel that they were at a decreased risk of financial exploitation and abuse).

164. *Id.*

165. *Id.*

166. *See* Padama, *supra* note 112, at 194 ("Given the frequent discussions between the patient and the supporter, a patient may come to adopt the views of the supporter, even if it contradicts the patient's true preference. There are no protections against this; even a well-intentioned supporter may unduly influence the patient without any additional oversight or guidance from a detached third party."). Decision-

studies so far show that SDM agreements provide greater protection against exploitation because decision-makers retain ultimate control over their financial decisions.[167] However, without formal court oversight, these agreements arguably still give supporters a convenient avenue to take advantage of SDM.[168]

In sum, the FREE Act provides much-desired remedies for conservatorship abuse at the federal level and potential caseworkers to monitor for abuse. However, the Act's remedial approach may pose great difficulties for elderly, ill, or disabled conservatees. Further, the Act fails to contemplate alternatives to a conservatorship. Alternatively, SDM prevents surrogate financial decision-making, which ultimately bars conservators from exploiting a conservatee. However, critics of SDM point out that SDM and conservatorships are inherently subject to the same risks of exploitation, and both need more federal oversight. Despite their individual shortcomings, the Free Act and SDM can work in conjunction to prevent conservatorship abuse.

IV. SOLUTION: PROPOSAL FOR AMENDING THE FREE ACT

The best resolution to prevent exploitation in conservatorships is to federally mandate state courts to consider least-restrictive alternatives, including SDM specifically, and combine the protections of SDM with the FREE Act's current remedies in an additional section of the FREE Act. Both the Act and SDM have their own flaws, but each is capable of addressing the shortcomings of the other.[169] This solution prevents exploitation because SDM is a least-restrictive

makers may thus feel trapped in unproductive or exploitive SDM agreements, absent third-party monitoring or resources to change the agreement independently.

167. Costanzo et. al., *supra* note 34, at 121.

168. *See* Burke, *supra* note 99, at 885 ("Because [SDM] relies on contractual-type agreements without court oversight, supported decision-making may elicit the same general criticisms unless it can prove that it is more effective than other strategies at helping individuals and their support networks identify exactly what an elder wants."). Some view SDM as basically the same thing as conservatorship without a declaration of incapacity, leaving the decision-maker exposed to the same risks as conservatorship. *See, e.g.*, Padama, *supra* note 112, at 194.

169. *See supra* Section III (discussing the disadvantages of the FREE Act and SDM, as well as the advantages of both); s*ee also* discussion *infra* Section IV.A (addressing the ways in which the FREE Act and SDM have advantages that make up for the faults of the other).

alternative that ultimately avoids conservators' access to finances in the first place,[170] and the Act provides for accessible caseworkers and a private right of action to ensure that SDM's protections are unwavering. This Note proposes a model amendment to the Act that (1) explicitly requires courts to consider least-restrictive alternatives; (2) explicitly requires courts to consider SDM and provides courts with a feasibility analysis to determine if SDM is viable in any case; and (3) applies the current remedies of the FREE Act to SDM agreements. Legislators are encouraged to utilize this model amendment in redrafting the FREE Act in a second attempt to protect conservatees and legislate SDM as an alternative to conservatorships at the federal level.

A. Incorporating SDM into the FREE Act: The Rationale

Amending the FREE Act to mandate least-restrictive alternatives such as SDM, while utilizing the existing remedies and safeguards proposed by the Act,[171] is the best solution to curb financial exploitation in conservatorships. Namely, there are three ways this solution prevents exploitation: (1) uniformly requiring state courts to consider least-restrictive alternatives—specifically SDM—before implementing a conservatorship at the federal level;[172] (2) providing for explicit remedial measures for exploitation of an SDM arrangement; and (3) eliminating unfettered third-party access to finances by having the Act's caseworkers monitor for exploitation. Although the FREE Act and SDM each contain flaws, each approach makes up for the flaws of the other when operating together.

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170. *See* discussion *supra* Section III.B (explaining that SDM requires an individual in question to remain as the final decision-maker of his or her own finances).

171. FREE Act § 3(b), 3(c).

172. This solution requires state courts to exhaust considerations of SDM before implementing surrogate decision-making arrangements such as conservatorships and guardianships. By using the model legislation proposed by this Note, current conservatees may likely start to petition for an SDM arrangement rather than their current conservatorship. It is the position of this Note that the best way to resolve such actions is to keep these kinds of individual cases at the state level so as not to overcrowd federal courts.

As previously discussed, the FREE Act provides for many useful remedies to exploitation.[173] However, the current remedial approach to financial harm in the Act fails to actively prevent exploitation. Although the Act's purpose is to prevent exploitation, it fails to do so when it does not contemplate least-restrictive alternatives to often-exploited conservatorships.[174] Although the Act's broad approach is not preventative in nature, the Act does provide for a tool absent in most SDM agreements: a third-party caseworker who can monitor for exploitation and provide assistance in communicating with a court to enforce one's own rights.[175]

SDM, in turn, avoids often-exploited conservatorships and keeps a decision-maker in control of his or her financial decisions.[176] As a result of electing against unnecessary conservatorships, exploitive conservators are denied access to a decision-maker's finances on the front end.[177] Yet, SDM agreements alone fail to completely protect against exploitation because most SDM agreements do not provide for accessible monitors for abuse.[178] SDM agreements also do not generally designate third-party caseworkers to assist decision-makers

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173. *See* discussion *supra* Section II.C (explaining the remedies afforded under the FREE Act).

174. *See* discussion *supra* Section III.A (discussing how the FREE Act generally takes a remedial approach to exploitation; thus, the Act does not take measures to prevent exploitation).

175. *See* discussion *supra* Section II.C (discussing how the FREE Act's caseworkers serve the purpose of acting as a protective safeguard against exploitation).

176. *See* discussion *supra* Section II.D (discussing how SDM functions to prevent a third-party from making decisions for a decision-maker); *In re* Guardianship of Dameris L., 956 N.Y.S.2d 848, 855–56 (Sur. Ct. 2012) (holding that a person who can engage in SDM should not be subject to "substituted decision making" measures); *Supported Decision-making*, *supra* note 153 ("Supporters do not make choices for you. You make all your own choices. They just help.").

177. *See In re* Eli. T., 89 N.Y.S.3d 844, 849 (Sur. Ct. 2018) (holding that the decision-maker in question retains the right to make their own personal decisions when they are able to participate in supported-decision making); Kohn, *supra* note 97, at 314 (explaining that allowing individuals to make financial decisions for themselves avoids restrictions on autonomous decision-making and court-authorized surrogate decision-making).

178. Kohn, *supra* note 97, at 335 (noting that state statutes of SDM agreements do not provide for "meaningful check[s]" on SDM agreements).

with court processes to rectify harm—which the FREE Act, in turn, does provide. Thus, both the Act and SDM possess flaws when operating individually. Accordingly, the solution proposed by this Note protects against financial exploitation by making SDM a recognized alternative to conservatorships at the federal level and applying the Act's remedies and caseworker monitors to SDM[179]—bolstering the protections of SDM even further.

Incorporating SDM into the FREE Act is directly in line with what the Act seeks to accomplish: better protection against financial exploitation by conservators.[180] To illustrate, the FREE Act's inclusion of alarming findings show that conservatorship exploitation is a prevalent concern across the nation.[181] The Act itself explicitly seeks to protect the liberty and property rights guaranteed to U.S. citizens under the Due Process Clause of the 14th Amendment.[182] SDM is directly harmonious with this goal because SDM avoids stripping an individual's liberty rights by preventing unnecessary third-party authority over the decision-maker's property.[183] Combining SDM and the Act fulfills the FREE Act's purpose of ensuring protection from financial exploitation by third parties and protecting constitutional rights.[184]

Similarly, legislating SDM at the federal level supports the view of most states that least-restrictive alternatives to conservatorships

179. *See* discussion *infra* Section IV.B. For example, the private right of action provided for in Section 3 of the Act could easily be applied to SDM to allow decision-makers to have a federally recognized right of private action against exploitive supporters. FREE Act § 3(c). Further, the caseworkers provided for under the Act, whose purpose is to serve as a monitor against exploitation in conservators, could easily serve the same purpose in SDM arrangements. *Id.* § 2(b)(2), (b)(3).

180. *See Free Act Summary*, *supra* note 8. The bill states in its headline that its purpose is "[t]o protect the rights of legally incompetent adults who are the subject of a legal guardianship or conservatorship." *Id.* Section 3, which lists the protections of people subject to conservatorship or guardianship, frequently references alarming findings of financial exploitation and how conservatees are currently unprotected from this kind of victimization. *See* FREE Act § (3)(a)(1)–(3).

181. *See* discussion *supra* Section II.

182. FREE Act § (3)(a)(10).

183. *Id.*

184. *See* FREE Act § 3.

should be considered before implementing a conservatorship.[185] Although a majority of states already require courts to exhaust considerations of least-restrictive alternatives prior to enforcing a conservatorship,[186] such alternatives are frequently cast aside by courts,[187] and SDM itself is enacted in less than half of states.[188] Requiring recognition of SDM at the federal level is a practical manifestation of the states' majority approach because the resolution proposed by this Note requires courts to consider SDM as a least-restrictive alternative to conservatorships.[189] Requiring least-restrictive alternatives such as SDM at the federal level will prohibit state courts from merely opting for plenary conservatorships out of convenience.

In summary, this Note provides a useful model amendment for Congress to use in redrafting the FREE Act to incorporate least-restrictive alternatives and SDM into federal legislation. This solution, which formally implements SDM into effect and applies the remedies from the FREE Act, is directly in line with the FREE Act's goals because this solution will better prevent exploitation. This model amendment will hopefully provide the Act with model legislation that would be appealing to the many members of Congress who expressed a great deal of support for "Free Britney."[190]

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185. *See* discussion *supra* Section II.B (explaining that a majority of states' laws require courts to assess lesser restrictive alternatives before implementing conservatorships; although, many courts do not perform this analysis out of judicial convenience). *See also* BLECHER, *supra* note 10 (providing a list of states that require consideration of alternatives to conservatorship).

186. *See* BLECHER, *supra* note 10 (demonstrating that most states already have legislation which uses language requiring courts to consider least restrictive alternatives to conservatorship before conservatorship is implemented).

187. *See* York, *supra* note 11, at 509 (noting that "courts continue to rely on the more judicially-convenient plenary conservatorship.").

188. *See supra* note 95 and accompanying text (explaining that only twenty states have codified SDM).

189. Hannah Shotwell, Note, *More Than #FreeBritney: Remedying Constitutional Violations in Guardianship for People with Intellectual Disabilities*, 52 N.M. L. REV. 513, 520–21 (2022) ("One of the least restrictive alternatives to guardianship is supported decision-making (SDM).").

190. *See Free Act Summary*, *supra* note 8 (noting that many members of Congress supported Britney in the "Free Britney movement" that is centered around ending exploitive conservatorships).

B. A Proposed Framework for Amending the FREE Act to Include SDM

The model amendment provides for the following: (1) requiring courts to assess the feasibility of SDM before imposing a conservatorship; (2) requiring courts to assess the capacity of potential decision-makers; (3) requiring courts to assess the availability of supporters to participate in SDM; and (4) applying the remedial measures of the FREE Act to the SDM procedures as provided. The protections given to conservatorships under the Act—such as a right of private action, the right to remove a conservator, and the right to communicate with a caseworker—are then applied to SDM agreements.

1. Requiring Courts to Assess the Capacity of Potential Decision-Makers

The proposed fourth section to the FREE Act will require courts to perform an analysis of the potential decision-maker's capacity to determine if SDM is a viable alternative to a conservatorship. Courts assess a potential decision-maker's functional capacity when determining what legal arrangement best suits their circumstances.[191] The new section of the FREE Act would thus require a court to examine a plethora of factors that have been used by courts when examining the feasibility of SDM. Such factors should include but are not limited to the following: (1) an individual's level of independence in daily functioning and self-managing;[192] (2) the extent to which an individual demonstrates the capacity to make his or her own decisions;[193] and (3)

191. *See In re* Richard S.H., 178 N.Y.S.3d 401, 404 (Sur. Ct. 2022) (demonstrating where a court assessed an individual's functional capacity to be a decision-maker in a potential SDM arrangement).

192. *See, e.g.*, *In re* Robert C.B., 125 N.Y.S.3d 253 (Sur. Ct. 2020) (demonstrating where a court considered SDM as an alternative to guardianship, and the court found that the individual in question had worked two different jobs with minimal supervision, performed his own cooking, and managed his own schedule). The court found that these performances were indicative of self-managing. *Id.*

193. *See In re* Guardianship of Michelle M., No. 2014, 2016 WL 3981204, at *2 (Sur. Ct. 2016) (illustrating where the *Michelle M.* court acknowledged that the record reflected there were certain areas where Michelle could soundly make decisions, and some areas where her decisions were argued not in her best interest).

what is in the individual's best interest.[194] It is not a new task to require a court to evaluate an individual's capacity before placing them in a conservatorship.[195] Virtually all state conservatorship and guardianship laws throughout the nation, although varied in different ways,[196] already require courts to evaluate the capacity and decision-making capabilities of an individual.[197] Thus, requiring an assessment of capacity for decision-makers would not be an unprecedented demand of a court and would enable a court to determine if SDM is feasible.

For example, Michelle demonstrated that she could make her own financial decisions, based on her ability to participate in online banking, access her money, deposit checks, and keep track of her finances. *Id.* The court noted that, while petitioners argued Michelle did not make medical decisions in her best interest, she nonetheless possessed capacity to make such decisions. *Id.* at 18–19. The court held that "[t]he appropriate legal standard is not whether the petitioners can make better decisions than Michelle, it is whether or not Michelle has the capacity to make decisions for herself, albeit with supportive services." *Id.*

194. *See In re* Guardianship of Capurso, 98 N.Y.S.3d 381, 384 (Sur. Ct. 2019) (illustrating where a court analyzed what was in the potential decision-maker's best interest). *See also In re* Eli T., 89 N.Y.S.3d 844, 849 (Sur. Ct. 2018) (finding that SDM were in the best interest of the individual). In *Eli T.*, the court found that Eli had some cognitive disabilities, but was ultimately able to make sound decisions with the help of familial supporters. *Id.* What constitutes the individual's best interest when it comes to considering SDM versus conservatorship means only imposing the "least restrictive means [necessary] to preserve and protect the rights of the [decision-maker]." *Id.* at 728. *But see In re* Luepke, No. A22-0186, 2022 Minn. App. LEXIS 745, at *8-9 (Ct. App. Nov. 21, 2022) (demonstrating where a court found that termination of a guardianship and conservatorship over the estate of an individual was not in his best interest). In *Luepke*, although the individual desired more independence, the court found that termination of the individuals' guardianship was not in his best interest when considering the seriousness of his mental health concerns and continual substance abuse. *Id.*

195. *See* Kohn, *supra* note 97, at 339 ("[M]odern guardianship laws generally require courts to assess individuals' functional abilities.").

196. *See* discussion *supra* Section II.B.

197. *See, e.g.*, MINN. STAT. § 524.5-401(2)(i) (2023) (a Minnesota court may impose a conservatorship if the court evaluates and finds that "the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions"); WIS. STAT. § 54.10(3)(a)(2) (2022) (a Wisconsin court may appoint a guardian of the person or the estate if "the individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for his or her physical health and safety.").

2. Requiring Courts to Assess the Availability of Supporters

A court contemplating SDM as an alternative to a conservatorship must also consider the availability of supporters who are both able and willing to participate in an SDM agreement.[198] The availability of supporters is an essential part of determining whether SDM is a feasible alternative to a conservatorship in any given situation because SDM arrangements require individuals to agree to participate as supporters.[199] As this Note has previously addressed, the supporters available to participate in SDM can include friends, family, and professional supporters.[200] By assessing the availability of supporters and keeping the decision-maker as the final authority over his or her own finances, the decision-maker is removed from the surrogate decision-making nature of conservatorships on the front end, and his or her assets remain in their own hands.[201]

3. Applying the Remedial Measures from the FREE ACT to the Proposed Fourth Section of the FREE Act

The fourth additional section to the Act should also retain the Act's remedial measures.[202] Such measures within the Act include a private right of action against conservators,[203] the right to communicate

198. *See Michelle M.*, 2016 WL 3981204, at *12-14 (demonstrating that a feasibility analysis of SDM must evaluated the availability of supporters able to participate in an SDM arrangement such as a support network of family or other supportive services); *In re* Guardianship of Chenel D., 2019 NYLJ LEXIS 125, at *5 (N.Y. Sur. Ct. Jan. 14, 2019) (demonstrating where a court assessed the availability of supporters in order to determine if SDM was feasible).

199. *See In re* Guardianship of Dameris L., 956 N.Y.S.2d 848, 854–55 (Sur. Ct. 2012) (listing the types of available supporters who can participate in SDM, including family, friends, and professionals). The availability of such supporters should be considered before a court resorts to the drastic measures of conservatorship or guardianship. *Id.*

200. *See id.* (listing friends, family, and professionals as examples of potential supporters able to participate in SDM).

201. *See, e.g.*, *In re* D.D., 19 N.Y.S.3d 867, 875 (Sur. Ct. 2015) (demonstrating a court expressly requiring a conservatorship be avoided when an individual can thrive in a supported environment, using the least restrictive means).

202. FREE Act § 3(b)(1)–(2), (c).

203. *Id.* § 3(c).

with a caseworker,[204] and the ability to petition the court to replace conservators without any required proof of wrongdoing.[205] This amendment will apply these listed protections to SDM agreements accordingly.

First, Congress should include within this new section the decision-maker's right to a private right of action to rectify exploitation by exploitive supporters.[206] This private right of action ensures that decision-makers may bring an action in any United States district court to enforce any right provided under the new Act, including the right to be free from exploitation.[207] This solution will ensure that any exploitation of the SDM agreement by a supporter will subject the supporter to legal action at the federal level because decision-makers will have the guaranteed right to do so. With this remedy applied to SDM arrangements, the fourth section will guarantee that a private right of action for SDM decision-makers is both recognized and enforceable at the federal level.

Second, legislators should incorporate into this fourth section the right to replace supporters without having to prove wrongdoing by the supporter.[208] This addition would enable decision-makers to petition the court to recognize the formal removal and replacement of supporters, without having to prove misconduct under the SDM agreement.[209] By being able to remove and replace supporters without having to prove wrongdoing, decision-makers will be able to proactively prevent initial or further financial exploitation if they feel they may be at risk while in their current SDM agreement. Many formal SDM arrangements already allow for the decision-maker to remove a supporter for virtually any reason without needing court approval.[210]

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204. *Id.* § 3(b)(1).

205. *Id.* § 3(b)(2).

206. *Id.*

207. *See id.* (stating within the FREE Act that a private right of action allows a conservatee to "bring an action in any United States district court to enforce any right provided by subsection (b)").

208. *Id.*

209. *Id.*

210. *See* Kohn, *supra* note 97, at 335 ("[I]ndividuals are legally free to end supported decision-making relationships. . ."); *Supported Decision-making*, *supra* note 153 (explaining that in formal SDM agreements, decision-makers should be able to "change or get rid of . . . supporters at any time").

Yet, including this additional protection in the revised FREE Act will allow for federal recognition of the right of decision-makers to quickly remove potentially exploitive supporters from the SDM agreement for any reason. Federally codifying the right of decision-makers to remove potentially exploitive supporters from the SDM arrangement will help decision-makers quickly avoid financial harm before it occurs or avoid it from proceeding further.

Lastly, having instant access to caseworkers, as proposed by the FREE Act, is important if a decision-maker wishes to remove a supporter from a SDM agreement.[211] Caseworkers can assist elderly or disabled decision-makers with long and arduous court processes and provide guidance on removing an exploitive supporter.[212] The Act funds caseworks to serve as protective monitors for signs of conservatorship exploitation and abuse.[213] As applied to SDM arrangements, these caseworkers could easily fulfill this exact role by acting as a monitor for signs of exploitation by supporters—providing an additional safeguard against potential exploitation. Thus, caseworkers can aid in removing and monitoring for exploitive supporters.

Legislating the above protections will better help the FREE Act reach its goal of ending conservatorship exploitation. Surrogate decision-making arrangements such as conservatorships deprive an individual of liberty to make their own decisions;[214] courts should thoroughly consider when conservatorships are necessary and when alternatives may work. Mandating SDM at the federal level will more explicitly require state compliance to avoid conservatorships when the less-restrictive alternative of SDM would suffice. Applying the FREE

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211. *See* FREE Act §§ 2(b)(2), 3(b)(1). Section 3(b)(1) allows conservators to "communicate with a caseworker referred to in section 2(b)(2), notwithstanding any objection of the legal guardian of, or conservator for, the individual[.]" *Id.* § 3(b)(1). Applying this protection to SDM agreements, decision-makers will be able to amend their SDM agreements and remove potentially exploitive supporters, despite a supporter's objection.

212. *See* Lemick, *supra* note 126, at 187 (noting the need for victims of elder abuse to have more specialized supports to assist them in dealing with court processes).

213. *Free Act Summary*, *supra* note 8.

214. *See* discussion *supra* Section II (noting that conservatorships strip a person of the right to make his or her own decisions, and instead allow a third party—a conservator—to make the decisions for the conservatee).

Act's remedies and caseworker access to SDM will better ensure that the same risks of exploitation associated with conservatorships will be prevented in SDM arrangements. Had SDM been an option for Britney Spears, she may not have been subject to such avoidable exploitation because third-party access to her finances would have been essentially barred.[215] The solution advanced by this Note hopes to prevent others in a similar position as Britney from enduring the unnecessary and devasting exploitation that she has experienced.

C. A Model Amendment for the Proposed Additional Section to the FREE Act

The FREE Act should be amended to include a fourth section mandating the consideration of SDM arrangements at the federal level and applying the FREE Act's remedial protections to these arrangements. The main purpose of this model amendment is to provide a workable baseline for legislatures to act on the propositions of this Note. A model amendment for the proposed Section 4 is provided as follows:

> Title Sec. 4: Alternatives to Legal Guardianship or Conservatorship and Protections.
>
> DEFINITIONS
>
> "Decision-maker" means a person otherwise subject to a conservatorship or guardianship who is making decisions in an SDM agreement.

215. Adding the above protections to the FREE Act likely could have prevented a great deal of exploitation endured by the Act's inspiration—Britney Spears. Had Britney been given the opportunity to remain in control of her finances, she likely would not have been subjected to a limited salary, lack of control of her own finances despite her incalculable success, or an exploitative conservator who made millions off of the conservatorship. Instead of a conservatorship, Britney could have participated in SDM with carefully chosen supporters that could have assisted her in making and carrying out financial decisions—leaving Britney as the final authority over her assets. However, because these protections nor any other alternatives to conservatorship have been recognized at the federal level, Britney is left to deal with the victimization and irreparable harm caused to her by the conservatorship she was locked into for over a decade.

"Supporter" means a supportive aid chosen by a decision-maker, such as a family member, friend, or professional, who assists the decision-maker in making, carrying out, or gauging the decision-maker's own decisions.

"Individual" means a person for whom a court is determining whether SDM is a feasible alternative to conservatorship or guardianship.

"Capacity" means the ability to understand, communicate, and make decisions.

"Best interest" means the most beneficial outcome for the well-being of the potential decision-maker being examined by a court when considering the totality of the circumstances.

"Least-restrictive alternative" means any alternative arrangement other than a conservatorship which preserves as many decision-making rights of an individual as possible. SDM (as defined in Section (c)) is a least-restrictive alternative to conservatorships.

"Wrongdoing or malfeasance" means a break of fiduciary duty or other illegal action.

REQUIRING COURTS TO CONSIDER LEAST-RESTRICTIVE ALTERNATIVES BEFORE IMPOSING A CONSERVATORSHIP.

No conservatorship shall be granted by a court unless the court makes an express determination that the granting of the conservatorship is the least-restrictive alternative necessary for the protection of the conservatee.

For the purposes of determining whether a least-restrictive alternative sufficiently protect a conservatee instead of a conservatorship, courts must consider the feasibility of a Supported Decision-Making arrangement (outlined in Section (c)(1)–(3)) before imposing a conservatorship.

REQUIRING SUPPORTED DECISION-MAKING AS AN ALTERNATIVE TO CONSERVATORSHIP

Before a court imposes any conservatorship or guardianship. the Court must first consider whether a Supportive Decision-Making ("SDM") alternative is feasible. In a SDM agreement, the individual otherwise subject to conservatorship or guardianship must have capacity to make his or her own decisions, even if support is necessary in making and carrying out these decisions. Supporters chosen by that individual agree to assist in making and carrying out the individual's decisions, without allowing the Supporters themselves to make such decisions.

To determine if SDM is feasible, a Court must consider the availability of Supporters able and willing to participate in SDM with the individual otherwise subject to conservatorship or guardianship. Supporters may be, for example, family, friends, and/or professional entities who are readily available to take on the supporter role.

To determine if SDM is feasible, a court must also examine factors relating to the individual otherwise subject to conservatorship or guardianship when examining the feasibility of SDM, including but not limited to: (1) the level of independence in daily functioning and self-managing; (2) in what particular areas the individual demonstrates the capacity to make his or her own decisions; and (3) what is in the individual's best interest. If the court finds that the individual has the capacity to make his or her own decisions, even where support is necessary to make and carry out those decisions, a court shall opt for implementing a SDM arrangement instead of a conservatorship or guardianship.

RIGHT TO MODIFY AND REPLACE SUPPORTERS —An individual who is the subject of a Supported Decision-Making arrangement has the right to—

(1) communicate with a caseworker referred to in section 2(b)(2), notwithstanding any objection of the legal supporter; and

> (2) petition a court to formally remove or replace any Supporter from the SDM agreement, and the individual shall not be required to prove wrongdoing or malfeasance by the Supporter.
>
> (d) PRIVATE RIGHT OF ACTION—An individual who is the subject of an SDM agreement may bring an action in any United States district court to enforce any right provided by subsection (b). The court may then provide the petitioner with such relief as the court deems appropriate.

V. CONCLUSION

The solution proposed by this Note advances a monumental opportunity to pass legislation to combat a critical, ongoing, and often unseen issue in the United States with no end in sight: financial exploitation in conservatorships. While the FREE Act contains flaws, it provides legislatures with a second chance to redraft a truly useful and protective piece of legislation for conservatees currently at risk of financial exploitation. The Act ensures that conservatees will have more accessible means for removing exploitive conservators and remedying financial harm.[216] However, in its current form, the FREE Act takes an outdated remedial approach which does not actively prevent financial exploitation of conservatorships.[217] Further, the Act does not avoid third-party access to finances in the first place.[218] In turn, SDM provides an alternative to surrogate decision-making arrangements, avoiding third-party access to a conservatees finances on the front end.[219] Adding Supported Decision-Making to the FREE Act, while incorporating the current safeguards the Act calls for, is essential to take a more proactive approach to preventing financial exploitation.[220]

Adding a section to the FREE Act that combines both least-restrictive SDM arrangements and the remedies currently provided under the Act is essential to better reach the Act's purpose of ending

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216. FREE Act § 3(b)(1).

217. *See* discussion *supra* Section III.

218. *See* discussion *supra* Section III.

219. *See* discussion *supra* Section III.

220. *See* discussion *supra* Section II.

the nightmare of tragic conservatorship exploitation.[221] The model amendment proposed by this Note should be considered by legislators when contemplating an additional fourth section to the FREE Act. Although the Act was introduced with no votes,[222] it may be more advantageous for a member of Congress to introduce it again with the addition of SDM requirements. With SDM protections in place, more individuals otherwise subject to a conservatorship will be able to avoid the surrogate decision-making arrangements and have their own decision-making rights recognized. The FREE Act's rejection is a second chance to rewrite this legislation in order to better combat a critical, ongoing, and often unseen issue in the United States: financial exploitation in conservatorships.

221. *See Free Act Summary*, *supra* note 8.

222. *See Free Act Summary*, *supra* note 8.