NB. Came to Canada in 1957

Supported Decision Making in Ontario

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NB. The author was a member of the Attorney General's Advisory Committee on the Substitute Decisions Act during its existence and was also invited by the Ontario Government of the time to participate in the development of the intellectual disability components of the Capacity Assessors training programme. The material below is adapted from personal writings and presentations by the author and excerpts from current law on the subject of supported decision making as an alternative to guardianship. An earlier version of this document was addressed to participants in the Community Living Ontario (CLO) funded Pilot Project on Supported Decision Making, March, 2016. The author has no authority to speak for any organization nor does so. AC

Background

Guardianship law is a provincial responsibility. In Ontario it relates to citizens over the age of majority (18). Children remain under the natural personal protection of their parents until but not beyond that age.

The matter of legal capacity with respect to people with intellectual disabilities has been an ongoing concern of the Community Living/Inclusion movement, provincially, nationally and internationally since the beginnings of the organization in the late 1940s. Laws that rely on cognitive/functional tests for legal capacity are inherently discriminatory in that they put certain people with intellectual disabilities in jeopardy of being placed under guardianship, perhaps for life, thus arbitrarily losing their equality as citizens – solely on the basis of a particular life long disability.

Guardianship, by definition, replaces the individual in the decision making process and vests his or her decision-making rights in another, typically court-appointed, person. The traditional societal assumption has been that guardianship is beneficent. Experience has clearly proven otherwise, at least in the experience of those who, by nature or intent, have learned to listen to people with disabilities and to seek to understand the wishes and needs of those of us who do not speak – in effect to determine their respective wills and preferences.

The problem is that, typically, the primary beneficiaries of guardianship have been and remain the contractual "third parties" – in intent, neither the individual nor the guardian. Nevertheless, guardians can and most often do assume absolute control over the individual. In a society that now prides itself on its belief in equality of citizenship, the arbitrary and probably life long loss of one's legal status and identity, in order, for example, to have a signature on a contract (whether health, commercial or otherwise) is too big a price to demand: it is neither fair nor just. With respect to people with significant disabilities such demands can date from their attainment of legal adulthood at age 18 and remain for life! Surely, that cannot be presumed to be beneficial to the fundamental equality of that person as a citizen.

The Origins of Supported Decision Making

When Canada's Charter of Rights and Freedoms became law in 1982, Provinces and

Territories were required to review their guardianship statutes and other laws affecting legal capacity to ensure they were not in conflict with the equality rights and other positive obligations of the Charter. The Community Living/Inclusion organization at all levels had been influential in getting "mental or physical disability" into the Charter as a prohibited ground for discrimination. There were certainly big red flags waving about Equality Rights under guardianship law. The Ontario Government established a Committee consisting almost entirely of lawyers, chaired by the late Steve Fram, then a senior Ontario Government lawyer. Its task was to propose new legislation to replace the old Mental Incompetency Act which had its origins in UK law dating from the 1200s and clearly did not comply. Community Living Ontario (CLO) was represented on the Committee by its legal Counsel. The draft Substitute Decisions Act (SDA) was the product of that Committee. (It should be acknowledged here that eventually, Steve Fram was convinced and he and the Minister became very supportive of the Community Living/Inclusion movement's effort but unfortunately too late to stop the process. With Steve Fram's retirement from government and untimely death we lost a valuable supporter, not helped at all by a radical change in government).

When concerns were raised in the late 80s by members of the Association about the discriminatory intent of the proposed SDA, CLO established a Task Force on Alternatives to Guardianship to make recommendations to Government for changes to the proposed SDA legislation. Other Provincial Associations were similarly involved in trying to make sure that people with intellectual disabilities were not placed in jeopardy by laws designed to make it easier to get guardianship. It was in that context, here in Ontario, that the notion of Supported Decision Making came into being.

Supported Decision Making was designed to ensure that people with severe and profound intellectual disabilities – simply by reason of their being – did not get placed under guardianship. Over time, the term tends to have been co-opted to mean "support with decision making" and is used for people, the majority of whom, given that needed support, can make their own decisions. Inevitably, if seen only in that context, the term cuts out those with severe or profound disabilities for whom it was originally devised. Currently, that is a major concern.

What we have to preserve is the notion that, no matter how profound or complex the disability, every person can control decisions affecting his or her life solely by means of the commitment that others are willing to make to ensure that person's well-being, including the preservation of their legal and social status as equal citizens. There can be no limitation on the degree of support in this context: to arbitrarily place limits on that support is to virtually deny full citizenship for certain people solely on the basis of disability.

Under International law to which Canada has agreed, legislation must implicitly ensure provision to enable supportive and accountable individuals to request formal recognition as the decision making supporters of a particular person to ensure that only the best possible decisions are made to that person's benefit and in that person's name and with no loss of status for that person. That the Province of Ontario is lax in fulfilling this obligation and amending the Act has significant detrimental effect on the lives and social standing of

Ontario citizens with severe and profound intellectual disabilities.

In the early 90s, a Coalition of Community Living Ontario (CLO), the Canadian Association for Community Living (now Inclusion Canada. IC), People First of Ontario (PFO) and People First of Canada (PFC) came together and after much hard work, succeeded in persuading the Ontario Government of the time to insert two prohibition clauses into the SDA. They are s.22(3) re. Property and s.55(2) re. Personal Care.

Those clauses remain in force today. Clearly, they prohibit a Judge from declaring a person incapable and in need of a guardian if there are other, less intrusive means by which the necessary decisions can be made. Apparently, the prohibition clauses are ignored. One of the existing problems is that people with severe disabilities are rarely personally represented in guardianship applications. An Applicant's sole interest is in obtaining guardianship of the person (either for property or for personal care or both). Rarely does anyone arrange for legal support for the individual to respond to such an Application. Thus there is no evidence that would call the Court's attention to the prohibitions. Most Applications are decided by Judges only on affidavit evidence in chambers. Yet those prohibitions provide for reasonable and effective alternatives to guardianship.

Unfortunately, guardianship is considered a private matter and society at large does not appear to have fundamental concern for the well-being or future of people with disabilities. We in the community living/inclusion movement have never found a way to ensure that someone other than the lawyers acting for the Applicants are there to speak on behalf of the individual at the time of an Application for Guardianship and to alert the Court to the prohibitions.

The prohibitions follow:

Legal Capacity (The Substitute Decisions Act - Ontario Provincial legislation)

Court-Appointed Guardians of Property

Court appointment of guardian of property

22 (1) The court may, on any person's application, appoint a guardian of property for a person who is incapable of managing property if, as a result, it is necessary for decisions to be made on his or her behalf by a person who is authorized to do so. 1992, c. 30, s. 22 (1).

Same

(2) An application may be made under subsection (1) even though there is a statutory guardian. 1992, c. 30, s. 22 (2).

Prohibition

(3) The court shall not appoint a guardian if it is satisfied that the need for decisions to be made will be met by an alternative course of action that,

(a) does not require the court to find the person to be incapable of managing property; and

(b) is less restrictive of the person's decision-making rights than the appointment of a guardian. 1992, c. 30, s. 22 (3).

Court-Appointed Guardians of the Person

Court appointment of guardian of the person

55 (1) The court may, on any person's application, appoint a guardian of the person for a person who is incapable of personal care and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so. 1992, c. 30, s. 55 (1).

Prohibition

(2) The court shall not appoint a guardian if it is satisfied that the need for decisions to be made will be met by an alternative course of action that,

(a) does not require the court to find the person to be incapable of personal care; and

(b) is less restrictive of the person's decision-making rights than the appointment of a guardian. 1992, c. 30, s. 55 (2).

Additional Comments - HCCA

Decision making with respect to people with intellectual disabilities in Ontario is even further complicated by the presence of decision making legislation specific only to health care, the Health Care Consent Act (HCCA). Unfortunately, although developed at the same time as the SDA, the equality principles that underpin the SDA are not similarly reflected in the HCCA. This was a cause for significant concern at the time. This is not the place to get into the politics of those decisions but the concern remains that matters that primarily related to mental illness are not necessarily useful with respect to people with intellectual disabilities. Suffice to say that this separate and situation specific HCCA, has its own hierarchy of authority to consent to treatment for another person. Families are way down the list.

The Community Living/Inclusion movement, including People First of Ontario (PFO) fought long and hard for a role for "friend" on that hierarchy, knowing only too well that without such a designation, many people with intellectual disabilities estranged from family would unnecessarily find themselves under guardianship. This is not a political document but I believe the current figures (available online) prove that concern. The fundamental issue was that of equal recognition before the law. Sadly, the Government of Ontario at the time appeared not to be prepared to recognise that principle. The United Nations feel otherwise.

Equal recognition before the law

(United Nations Convention on the Rights of Persons with Disabilities)

Article 12 – Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

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

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

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Equality Rights (Charter of Rights and Freedoms - Federal legislation)
Marginal note: Equality before and under law and equal protection and benefit of law
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Marginal note: Affirmative action programs
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (84)

SDA

The Subsitute Decisions Act (SDA) was passed unanimously by the Ontario Legislature in December 1992 after many years of study and public consultation. The law came into force on April 3, 1995. Amendments to the law came into force on March 29, 1996, upon proclamation of the *Advocacy, Consent and Substitute Decisions Statute Law Amendments Act, 1995*, which repealed the *Advocacy Act*, made amendments to the SDA, and replaced the *Consent to Treatment Act* with the *Health Care Consent Act.*

(For Community Living's Presentation before Parliament on the SDA on Feb 12 1992, see http://www.ola.org/en/legislative-busness/committees/administration-justice/parliament-35/transcript/committee-trascript-1992-feb-12#P265_77123 or I can perhaps send you a typed copy if I can find it.

ADC March 16 2021