COMMUNITY LIVING
Brockville and District Association for Community Involvement

Supported Decision Making in Ontario

AN OUTLINE

by Audrey Cole

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(Prepared for BDACI Pilot Project (CLO) and adapted from BDACI Board Update, March 28, 2016)

Background

Current guardianship law in Ontario relates only to adults over the age of majority. Children remain under the natural protection of their parents until reaching that age (18 in Ontario).

The matter of legal capacity with respect to people with intellectual disabilities has been an ongoing concern at all levels of the Community Living Association for over half a century. We see laws that rely on a cognitive/functional test for legal capacity as discriminatory in that such tests put people with intellectual (cognitive) disabilities in jeopardy of being placed under guardianship thus losing their status as equal citizens solely on the basis of that 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 always been that guardianship is beneficent. Experience has proven otherwise, at least in the belief of many who by nature or intent have learned to listen to people with disabilities and to seek to understand the wishes and needs of those who do not speak – in effect, to their respective wills and preferences. The problem is not that guardianship has not been useful or helpful in society, it is that typically, the primary beneficiaries of guardianship have been and remain contractual "third parties." In a society that prides itself on its belief in equality of citizenship, the arbitrary loss of one's legal status and identity in order to have a signature on a contract (usually commercial) is too big a price to demand. With respect to people with significant disabilities such a demand 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.

The Origins of Supported Decision Making

When Canada's Charter of Rights and Freedoms became law in 1982, Provinces and Territories had to review their Guardianship statutes to ensure they were not in conflict with the equality rights and other obligations of the Charter. The Community Living Association at all levels had been influential in getting "mental or physical disability" into the Charter as a prohibited reason for discrimination. There were certainly big red flags flapping about Equality Rights. The Ontario Government established a Committee consisting almost entirely of lawyers, and chaired by the late Steve Fram, then a senior Ontario Government lawyer. Its task was to propose new legislation. CLO was represented on that Committee by its legal Counsel. The draft Substitute Decisions Act (SDA) was the result.

When concerns were raised in the late 80s by certain members of the Association about 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 peoplewith 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.

Initially, Supported Decision Making was designed to ensure that people with severe and profound intellectual disabilities did not – almost by reason of their being – get placed under guardianship. Over time, the term tends to have been co-opted to mean "support with decision making" for people, the majority of whom, given that 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 complicated 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 wellbeing, including the preservation of legal and social status as an equal citizen. There can be no limitation on the degree of support in this context. Legislation must include 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.

Ultimately, in the early 90s, a Coalition of Community Living Ontario (CLO), the Canadian Association for Community Living (CACL), People First of Ontario (PFO) and People First of Canada (PFC) came together and after much hard work, succeeded in persuading the Ontario Government (NDP) to insert two prohibition clauses into the SDA.

Those clauses prohibit a Judge from declaring a person incapable if there are other, less intrusive means of making the decision. Those clauses, re. Property and Personal Care, remain in the Substitute Decisions Act (SDA) in s. 22 (property) and s. 55 (personal care) but, apparently, they are not well used. One of the existing problems is that people with severe disabilities are rarely represented in guardianship applications. In court proceedings, the Applicant's sole interest is in obtaining guardianship of the person (either for property or for personal care or both). Applicants do not direct the court's attention to the prohibitions. But those prohibition clauses provide the means of recognising in law both supported decision making and support with decision making. Unfortunately, guardianship is considered a private matter. We have never found a way to ensure that someone other than the lawyers acting for the Applicants are speaking to the Judge.

The Law Commission of Ontario's Report

The funders of the Law Commission of Ontario (LCO) are the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, the Dean of Osgoode Hall Law School and the Law Society of Upper Canada. The LCO consists mostly of lawyers and researchers and its purpose is to look at current law and recommend changes where indicated. The LCO examined implications and practice under the Substitute Decisions Act (SDA). Its Report was released a couple of years ago (Legal Capacity, Decisionmaking and Guardianship 2017).

Despite the fact that CLO was represented on the Advisory Committee for the LCO's Legal Capacity Project and despite written submissions by individuals and organizations, the direction taken by the LCO was of such concern to many of us that the 1990s Coalition on Alternatives to Guardianship (the Coalition) was reborn in order to address them. The major concern remains: the recommendation of the LCO is that Ontario maintain its cognitive/functional test for capacity. This shows total disregard for Article 12 of the UN Convention on the Rights of Persons with Disabilities (CPRD), which guarantees legal capacity for all people without question and places the onus on all provincial governments in Canada to put into place the necessary supports to ensure that status.

The Coalition, with the financial help of CLO, engaged two independent experts to provide their opinions on the offending Law Commission Recommendations. One, a Canadian lawyer, well known in the Human Rights context, was a member of Canada's official delegation to the UN Ad Hoc Committee mandated to develop the CRPD - a process that took about four years. The other, an internationally known Law Professor at Syracuse University, was invited by the UN to participate in the drafting of the CRPD and has helped governments and civil society organizations in more than a dozen countries with implementation of the CRPD and changes to law to include the requirements of Article 12 (legal capacity). Their comprehensive Reports were submitted by the Coalition to the LCO along with the Coalition's brief.

All clearly indicated Ontario's obligations under the CRPD. Despite that input, the Law Commission went no further than to say the issue relating to people with severe intellectual disabilities needed further discussion.

In the meantime, families and others closely involved in the lives of people with intellectual disabilities and people whose cognitive capacity is declining need to know

that the law does open the possibility of alternatives and that their lawyers must take that into consideration rather than simply go forward with guardianship applications. This current effort will contribute to such discussion and, hopefully will even guide it.

Audrey Cole

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(Note: For those who don't know me, I had the privilege of chairing the above mentioned CLO Task Force, the CACL Task Force and the Coalition meetings and was the author and presenter of CLO's briefs and other submissions to Government and Parliamentary Committees relating to the Substitute Decisions Act. I was also a member of the Attorney General's Advisory Committee on the Substitute Decisions Act during its existence and was invited to participate in the development of the intellectual disability components of the Capacity Assessors training programme. I am a member and a Past President of BDACI and was asked to provide the above Report. Audrey D. Cole, O.Ont.)

Resources

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)

Legal Capacity (The Substitute Decisions Act - Provincial legislation)

Court-Appointed Guardians of Property

2. 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

2. 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).

Equal recognition before the law (United Nations Convention on the Rights of Persons wit 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.

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