



Office of the Public Advocate

Decision-making by a guardian: should it be different if the Represented Person once had capacity?

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Decision-making by a guardian – should it be different if the Represented Person once had capacity?

The Victorian Law Reform Commission (VLRC) is reviewing the *Guardianship and Administration Act* 1986 and has called for submissions on a range of issues. In Question 5 of the Guardianship Information Paper, the Commission asks:

People with age related disabilities and acquired brain injury are now the main users of guardianship and administration. Do you think the system needs to change to reflect this situation and prepare for the future? If so, how should it change?

The Office of the Public Advocate's response to the VLRC Guardianship Information Paper is available on our website.¹ This discussion paper develops and expands upon some of the points in OPA's submission.

Background

Concern about the projected ageing of the Australian population has focussed the attention of politicians, policy makers and media on an expected increased future demand for welfare and income support from the generation now reaching retirement.

An associated area, but one receiving less public attention, is the expected increase in the number of people with decision-making incapacity for whom some form of alternative decision-making will be required.

The policy response to this issue in most Western countries has been the promotion of private arrangements such as Enduring Powers of Attorney, put into place by an individual against the possibility of incapacity in the future. Countries vary in their level of public oversight and protection of these arrangements. Some require registration of the agreement and monitor its use. Some provide avenues where allegations of misuse can be investigated. In others, the safeguard is the court system.

Alongside these private arrangements is the system of legal guardianship, whereby a guardian or administrator may be appointed by a court or tribunal for a person who does not have capacity to make decisions in one or more areas of their life. This incapacity may have been present from birth or may have been acquired at some point in their life. Thus, the guardianship population is made up mainly of people who could have, but did not, appoint an attorney or agent under an enduring power and of people who have never had the legal capacity to make such an arrangement. Those whose capacity is fluctuating due to a mental illness or similar condition are a smaller group who present different challenges.

The basic question addressed in this paper is whether the decision-making approach of a guardian should be the same for all or whether a different approach should be taken for those who have previously had capacity.

¹ <http://www.publicadvocate.vic.gov.au/file/file/Research/Submissions/2010/OPA-Submission-to-VLRC-May-2010.pdf>



Decision-making

First, a few words about decision-making, its basis and why it is so important in the Western philosophical and intellectual tradition.

According to Western philosophy, the unique feature that distinguishes us as humans from other creatures is that we have consciousness of ourselves as separate beings and that we are able to reflect upon our existence and that of others. A consequence of being able to reflect on our existence is that we are able to make decisions about what is happening in our lives and therefore take action to influence or determine what will happen next or further into the future. This ability to make decisions for ourselves, and the quality of the decisions we make, varies and depends upon many factors, including age, maturity, intelligence, personal experience, education, social and political systems and personal circumstances.

As far back as the Greeks and the Stoics, understandings developed about how human beings, living in society with others, should go about living their lives. At the same time, various religious traditions developed moral codes for community and individual living. Whilst these codes have changed throughout history, a consistent theme is that people should live their lives and make decisions with consideration for the good of themselves and others. For Aristotle, for example, the function of human beings is to achieve virtue or excellence and thereby have a fulfilled and happy life.

During the enlightenment of the 18th century, Kant developed the concept of the categorical imperative: the idea of moral obligation deriving from a “good will” or good motives. In making moral decisions, one should “act only according to that maxim whereby you can at the same time will that it should become a universal law”. A person should act in a way that he could reasonably wish everyone else would act in the same circumstances and not make exceptions for himself. For Kant, all genuinely moral action flows from the dictates of an autonomous will whilst at the same time regarding these dictates as binding on everyone else as all people possess the same rational faculties for practical reason. Kant believed that there was overarching moral law derived from God, whilst at the same time insisting that people have free will and their responsibility is to use that free will to strive for moral perfection.

For existential philosophers, such as Jean Paul Sartre, existence precedes essence. In the beginning, we simply exist and what we become is up to us. Thus, who we are is created over time by the decisions we make. The essence of a human life is the responsibility to choose and to accept the responsibility for the consequences of those choices. Moral judgment, however, is still important. We can still make bad decisions by not keeping faith with ourselves even though, for existentialists, there is no particular external standard or moral code to which we can hold.

An emphasis on freedom of individual choice in all areas of life as the ultimate expression of autonomy and humanity emerged during the latter part of the twentieth century. The idea of moral choice as the fundamental expression of our humanity has been overtaken by the idea that maximum choice means maximum freedom, and from maximum freedom flows maximum benefit. This fits well with the paradigm of putting faith in the free market to deliver justice and freedom to all. It is too early to say whether this is a new direction or simply a passing trend.

Recent writings by people such as Michael Sandel and Amartya Sen argue that the market paradigm has failed because it ignores values, the search for the common good and moral



responsibility to self and others as the necessary basis for personal decision-making and living a 'good' life.

Substitute decision-making

As can be seen from the brief comments above, philosophers from different times and with different approaches have all seen decision-making as an essential part of being human. Free will, self-determination and autonomy are all familiar concepts upon which Western philosophy is based. Our legal system, also, is based upon these philosophical understandings. Once a person is adult, s/he is responsible for the decisions s/he makes and for his or her actions. Although the law recognises a range of factors that may limit that responsibility, the major factor that limits the legal responsibility of a people for their actions and decisions is inability to make their own decisions or control their actions.

It is important to recognise that whilst the decisions we make are one outward manifestation of our humanity, they are not the full or only expression of it. Other disciplines, such as psychology, suggest that our humanity or personhood is also about our personal identity, our personality, our experiences and the values we adopt and develop over a lifetime. These things are not predominantly rational or particularly reliant on intellectual capacity.

In order to give credence to a person's decisions, our society and our legal system expects the person to have the intellectual capacity to make "reasonable" ones. Our society will accept bad and irrational decisions as long as the person has the capacity to make reasonable decisions if s/he 'chooses' to do so. As not everyone has the ability to make all their own decisions about every aspect of their lives, a range of substitute decision-making mechanisms have been developed, of which guardianship is one.

Obviously, not all decisions matter. The significance of a decision can be gauged by its effect and the consequences that follow from it. So, choosing whether to eat the red apple or the green apple is a decision of little consequence, but a decision about where we live, the work we do and whom we spend time with has significant consequences that affect others and ourselves into the future. That is why society has an interest in the important decisions people make and whether they have the ability to make them.

Guardians are frequently described simply as substitute decision-makers. However, whilst guardianship legislation has a clear decision-making focus, more is required of a guardian. Decisions are made and actions taken in the context of the represented person's life and the relationship between the guardian and the represented person that is preferably developed over some time. If that relationship were not a necessary part of guardianship, it would probably be more efficient and effective simply to have a decision-making panel that determined each matter brought before it. I would suggest that, by the appointment of a *person* as guardian, guardianship legislation recognises that the represented person should be treated as a whole person, with respect for their full humanity, even though the guardian's authority is limited to a particular area of the person's life.

Substituted judgment



The substituted judgment principle in guardianship is usually defined as making the decision that the Represented Person would make, if s/he were competent and had given full consideration to his or her present situation. A proviso is generally included to the effect that substituted judgement should apply to the extent that it will not result in undue harm to the represented person. In order to exercise substituted judgment, a guardian needs to discern the person's critical interests: their values and convictions about the overall direction they want their life to take and what, for them, constitutes a meaningful and 'good' life.

Substituted judgment is not included as a principle in the current *Guardianship and Administration Act* 1986. Nor does the current Victorian legislation distinguish between the approach that should be taken for someone who has previously been regarded as competent and a person who has never been regarded as competent. The Public Advocate has proposed that substituted judgment should be included, together with other guardianship principles, in the new Act.² The Public Advocate also considers that the substitute judgment principle may be used where the person has always had a decision-making impairment.

Acting in accordance with substituted judgment principles is not easy or straightforward, whether or not the represented person has previously had capacity. The guardian may find some guidance in the represented person's earlier decisions, made when s/he had capacity. However, in most cases where a guardian is appointed, the person has not made particularly clear statements about what they would want in the future and has rarely written anything down. As well, research suggests that most people are not able or willing to look ahead to a time when they might lose capacity or accurately predict what they might think and feel in such a situation. Past decisions may not be an entirely reliable guide for guardians attempting to exercise substituted judgment.

Certainly, where a person has never had the decision-making capacity, it can be more difficult to apply a substituted judgment principle. However, substituted judgment is not precluded, as a person with a disability will still have critical interests: values, interests and views about the direction they want their life to take. As we have seen, these are as much the essence of a person's identity as rationality and they shape the decisions a person makes, whether those decisions are judged as competent or incompetent, reasonable or unreasonable.

Why not have different approaches to decision-making?

In jurisdictions where different approaches to guardianship decision-making are set down, the substituted judgment approach is generally applied only for people who have previously had capacity. In the USA for example, the National Guardianship Association of America (NGAA) draws a clear distinction between the standards of decision-making that should be used by a guardian. In the NGAA standards, substituted judgment is defined as "the principle of decision-making that substitutes, as the guiding force in any surrogate decision made by the guardian, the decision the ward *would have made when competent*"(emphasis added). The standards state that

² Office of the Public Advocate: *Submission to the Victorian Law Reform Commission in response to the Guardianship Information Paper*. Page 18.

<http://www.publicadvocate.vic.gov.au/file/file/Research/Submissions/2010/OPA-Submission-to-VLRC-May-2010.pdf>



Best Interest is “the standard of decision-making the guardian should use when the ward *has never had capacity* or when the ward’s wishes cannot be determined” (emphasis added).

Clearly, in the USA, the person’s previous decisions, made when competent are to be the ‘guiding force’ for substitute decision-making when they lose capacity. Their individuality and previous capacity for reason are paramount. A more protective best interests approach is to be adopted where a person has never had capacity. Such a distinction risks unduly privileging one aspect of a person’s humanity (their rationality) above other aspects when making decisions on their behalf. Instead, as argued above, the Public Advocate considers that a guardian should act in a way that respects all aspects of the person’s humanity.

Australian guardianship has adopted the principle that competence is domain specific and relates to functioning for a particular purpose at a particular time. Neither capacity nor incapacity are global concepts. We no longer think that a person who cannot make a decision about one particular matter will be unable to make a decision about another matter in his or her current situation. Consequently, it is too stark to suggest that those under guardianship can be categorised according to whether or not they have previously had capacity.

Adopting a different approach to guardianship for people who have previously had capacity also carries the implication that decisions made at an earlier time about one matter can be relied upon to determine what decision should be made at a different time in different circumstances. This is problematic in modern guardianship systems where a person only has a guardian appointed when there has been a radical and usually detrimental change in their circumstances. It is likely that the person will not have encountered and dealt with a similar situation in their life before. This makes relying on past decisions to project to current decision-making, after the person has lost capacity, an even more doubtful proposition.

This is not to suggest that past decisions and past situations provide no assistance to the guardian making decisions about a current problem. It is one of several things that a guardian may consider, but to suggest that a distinctly different approach should be adopted for people who have previously had capacity cannot be supported by looking at the complexity and reality of people’s lives.

Providing for two different approaches to guardianship, dependent on previous capacity, would risk creating two classes of guardianship clients and possibly give rise to accusations of discrimination against people with life-long disabilities. Differential approaches to dealing with social issues are rarely successful. Perhaps the earliest, and still the most famous, legal expression of this insight came from Justice Warren, Chief Justice of the United States Supreme Court in 1954. Finding against segregated education of Afro-American children in American schools in *Brown vs Board of Education of Topeka*, the Supreme Court, in a unanimous decision, stated: ‘the separate but equal doctrine... has no place in public education... Separate education facilities are inherently unequal’.

Nor do differential approaches sit well with the Preamble or General principles of the United Nations Convention on the Rights of Persons with Disabilities. For example, the Preamble includes in Part c:

Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination



The Public Advocate is already aware of the concerns of some disability advocacy groups that the interests of people with what could be termed the “traditional” disabilities are being forgotten, with policy attention and resources now being focussed on the increasing numbers of those with age-related disabilities.

The Public Advocate has proposed that respect for human dignity should be the overarching principle of the new legislation and that the promotion of personal and social well-being should be the principle that guides the work of a guardian. These principles have equal applicability whether the person has ever, or never, had capacity.

Conclusion

Within the Western intellectual tradition, decision-making is an important expression of our humanity. It is not however the essence of our humanity, simply one manifestation of it. The idea of competence is a legal and/or medical construct that has evolved to meet the needs of society and its members who may not be able to make decisions and take responsibility for their actions. In its current incarnation, competence is understood to be domain-specific and decision-specific.

The responsibilities of a guardian are to the whole person, although their authority for substitute decision-making is limited to an area of the person’s life. Because each person is different, guardianship legislation should be wary of categorising people or of being unduly prescriptive about the approach that should be taken in particular cases. There should be room for the creative aspects of the guardianship relationship to flourish.

The Public Advocate does not consider that a differential approach to guardianship decision-making on the basis of previous capacity offers a meaningful policy solution to the changing guardianship demographic in Victoria.