Guardianship as a Last Resort

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I. Overview

As estate planning lawyers, we are often faced with providing advice on matters involving a person's right to make their own decisions. In particular, parents of an adult child with an intellectual or developmental disability may seek direction on applying for guardianship in order to open a bank account or an estate trustee may question what happens in situations when the beneficiary of an estate may be considered incapable of managing their property. Too often, some practitioners are quick to suggest that guardianship be pursued, without considering alternative options which are less restrictive in nature and promote a person's autonomy in the decision-making process.

This approach is based on laws in Ontario that primarily rely on a substitute decision-making framework. The purpose of this article is to provide some thought and insight with respect to options lawyers may consider when faced with issues of capacity, which would enhance a person's right to make their own decisions as opposed to having them stripped away through the guardianship process. Although Ontario's statutory framework governing guardianship has not kept pace with international developments in this area of law or with more progressive supported decision-making options in other provincial and territorial jurisdictions, there are some mechanisms in place that should be explored and exhausted before advice is provided to pursue a guardianship application.

II. Ontario's Approach to Legal Capacity and Substitute Decision-Making

Ontario's Statutory Framework

There are two pieces of legislation that primarily govern matters related to legal capacity and decision-making in Ontario: the *Substitute Decisions Act*[1] (the "SDA") and the *Health Care Consent Act*[2] (the "HCCA"). These statutes broadly address two areas of decision-making: property and personal care. Property refers to financial affairs such as decisions related to banking, investments and real property, while personal care is specific to decisions related to health, nutrition, shelter, hygiene, clothing and safety.

More specifically, the SDA addresses decisions related to the management of property and personal care, as well as the appointment and duties of guardians and those granted powers of attorney. The

[1] *Substitute Decisions Act*, *1992*, S.O. 1992, c.30.
[2] *Health Care Consent Act, 1996*, c.2, Schedule A.

HCCA addresses consent to treatment, admission to care facilities and personal assistance services for residents of care facilities.

Note that the *Mental Health Act*[3] also addresses the capacity to manage property upon admission or discharge from a psychiatric facility. For the purposes of this article, we will focus on the SDA and HCCA.

Ontario's Approach to Legal Capacity

Legal capacity refers to a person's authority under the law to make specific decisions, such as the decision to open an investment account, to consent to medical treatment, to enter into a contract, and so on. Ontario takes a functional and cognitive approach to legal capacity, which means that the requirements for legal capacity differ depending on the nature of the decision being made.

Generally, the overall theme for the determination of legal capacity is based on the ability to:

a) **understand,** retain and evaluate the relevant information with respect to a decision; and

b) **appreciate** the reasonably foreseeable consequences of said decision.

The determination of capacity therefore exists on a spectrum – it is decision- and issue-specific. Moreover, legal capacity is not fixed, but may fluctuate over time. People with mental health issues and addictions, or people with episodic disabilities, for example, may be capable of making decisions at one time, but not at another time.

As stated in section 2 of the SDA, a person is presumed to be capable of making a decision, unless there is clear evidence to suggest otherwise, as follows:

> **2 (3)** A person is entitled to rely upon the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable of entering into the contract or of giving or refusing consent, as the case may be.

Ontario's Approach to Decision-Making

The law in Ontario reinforces a **substitute decision-making** framework. If a person requires assistance with decision-making, a substitute decision-maker ("SDM") may step in to make the decision on the person's behalf. The SDM could be a statutory or court-appointed guardian, an attorney for property or personal care or with respect to health care decisions, a substitute decision-

[3] *Mental Health Act*, R.S.O 1990, c. M.7.

maker listed in the HCCA, including a representative appointed by the Consent and Capacity Board or a family member.

I. Guardianship

The SDA provides for statutory guardians, most commonly the Public Guardian and Trustee ("PGT") under sections 15 and 16. Additionally, a legal guardian may be appointed by the court for decisions related to property, pursuant to section 22 of the SDA, and decisions related to personal care, pursuant to section 55 of the SDA. Whether statutory or court-appointed, a **guardian of property** may make financial decisions on behalf of another person, while a **guardian of the person** may make personal care decisions on behalf of another person, related to health, nutrition, shelter, clothing, hygiene and safety.

II. Powers of Attorney

A power of attorney allows a person to authorize an SDM with respect to decisions related to property or personal care. Note that a power of attorney differs from guardianship, as the person must meet the legislative requirements as set out in the SDA to complete the document.

A power of attorney for property that continues during any period of incapacity by the grantor is referred to as a **Continuing Power of Attorney for Property** ("CPOAP"). An attorney for property would be appointed as an SDM to manage the financial affairs of the grantor with respect to decisions related to banking, investments, real property, and other financial matters. The capacity requirements for granting a CPOAP are outlined in section 8(1) of the SDA.

A **Power of Attorney for Personal Care** ("POAPC") allows an attorney for personal care to be appointed as an SDM to make decisions related to health, hygiene, nutrition, shelter, clothing and safety. The capacity requirements for granting a POAPC are outlined in section 47(1) of the SDA.

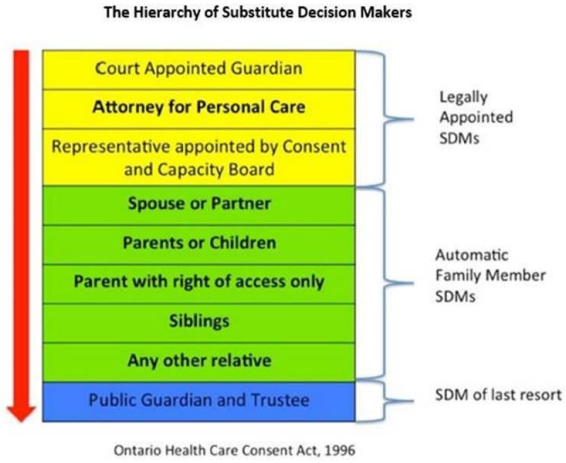
Usually a CPOAP or POAPC comes into effect if and when a person becomes incapable of making a decision related to property or personal care i.e. if a person with dementia is incapable of managing her financial affairs, their attorney for property may do so on her behalf; or if a person loses consciousness, their medical treatment may be approved by their attorney for personal care.

The CPOAP, however, may also come into effect immediately, meaning that upon signing, an attorney for property may make decisions on behalf of the grantor, even while the grantor is still capable of making their own financial decisions. A CPOAP may be activated immediately, for example, when a person requires assistance with banking and has the capacity to appoint their parents as attorneys for property to assist with the management of their finances.

III. Health Care Decisions

Like the SDA, the HCCA presumes that a person is capable of making health care decisions, with respect to medical treatment, admission to a care facility or personal assistance service.

In the event that a person lacks the capacity to give or refuse informed consent to health care, based on a declaration by a healthcare practitioner, section 20 of the HCCA ranks the order of substitute decision-makers that may make a medical decision on behalf of the person.



As demonstrated in the diagram opposite[4], if there is no legally-appointed SDM, such as a guardian, attorney for personal care or representative, family members are automatically SDMs, without being formally appointed by legal procedure.

Concerns with Substitute Decision-Making

Given that Ontario's decision-making regime reinforces substitute decision-making, family members who care for a person with an intellectual, developmental, neurological, mental health or cognitive disability may seek decision-making authority for that person into adulthood or when the person is elderly. When faced with such situations, lawyers may be quick to recommend substitute decision-making mechanisms such as legal guardianship or powers of attorney. While SDMs may be necessary in some cases, there are potential issues with substitute decision-making that should be taken into consideration, as follows:

- **Loss of Rights**: A person under guardianship or with powers of attorney may, in fact, be capable of making issue-specific decisions with respect to property or personal care. However, once guardianship is in place, it may remove the right of the person to not only make the decision, but to express any will or preference with respect to the decision itself. Instead, SDMs may make decisions independently on the person's behalf. In addition, the process of a capacity assessment may be stigmatizing to individuals, as they may be labelled as "legally incapable," and left with no option but to surrender decision-making authority to a guardian or attorney.

- **Misuse of powers:** Once SDMs are appointed, there is usually minimal monitoring or oversight of the decisions they make on behalf of a person, even if those decisions result in the misuse of powers or even abuse. Moreover, SDM powers may be misused without intent,

[4] Toronto East Health Network, Substitute Decision-Maker (2020), online: <https://www.tehn.ca/your-visit/patient-family-services/advance-care-planning/substitute-decision-maker>.

simply due to a lack of understanding of the law, given its complexity, and the roles of SDMs. These decisions could be made over the lifetime of a person, with no accountability or recourse for the individuals involved.

- **Barriers to Challenging SDMs:** Once SDMs such as guardians, attorneys, or SDMs under the HCCA are put into place, it is difficult to challenge or revoke the appointments. Remedies available under the SDA involve applications to the court that are "costly, complicated and intimidating."[5] The procedural protections under the HCCA are also largely ineffective, as they are not widely understood or implemented.

Furthermore, research indicates that substitute decision-making mechanisms, such as guardianship, can have negative impacts on the individual for whom decisions are being made, including:

- diminished functional ability, health status and well-being;
- social isolation;
- loss of self-esteem, feelings of hopelessness, inadequacy and incompetency;
- feelings of being demeaned and socially stigmatized; and
- financial abuse, overbroad application of guardianship orders, physical abuse and neglect, restriction on voting rights, and restricting people in developing and enjoying their sexuality and sexual identity.[6]

III. The Flip Side: Supported Decision-Making

It is sometimes easy to forget the presumption of capacity found in section 2 of the SDA. We might instead make negative assumptions about the capacity of adults with disabilities, based on their particular medical diagnoses or the opinions of their family, friends or support workers.

When approaching the "problem" of guardianship, it will be helpful to employ a supported decision-making lens. In other words, prior to going down the path of guardianship, practitioners can ask themselves how best to support the person with a disability (and their circle or network), within the confines of Ontario's laws. This approach is in fact grounded in domestic and international human rights obligations.

Supported decision-making allows us to consider a range of ways to exercise legal capacity. It requires us to consider alternatives to guardianship and powers of attorney. Per Bach & Kerzner, "the 'decision-making capability' approach grounds recognition of legal capacity first and foremost in the will and preferences of the person, rather than in their cognitive abilities."[7] This 'paradigm shift' in the

[5] Law Commission of Ontario, *Legal Capacity, Decision-making and Guardianship: Final Report* (Toronto: March 2017) 26.
[6] Michael Bach et al, "Implementing the Right to Legal Capacity in Canada: Experience, Evidence and Legal Imperative"(April 2018) IRIS - Institute for Research and Development on Inclusion and Society 7.
[7] Michael Bach & Lana Kerzner, Amicus Curiae Brief (March 2020) Constitutional Court of Colombia, Reference File No. D-13575 and D-13585 Law 1996 of 2019 at para 5.

law of legal capacity is reflected in the provisions of Article 12 of the UN Convention on the Rights of Persons with Disabilities[8] ("CRPD"), which was ratified by Canada in 2010. Article 12 requires parties to recognize the right to legal capacity, without discrimination, and to provide supports, accommodations and safeguards that are necessary for people to exercise that right.

> **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.**

Article 12 is a response to concerns by the UN Committee on the Rights of Persons with Disabilities that guardianship is increasingly used in Canada to restrict legal capacity through many provincial-territorial and statutes.[9]

The right to legal capacity without discrimination is also protected by our *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Section 15 Equality rights are engaged when laws respecting decision-making rights discriminate against those with cognitive/mental disabilities.[10] Moreover, section 7 will be relevant when "laws which remove a person's right to decide because they do not meet a cognitive test of capacity can be seen to infringe on a person's liberty, which includes the right to make fundamental personal decisions without state interference."[11]

While supported decision-making typically refers to a legally recognized process involving persons appointed as decision-making supporters[12], other informal "supports for decision-making" are perhaps best understood as a way of accommodating someone with a disability in the exercise of their legal capacity. Accommodation is certainly not a new concept, enshrined as it is in our provincial *Human Rights Code*.[13] Yet, the intersection of accommodation and decision-making may be an unfamiliar junction to us as legal practitioners. What exactly do supports for decision-making look like?

Recently, a young woman with an intellectual disability was found to be capable of managing her property, after years of being subject to the guardianship of the PGT. The capacity assessor's comments from the recent assessment emphasize the importance of supports for decision-making:

> The results obtained during the assessment and reported here are in sharp contrast to

[8] *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3, GA Res 61/106 (entered into force 3 May 2008, ratified by Canada 11 March 2010).
[9] Michael Bach et al, *supra* note 6 at i.
[10] *Ibid* at 55.
[11] *Ibid* at 56.
[12] *Ibid* at ii.
[13] *Human Rights Code*, RSO 1990, c. H. 19.

> those reported in the previous (2016) assessment. Jennifer[14] is not unaware of her developmental disability. She knows that she was in Special Education; that she was tested; that she was deemed as a special-needs student; that she was provided with a job coach; and that is why she was granted ODSP benefits in the first place. She is also aware of her need to rely on the great support of the Passport Program, as well as on her PSW's and on all the personnel and agencies that provide her with supports. ***Rather than interpret this reliance as a burdensome dependency on her part, it should be seen as a successful access and use of programs and benefits that are available and designed specifically for that reason. It is incorrect to describe her reliance on these supports as the effect of her mental impairments when no such impairments were detected by objective testing***.
>
> […]
>
> I found no impediments to her decision-making capacity. ***If complex choices exist and they are clearly explained to her, I have no doubt that she can make decisions based on the facts disclosed to her and on her appreciation of the potential outcomes***.[15]
>
> [***emphasis added***]

In Jennifer's case, plain language and a circle of support meant the difference between the exercise of legal capacity and the deprivation of decision-making rights.

A range of supported decision-making tools have been identified through various case studies and examples from other jurisdictions that are perhaps better-versed than we are here in Ontario. Such tools may include:

- independent advocacy;
- representatives appointed by or on behalf of the person;
- person-centered planning assistance;
- communication assistance;
- interpretive support;
- opportunity and relationship-building support; or,
- administrative support.[16]

IV. Alternatives to Guardianship in Ontario: Practical Tools for Practitioners

[14] Name has been changed to ensure anonymity.
[15] Form C - Assessment Report, dated December 19, 2019.
[16] Michael Bach et al, *supra* note 6 at ii.

While the SDA and related legislation are seemingly at odds with the notion of supported decision-making, we must not forget the critical "alternative course of action" ("ACA") provision found in

> **(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[1]; and**
>
> **(b) is less restrictive of the person's decision-making rights than the appointment of a guardian.**

sections 22(3) and 55(2) of the SDA. In reviewing an application for guardianship of property, the following prohibition applies to the court:

In *Gray v Ontario*[17] the Divisional Court was required to consider the issues of capacity and consent in relation to the residents of Ontario's institutions for people with developmental disabilities. The Court recognized the significance of the ACA provision of the SDA and in so doing, highlighted the arguments of the Intervenor, Community Living Ontario: "a process short of full or partial guardianship is preferable in many cases, as it best recognizes the autonomy and dignity of the individual and the inclusiveness of the decision-making process."[18]

The very concept of seeking an alternative course of action that is less restrictive than guardianship is echoed in Article 12 of the CRPD:

> 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***.
>
> [***emphasis added***]

Consider the following scenario: you are contacted by Jean, a concerned mother of a young adult with autism. She explains that her son, Matthew, will soon be 18 years old, and that she has been told that she needs to apply for legal guardianship.

[17] *Gray v Ontario*, 2006 CanLII 1764 (ON SCDC).
[18] *Ibid* at para 47.

As a legal practitioner attuned to the dangers, pitfalls and human rights implications of guardianship, you can take a step back and evaluate the options available to this family. You might consider the following checklist as a helpful roadmap to your discussion with your prospective client:

- ✓ ***Start from the presumption of capacity***: The law presumes an 18-year-old to be capable of entering into a contract and a 16-year-old to be capable of giving or refusing consent in relation to their personal care.

- ✓ ***Use lens of accommodation***: Does Matthew require any accommodation to exercise his legal capacity or his right to make his own decisions? Do you need to modify your communication techniques in order to make your own assessments about his right to instruct counsel or to create powers of attorney? Is technological assistance required? Do you need to bring in a translator? Does the person require specific support persons to interpret signs, gestures or verbal cues?

- ✓ ***Utility of Guardianship:*** If the person is capable of making their own decisions, is guardianship needed? Even if incapable, is there any impetus for going down the guardianship path? In other words, **is there a problem that needs to be solved through guardianship**? (e.g. financial institution refusing to open an account in son's name; funding for services withheld without proof of guardianship).

- ✓ ***Alternatives to Guardianship:*** If it appears as though Matthew lacks capacity to make certain decisions himself, explore alternatives to guardianship as per the ACA provision. In other words, **what measures might be less restrictive in solving whatever roadblocks that the family is currently experiencing or anticipating in future**? For instance:

    - Powers of Attorney ("POA"s): Will POAs be helpful tools for planning ahead in the event Matthew is later found incapable of certain decision-making? While still a substitute decision-making tool, Matthew may be able to name people he trusts to stand in his shoes, rather than be at the mercy of default decision-makers like the PGT. (Note that there is a separate legislative test for the capacity to execute both types of POAs under the SDA);

    - Supported decision-making tools and mechanisms; and,

    - Use of voluntary trustees for the Ontario Disability Support Program ("ODSP") or other social benefit programs.

V. The Law is Evolving

While the decision-making framework in Ontario reinforces substitute decision-making, we have competing obligations under Article 12 of the CRPD and section 7 and 15 of the *Charter* to provide supports and accommodations in decision-making, and under the SDA to seek alternative courses of

action to guardianship. Those obligations can often be met through the use of supported decision-making mechanisms, in order to allow individuals to exercise their full legal capacity.

In the last few years, there has been movement in the province on this front. After completing two projects on the framework of the law affecting older adults and people with disabilities, the Law Commission of Ontario ("LCO") released a report in March 2017 after a four-year study. The report focused on Ontario's statutory framework related to legal capacity, decision-making and guardianship, and provided recommendations to reform law, policy and practice.[19] While the LCO recommended the use of autonomy-enhancing decision-making practices within existing SDA legislation, as well as the development of legislation and pilot projects, little has been done since the report was released to further develop supported decision-making mechanisms in Ontario.

Other Canadian jurisdictions, however, have embraced a "decision-making capabilities" approach in Canada that is more consistent with Article 12 of the CRPD and the *Charter*. Under this approach, the laws recognize and provide access to the full range of supports that may be required to enable *all* persons to exercise legal capacity, including people with disabilities and the elderly.[20] Provinces and territories such as Alberta, British Columbia, Manitoba, Saskatchewan, and Yukon have incorporated approaches in their laws to include alternative options to guardianship (**see Appendix A**).

While the laws in Ontario remain steadfast, without any formal recognition of supported decision-making, it is possible for legal practitioners in the province to adopt a range of decision-making options in order to better accommodate clients. Moreover, under the SDA, there is an obligation on lawyers to seek alternative courses of action that are less restrictive than guardianship.

[19] Law Commission of Ontario, *supra* note 5.

[20] Michael Bach et al, "Implementing Equal Access to Legal Capcacity in Canada: Experience, Evidence and Legal Imperative" (November 2018) IRIS - Institute for Research and Development on Inclusion and Society 4.

Appendix A: Examples of Decision-Making in Canadian Jurisdictions

	Alberta	British Columbia	Manitoba	Saskatchewan	Yukon
Statute	*Adult Guardianship and Trusteeship Act, 2013*	*Representation Agreement Act, 1996*	*Vulnerable Persons Living with a Mental Disability Act, 1996*	*Adult Guardianship and Co-Decision-Making Act, 2000*	*Adult Protection and Decision Making Act, 2003*
Determination of Capacity to enter Supported Decision-Making Relationship	An adult is considered 'capable' to authorize a supported decision-maker if they understand the nature and effect of a supported decision-making authorization. Capacity is defined as the ability to understand information that is relevant to making a decision; and the ability to appreciate the reasonably foreseeable consequences of making or not making the decision.	Unique four-factor test to determine capacity: (1) communicating a desire for a representative to make or help make decisions; (b) demonstrating choices, preferences and feelings of approval or disapproval of others; (c) awareness of the consequences of the decision of the representative; and (d) whether the person has a relationship with the representative that is characterized by trust.[21]	There is no definition or standard for entering supported decision relationships but rather an assumption that all vulnerable adults living with a mental disability benefit from support and that this should be encouraged.[22]	Capacity is determined by assessing the vulnerable adult's ability to both: understand information relevant to making a decision, and appreciate the reasonably foreseeable consequences of making a decision, or of not making a decision.	An adult is capable of entering into a supported decision-making agreement if they understand the nature and effect of the agreement.

[21] Paraphrased from *Representation Agreement Act* [RSBC 1996] Chapter 405, section 2.
[22] Law Commission of Ontario, *Understanding the Lived Experiences of Supported Decision-Making in Canada* (Toronto: March 2014) 23.

	Alberta	British Columbia	Manitoba	Saskatchewan	Yukon
Court-imposed Decision-Making Support Relationships	Allowed, if the supported person's capacity is impaired to the degree where assistance is required in decision-making. Consent of the supported person is required, but the court will consider what is in the supported person's best interest.	No statutory provision.	No statutory provision.	Allowed, if the supported person's capacity is impaired to the degree where assistance is required in decision-making. Consent of the supported person is not required.	No statutory provision.
Supported Decision-Making Planning Documents	Limited to personal matters.	Routine management of financial affairs; personal matters; some health care decisions.	None.	None.	They cover all the affairs of the person supported.
Note	Offers a range of options for decision-making related to personal matters, including supported decision-making, co-decision-making[23], and specific decision-making, depending on the person's capacity and the decision being made.		Applications may be made to a Commissioner for the appointment of a substitute decision-maker. If the person does not have a support network, the Commissioner may make a request that steps be taken by a government program	Allows for co-decision-making, where the co-decision-maker's power applies to both property and personal decisions.	Explicitly requires the Court to consider support relationships *before* guardianship is imposed.

[23] Joint decision-making between the adult and the appointed co-decision maker.

	Alberta	British Columbia	Manitoba	Saskatchewan	Yukon
			to involve a support network.		