Supported Decision Making: The Next Frontier

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Checking in ....

1. Who prepares enduring/continuing power of attorney documents?
2. Who has applied for a court appointed guardian?
3. Who has had issues with a 3rd party financial institution accepting a power of attorney document and/or acting on an attorney’s instructions?
4. Who has heard of supported / assisted decision making? “Article 12”
5. Who a family member with a cognitive disability?
6. How many are lawyers?
Outline

• Why supported decision making laws matter to TEPs
• Who we are
• Article 12 of the UN CRPD
• Why BC’s Representation Agreement? The “need” in 1989
• Implementing Article 12 – Selected developments
• New Canadian Research:
  o Supported Decision Making within the context of investment decisions
• New Australian Research:
  o Supported Decision Making in the Personal and Health Care context
• Discussion

TEP Client Needs

• Wills: Transfer estate assets
• Trusts: Structures for orderly succession planning;
• Incapacity planning: Variety of options
  o Power of attorney/mandate for financial and legal decisions
  o Proxies for health and personal care decisions
  o Advance directives and living wills
• Planning for “incapable” family members
• Default regime if fail/unable to plan for incapacity:
  o Court ordered determination of incapability
    – “incapable” of making decisions (financial/legal and/or personal/health care)
  o Appointment of a guardian responsible for making decisions
    – Often supervised by the courts
• Assistance when using decision-making documents
Emerging Values & Issues
Implications for Client Needs

- Disputes over attorney’s authority
  - Is donor capable?
  - Does attorney have authority?
  - Does attorney’s instruction reflect donor’s wishes?

- Fluctuating capacity

- Autonomy v protection

- 3rd party engagement with decision-makers, especially supported DM
  - Autonomy v protection + liability of 3rd party
  - Understanding the law

⇒ TEPs need to understand range of decision-makers and be ready to assist clients

Who is the BC Law Institute?

BC Law Institute (BCLI) is ...

- an independent not-for-profit, charitable society since 1997
- dedicated to legal research, law reform, public outreach
- successor to BC Law Reform Commission

Non-partisan
Non-political

Purposes:

- Promote clarification & simplification of the law & its adaptation to modern social needs
- Promote improvement of the administration of justice & respect for the rule of law, and
- Promote & carry out scholarly legal research

The Canadian Centre for Elder Law (CCEL) is...

- a division of BCLI since 2003
- dedicated to projects, activities and public outreach supporting older adults in Canada
Who We Are? What We Do?

Staff
- Core (5) + Contract (4-8)
- Volunteer Students & Pro Bono (4-8)

Volunteers
- Board (16)
- Project & Advisory Committees (50-100)

Projects
- Reports
- Recommendations
- Draft Legislation
- Study Papers
- Resources & Outreach (professional, public)

Article 12 – UN Convention Rights of Persons With Disabilities

Adopted December 13 2006 - Equal recognition before the law:
1. Right to recognition as persons before the law
2. Enjoy legal capacity on equal basis with others in all aspects of life
3. Provide access to supports required to exercise legal capacity
4. Ensure all measures provide appropriate and effective safeguards to:
   - prevent abuse
   - respect rights, will and preferences of the person
   - free of conflict of interest & undue influence
5. Ensure equal right to own/inherit property, control financial affairs & have equal access to bank loans, mortgages & other credit

STEP Academic Community - 2nd Annual Conference - Hong Kong Nov 3, 2016
Why the BC Representation Agreement?

- Community led project to reform adult guardianship – began in 1989...
- Avoiding court ordered guardianship – balance autonomy with protection:
  - Parents with children with intellectual disabilities
  - Mental health patients seeking independence (and protection from selves)
  - Older adults seeking to maintain right to make decisions
- Integrated package of laws introduced 1993
  - Representation Agreement Act (to replace POA & add Proxy)
  - Health Care Consent and Care Facility (Admission) Act
  - Adult Guardianship Act (to replace out dated court guardianship & provide for investigation of abuse and neglect
  - Public Guardian and Trustee Act – new roles, including financial abuse investigation
- The Representation Agreement was both hailed as a victory and slammed for new test of incapability – In force 2000; Amended 2011 (+ new POA Act)

RAA Purpose, Principles & Test of Incapability

- Purpose
  - To allow for planning in advance
  - To prevent applications to court when there is someone available to make decisions or assist
- Principles
  - Presumption of capability
  - Way of communicating is not grounds for decision of incapability
- Representation Agreement (s. 7 – Standard Powers)
  - Adult may authorize representative to help make, or make decisions about personal care, health care, management of routine financial affairs, & obtain legal services
- Test of Incapability (s. 8)
  - May make a RA even if incapable of making a contract; when deciding if incapable...
  - Consider all relevant factors including communicating desire for help, relationship of trust ...
- Safeguards: types of decisions; financial (2 or with a monitor); reporting to PGT
Attempts to Define Supported Decision-Making

An early definition from Mental Disability Advocacy Centre (MDAC)*

- Person retains their full legal capacity
- Person makes the decision. Supporter’s role is to assist person to reach own decisions
- There is a relationship of trust between the person and supporter(s)
- The system is a free agreement of the adult and the supporter(s)
- There is usually a supporting group or network around the person
- The supporter’s role is to assist the person to communicate the person’s intentions to others and help person understand the choices
- Supporters are usually unpaid and could include friends, family, and/or members of the community

Other definitions and articulations of the concept exist and are emerging

*As cited in CCEL 2014 paper

Implementing the CRPD
Developments in Canada and Internationally

- Canada
  - Yukon territory (similar to BC); Ontario Law Commission Report
  - Quebec, Saskatchewan and Alberta have limited authority appointments by court
    - Different scope of authority
  - Nova Scotia (2016) SC struck down guardianship legislation as unconstitutional
- Texas (2015) Supported Decision-Making Agreement Act
- Northern Ireland – 2016 legislation (not in force)
- State of Victoria in Australia
- German laws have changed
- Resources – e.g. USA
  - PRACTICAL for lawyers
But What Does it Really Mean in Practice? Relationship with 3\textsuperscript{rd} Parties

- Announcement pending – financial institution in Canada to make bank accounts available for people with intellectual disabilities – a new model?

- CCEL research in 2014 into the lived experience of adults & supporters found:
  - An important option for dignity and rights protection
  - Works best when have strong circle of support
  - 3\textsuperscript{rd} parties (professionals and financial institutions) not comfortable
  - Frustration with lack of acceptance in health care as well
  - Lack of understanding of, and training to work with, adults with supporters
  - Slippage – representatives not really supporting
  - Process to make RA is expensive, difficult and confusing

- Phase 2 of Research – 2016-2018 – Investing with Supported Decision-Making
  - First of its kind in Canada (and the world?)

Investing with Supported Decision-Making Overview

- Law Foundation of Ontario [Access to Justice Fund](#)

- Engage with investment industry and regulators, Public Guardian and Trustee, adults with cognitive limitations or experiencing cognitive decline, supporters

- Compare BC (with legislation) and Ontario (without)
  - Formal v Informal relationships

- Advisory Committee
  - Interviews; consultations

- Potential links with FAIR Canada project – Vulnerable Investor Protective Actions and Legal Safe Harbour
  - Also funded by Law Foundation of Ontario [Access to Justice Fund](#)
Investing with Supported Decision-Making
Goals & Outcomes

• Understand the legal and regulatory issues
• Identify practical issues
• Identify options for legal and regulatory reform
• Develop educational resources and tools to support investment sector, investors and supporters
• Evaluation – questions will include
  o successes and challenges with engaging each sector
  o change in attitudes?
  o Increased confidence in investors and supporters to assert rights
• Report expected late 2018/early 2019

Supported Decision Making
in
Australia
Background

• Australia not compliant with UNCRPD!
• Australia has a federal system of government;
• Some smaller studies on supported decision making previously undertaken in various jurisdictions;
• Recent changes to legislation in Victoria include provision for supported decision making for financial matters.

Aims of the study

• To determine the following:-
  o What level of supported decision making is in existence;
  o To provide an alternative approach.
Current study

- This study is one of the activities on the Cognitive Decline Partnership Centre – funded by the National Health and Medical Research Council (NHMRC)
- The research project incorporates three jurisdictions, i.e. Western Australia (WA), South Australia (SA) and New South Wales (NSW)

Current – cont.

- Project team consists of experts in law, medicine and social sciences
- Funded for three years, about to enter the second year of the project
- Focus of the research is supported decision making in the domains of health and personal matters
Current – cont.

• Study involves the following:-
  o Analysis of the relevant legislation in the three jurisdictions;
  o Analysis of the decisions of the relevant tribunals;
  o Review of the policies of aged care providers, in respect of decision making principles (both residential and home care);

Current – cont.

• Interviews with key “players”, these include:
  o Aged care providers;
  o People with cognitive impairment;
  o Formal substitute decision makers; and
  o Those people involved in informal substitute decision making.
Discussion and Questions

Thank you

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