THE ROLE OF THE ADULT GUARDIAN

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Adult Guardian
Role of Adult Guardian

- Role to protect rights and interests of adults (not children) with impaired capacity, i.e.
  - Adult with a psychiatric or intellectual disability, dementia, acquired brain injury, or other condition that affects capacity
  - Not a systemic advocacy role— that is for the Public Advocate
Functions of Adult Guardian

- Guardian of last resort for personal and health decisions
- May accept appointment under Enduring Power of Attorney or Advance Health Directive as personal attorney of last resort
- May investigate abuse, neglect or exploitation
- Statutory health attorney of last resort
- Includes withdrawal or withholding of life sustaining measures
Role of the Adult Guardian cont’d

- Make representations or seek assistance from government or non-government agencies, i.e. advocacy
- Not legal representation
- Consent to forensic examination
- Community education and advice and research
Presumption of Capacity

- Everyone is presumed to have capacity to make decisions

- Presumption of capacity can be rebutted by evidence from experts such as neuropsychologists (good for dementia and acquired brain injury) or psychologists (good for intellectual disability as will assess IQ) or psychiatrists (mental illness)
Capacity to Make Decisions

- Able to understand the nature and effect of decisions about a matter
- Freely and voluntarily making decisions (no undue influence)
- Communicating the decisions in some way.
- Capacity is time and decision specific, varying with the complexity of the decision (s. 5)
Definition of intellectual disability

- IQ of 70 or below, but standard error of measurement is plus or minus 5, therefore can go to 75.
- Significant limitations both in intellectual functioning and in adaptive behaviour as expressed in conceptual, social, and practical adaptive skills and originating before age 18.
- Check if there is a psychologist’s report and behaviour management plan
Informal Substitute Decision Making

- *Guardianship and Administration Act 2000* recognises that decisions may be made on an informal basis by an adult’s existing support network if the adult lacks capacity to make decisions.

- Support network excludes paid carers.
Formal Decision Making

Decisions may be made on a formal basis by –

- A personal or financial attorney under an Enduring Power of Attorney
  - A Statutory Health Attorney
  - Guardian
  - Administrator
- Guardianship and Administration Tribunal
Guardianship and Administration Tribunal

- Appoints guardians & administrators
- Makes declarations about capacity
- Gives advice, directions, recommendations to guardians and administrators or about EPAs and AHDs
- Consents to special health care or to withdrawal or withholding of life sustaining measures
- Approves clinical research
Guardian - criteria for appointment under s12

Tribunal may appoint a guardian for a personal matter if Tribunal is satisfied

- The adult has impaired capacity for the particular matter; and
- There is a need for a decision or the adult is likely to do something in relation to the matter that involves, or is likely to involve unreasonable risk to the adult’s health, welfare; and
Guardian - s12

- Without an appointment –
  - The adult’s needs will not be adequately met; or
  - The adult’s interests will not be adequately protected
Guardian- decisions

- Order for all personal matters - includes other decisions required for the adult’s care and welfare – but scope should be limited by rules of statutory interpretation and human rights principles or for the specific powers below, e.g.:
  - Health
  - Accommodation
  - Service provision
  - Contact
Guardian

- Guardian is a substitute decision-maker not a case manager or a counsellor, nor a day to day carer nor a magician to heal entrenched family conflict nor to obtain government funding nor to create appropriate accommodation for adults.

- Some discretion as to how order is implemented but must comply with the order and the Act.
General Principles

- Presumption of Capacity
- Same Human Rights
- Individual Value
- Valued Role as a Member of Society
- Participation in Community Life
- Encouragement of Self-Reliance
General Principles cont’d

- Maximum Participation and Minimal Limitations
- Maintenance of Existing Supportive Relationships
- Maintenance of Environment and Values (cultural and linguistic)
- Confidentiality
Health Care Principle

- Power to be exercised only if appropriate to promote and maintain the adult’s health and well-being.

- Decision maker must to the greatest extent practicable
  - Seek the adult’s views and wishes
  - Take information given by adult’s health provider into account
Principles - Guide for Decision-Makers

- To the greatest extent practicable, when exercising a power, the adult’s views/wishes are to be taken into account.

- Use principle of substituted judgement – if it is reasonably practicable to work out what the adult’s previous views/wishes would be, then take account of what would be the adult’s views/wishes.
Principles for Decision Makers cont’d

- A person performing a function must do so in a way that is least restrictive of the adult’s rights.
- Exercise power consistent with adult’s proper care and protection (used to override adult or family when necessary).
- Power exercised in a way that is appropriate to adult’s characteristics and needs.
Confidentiality – s 249

- Strict confidentiality rules for Adult Guardian and Tribunal
- But can disclose if for this Act or
- To discharge function under another law
- Or for proceedings in a court or tribunal
- Guardian can furnish guardianship application, professional reports, orders, contact details of services/ families.
Health decisions

- Health care includes treatment of physical and mental condition
- Previously assumed MHA orders overrode GAA, and if already under ITO or forensic order, only physical conditions treated by guardian
- But with Langham [2005] QSC 127, treatment under MHA compulsory orders oust GAA and include anything done with intention to have a therapeutic effect, even if cannot cure
No distinction between *symptoms* of mental illness and its *consequences*, such as physical consequences e.g. refusal to eat.

Scope under negotiation with Director of Mental Health – Langham had no physical illness like cancer.

Treatment includes nursing, care or to prevent harm or alleviate consequences or prevent deterioration even if will not cure.
Langham cont’

- Chesterman J referred to MM V MHRB, WA
- Elder with dementia, exposed to substantial risk or injury or unintentional self harm - treatment included detention in hospital

- Case pending in GAAT whether Adult Guardian can give key to nurses to enter without consent to treat diabetes, or to mental health to treat mental illness
Long history of challenging, destructive & high risk behaviours – if unable to be settled by counselling, diversion activities or distraction, WCM is placed in seclusion and given medication.

was under ITO, but a voluntary patient for 2 years so no MHRT review.

Doctor applied for order so care and treatment could be monitored by external body, i.e. Tribunal and Adult Guardian.
Tribunal appointed Adult Guardian for 6 months for health care, including decisions on restrictive Behaviour Management Plan consistent with WCM’s proper care and protection

Placement in mental health centre is treatment and not an accommodation decision
Though WCM does not have a mental illness, his destructive behaviours and aggression fall within “mental condition,” and are part of health care medication required to manage symptoms of this condition and at times to sedate WCM during acute outbursts. Consent can be given for medication which treats WCM’s aggression and agitation but not for staff convenience (i.e. not chemical restraint).
WCM cont’

- use of seclusion/ restraint for managing adults with challenging behaviours is a major infringement on civil liberty and only used as a last resort when all other options have failed.

- If physical or chemical restraint used for non medical reasons, cannot be authorised as health care under GAA.
Decisions about “legal matters” by guardian

- Use of legal services to obtain information about adult’s legal rights
- Use of legal services to bring or defend proceedings, including Family Provision; and
- Bringing or defending proceedings including settling claim
- No distinction between a guardian or an administrator, so unclear boundaries
- Administrator should deal with personal injury/criminal compensation/ family provision
Guardianship and legal aid

- Recent trend to appoint Legal Aid as separate representative- Langham as Adult Guardian had already acted as statutory health attorney

- Tribunal strict on any alleged conflict of interest; yet Adult Guardian has role to protect adults even if has had to make decisions already to protect adult

- Adult Guardian supports extra funding for legal aid to deal with these cases
Child Protection

- Adult Guardian appointed for legal matter when DOCS think that guardian will represent adult at child protection hearings
- Guardian will seek legal aid for adult, may attend conferences but no legal representation by Adult Guardian
- Will give information and advice to legal aid on what adult wants, if known, and what decision would be consistent with adult’s care and protection
Child Protection

- Victorian Civil and Administrative Tribunal - *Michelle Gray*, 8 June 2004

- It was a matter for the Children’s Court to determine the competency of the parent to be a parent, to understand the issues concerning parenting and the level of insight into parenting issues. Ms Gray did not need a guardian as the *Childrens and Young Persons Act* 1989 effectively meets her needs, i.e. to enable custody of the child to be resolved.
The Tribunal refused to appoint a guardian as concerned that potentially a guardian could decide whether or not to exercise the right of the adult to participate in the child protection hearing, or stop the adult participating.

Therefore, a guardian does not decide to consent to the child remaining in care, or to defend such proceedings.

Legal Aid have to deal with reality of parenting skills of adult and risks and benefits to child.
Child Protection

- Guardian will give advice based on what is consistent with the adult’s care and protection.
- In some cases, despite appointment, adult can give instructions to solicitor.
- Guardian expects adult’s solicitor to negotiate contact with DOCS, as this is outside guardian’s power.
Family law matters

- Adult with intellectual disability - parents divorced
- Adult Guardian appointed for adult to make decisions on contact & accommodation
- Act does not specifically state that Adult Guardian can restrict or refuse contact, but is a decision for adult’s care or welfare
- D-R (Adult: Contact) [1999] 1 FLR 1161 – no presumption of right of contact between a parent and adult child, even if adult had mental incapacity
Re F (adult: court’s jurisdiction) [2000] WLR 1740

- English Court of Appeal granted a declaration that would protect an adult’s best interests, such as keeping her in accommodation away from her mother, and restricting and supervising her contact to her family, particularly her mother.

- She had been removed into the care of the local authority with allegations of neglect and exposure to adults who might sexually abuse or exploit her.
Personal injuries

- Adult must be able to understand, absorb and retain information and advice sufficiently to make decisions on the legal advice.
- Since capacity depends on time and context, a decision on capacity in one set of proceedings does not bind a court in a different set of proceedings.
Family conflict

- Whether family conflict about adult child, or by adult children re elder with impaired capacity, some similar family dynamics
- Act places priority on rights and interests of adult
- Family have no legal rights to demand guardian to do what they want if against adult’s rights and interests
- Society needs to accept primacy of vulnerable adults rather than right of families when conflict between them
- We may accept this for children (note CMC critique of Families) or elders but we have not done so for adults with intellectual disability or acquired brain injury or mental illness
Abuse, neglect or exploitation

- Discretion to investigate – may decline and instead use advocacy or guardianship
- Referral form with evidence of impaired capacity asking for investigation
- No (mandatory) reporting system
- Only individuals, no systemic investigation powers
- Focus on timely outcomes of protection not on full investigations duplicating Police etc
- Crimes against adults- physical/sexual abuse should be reported to Police
Internal review of decision/ complaints

- Act does not provide for Adult Guardian to review decision when family or adult dissatisfied
- At their request or officer’s initiative, decision reviewed by higher officer
- Complaints processes- will trigger review if current decision
- In practice Tribunal reviews actions of guardian on review of order, though Act states review of whether order is still required
Criminal Justice system

- Clients with intellectual disability increasingly in the criminal and corrections systems
- Try to get psychiatric opinion of challenging behaviours as a psychiatrist unfamiliar with intellectual disability may have stated that client does not have a mental illness, when in fact may have dual diagnosis
- Guardian focused on decisions to minimise harm long term to client, and consistent with care & protection
Criminal Justice System

- Adults with intellectual disability may hide disability
- Give incriminating, but inaccurate "confessions," because want to please, easily influenced or is confused
- Communication difficulties is a major impediment to taking instructions
- Should lawyer have duty like a separate representative of adult’s best interests rather than normal litigation duty?
- Prefer forensic dual diagnosis unit in the Park etc than prison
Criminal Justice System

- Guardian has no authority to make a decision that client pleads guilty or not guilty.

- Even if client found fit to plead, may be a lower threshold of capacity than capacity to give instructions to solicitor, so client may be unable due to cognitive impairment or communication issues to give instructions.

- Tell the court that client cannot give instructions.
Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (NZ)

- Therapeutic alternative to prison
- Allows courts to make compulsory care orders for adults with intellectual disability charged with or convicted of imprisonable offences
- Order lasts for 3 years, extendable by Family Court if behaviour continues to pose serious danger
- 6 month clinical reviews of care order
IDCRA

- Care orders require adult to comply with order
- Right to independent health, disability and legal advice
- Needs assessment, care and rehabilitation plan, regular reviews of orders
- Can be ordered to receive secure care in hospital, community based facility, or community based supervised care
- Detention reviewed by lawyers similar to Official Visitors
Case Study of Guardianship client

- Mr P is a 23 year old male who has a moderate intellectual disability and a possible psychiatric illness.

- Concerns raised that Mr P has engaged in inappropriate sexual behaviours towards children and tried to prostitute himself to men in public toilets. He had been a victim of sexual abuse.
CASE STUDY

- Currently facing sexual offences against children
- Due to his inability to understand the letters from the Magistrates’ Court, he did not attend, so warrant issued
- But already arrested for wilful damage and taken into custody
Kept in protective custody due to his vulnerability

Tribunal appointed Adult Guardian as Mr P’s family would not accept the appointment, as frustrated with his behaviour.

Did Mr P have capacity to instruct a lawyer from Legal Aid?

Extensive work was undertaken with key parties involved with Mr P to secure appropriate funding.
CASE STUDY

- Psychiatric assessment arranged to see if able to plead or not
- Service provider applied for Legal Aid
- Bail with strict conditions sought for Mr P and strongly advocated for by Senior Guardian in discussions with Legal Aid lawyer
- United collaboration in the case of Mr P resulted in a positive outcome.
- Mr P was released on bail, with 24 hour support and assistance to live successfully in the community
Strategies and safeguards were put in place to prevent self-harm directly or indirectly by further offending whilst in the community.

If he wants to leave his home, workers follow him rather than prevent him leaving, and encourage him to return, but may call Police to assist his return.

Clear boundaries were put in place to ensure that all parties knew their respective powers and duties e.g. between bail and guardianship orders, and now forensic order.
CASE STUDY

- These boundaries constitute a tight rope to walk as under the *Guardianship Act 2000*, no legal duty or authority to make decisions with the direct intention of protecting the community.

- Duty is only to protect the adult.

- Mental Health Act does provide for the protection of the community.

- Guardian cannot use common law to authorise Necessity Principle to prevent him leaving home or returning him there with force if necessary