

Conflicts in guardianship

3rd World Congress on Adult Guardianship

Arlington (Washington D.C.), Virginia, USA.

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May 30, 2014.

Slide 1: Title: Conflicts

The subject of my presentation is “Conflicts in Guardianship”, focused on decision-making processes. I will be presenting in short an analysis based on game theory. In particular, I will be looking at the position of guardians. The objective of my presentation is to provide insights that can be used by guardians in practice and can help them in their work, and to offer a tool for best practices. This is my way of dealing with the problems I encounter in my work as a guardian.

Slide 2: Game theory

Game theory, commonly used in economics and political science¹, uses mathematical models to describe gameplay behaviour. The game perspective I will be presenting here is based on the microsociological analyses of everyday face-to-face interaction by Erving Goffman in his essay entitled 'Strategic Interaction'².

Slide 3: The game and the stakes

What are the issues involved in the conflict? This is important to know and to describe.

We can make a distinction between conflicts of interests and conflicts of values. Correspondingly, we have guardianships of the estate and guardianships of the person.

In the case of a conflict of interests, material matters, or in other words money, are involved. An example: one of the children in a family has been looking after the bank balance of the father or mother and has appropriated money for himself. The other children recognise that their share in any future inheritance is being reduced. Many cases of misuse and elder abuse involve this type of situation.

We refer to a conflict of values if one party, 'driven by a passionate belief in being morally right', wants to impose their standards and values on the other party. Here immaterial matters, such as issues relating to care and nursing for the person involved, are at stake. Conflicts relating to the location at which the person involved is treated and cared for are often major ones. To which nursing home or care home should the father or mother be admitted? Or is

¹ Neumann, John von, Morgenstern, Oskar: Theory of Games and Economic Behavior. Princeton University Press, Princeton, NJ, 1944.

Schelling, Thomas, C.: The Strategy of Conflict. Harvard University Press, Cambridge, 1960.

² Goffman, Erving: Strategic Interaction. Basil Blackwell, Oxford, 1970.

home care still an option and is it desirable? In addition, conflicts can arise with the health-care institution at which the person involved is residing.

Values and interests become mixed up. "A conflict of interests is often presented as being a conflict of values because fighting for lofty values is more respectable than fighting for your own base interests. Conversely, conflicts of values often only really blow up when interests come into play, too."³

As an example, I once had to resolve a problem by placing an individual in a care institution for people with multiple disabilities when the individual's mother and brother were opposed to this. Legal proceedings and the help of the police were required in order to obtain the help and care the individual needed in the setting of a care institution, for which she had a referral. The family was strongly opposed to this. What made their opposition so strong was the fact that the family was receiving payment from the health-care insurance for providing the care required at home themselves. The family had a direct financial interest in keeping the care of the individual at home.

Slide 4: The game and the players

Who are the parties involved in a conflict? A party is described as an entity with a 'unitary interest' to promote. A party can therefore be one or more individuals or an organisation. Organisations are always represented by people. The person representing the interests of a party is called a player. In guardianship, we distinguish between the following potential parties:

- A. the incapable adult, also called the ward
- B. the guardian
- C. members of the ward's family: C1, C2, C3, etc.
- D. health-care professionals
- E. the court, the judge
- F. other parties

Players in a conflict may join together to form a coalition.

Slide 5: The game and the rules

Every game has its own rules. So, what are the rules in guardianship?

First of all, the parties involved are supposed to act in accordance with the law. And the judge must be sure that a guardian acts in accordance with the law.

Secondly, the guardian is guided by the rules of the 'Code of Ethics' and 'Best Practices'.

But the law doesn't always offer a solution to all of the problems we encounter in practice. For example, a 73-year-old woman is suffering from Alzheimer's disease. She can no longer live in her own home. Her three children, who are adults, disagree with each another regarding what should be done with the house, household effects, etc. The judge appoints a professional guardian for the estate. His task is to sell the house and to divide the furniture among the three children. Here we have a distribution problem. Here the guardian needs to decide on the rules regarding how the household effects are distributed between the ward's children. A fair and clear procedure is required. And in advance the guardian needs to make

³ Jager, H. de and A.L. Mok: *Grondbeginselen der sociologie. Gezichtsputen en begrippen*. H.E. Stenfert Kroese, Leiden / Antwerpen, 1983, pp. 97-98.

the rules clear and to get the parties to agree to them, and thereby also to agree to the outcome, which is uncertain to the parties involved.

Slide 6: The game and the gameplay

In game theory, social behaviour is described as if a strategic game is involved. If it is a particular player's 'turn', then he has the opportunity to make a choice. The action he takes as a result of this is called a 'move'. It is then the turn of a different party, in reaction to the move of the first. Action → reaction → interaction.

Each move made by one of the parties irreversibly changes the game situation. A new situation has been created and the other party can respond to that situation by making a countermove.

Players strive to achieve a certain goal. Their moves, and the countermoves they make in response to the moves made by others, can be seen as a series of connected moves, the aim of all of which is to bring them closer to their goal. This is what we call 'strategic interaction'.

The game has its own dynamics. None of the parties wants to go to war. But in striving to achieve their own goals, and the successive moves made by the parties involved, aimed at preventing war, the unavoidable result may well be war.

In conflict theory, this process is described as 'escalation'. It can be broken down into the following phases:

1. The win-win phase

In this phase there are conflicts of interests and different opinions are perceivable, but attempts are made to 'work things out' together. As events progress, irritation can increase, discontentment becomes manifest and gradually the realisation may dawn that things cannot be worked out.

2. The win-lose phase

In this phase, competition is the overriding experience. There is no longer any belief that a feasible solution can be found. The parties look for support from other parties and start to form coalitions. The image of individual parties starts to play a role. Giving in means losing face. The parties go all out to win.

3. The lose-lose phase

The other party is seen as being guilty and as the source of all the problems and of their own misfortune. The parties no longer have any positive goal in mind, but are focused on destroying the other party. They try to limit any damage to themselves and to reduce the threat presented by the other party.

Slide 7: The game and the outcome

The gameplay is determined by the moves the players make. If we assume that each player is pursuing his own goal and following his own strategy, then ultimately this may lead to a different gameplay than the one the players had expected, and may lead to none of the players achieving their own goal. The gameplay and its outcome do not match what the participating parties had in mind and had intended.

The processes described can, due to the parties, have unintended and unforeseen consequences. This phenomenon is known as the unintended and unanticipated consequences of social action⁴.

Slide 8: Game theory: conclusions (1)

In economics and mathematics is assumed that players are rational decision-making subjects.

But: people are more than that: they have emotions, feelings, passions, reputations, goals, anger, frustration, values, norms, tradition.

Slide 9: Game theory: conclusions (2)

In decision-making processes an rational approach can help us. Keeping some distance to the emotions of the players involved.

But: real life is not a game. Nevertheless: sometimes there are game-like situations in real life. So we can learn something from game theory in thinking reality 'as if' it were a game.

Slide 10: The guardian in conflict

On the basis of his position and duties, a guardian needs to make decisions on behalf of and for his ward. In doing so, he can become party to a conflict with other parties. This makes his position (as a dispute resolver) unique.

Slide 11: The guardian versus the ward

The first issue to mention is the particular characteristics of people who are considered for protective measures. Due to their psychological or mental impairments, these people often find it difficult to make a distinction between the message and the messenger. If, for example, the guardian delivers the message that, as part some desirable expenses cannot be made, because of a deficit in the budget, then the messenger can be blamed for this and be judged by the ward. The more impairments (psychological or mental) a ward has, the more difficult it is for him to make a distinction between message and messenger.

Unpleasant messages, whether they relate to facts or legal regulations, can lead to deterioration in the relationship with the guardian. In some cases, this may take on very serious forms, such as unfair treatment, verbal aggression, threats or physical violence (including death threats).

Here I refer to the study of Michael Lipsky on 'Street-Level Bureaucracy'⁵ where in chapter 5 he discusses the 'Relations with Clients'.

Slide 12: The guardian versus family-members

As mentioned, in cases where it has been established that there is dissension between family members regarding the management of the finances of, or the provision of care to, a parent

⁴ Merton, Robert K.: On Theoretical Sociology. New York, The Free Press, 1967, p. 105.

⁵ Lipsky, Michael: Street-Level Bureaucracy. Dilemmas of the Individual in Public Services. New York, Russell Sage Foundation, 2010 (original 1980).

who has become a ward, the sub-district court appoints an outsider. In such cases, the conflict has already escalated to such an extent that it has been brought before the court. Following the conflict settlement procedure in court, the parties may then proceed with their dispute, but are required to involve the guardian in the matter. Coalitions have generally already been formed between brothers and sisters within families. The position of the guardian may take the following form:

At first the affected parties accept the decision of the court and the appointment of a guardian. It is accepted that the guardian properly manages the income and assets of the ward, and that misuse of that income and those assets by other family members is no longer possible. The sting has been taken out of the conflict. This is generally the case in conflicts relating to property law. It is for this reason that some families look for an outsider to serve as a guardian themselves, with the aim of preventing disputes within the family or the escalation of such disputes.

Second the affected parties make attempts to bring the guardian around to their point of view, trying to get him to dance to their tune. This sounds a warning to the guardian. The disputes in such cases are generally about non-material matters: they maybe about health care or where the ward should live. Often many emotions play a role in the conflict situation, too. Sight is often lost of what the ward himself wants and what is in his best interests. The disputes drag on and the guardian becomes involved in them as a party.

Third the affected parties collectively turn against the appointed guardian. This often happens in situations where the family members are collectively exploiting the ward.⁶ The outsider is viewed as an intruder or enemy. This reinforces the bonds within the group. Sometimes the situation may involve a closed family system to which welfare or care services are also unable to obtain access. In such cases is it difficult to obtain proper insights into the situation and the interests of the ward as long as the ward is still a part of a closed family system.

Another example is when parents of a son or daughter who is of age have requested protective measures and in doing so have asked an outsider to take on the role of guardian. Following appointment, it may turn out that what the parents had in mind was for the guardian to take on the supervision of and to impose discipline on the child, as the parents were able to do themselves when the child was still a minor. This sort of expectation may relate to both material matters and care. The genuine concern of parents and their emotional involvement can, however, also have a very oppressive effect. Letting a child go and giving him or her the opportunity to grow into adulthood, with all of the failures that involves, is difficult, particularly if the child involved requires protection due to psychiatric or metal impairments.

Slide 13: The guardian versus health care

Such conflicts involve care that does not come up to the mark in the view of the guardian. Here, the task of the guardian is to represent the ward and promote his interests. If, following consultation, disagreement persists, then the guardian can make use of the right of complaint by submitting a complaint to a complaints committee. In addition, he can also report the case to the Health Care Inspectorate. The guardian is allowed to make use of any means that are

⁶ Coser, Lewis A.: The Functions of Social Conflict. New York, The Free Press, 1956, p. 87-95.

available to competent persons on behalf of the ward. Often conflicts are resolved through consultation and negotiation. However, the differences in point of view regarding care and treatments are sometimes fundamental. The problems may be such that the care providers and guardian involved may be faced with a terrible dilemma.

Slide 14: The guardian versus the judge

My advise: never come into an open conflict with your supervisor. In the end the judge has the authority to appoint or discharge a guardian. That doesn't mean you cannot disagree with a judge. The right attitude is: you "agree to disagree".

As to the practise, the exercise of your tasks: it is the guardian who makes the decisions, not the judge, unless the law says otherwise.

Slide 15: The guardian versus other parties

The guardian may come into conflict with other affected parties, such as creditors, or bailiffs. In the case of a ward having problematic debts, the guardian or the debt counsellor can find himself in a situation of conflict with creditors. The parties are aware of the rules for debt counselling, whether in place by agreement or as part of a legal procedure. Negotiations may take place in order to resolve the problems. Sometimes the conflict should be resolved by the court reaching a decision. In this type of conflict the guardian acts in place and on behalf of the ward. As a promoter of the ward's interests, it is his job to side with the ward in a conflict.

Slide 16: The guardian as a mediator

In some situations the guardian can take the role of a mediator.

Slide 17:or as an arbitrator

Slide 18: The guardian as an arbitrator?

The guardian is the authority to make the decisions. Like a parent sometimes has to, or a police officer.

The guardian makes decisions, in the interests of the incapable adult, in accordance of the law, respecting moral 'standards of practise'.

Here comes in Mrs. Carmen Kaminsky.