Swedish Guardianship Legislation

Torbjörn Odlöw, Senior Lecturer, Department of Law, School of Business, Economics and Law, University of Gothenburg

The outline of my presentation will be as follows. First I will describe the reformation of the Swedish Guardianship legislation from the Guardianship Act of 1924 to present time. Then I will point out the basic features of the legislation with respect to assisted decision-making and tailored protective instruments followed by a problematization of these basic features. Finally I will make some concluding remarks. Since the time I’ve been given to present is quite short I enclose this supplement in order to give at least a bit more detailed description of the relevant legislation.

There are two kinds of measures that can be made regarding a person who needs help in or are incapable of managing his/her own affairs the godmanship, which is the key measure, and the administratorship.

The appointment of a god man (good or fair man) is a voluntary measure and the individual must give his/her consent to the arrangement. The consent regards the arrangement as such and not who is appointed but usually consent is obtained regarding both the arrangement and the appointee at the same time. Since the individual can apply for cessation of the godmanship at any time there would also be pointless to appoint a person that the individual lacks confidence in. Persons who can apply for the measure are the individual him-/herself, his/her guardian (if the individual is under aged, i.e. an application in advance to make sure that a person who are intellectually challenged does not lack legal representation when s/he reach majority), his/her spouse (married as well as co-habitant) and nearest relatives. The appointment of a god man is a district court affair and the court’s decision can be appealed by anyone who can apply for the measure.

The requirements for establishing a godmanship is that the individual as a consequence of a disease, a mental disorder, a weakened state of health or a comparable condition needs help in managing his/her private and/or financial affairs and, and this is an important and, that the need cannot be met with a less restrictive measure, e.g. by appointing a power of attorney or likewise.

The establishment of a godmanship as such does not affect the individual’s capacity to represent him-/herself in any way; the god man is considered primarily to be an assistant decision maker and not a substitute decision maker. Hence the god man needs consent from the principal in order to legally bind him/her except if the legal act concerns the upholding of the individuals household, such as payments of rent and/or mortgage and other monthly bills, buying food etc.
If there are grave concerns regarding the individual’s ability to represent him-/herself the appointment of an administrator may be considered. With regards to the principle of minimum intervention the legislation explicitly states that the court may not appoint an administrator if it is sufficiently enough to establish a godmanship or if the individuals needs can be provided for in a less restrictive way, e.g. by appointing a power of attorney or likewise as in the case of godmanship.

Appointment of an administrator means that the administrator gets exclusive powers to represent his/her principal, but only within the scope of the commission. The individual cannot unless permitted so by the administrator enter into legally binding acts in that specific area. The appointment does not affect the individual’s right to vote.

In establishing both measures the court must specify the scope of the appointment to match the precise needs of the individual as far as possible. For instance, if a person who suffers from a specific disorder or illness, such as grave alcoholism or drug abuse, gets a large sum of money in inheritance s/he might spend it all on alcohol and/or drugs which might pose grave danger to the persons health as well as his/her ability to provide for him-/herself economically. The court can in such a case appoint an administrator with exclusive power to manage a specific account on a bank where the money is deposited and the individual’s ability to represent him-/herself otherwise can be left intact. Then the administrator can portion out a limited sum of money on a regular basis (e.g. weekly or monthly) to an account that the individual may manage without restriction. As another example, a person who suffers from a compulsive disorder and because of this cannot refrain from buying products on-line or from TV-shopping networks and does so in an extent that seriously may harm his/her financial status, can be appointed an administrator with exclusive powers to enter into credit agreements on behalf of the individual, thus leaving the individual free to enter any and all cash payment agreements.

Due to the explicit reference to the principle of minimum intervention in the legislation regarding the establishment of an administratorship such a measure cannot be established in case the individual is in a more or less vegetative state or if s/he clearly suffers from grave dementia and therefore pose no real danger to him-/herself, i.e. would not or could not enter into any kind of agreement what so ever. In these cases the court will establish a godmanship and not an administratorship. One would think that this was impossible due to the requirement of the individual’s consent, in establishing the measure as well as in order to legally bind him/her to a legal act made by the god man, but there is an exception from this rule. Consent from the individual is not required if the individual on account of his/her condition is incapable to express a view whatsoever or if the individual, although capable of speaking and answering, clearly lacks sufficient comprehension in the matter (e.g. answers all questions affirmatively or vice versa).

The fact that severely ill people in concurrence with the principle of minimum intervention do not get their power to represent themselves restricted, since it is enough to appoint a god man to provide for their needs, were a major contributing cause in
Sweden’s abolishing of adjudication of (total) incapacity in the late 1980:s, which brings me to the next part of this paper; the reformation of the guardianship legislation in Sweden during the twentieth century and the ideological considerations underlying the three major reforms.

The adoption of the Guardianship Act of 1924 was the first major reform of the guardianship legislation in the twentieth century. Before the year of 1924 the protection of vulnerable adults’ affairs were regulated in the Inheritance Code from 1734. In comparison with the act of 1924 the Inheritance Code contained few statutes concerning guardianship and needless to say they were quite patriarchic. However, the 1924 reform did not alter the ideological view on vulnerable adults that underlay the previous law. Total adjudication of the individual’s capacity was seen as the key as well as the only real effective measure.

The big difference between the previous legislation and the Guardianship Act was the necessity for legislative exactitude. The legislators acknowledged the basic principle behind the earlier law to be accurate, i.e. that a person who was deemed unable to manage the own affairs should be declared legally incompetent and that a guardian should be appointed. However, the Inheritance Code was considered to give the court a too extensive jurisdiction in deciding if and when a person should be declared legally incompetent. In accordance with the rule of law and the subsequent demand of a predictable application of the law and the protection of legitimate expectations this vagueness needed to be remedied. Hence the situations when to declare a person legally incompetent and how the appointee should act on behalf of the individual, i.e. what he or she could do, in what cases the guardian needed specific consent from the chief guardian and rules concerning the audit of the management, were meticulously outlined.

A new legal figure was nevertheless introduced in the 1924 reform, the godmanship (although this godmanship differed quite a lot from the current godmanship). If the individual suffered from a temporary illness or from an illness that could be expected to progress into a severe and permanent condition but the disease was still in an early stage a god man could be appointed. However, if the condition was considered more or less permanent and the individual met the requisites of the statute, i.e. was deemed unable to manage his/her affairs, a god man could not be appointed. A major concern regarding the introduction of a godmanship was the risk of colliding legal acts, i.e. that the individual and the god man each perform a legal act concerning the same property. This due to the fact that the god man had the same power to act on the individual’s behalf as a guardian and that the appointment did not affect the individual’s own power in that regard. Since the godmanship only was intended as a temporary measure and since a god man was to be appointed only if the risk of colliding legal acts were small the uncertainty regarding the introduction of the new legal figure diminished.

The Guardianship Act did not include any statutes regarding the individual’s participation in the management of his/her affairs; when declared legally incompetent the managing of the estate was transferred to the guardian which had no obligation to include
the individual in the decision making. However, if the guardian were to make a decision in an important matter there was an obligation for the guardian to hear the individual’s opinion. The statute was (and still is) a *lex imperfecta*, i.e. there is no real sanction if the guardian does not hear the individual on important matters. According to the preparatory works such a behavior could lead to the dismissal of the guardian. However, to the best of my knowledge a dismissal on that ground has never happened.

The following reform of the Swedish guardianship legislation was carried through in 1974 and this must be considered as a turning point in the development of Swedish guardianship law. This reform brought about a radical change in the societal view on vulnerable adults needs and rights. The adjudication of incapacity was, however not abolished, now considered a last resort and instead a reformed godmanship was introduced as the key measure.

The 1974 reform was preceded by a government official report that did not propose any real changes in this direction, but merely more or less procedural changes of the legislation. However the report was revised in the department of justice and in a PM in the ministry publication the new view was presented. The authors proclaimed that the time had come to radically reconsider the (then) current grounds for adjudication of incapacity. The reason for this change of view is to be found in the construction of the social security system, which largely took place in between 1930-1960. The authors of the PM regarded that the view on vulnerable adults that characterized the legislation then in force originated from nineteenth century values and was based upon the will to protect the individual’s assets from his/her own disposals. This was explainable in a time when the social security system had not yet been constructed but in the mid 1970’s the rules were regarded as antiquated.

The change of view is clear. In the preparatory works for the Guardianship Act the drafts legislation committee stated that the key and only real effective measure was the declaration of legal incompetence; in the 1974 reform the authors of the ministry PM declared quite the opposite that the individual’s need in most cases could be resolved without appointment of a guardian and that the adjudication of incapacity in the majority of the cases could be considered too harsh a measure in relation to the practical need and that such a measure should be considered only when there was a real need for such a radical measure.

This new view was also maintained in the case law in two important rulings were the Supreme Court interpreted the reformed law as so that i) a guardianship could not be appointed if the individual had no ability what so ever to perform a legal act per se and ii) that a godmanship furthermore was sufficient if the individual, even if the requirements of a guardianship were met and the individual was able to perform legal acts by him-/herself, could be expected to cooperate with the god man. The measure of guardianship was in the future only to be used if there was a significant risk that the individual performed legal acts in a way that was seriously harmful for his/her private economy.

However, even if the 1974 reform introduced the principle of minimum intervention
in establishing a measure the principle did not influence the rules concerning the exercise of the assignment. The individual’s right to active participation in managing the estate was the same as in the Guardianship Act of 1924. The above mentioned rule that the guardian and the god man should hear the individual’s view on more important matters was more or less the only statute in this respect.

Even though the reform of 1974 must be regarded as the major turning point for the development of Swedish guardianship legislation the subsequent reform in 1988 have to be considered pivotal as well. The two major changes in this reform was the abolishing of guardian- ship for adults altogether and the introduction of a rule demanding that the god man obtains consent from the individual in order to legally bind him/her except if the legal act in point is regarded as a day to day transaction (such as payment of rent, monthly bills etc.).

The abolishing of guardianship for adults were in large parts due to a debate regarding the loss of right to vote that was a consequence of the establishment of a guardianship for an adult but also due to concerns about the psychological wellbeing of the individual and the fact that the establishment of a guardianship could render difficulties for the individual in adapting to society. Since the previous reform entailed that guardianship no longer was established for persons that were severely ill but was for persons with in some respect lesser cognitive problems the loss of the right to vote was perceived unjust. Furthermore the right to vote was (is) considered a strong political right and the deprivation of that right was considered as stigmatizing. As a result of all this the courts were reluctant to establish guardian- ships in practice, and not so much due to the capacity restrictions but because of these side effects. In a government official report these negative aspects were pointed out and the investigators proposed that the guardianship for adults should be repealed.

However, removal of plenary guardianship brought about the need of a replacement measure in order to maintain the protective function that the guardianship had fulfilled. The possibilities to receive aid from the social service and to nullify legal acts since they have been made under undue influence of a mental disturbance were not considered sufficient to meet this need (it was argued that such solutions in the specific case would take too much time, would pose practical difficulties and would be too costly) and that the godmanship was not a sufficient replacement. The investigators hence proposed the introduction of a new legal figure, the administratorship, which could be adjusted to target the individual’s specific need and leave the rest of his/her powers and rights unaffected. In this way the problem with the loss of right to vote also could be remedied. The principle of minimum intervention was seen as paramount. The court should not establish an administratorship unless all other means could be considered insufficient, i.e. if the individual lack ability to manage his/her own affairs but there is no apparent risk that s/he perform potentially harmful disposals with his/her property.

The second above mentioned alteration due to the reform was the introduction of a
requirement that the god man acquires consent from the individual in performing legal acts on his/her behalf. Before this change the god man could perform acts completely independent from the individual and even take measures that were not consistent with the individuals wishes and feeling even though the individual's own power to manage his/her affairs were not affected by the establishment of a godmanship. This was considered a problem and it was regarded that the scope of the god man's authority as well as in relation to his/her principal as to a third party needed more precision. Principally the guiding perspective should be that the god man is an assistant decision maker and not a substitute decision maker; hence a legal act performed within the scope of the appointment but without the consent of the individual does not legally bind the individual. Consequently the god man, as in general rules regarding powers of attorney, is liable towards a third party that s/he, besides having authority, has the proper mandate to act on his/her principals behalf.

Besides the demand for consent in godmanship and the pre-existing above mentioned rule that the guardian and the god man should hear the individual’s view on more important matters the legislation after the 1988 reform did not entail any other statutes regarding rules on how the administrator or the god man should fulfill his/her assignment. The principle of minimum intervention still has a weak position in this part of the legislation. Even the consent-rule could be regarded as a small step in the direction towards more active participation on the individual’s side since most of the legal acts that a god man or an administrator makes on his/her principals behalf falls outside the scope of the rule, i.e. they usually are day-to-day-transactions.

The ideological standpoints underlying Swedish guardianship legislation have continually been revised throughout several reformation during the twentieth century. Unlike the situation when the Guardianship Act was implemented in 1924, the autonomy and integrity of the concerned adults is now a prime consideration when a certain measure is considered. Complete removal of a person’s powers to manage his or her personal affairs was abandoned as a key measure as early as 1974. With reference to the principle of minimum intervention the legislator declared that an appointment of a “god man” (good or fair man) from then on should be the primary solution when vulnerable adults need help managing their personal affairs. The appointment of a “god man” does not affect the person’s power to represent him- or herself at all but gives the “god man” authority to represent his or her principal. Even if used more rarely the possibility of complete removal of a person’s authorities still existed up until the subsequent reform in 1988 when adjudication of (total) incapacity was abolished and replaced with the measure “administratorship”. In this respect the Swedish reforms were considered to be rather progressive. However, this ideological reformation has mainly affected the part of the legislation that concerns the establishment of a specific measure; the rules regarding a guardian’s exercise of the assignment are still largely the same as in the Guardianship Act of 1924.
In short, nowadays it is not as easy for the courts to restrict an individual’s authority to enter into legal transactions on his/her own as is was in the early twentieth century but if a measure nevertheless is taken, the individual in many respects will find him-/herself back at the 1920’s.