Introduction

• Thanks + special thanks;
• Who am I?
• Why am I here?
  • Well....I was invited....
  • 1994 – AARP LCE
  • 2004 – The Joint Conference of NGA and NCPJ (N. College of Probate Judges) (Wingspan Implementation)
    • Ethical End-of-Life Issues: A Jewish Viewpoint;
  • 2011 – 3rd Summit on Guardianship;
  • Why is this relevant? Reflecting my bias + my political commitment for a new ICROP.

• The goal of this presentation: to be critical:
  • What are the politics behind the Supp.DM paradigm?
• How am I going to answer this question?
  • Part 1: Provide some political insights on Guardianship and the historical background to Supp.DM
  • Part 2: Provide some political thoughts re Supp.DM
Part 1: The Historical Background


(1) The historical journey of adult guardianship: A story of POWER

• My first academic article was on the historical development of guardianship.
• It showed how adult guardianship has developed throughout history.
• This historical study revealed that guardianship is a political system: it reflects dynamic social constructs such as “fools”, “lunatics”, “idiots”, “mentally Incompetent persons”, and the “elderly”.
• It mirrors societal power relationships within cultures and societies: Families; The State; The medical profession; and more.
• The bottom line is the realization that guardianship, Sub.D.M. and supported-decision making models are not inherently “neutral” or “good”: all of them represent “power-relationships”.

(2) The Local Nature of Guardianship, Sub.DM, and Sup. DM.

• My second academic article was about international comparative elder guardianship:
  • It originated in my Berlin experience of the IGN 1st meeting;
  • This comparative legal study revealed how Guardianship, Sub.DM, and Supp.DM are all rooted in local/national laws: they reflect local cultures, legal traditions, and local community characteristics of power relationship;
  • Therefore, any understandings of this field need to take into account local socio-legal traditions and the contextual social power relationships;
  • This insight is especially true within the context of this meeting.


(3) The Significance of Procedural Justice

• My first Israeli empirical study on guardianship re-emphasized a well known fact: Procedural justice is also at the heart of any guardianship, Sub.DM, and Supp.DM reform.
• Evidence shows the importance of procedure; e.g.:
  • Legal Representation: an attorney advocating for the person’s wishes;
  • Monitoring systems & prevention of abuse under guardianship, Sub. and Supp. Decision Making;
• Hence, many times “power” relationships are hidden within the procedures of guardianship, Sub. and Supp. DM; Many times, they are more important than changing the material law in the field;

(4) The Importance of Inter and Multidisciplinary Work

- Historically, lawyers used to analyze guardianship systems from a “pure” legal and positivist perspective.
- However, since the 1988 “Wingspread” meeting, the need for “multidisciplinary” perspective was brought to the fore.
  - E.g.: Recommendation I-E entitled “Multidisciplinary Guardianship Committees”;
- The Borchard Foundation Research Project (with Prof. N. Kohn & M. Brown).
- It is clear today that any guardianship “reform” or “alternative” must be a result of a multi-disciplinary, multi-professional collaborative, project.


(5) The “Popular” Search for Alternatives to “Traditional” Guardianship

- Finally, may be the most well known development in the field is the constant search for legal alternatives to traditional guardianship:
  - The Substitute Decision Making Movement/paradigm (e.g. Living wills, advance directives, continuing PoA; etc.)
  - Family members as automatic/default SDM;
  - Mediation & ADR as alternatives;
  - Shared decision making models;
  - Supported decision making models.
- All have a similar promise: “guardianship = wrong”; “alternative = right”.
- The real question is: are they really better? Are they making a difference? Is one alternative “better” than the other?

To conclude this part:

• There is nothing simple about adult guardianship....

• Is supported decision making any better?

Part 2:
Four Critical Perspectives on Supported Decision Making –

From an Elder Law Perspective
Insight 1 – Hidden Powers: The Importance of Empirical Data

- For many years (and in many places this is still the case) one of the main challenges within traditional guardianship systems was the lack of empirical data and knowledge;
- This was not accidental:
- Without accurate and full data – we can hide social power exploitation;
- Sometimes empirical data contradicts our “value-based” arguments (see the Shamir & Doron study).
- From my limited analysis, there is still lack of empirical data with regards to Supp.DM;
- Therefore, my first insight is that we need systematic empirical data & good scientific research re Supp.DM – e.g.: how and why is it different? Does it make a difference?


Insight 2: The Power-Colonialization of Persons with Disabilities movement?

- Empirically speaking – guardianship was mainly an “older persons’” legal issue.
- But, it seems that in recent years it was the “persons with disabilities” HR movement which was powerful and visible (e.g. CRPD) in shaping the legal agenda in the field (and advancing the CRPD);
- In my view – the Supp.DM paradigm, which is basically a CRPD based regime, is trying to “colonize” the Older Persons HR movement.
- I believe it could be argued that advance legal planning tools, embedded in the Sub.DM paradigm – are much more relevant (and appropriate) to older persons than Supp.DM.
- Moreover, I would argue that this is yet another example of the potential conflict between the CRPD and the forthcoming CROP;
- So, are we – i.e. older persons and older persons’ advocates – being colonized by a “foreign” legal doctrine? And is it not yet another evidence for the urgent need for a new – and unique – International Convention for the rights of Older Persons with a new and unique paradigm?
Insight 3: The Power of Procedural Justice within Supp.DM

• Procedural justice within the Supported Decision Making Model is no less important;
• The potential for misuse or abuse of Supp.DM is of significance (no less than Sub.DM regime);
• Once again, well known issues (from the Sub.DM models) need to be addressed:
  • How to ensure the person’s wishes are honored?
  • What are the qualifications of the Supp.DM?
  • How to prevent abuse?
  • How do we craft the “agreement” formalities?
  • To what extent do lawyers and courts need to be involved?
• In other words: is Supp.DM really different in its procedural justice elements (e.g. compared to Sub.DM) – or is it simply the same system but with a different name?

Insight 4: Cultural Politics - American Privatization or European Social Community-care?

• The historical “split” within guardianship reforms of the 1980s and 1990s is well known:
  • Europe: from guardianship to social friendship (Germany - caregiver; Sweden – good friend);
  • USA: from guardianship to advanced legal planning & Sub.DM (advance directives; substitute decision maker);
• The core difference between them: privatization/individualism v. community-base/public social support and care systems.
• So, how do we understand the current Supp.DM paradigm?
• My fear is that personal “agreement-based” Supp.DM models, are simply another form of the privatization and individualization of public guardianship/care systems.
• Or politically speaking yet again, are we experiencing another victory to neo-liberal individualism over social-democratic collectivism?
To Conclude

The Politics of Power & Older Persons

• I would like to commend the NGA and its members for their leadership in the field of adult guardianship, and for their openness to a variety of ideas and approaches;
• Potentially, there is a promise to the Supp.DM model within the guardianship reform movement;
• The NGA and its members have an important role in further developing the Supported Decision Making Paradigm;
• However, this does not mean that guardianship or Sub.DM paradigms are by definition “wrong” or that necessarily Supp.DM is “better”.
• In practice, and within the Supp.DM model, and in the context of older persons, in my view, there is still a significant challenge to:
  • Empirically study and learn it;
  • Theoretically justify it;
  • Procedurally improve it;
  • Locally and culturally refine it;
  • Work on it in an inter & multi-disciplinary manner;
  • Politically understand its hidden power relationships;
  • Reduce the “theory/reality” gap in its implementation.
And with wishes for a continued discussion on the future of adult guardianship;

We’ll meet again in the 2043 NGA meeting, to re-evaluate our insights yet again .... 😊

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