

Legal Capacity, Personhood and Supported Decision Making

Michael Bach

Canadian Association for Community Living

January 2006

Overview

- Key Terms
 - Individuals
 - Subjects
 - Persons/Personhood
 - Legal Capacity
 - Guardianship
- The Issue
- Supported Decision Making
 - What is it?
 - Principles?
 - Montreal Declaration
- CACL Response to Issues Paper – Article 12

Individuals, Subjects

- *Individuals* – all of us - human beings - includes children, those considered ‘non-rational’ human beings
- *Subjects* – individuals who become known, to themselves and others, in a coherent narrative context of a particular life – past, present, and future

Persons/Personhood

- Those individuals accorded legal capacity to act and recognition to exercise the right of self-determination – and recognized to have:
 - Decision-making capacity
 - Reflective Capacity
 - Personal identity

Decision-making capacity to act – give consent, contract

- Understanding relevant information
- Appreciating consequences of a decision
- Acting voluntarily, autonomously
- Communicating decisions

Reflective Capacity

- Deliberative capacity, can assess one's situation and future possibilities

Personal identity

- Where an individual is recognized as a subject and as the same person through time (psychological continuity)

Legal Capacity

- The recognized capacity of persons to make binding legal arrangements, enter contracts, sue and be sued, marry, and make other decisions of a legal nature
 - Some distinguish legal capacity from personhood, others see it as integral to the notion of persons before the law.

‘Guardianship’ or ‘Substitute Decision Making’

- State-sanctioned removal of personhood from an individual with respect to one or more or all areas of personal decision-making

The Issue –

People with intellectual and mental health disabilities:

- Usually recognized as individuals, but not persons – guardianship sanctions removal of personhood
- Often known as objects, but not as subjects of a life, with ‘narrative coherence’ – because dominant forms of knowledge-making objectify individuals out of personhood

The Issue...

- Assumed by others not to meet the presumed test of personhood – demonstration that one is a freely contracting, rational, autonomous agent
- Personhood usually equated only with demonstration of decision-making capacity – despite legal cases to the contrary (Clark, Benton).

How Right to Self-Determination is Designed to Exclude Some through Guardianship

Ethical principle of respect for autonomy of others



Legal right to self-determination



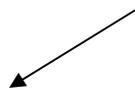
Legal duty of others to obtain informed consent or indication of capacity to contract



Criteria for persons able to consent/contract – 1) decision making capacity, 2) reflective capacity, 3) psychological continuity



Knowledge-Making/Assessment against criteria



Yes: rights affirmed



No: guardianship

What is Supported Decision-Making?

- An accommodation in legally-regulated decision-making processes to protect the right to exercise self-determination for those vulnerable to losing this right
- Provides legal recognition and status to trusted others to assist in any aspect of protecting the personhood of an individual
 - Decision-making
 - Reflective capacity
 - Personal identity – weaving narrative coherence

What is Supported Decision-making...

- Based on a ‘narrative ethics’ - A recognition that our bodies and selves are best made and exercised jointly with others in the context of a personal life plan

Principles of Supported Decision Making

- All individuals of legal age are persons before the law and have a right to self-determination and respect for their autonomy, irrespective of disability
- All adults are entitled to the presumption of capacity [and identity], irrespective of disability, and to the decision-making supports necessary to exercise capacity and reveal identity
- Decisions [and identity] made interdependently with family, friends, and trusted others chosen by the individual, will be recognized and legally validated.

Principles...

- All individuals have a will, and this will is capable of being interpreted and forming the basis for competent decision making [and identity].
- Individuals are entitled to the supports and services necessary for full participation and equality. The provision of such supports will lessen the need for legal intervention in decision making.
- Third party interests and liability concerns do not provide a valid justification for removing a person's decision-making rights.

Montreal Declaration

- 6. a. People with intellectual disabilities have the same right as other people to make decisions about their own lives. Even people who have difficulty making choices, formulating decisions and communicating their preferences can make positive choices and decisions that further their personal development, relationships and participation in their communities.

Montreal Declaration...

- Consistent with the duty to accommodate in paragraph 5b, people with intellectual disabilities should be supported to make their choices and decisions, to communicate them and to have them respected. Accordingly, where individuals have difficulty making independent choices and decisions, laws and policies should promote and recognize supported decision-making. States should provide the services and the necessary support to facilitate persons with intellectual disabilities in making meaningful decisions about their own lives.

Montreal Declaration...

- b. Under no circumstances should an individual with an intellectual disability be considered completely incompetent to make decisions because of his or her disability. It is only under the most extraordinary of circumstances that the legal right of persons with intellectual disabilities to make their own decisions can be lawfully interrupted...

CACL Response to ‘Issues Paper’

1. Chair’s text – paras 1, 2 are fine.
 - 2a should become a para on its own... “States parties shall ensure... (drop to the extent possible) that where support is required...”
 - This will make it clear that not all persons require support
2. Supported Decision Making is an essential component of this article if the Convention is to be fully inclusive.
3. There is no place in a ‘continuum’ of support for substitute decision-making – it is not a support for personhood, it removes it.

... CACL Response

4. It is not helpful to maintain a separate provision re: substitute DM, and to do so is in fundamental contradiction to the purpose of this Convention. This is not a mechanism for protecting individual rights, but rather for protecting rights of 3rd parties.