

**4<sup>TH</sup> WORLD CONGRESS ON ADULT GUARDIANSHIP  
ERKNER, NEAR BERLIN, GERMANY: 14 – 17<sup>TH</sup> SEPTEMBER 2016  
PANEL 11: “DECISION MAKERS IN FORMAL SUPPORT”  
THURSDAY 15<sup>TH</sup> SEPTEMBER 2016, 4.30PM – 6.00PM**

**Notes prepared  
by  
Adrian D Ward MBE LL.B  
Consultant to TC Young LLP, Glasgow and Edinburgh, Scotland**

## **Definitions**

“CRPD”:	UN Convention on the Rights of Persons with Disabilities
“UN Committee”:	United Nations Committee on the Rights of Persons with Disabilities
“General Comment”:	General Comment No 1 (2014) by the UN Committee entitled “Article 12: Equal Recognition before the Law”
“ECHR”:	European Convention on Human Rights
“EAP3J”:	Essex Autonomy Three Jurisdictions Project: final report available at <a href="http://autonomy.essex.ac.uk/eap-three-jurisdictions-report">http://autonomy.essex.ac.uk/eap-three-jurisdictions-report</a>

## **Yesterday’s question:**

**How can modern, human-rights compliant, legal systems best respond to the needs of people who may require support in the exercise of their legal capacity, and who may – or may not – be capable of proactively and validly exercising their legal capacity?**

## **Key term today: “support”**

Support for what?

CRPD Article 12.3 frequently misrepresented as requiring support for decision-making. It does not. It requires support for persons with disabilities “in exercising their legal capacity”. The relevant question (see EAP3J report page 13) is accordingly:

*“What measures should be taken to support the exercise of legal capacity, both by supporting persons with disabilities to make decisions themselves wherever possible, and by supporting their ability to exercise their legal agency even in circumstances when they lack the ability to make the requisite decisions themselves?”*

The provision of support must be subject to the CRPD Article 12.4 safeguards.

Today’s title puts us in the second of the above alternatives. Decision makers must always robustly check that first alternative is not wholly or at least partially possible. Does the law require this?

## **Substitute and supported decision-making**

States which have ratified CRPD are bound by it. They are not bound by the views of the UN Committee, though those views command respect.

It is clear from the travaux préparatoires that CRPD Article 12 was explicitly drafted so as neither to prohibit nor endorse substitute decision-making (see Appendix B to EAP3J report).

Both substitute and supported decision-making are ill-defined, best seen as centres of emphasis, pointing to a direction of travel.

## **Topics for comparison**

### **(a) Addressed yesterday**

1. *Directly equating adults to children*
2. *Ex lege family representation*
3. *Close relatives preferred for appointment as guardians*
4. *Two-tier childhood of Roman law applied to adults*
5. *Incapacitation?*
6. *No explicit incapacitation*
7. *Specialist courts?*

### **(b) Further topics**

[Note: As in yesterday's presentation, information taken from questionnaires for this Congress and previous questionnaires]

8. *What are the criteria which appointees must apply when acting?*

Argentina: Safeguard the person's welfare or property, and promote greatest possible autonomy.

Australia, England, New Zealand & Sweden: Best interests.

China: Protection.

Czech Republic: Supporters must not jeopardise person's interests through improper persuasion, nor enrich themselves.

Hong Kong: Promote and protect the person's interests.

Italy: Must act as a "good family father" would.

Japan: A duty of care, being the care of a good manager acting in compliance with the main purpose of the mandate.

Malta: Best interests, support exercise of capacity so far as possible, consult.

Netherlands: "No clear standard regarding representation", but there are requirements for subsidiarity, proportionality and effectiveness.

Norway: Care for the interests of the person, listen to the opinion of the person before making significant decisions.

Poland: Due diligence as required by the interests of the ward and the interests of society.

Scotland: Comply with principles (leading to a constructing decisions approach).

Slovenia: Take all measures required to protect the ward's interests.

South Korea: "to serve in good faith and skill", respecting welfare and preferences or wishes.

Taiwan: Respect person's intent, consider person's physical and mental condition, exercise the care of a good administrator.

9. *Respect for rights, will and preferences?*

Czech Republic: Person may express will to have affairs administered in a certain way, by a certain person, or to have a certain person appointed as legal representative.

Estonia: Consent of adult required for appointment of curator.

Malta: Guardian must take rights, will and preferences into account and respect them "as far as possible".

Netherlands: Regarding choice of guardian, court must respect the person's preference, and give explanation if that is overruled.

Slovenia: In choice of guardian, Social Work Centre must "respect the wishes of the ward" if the ward is capable of expressing them.

10. *How are will and preferences balanced against rights when they are perceived to be in conflict?*

Czech Republic: A supporter has explicit power to object to the validity of a purported act by the adult.

Germany: Betreuer must respect adult's wishes provided they are not contrary to the adult's welfare.

Norway: Appointee must act in accordance with the person's will unless legal capacity is deprived or the person is incapable of understanding the consequences.

Slovenia: In choice of guardian, Social Work Centre must "respect the wishes of the ward" if the ward is capable of expressing them.

South Korea: Welfare must be respected if preferences or wishes are contradictory to welfare.

11. *Supervision and support for appointees?*

Czech Republic: A legal representation council may be requested.

Italy: Annual written reports to court.

Japan: Education and support programme for supporters provided by local government.

Netherlands: Periodic reports must be submitted to Guardianship Court (there are 11, but one with specialised staff concentrates on supervision activities).

Norway: Supervision by County Governor.

Poland: Court supervises, may make recommendations, consent of court required for important matters.

Scotland: Local authority in personal welfare matters, Public Guardian in property and financial matters.

Slovenia: Account or report to the Social Work Centre.

South Korea: Court may appoint a supervisory guardian but is reluctant to do so where guardians are family members or professionals.

Sweden: By Chief Guardian.

Taiwan: Court may request a report, investigate. Guardian requires court's permission for major transactions.

## 12. Use of trust for administration

Argentina: "Living trust".

France: The fiducie.

Japan: "Guardianship trust".

Scotland: Largely superseded by current regime, but still competent.

## 13. Private mandates/powers of attorney?

Available in:

Argentina

Czech Republic

Finland

France – mandat de protection future

Germany

Hong Kong (medical certificate required to trigger)

Japan (agency contract – may commence immediately or upon disability)

Japan – Also: voluntary guardianship contract, which comes into effect upon appointment of a supervisor by the Family Court

Liechtenstein

Netherlands – "Living Will" promoted by notaries and estate planners, with national register: legislation awaited

Norway

Powers of attorney ended by incapacity of granter: Brazil, Estonia (probably), Italy, Russia, Turkey (unless explicit provision, or necessary implication, that they should continue, but applicable to property and financial matters only).

More information awaited once Council of Europe review of implementation becomes available.

## Support

Support before formal proceedings commenced renders them unnecessary?

Support before formal proceedings commenced reduces requirements?

Must decision maker check on above elements?

Advocacy support? Must decision maker engage with advocate?

Must decision maker engage personally with adult? Ensure that this is facilitated? Record how this was done, and the outcome? If there were obstacles or limitations to this, must decision maker explain them, and explain why they could not be overcome?

Attributable duties to ensure adult's will and preferences are conveyed to the decision maker?

Stringent criteria if will and preferences are to be overridden? Requirement to record reasons?

Are there robust Article 12.4 safeguards, including in relation to undue influence and conflict of interest?

Requirements for ongoing monitoring, future review?

Adrian D Ward  
Consultant to TC Young LLP  
email: [adw@tcyoung.co.uk](mailto:adw@tcyoung.co.uk)  
Tel: 00 44 (0)141 221 5562  
[www.tcyoung.co.uk](http://www.tcyoung.co.uk)