



Panel 5: The Role of Family Members in Exercising Legal Capacity

Regina Aebi-Müller, Switzerland; Barbara Novak, Slovenia; Sieh-Chuen Huang, Taiwan; Moderator: Stephan Sigusch, Germany

Introduction:

Stephan Sigusch, Germany; Translation from German: Ekpenyong Ani

Family members are and/or can be involved in the exercise of legal capacity in very different ways when it comes to facilitating a self-determined life for the persons concerned.

They can be “just” family members; they can be appointed by the court as legal representatives; they can “automatically” be given power of representation by operation of law; they can be appointed as a self-determined person responsible by enduring power of attorney.

These very different forms, which may exist simultaneously in some countries, raise interesting questions regarding the UN CRPD and the right to self-determination.

Whose best interest are family members obligated to and in what form is the exercise of legal capacity realized?

If “exercise” does not mean representation but supported decision-making, how is the person concerned put in the position to develop their own will, to articulate it and therefore ultimately to make self-determined decisions and to act accordingly?

Who determines if someone is suitable for the task and who determines the extent of the power of representation or are family members per se better representatives?

How and by whom are all relevant facts and circumstances verified so as to avoid the judicial procedure and/or safeguard the right of the person concerned to self-determination during the procedure? Is such a procedure conducted and how are the involved parties interconnected?

Is the protective function with regard to the person concerned even ensured? Is there actually a requirement of protection within the family? Does counseling and a review of alternative measures take place during the preliminary stages, also to reflect on the risk and “side effects” of representation within the family?

How do these procedures currently take place and how can/could their execution/implementation be improved?

Swiss point of view

Regina Aebi-Müller, Switzerland; Translation from German: Ekpenyong Ani

The new law in Switzerland is based on the assumption that in many cases there are functioning family networks that can take on support tasks. Therefore (since Jan. 1, 2013), there is a new regulation granting the spouse a legal power of representation for certain everyday affairs as well as

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a legal power of representation for a whole host of family members for medical treatment decisions and concluding a nursing care contract for someone mentally incapable. In the following I will focus on the legal power of representation and not on the (also existing) possibility of appointing family members as assistants/supporters.

Is it actually true that in a majority of cases family members are better suited to support and represent a vulnerable person? What is this “better right” derived from? Could it just be the desire to save costs due to lower administration expenditures that’s behind the legal authorization to representation?

What are the control mechanisms that would urgently need to be in place? Who is liable in case of abuse of legal power of representation? Considering international conventions (ECHR, Oviedo Convention, CRPD), is it even legitimate for a power of representation by family members to become effective “automatically” without the need for a constitutional procedure and/or at least an administrative decision?

Are there enough services offered to prepare family members for their tasks, to support them and if necessary also to supervise them? Isn’t it inappropriate for family members to be obliged to make medical decisions that have far-reaching consequences for the mentally incapable patient? How is support for family members after such decisions ensured?

What status do third parties (business partners, banks, doctors etc.) have in relation to the family members legally authorized to represent and/or the vulnerable person? Do they have the right/obligation to notify the authorities when they detect abuses – or is this actually not permitted due to professional confidentiality? What are their obligations to determine who is authorized to represent when and in what matters?

Slovenian point of view:

Barbara Novak, Slovenia

In a similar manner as depriving of legal capacity, the legal capacity of an adult person is also restricted by the legal institute **of extension of parental rights**. Parental rights are extended past a child's adulthood if because of physical or mental disability the child is not capable of taking care of her or his own rights and interests. A proposal for such a measure may only be made if the reason because of which it is necessary to extend parental rights already existed in the time prior to adulthood. A decision on extending parental rights excludes the presumption of full legal capacity that would otherwise occur with adulthood. Parents take care of a person when parental rights are extended. Legislative use of the institution of extended parental rights with a physically handicapped person is not restricted to the condition of incapacity to accept reasonable decisions. The legal arrangement that allows parental rights to be extended on the proposal of one of the parents or on the proposal of an official body of social protection without the consent of a physically handicapped person, otherwise capable of independently making reasonable decisions, is therefore in conflict with a person’s right to make her or his own decisions.

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Taiwanese point of view:

Sieh-Chuen Huang, Taiwan

Although adult guardianship system exists in Taiwan Civil Law since 1930, taking care of vulnerable persons including exercising legal capacity has been considered as the family's affair for a long time in Taiwan. Due to population aging and weakened family solidarity for the past two decades, Taiwan's Adult Guardianship system was revised in 2009. However, power of attorney (contractual guardianship) and advance directive have not been legally recognized in Taiwan yet. The only exception is Palliative care. Therefore, almost all kinds of supporters of decision-making are still either appointed by the court or stipulated by the law, not chosen by the protected person himself/herself. In reality, these supporters are usually family members.

If we take adult guardianship for example, it is reported that more than 90% of guardians/assistants in Taiwan are family members. Other parties such as legal professionals, public agencies, and social welfare organizations have limited participation in adult guardianship. In court practice, before appointing the guardian, the judge usually investigates the vulnerable person's family members' opinions first. Also after the guardianship/ assistance commences, the family members may supervise the guardian's decision-making and offer information about the preferences or intents of the protected person. However, family members do not always play a positive role. Through analyzing court cases, it is found that sometimes family members conspired with the guardian to consume the protected person's assets, or on the contrary, in order to inherit more on the protected person's death, they may prevent the guardian from using the protected person's assets even when such disposition might be necessary to receive better care.

In addition to financial affairs, family members are also statutory and default substitute decision makers (supporters) in many health-care affairs such as (general) informed consent, DNR (Do Not Resuscitate) orders for terminal patients, psychiatric surgery and electroconvulsive therapy for "severe patients," and sterilization for persons under guardianship and assistance. However, these supporters' decisions are not monitored by the court but only discussed with the physicians and other medical practitioners. It is more likely that family supporters' health-care decisions conflict with the protected person's real wishes or interests than adult guardianship.

Because family members still have strong influence on the protected person in all areas of decision-making, how to legally empower the family to support vulnerable person's decision-making without damaging the rights and autonomy of the person becomes significant task in Taiwan.

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