

Rethinking legal protection of the elderly. Report of the second international RETHINKIN. seminar.

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1. Introduction

1. Rethinking the family laws of the Low Countries is one of the aims of the Scientific Research Network (WOG) RETHINKIN. The research group in question is a collaboration between the Flemish Vereniging voor Familie & Recht (Association for Family & Law) and the Dutch Alliantie Familie & Recht (Alliance Family & Law). This year RETHINKIN. organized its second closed seminar on the 12th and 13th of September 2016 in Amsterdam and Utrecht.¹ On the first day of the seminar, international experts in family law gathered and reflected upon the legal protection of the elderly.² The current article aims to offer a glimpse of the issues discussed on the first day of the seminar.

2. Elderly protection measures in Europe

2. The first key note speaker, A. Ward (Scotland, solicitor and consultant to TC Young LLP), looked into the legal protection measures of several European countries in order to formulate an answer to the following central 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?". The UN Convention on the Rights of Persons with Disabilities³ provides a common and unified framework regarding the objectives to be achieved by legal protection measures for disabled persons. However, the approaches on behalf of *how* these

objectives can be achieved differ in the various European jurisdictions. These differences concern numerous issues, like the effect of the appointment of a guardian on the capacity of the person, the criteria the guardians must apply when acting, the supervision of the guardians, etcetera. A. Ward came to the conclusion that although the majority of the European regimes are non-compliant with the UN Convention on the Rights of Persons with Disabilities, several of these non-compliances are probably remediable.⁴

3. According to A. Ward, the best response to people who may require support would be a ‘reversal of jurisprudence’.⁵ What does this mean? Up until now, the law has always taken healthy adult persons as a general point of reference for the construction of law. Consequently, for people belonging to other categories – for example minors or persons with disabilities who do not live up to the norms of healthy adult persons – the law has developed special measures. A. Ward suggests to reverse this mechanism. He suggests that the law should depart from the assumption that as a rule the protective measures apply to everyone (including healthy adult persons), and that the law should relax these rules as an exception for those categories who don’t need these protective measures (i.e. healthy adult persons).

3. Protecting the elderly by means of adult guardianship measures

4. After this introduction, more in-depth comparative research was made possible by three speakers who presented the adult guardianship measures in their jurisdiction. Dr. M. Mammeri-Latzel (Guardianship judge *Betreuungsgericht* Berlin, Germany) gave an overview of the measures in Germany; Prof. Dr. F. Swennen (University of Antwerp, Belgium) accounted for the measures in Belgium; and finally Dr. K. Blankman (VU Amsterdam, ACFL, the Netherlands) explained the measures in the Netherlands.

5. In Germany, the regulation on adult guardianship has been a highly sensitive topic due to the maltreatment of persons with disabilities during the nazi-regime. In 1992, a limited guardianship (*Rechtliche Betreuung*) was introduced. For a maximum period of 7 years, a guardian can be appointed to a person of full age who is incapable of managing his own affairs as a result of a mental disease or physical, intellectual or mental handicap (§ 1896 -1908 *i* *Bürgerliches Gesetzbuch* – Civil Code).⁶ An important rule is that the guardianship does not limit the legal capacity of the ward. The appointment of a guardian is not made public. Contrary to the expectation of some of the other participants of the seminar neither the maintenance of the legal capacity nor the lack of publicity seem to cause a lot of problems in daily practice according to Dr. M. Mammeri-Latzel. The duties of the guardian may be the following: keeping an oversight of the

medical treatment of the ward, making decisions about the person's commitment in a psychiatric institution even against his/her will, taking care of financial matters and housing, and taking charge of the ward's correspondence. On the procedural level, the guardianship is appointed by a specialized judge. The guardians are supervised by the Guardianship Auditors (Rechtspfleger), i.e. specialized lawyers who enjoyed a three-year specialized training.

6. In Belgium the legislation on adult guardianship measures was reformed in 2013. The underlying principles of the reform were the shift from protection towards autonomy, the creation of a clear distinction between measures for minors and measures for adults, the promotion of the social network and finally the abolition of four existing and outdated regimes in favour of one regime in line with international instruments on persons with disabilities (like the UN Convention on the Rights of Persons with Disabilities). The new regime of guardianship applies to adults who are incapable of managing their own affairs as a result of physical or psychological disabilities (similar to the case in Germany) and to persons suffering from prodigality.⁷ The guardianship measure comprises two aspects: on the one hand it comprises the establishment of the incapacity and on the other hand it comprises the appointment of an administrator. As far as the aspect of incapacity is concerned, the law assumes that the person has full legal capacity. Only with regard to the acts explicitly specified by the judge, the person is considered to lack legal capacity. In addition, the judge needs to determine for each of these actions whether the person merely needs assistance for these actions or whether the person needs a representative who will perform the action in his place. In case of a lack of such specification by the judge, the person is considered to be merely in need of assistance, meaning that he himself is capable performing the action together with his guardian. If the person performs an action in spite of his incapacity, the action may be subject to nullity. Furthermore, the guardian is supervised by the court and is also *de facto* supervised by the confidential counsellor of the ward. The ward is appointed a confidential counsellor who offers assistance to the ward, not in a legal way but in a factual way.

Prof. dr. F. Swennen concludes that the reform positively has led to a regime that is – mostly – in accordance with the UN Convention on the Rights of Persons with Disabilities. However, he does admit that the regime is very complex. Due to this complexity the intended custom-made approach risks slipping into a simplified ready-to-wear approach. Furthermore, he has expressed the regret that the law does not apply to persons who are socially vulnerable and who are in severe financial troubles. Indeed, research shows that persons under guardianship are often involved in judicial insolvency procedures at the same time.

7. In the Netherlands three forms of guardianship exist: the protective trust ('bewind')⁸, the plenary or full guardianship ('curatele')⁹ and the personal guardianship ('mentorschap')¹⁰. Where the protective trust concerns financial matters only, the plenary or full guardianship concerns all matters, and the personal guardianship is limited to matters of care, nursing, treatment and support. All of these forms of guardianship automatically entail legal incapacity: partial incapacity (the protective trust and the personal guardianship) or full incapacity (plenary or full guardianship). According to prof. Dr. K. Blankman the *ex lege* limitation of the legal capacity is a major problem, because it conflicts with the principle of autonomy (art. 3 and 12 UN Convention on the Rights of Persons with Disabilities) and the right to private life (art. 8 European Charter of Human Rights). He is convinced that in the majority of cases the appointment of a guardian suffices and that the limitation of legal capacity is not necessary. As a result, he pleads for the abolition of the automatic incapacity that comes along with guardianship.

8. From a comparative point of view, the presentation of the guardianship measures in these three jurisdiction demonstrates that despite the common international framework there exists a lot of differences between them. The participants of the seminar reflected upon the question whether law could benefit from the harmonization of the measures in the different European countries. It was agreed that harmonization – given that harmonization doesn't coincide with unification – indeed would allow for the 'elimination of unnecessary differences'. Several participants agreed for instance that more attention should be paid to the quality standards applying to the guardians overall and to the provision of guidance and training for the guardians in order to improve the quality of their guardianship.

4. Continuing powers of attorney

9. After the discussion on adult guardianship measures, the second topic of the day was broached: the use of continuing powers of attorney as a means to protect the elderly. A continuing or enduring power of attorney is a power of attorney that continues even after the grantor becomes incapacitated. Three speakers presented their experiences with continuing powers of attorney in their jurisdiction: prof. dr. W. Kolkman (Notarial Institute RUG, the Netherlands), Dr. T. Odlöw (Department of Law, University of Gothenburg, Sweden) and prof. dr. F. Swennen (University of Antwerp, Belgium).

10. In the Netherlands the use of continuing powers of attorney is often linked to 'living wills'. By means of a living will a person records or states his wishes concerning medical matters, personal matters and/or property matters in case he will not be able to take care of these matters himself due to events such as illness or an accident. In

recent years living wills have become increasingly popular in the Netherlands: whereas the Central Register of Living Wills contained only 2 351 living wills in 2012, this number of registered living wills amounted up to 22 588 in 2016, i.e. nearly a tenfold of the number in 2012.¹¹ Surprisingly, there exists no specific legislation on living wills. As a result, living wills appear in different forms and shapes and a lot of questions arise on their juridical classification. Depending on the actual elements the living will – or some of its stipulations – may be classified as continuing power of attorney, an assignment or a mandate. Additionally, questions arise on the legal relationship between the parties, as well as on the activation and the termination of the living will, the possibility to enable the attorney to make donations and the way in which financial abuse can be prevented. Despite these questions, prof. dr. W. Kolkman's believes living wills are a very valuable alternative for adult guardianship measures. Living wills are namely a less intrusive measure and they allow a tailor-made response to a person's lack of capacity.

11. In the Scandinavian countries continuing powers of attorney are a quite recent legal figure. Finland was the first of the Scandinavian countries to introduce regulation on continuing powers of attorney in 2007 (lag om interessebevakningsfullmakt, Law no. 648/2007). Norway followed in 2010 (lov om vergemål LOV-2010.03.26 No. 9). In Denmark, the legislation was only recently signed and will entry into force in the next few months. In Sweden, work is still in progress: the Swedish government plans to put forward a bill on continuing powers of attorney. During his presentation, Prof. T. Odlöv discussed the similarities and differences between these four jurisdictions regarding the coming into effect of the continuing powers of attorney, its formal requirements, the restrictions regarding the content, measures on supervision and the revocation of the continuing powers of attorney.

12. In Belgium the legislation on adult guardianship measures was reformed in 2013. At the same time the new legislation provided for extrajudicial protection by means of regulation on continuing powers of attorney.¹² The continuing powers of attorney can take the form of a notarial deed or a private act. It is important to note here that the continuing powers of attorney must be registered in a central register and it must explicitly mention that the power of attorney is designed to be used in case of incapacity of the mandator. Prof. dr. F. Swennen regrets that the Belgian law only allows the continuing powers of attorney to be used for matters regarding assets and not for personal matters. According to prof. dr. F. Swennen this restriction stands in the way of a global approach. Importantly, the legal capacity of the mandator is not affected by the continuing powers of attorney. This means that actions performed by the mandator are in principle valid and that the mandator may still be subject to abuse by malafide persons putting pressure on the mandator to perform an action to

their benefit despite the continuing powers of attorney. As a possible solution to this problem, prof. dr. F. Swennen suggests to invoke a declaratory judgement in which the judge declares that the person is incapable of performing those actions.

13. In the subsequent comparative discussion, two specific topics were touched upon.

The first topic concerned the interaction between the continuing powers of attorney and the supervision by the court. In Belgium some controversy exists on behalf of the question whether it is possible to install compulsory supervision by the court in the continuing power of attorney. For example, the stipulation in the continuing powers of attorney that the mandatory needs the authorization of the judge in order to sell belongings of the mandator. At present it is not possible to create such a compulsory supervision in the Netherlands or in Sweden.

The second topic concerned the lack of legislation in the Netherlands on behalf of the living will. Some participants warned that the lack of legislation may bring along lack of protection of the mandator too. The lack of legislation may for example cause problems in the search for a principle of justice on which ground the mandatory can be held responsible for his actions. As far as the legal classification of the living will is concerned, some of the participants pointed out that the granting of the powers of attorney is to be considered as a unilateral action. However, as soon as the mandatory accepts his mission the unilateral action turns into a multilateral contract. Hence, this contractual basis serves as a principle of justice.

5. Protecting the elderly by focusing on autonomy and actual capacity

14. During the last session of this first day of the seminar, the juridical perspective on the protection of the elderly was complemented by an ethical approach on the concept of autonomy in old age and by a medical-legal approach on the assessment of actual capacity. First, prof. dr. T. Abma (VU Medical Center Amsterdam, the Netherlands) presented some ethical questions concerning the participation of elderly persons in decision-making relating to care. Subsequently, attention was paid to the assessment of actual capacity: Dr. E. Pans (VU Amsterdam, ACFL, the Netherlands) compared the medical assessment with the legal assessment of actual capacity as applied in practice in the Netherlands.

15. Prof. dr. T. Abma recalled that autonomy as a concept became popular with the rise of bioethics after World War II. Autonomy is one of the four principles in bioethics next to doing good, doing no harm and justice.¹³ When it comes to autonomy and elderly people, their

autonomy seems to be at risk in several contexts. When staying in their own home, elderly people suffering from health problems may lack the care they need to live their life autonomously. Nonetheless, when staying in a hospital or a nursing home, elderly people may receive too much interference which may also overrule their autonomy. This leads to the question of how older people in these various contexts could still remain in control over their lives. According to prof. dr. T. Abma it is necessary to rethink the traditional concept of autonomy.

Traditionally, autonomy is seen as self-determination, meaning that the patient is independent and has freedom of choice. The healthcare professional does not interfere with the decision of the patient, regardless of the content of the decision. Indeed, the content of the decision doesn't matter, what does matter is that the decision is made by the patient himself. This view mainly approaches autonomy in a cognitive way.

Inspired by phenomenologists¹⁴ and care-ethicists¹⁵, prof. dr. T. Abma suggests another interpretation of the concept of autonomy, i.e. autonomy as self-development. This means that autonomy is seen as a relational or interdependent issue: someone is not autonomous despite others but because of others. In order to be or remain autonomous, a person might need interference from others. In this view, the content of the decision of the patient does matter and the healthcare professional should help the person to come to the right decision. Rather than focussing on freedom of choice, autonomy should lead to an increase of freedom: enabling the person to explore his own life-path, values and stories. Thus, autonomy as self-development is highly linked to values and identity (and not only cognitively oriented).

16. After this elaboration on the concept of autonomy, the focus was shifted to the actual assessment of capacity. Dr. E. Pans explains that as a starting-point each person is considered to have full mental capacity until the contrary has been proven. A distinction indeed can be made between different degrees of mental capacity: full mental competency (which is the legal starting-point), partial mental competency and full mental incompetency. The definition of capacity used to assess the need for a protective mentorship¹⁶ and the definition of capacity used to assess whether a person is capable or not of agreeing to a medical agreement¹⁷ differ slightly. However, they have in common that mental capacity is related to the ability of a person to protect his interests. In order to help professionals such as notaries¹⁸ and doctors¹⁹ to assess the actual capacity, professional guidelines were developed. Interestingly, although these different professional groups depart from more or less the same definition of capacity, the guidelines show that the actual assessment of the capacity differs. Doctors' guidelines are more extensive (15 steps) and more concrete than the notaries' guidelines (only 7 steps). The

assessment by the notaries is largely based on ‘professional intuition’ and leaves room for subjective judgments.

According to Dr. E. Pans the difference between the two professional guidelines is illustrative for the difference between a legal approach (guidelines of notaries) and a medical approach (guidelines of doctors) of capacity. The legal approach focusses on the individual and departs from an ideal of an autonomous, well-informed person who makes a choice in a situation of freedom. The medical approach, on the other hand, focuses on the community and departs from a more reality based model of informal decision making, acknowledging that aspects like incomplete knowledge, interaction between persons and situations of fear, pain, dependence etc. may influence the process.

6. Conclusion

17. The comparative discussions held during this seminar show that the different jurisdictions make use of – approximately – the same ingredients for their legislation on adult guardianship measures and continuing powers of attorney. Given the common international framework (for example the UN Convention on the Rights of Persons with Disabilities) and given the common societal context (cfr. the strong increase of the ageing population) this may not come as a surprise. Despite these common ingredients, the different jurisdictions have managed to arrive at different dishes spiced with specific local flavours. Given that each jurisdiction bears its own history and specific policy plans, this may not come as a surprise either. The adage ‘same same but different’ is in this respect a suitable bromide.

18. For my own research, the several invitations – that implicitly or explicitly arose from the different discussions – to rethink important concepts or assumptions were of most relevance and importance. A particular example that comes to mind is the suggestion to ‘reverse the jurisprudence’ and to take persons with disabilities instead of healthy adult persons as a point of reference. Also, the invitation to rethink the relationship between the limitation of capacity and the attribution of a guard comes to mind as the juxtaposition of the different jurisdictions showed that these two aspects don’t need to be automatically combined. Also the discussion on the interference between the continuing powers of attorney and the supervision by the court, provoked further reflection on hybrid forms of protection on my part. Finally, the ethical and medical-legal approaches may lead to a reconsideration of the traditional underlying concepts of autonomy and the assessment of capacity.

7. Participants

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Noten

1 The first closed RETHINKIN. seminar took place on the 12th and 13th of November 2015 in Ghent and Kortrijk. See: prof. dr. F. Swennen, 'Family Law and Economics Introduction to a RETHINKIN. Seminar', *F&R* maart 2016, DOI: 10.5553/FenR/.000025; K. de Vos Ph.D., 'Verslag van het internationale besloten expertenseminarie Family Studies' Perspectives towards Household Production and Informal Care', *F&R* februari 2016, DOI: 10.5553/FenR/.000024.

2 The presentations of all the lectures can be found online: www.acfl.nl/nl/rethinkin-presentations-12-september.

3 UN Convention on the Rights of Persons with Disabilities New York, *United Nations Treaty Series*, vol. 2515.

4 The Essex Autonomy Project investigated compliance with the UN Convention on the Rights of Persons with Disabilities in the three

jurisdictions of the UK. The results were published in: W. Martin, S. Michalowski, J. Stavert, A. Ward, A. R. Keene, C. Caughey, A. Hempsey and R. Mc Gregor, *The Essex Autonomy Project. Three Jurisdictions Report. Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK*, 6 June 2016, 107p, <http://autonomy.essex.ac.uk/eap-three-jurisdictions-report>.

5 Prof. Dr. M. Löhnig (Hrsg.), *Beiträge zum europäischen Familienrecht*, 14, *Kindesrecht und Elternkonflikt*, Bielefeld: Giesecking, 2013, pp. 249 *et seq.*

6 § 1896-(1) Bürgerliches Gesetzbuch (Civil Code): Kann ein Volljähriger auf Grund einer psychischen Krankheit oder einer körperlichen, geistigen oder seelischen Behinderung seine Angelegenheiten ganz oder teilweise nicht besorgen, so bestellt das Betreuungsgericht auf seinen Antrag oder von Amts wegen für ihn einen Betreuer.

7 Art. 491 *et seq.* Burgerlijk Wetboek (Civil Code).

8 Art. 431 *et seq.* Burgerlijk Wetboek Boek 1 (Civil Code Book 1).

9 Art. 378 *et seq.* Burgerlijk Wetboek Boek 1 (Civil Code Book 1).

10 Art. 450 *et seq.* Burgerlijk Wetboek Boek 1 (Civil Code Book 1).

11 The KNB - Koninklijke Notariële Beroepsorganisatie (Royal Dutch Association of Civil-law Notaries) regularly publishes statistics on the number of acts passed by notaries, see for example: KNB, *Fact Sheet*, July 2016, www.knb.nl.

12 Art. 489 *et seq.* Burgerlijk Wetboek (Civil Code).

13 T. Beauchamp and J. Childress, *Principles of Biomedical Ethics*, New York, Oxford University Press, 1979.

14 See for example: George J. Agich, *Autonomy and long-term care*, New York: Oxford University Press, 1993.

15 See for example several publications by Joan Tronto.

16 For example the definition in Recommendation (99)4 on principles concerning the legal protection of incapable adults by the Council of Europe. See also: art. 1:450 Burgerlijk Wetboek Boek 1 (Civil Code Book 1) and art. 7:465 Burgerlijk Wetboek Boek 1 (Civil Code Book 1).

17 See art. 7:465 Burgerlijk Wetboek Boek 7 (Civil Code Book 7).

18 KNB-Koninklijke Notariële Beroepsorganisatie (Royal Dutch Association of Civil-law Notaries), *Step-by-step Plan on the assesment of Mental Competence*, The Hague, 2006, <https://www.knb.nl/dossier/bescherming-ouderen/stappenplannen-voor-het-notariaat>.

19 KNMG - *Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst* (Royal Dutch Medical Association), 'Bijlage 9 Stappenplan bij beoordeling van wilsbekwaamheid' (Step-by-step Plan on the Assessment of Mental Competence) in KNMG - *Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst* (Royal Dutch Medical Association), *Van wet naar praktijk. Implementatie van de WGBO, 2, Informatie en toestemming*, Utrecht, juni 2004, pp. 117-122.