

Creating a Specialized Decision-Making Body for Guardianship Matters: A Path to Explore for a Better Protection of Vulnerable Seniors

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SUMMARY

In Quebec, when an adult is no longer able to take care of himself or administer his property due to illness, disability, age-related impairment, etc., the legislator has created protective regimes designed to provide him with a legal representative or adviser – depending on how incapacitated he is. This allows for the protection of his person and/or the administration of his property.

Instituting protective supervision has far-reaching human and legal consequences. The protected person sees the exercising of his civil rights considerably reduced or even eliminated. The choices and decisions he can make that are at the heart of his individuality are also considerably affected. It is therefore not surprising that this loss of autonomy has been described as a distressing period for the adult who is aware of it and who often experiences it as "the mourning of a part of himself."

To promote and protect the well-being of vulnerable adults, the legislator has clearly stated that any decision concerning a person in need of protection must be in his interest, be respectful of his rights, safeguard his autonomy and be in accordance with the presumption of capacity. The rigorous application of these key principles allows the person subject to the protective measures to be treated as a human being in his own right and to realize himself even though his mental capacities might be impaired. However, the current application of the law in this field, both by legal and health professionals, is too often in conflict with these key principles that should be guiding it.

This paper identifies the criticisms and observations made in recent years by lawyers, health professionals and academics regarding the neglect of these key principles. It explores how the creation of a specialized decision-making body for guardianship matters could remedy certain of these problems.

The first part defines what is incapacity and offers a brief overview of Quebec Civil Law regarding the protective supervision of persons of full age.

The second part identifies various criticisms and observations made on the current application of the law when it comes to protective regimes. It highlights the dissonance between practice and key principles that should guide it. Among other

things, it mentions how the importance of the courts' role as the ultimate guardians of the fundamental rights of adults in need of protection is often undermined by a high deference to medical and psychosocial assessments – which are, in turn, often conducted in a context that is not conducive to valuing residual capacity. It also discusses how the underuse of tutorship and its flexibility and the negligence of the person's residual decision-making autonomy often result in an undervaluation of the protected adult's residual capacity.

The third part suggests that the creation of a specialized decision-making body could be an interesting path to explore in order to ensure that vulnerable adults' interests, rights, and autonomy are fully protected when protective supervision is instituted. It seeks to initiate a reflection on the possible benefits associated with such a specialized decision-making body when it comes to the quality of the legal protection offered to vulnerable adults. It does not address the technicalities related to its creation or the scope of the jurisdiction that should be assigned to it by the legislator.

More specifically, the author argues in the third and last part that certain characteristics of a specialized decision-making body – namely its multidisciplinary nature and expertise, its educational mission, the configuration of its courtrooms and its inquisitorial like procedure – could allow for a legal protection that is better adapted to vulnerable adults' needs, interests, rights and residual autonomy.