Incapable Adults – The Most Vulnerable

Cecilia Nordenfelt, Parliamentary Ombudsman, Sweden

Workshop 4: Protecting the Particularly Vulnerable
Thursday, June 11, 2009

A number of problems can arise when individuals are forced to relinquish responsibility for their own finances and personal affairs to a specially appointed administrator. Appointment of a public administrator may be necessary, and society has a special responsibility for both the appointment and supervision of that person. Safeguards against inappropriate administrative measures are needed, and these are raised in the 2008 UN Convention on the Rights of Persons with Disabilities. In Sweden, the Parliamentary Ombudman oversees the Public Guardian, which appoints public administrators, thereby helping to protect those vulnerable people who cannot manage their own affairs. This paper reviews the Ombudsman's process of dealing with complaints and investigations involving the Public Guardians, and problems raised, such as the need to improve the legal knowledge and administrative routines of the guardians.

Incapable adults are one of the most neglected groups of people in society. I am thinking of all those who are old or sick and unable to manage their own affairs. What characterizes this group is that there is often no one to stand up for their interests – unlike children, for instance, who have their parents. In addition, people who are old or sick are often in situations where they are unable to understand that their concerns are not being managed appropriately. They do not realize that they should be complaining about the way their property or personal affairs are being administered, and they are often physically incapable of doing so. This is a group of people who really are helpless from a judicial and practical point of view.

In Sweden, we have two forms of legal assistance in situations like these: either administration (*förvaltarskap*) or personal representatives (*god man*). The major difference is that with a personal representative the person retains the legal capacity to act, while this is not the case if an administrator is appointed. Nomination of a personal representative, then, involves less of an intervention than appointment of an administrator. However, the problems that arise when it comes to safeguarding the person's interests are similar and have been provided with more or less the same solution in Swedish law.

I do not intend to go into the differences in any greater detail, but will speak instead of the problems that can arise with administration. This is a state of affairs in which individuals are forced to relinquish responsibility for their own finances and personal affairs to a specially appointed administrator. My intention is to present a number of general problems that can arise when society assumes responsibility for someone, especially for that person's finances, in this way.

The first question that needs to be asked is whether, in deciding to appoint an administrator, society really does assume responsibility for the financial concerns of an individual. The answer to this question determines, in my opinion, the extent to which society is also obliged to supervise the administrator.

In dealing with incapable adults who cannot manage their own finances, appointment of an administrator may be necessary, even against the individual's will. When a public institution makes such decisions, it must also assume the responsibilities. Naturally, this does not mean that administrators are not legally liable for what they do. On the other hand, society has a special responsibility for both the decision to appoint an administrator and for supervision of the administrator's conduct.

It is not difficult to identify a number of occasions when the risks from the individual's perspective are very high and therefore the need for supervision is particularly important.

The main issues are the regulations that apply to:

a. the application for administration,
b. the information needed about the person who needs an administrator and,
c. the decision about administration.

In addition, safeguards against inappropriate administrative measures are needed.

These questions have been thoroughly considered in a 1999 recommendation by the Council of Europe on Principles Concerning the Legal Protection of Incapable Adults (Council of Europe, Committee of Ministers, No. R [99] 4). They are also raised in the 2008 UN Convention on the Rights of Persons with Disabilities.

These international agreements underline the importance of the abovementioned questions. It must not be possible to casually deprive individuals of control over their own lives and assets. The decision to appoint an administrator is a major intervention. It deprives a person of the legal capacity to act. Such decisions must have a very firm basis, and a system of regulations should provide support for the processes that lead to these decisions.

The first requirement is that an application for administration cannot be allowed to be made by just anybody. This is a possibility that can be abused and should therefore be explicitly restricted to those who can be assumed to possess special insight into the person's capacities and needs; i.e., if not the individual himself or herself, then his or her closest relatives.

The second requirement, self-evident and fundamental, is that it must be shown without doubt that the person really does need an administrator. This may be done through the presentation of a medical certificate, by procuring the opinion of persons close to the individual and, if possible, from the person himself (or herself).

In addition, it is necessary for the individuals concerned to have the right to examine all the documents and decisions that concern them. It must not be possible, for instance, to conceal the reasons for the appointment of an admin-

istrator. Although he or she may not always understand what it all means, that is not the point. What is important is that someone who does not need an administrator will be informed and able to take action.

Decisions on administration must also be made by an authority with the appropriate competence and be open to appeal. In view of the fact that they involve depriving individuals of their legal capacity to act, it is natural, in my opinion, for such decisions to be referred to the courts. Those making the decision must make sure that the inquiry into the person's needs provides an adequate basis.

In addition, when an administrator is appointed, it cannot be just anybody. Some appraisal of the proposed appointee's suitability is required, both in general terms and for each individual case. It goes without saying that the administrator has to be someone who has no criminal convictions and whose own financial situation is stable. But that is not enough. The wishes of the incapable adult must be taken into account and it may also be necessary to consider the opinions of his or her closest relatives. In this context, it must also be remembered that nobody is entitled to be appointed as an administrator; this applies to even the most respectable of citizens.

Finally, there must be an autonomous body whose main task is to safeguard the interests of incapable adults and supervise the way in which administration is undertaken. An additional element of control may be provided by offering the closest relatives insight into the administration.

Last but not least, there must be regulations about criminal responsibility and liability for damages that apply to administrators who abuse their position.

In Sweden, we have a system of regulations that, in my opinion, meets these requirements.

Decisions on administration are made by a public court of law. The requirements for such decisions are enshrined in law and can be appealed. The law also states who is entitled to apply for administration and stipulates minimum requirements of the inquiry on which the court is to base its decision.

A key role in the Swedish system is played by a municipal body, the Public Guardian. The Public Guardians are, beside the closest relatives, empowered to apply for administration, and other agencies, e.g., social services, may turn to the Public Guardian to raise the question of appointment of an administrator. The Public Guardians are also responsible for the supervision of administrators. Their task is to safeguard the interests of individuals and to review decisions on such appointments every year. One of their most important duties is to audit the annual accounts that administrators are required by law to submit, and they have the power to discharge an administrator and appoint a new one if necessary. The Public Guardians also make a number of decisions concerning the administration of valuable assets. Their participation is required, for instance, when real estate is bought or sold and in transactions involving securities. Appeal against a decision of a Public Guardian can be made to a court of law.

Who supervises the supervisor? In Sweden, this is the task of regional government agencies called County Administrative Boards. These boards monitor the Public Guardians by making annual inspections, among other things. These are, however, in my experience, often of a relatively summary nature.

So, where do the Parliamentary Ombudsmen fit in?

As a Parliamentary Ombudsman, I exercise supervision of both the Public Guardians and the County Administrative Boards where administration is concerned. My task is to ensure that the actual procedure meets the legal requirements. On the whole, this concerns the application of all the "musts" I have discussed herein. My review is extraordinary and I cannot change the decisions of a Public Guardian; that is for the courts to do.

Every year, I make two or three inspections and receive 50-60 complaints from the general public against the Public Guardians. The number of complaints may seem small – and indeed it is, compared with other areas. I believe that this is because the majority of those who should complain do not realize that that they ought to do so. In fact, inspections reveal that the Public Guardians find it difficult to comply with the regulations and often have poor, or at least primitive, administrative support.

Unfortunately, the difficulties of the Public Guardians involve shortcomings at every stage, both administratively and in applying the law. It is particularly grave when Public Guardians do not concern themselves appropriately with auditing the annual reports of the administrators, and so leave the field open for all kinds of doubtful transactions.

Here we face the exact problem I pointed to initially. Incapable adults have limited ability to protect their own interests. That is why there are Public Guardians. When they fall short, there is no protection for the vulnerable person. The extensive system of regulations, with its strong element of protection and monitoring, has no effect if the Public Guardians are incapable of upholding it. At the same time, there are few complaints about Public Guardians. For this reason, the inspections I make in this area are particularly important.

It is no simple matter to review these cases, which are often complicated. I am assisted not only by a number of exceptionally competent lawyers, but also by a system of regulations in the constitution. The core obligation of all public servants is to assist the Parliamentary Ombudsmen in their work. This means that a Public Guardian is required to look into a sequence of events and make a written report to the Ombudsman when asked, and in general must respond to questions fully and truthfully. The Parliamentary Ombudsmen also have access to all records of public authorities. No agency may invoke the secrecy of a document against the Parliamentary Ombudsmen.

Consequently, problems do not arise involving the Parliamentary Ombudsman's right to appraise the individual cases or the workings of a Public Guardian as a whole. The difficulties are at other levels. Often it turns out that there are such shortcomings in the Public Guardians' records that it is difficult to determine what decisions have in fact been made and on what material they have been based. In addition, there are direct shortcomings in the application of the law.

This problem can only be remedied by increasing the knowledge of the law and improving the administrative routines of the Public Guardians. One reflection I often make is that the municipal authorities underestimate how much the Public Guardians need to know about civil law and administrative law. This applies particularly in Sweden, where the administrators appointed are rarely professionals. An administrator is likely to be someone who has a personal relationship with the incapable adult. In my opinion, it is obvious that these administrators need the advice and support of a competent Public Guardian.

During inspections of the Public Guardians, I mainly see the shortcomings; that is in the nature of the task. It is important to remember that virtually all administrators have the best interest of their subjects at heart. In the vast majority of cases, the administration functions well, even if there are shortcomings in the way they are managed by the Public Guardian.

The great importance of the inspections does not lie in the disclosure of the way in which a specific Public Guardian is working. The effect is much more far-reaching. My adjudications are published in an annual report to the Riksdag and also, to a large extent, in the media. This means that not only are the operations of the Public Guardians I inspect set right, but other Public Guardians are prompted to review and improve the way in which they apply the law and their routines. In this way, as a Parliamentary Ombudsman, I contribute to the protection for those individuals who cannot manage without the support of society.