

Guardianship for adults and protecting the elderly; is there a need for change?

Amsterdam, 12 september Kees Blankman



vrije Universiteit amsterdam

Three forms of guardianship

- ▶ 1. protective trust, 36.000 per year
- ▶ 2. plenary or full guardianship, 2.000 p.y.
- ▶ 3. personal guardianship on matters of care, nursing, treatment and support, 8.000 p.y.
(in Dutch: “bewind, curatele, mentorschap”)
- ▶ In most cases partners or family members request guardianship and are appointed, but the number of family guardians is decreasing
- ▶ The number of persons over 65 under guardianship is unknown

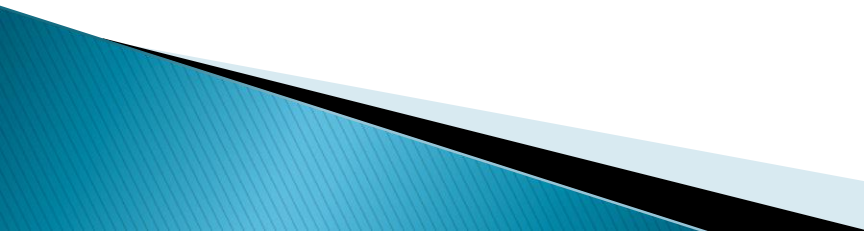
Two kinds of incapacity

- ▶ De facto/actual: the adult cannot act, does not oversee the consequences, does not understand the pros and cons of the decision to make; in Dutch legislation often: “niet in staat tot een redelijke waardering ter zake”
- ▶ By statute: minors or adults in case of full guardianship (‘handelingsonbekwaamheid’); the adult is not allowed to act; also partial legal incapacity (‘onbevoegdheid’) in case of protective trust or personal guardianship

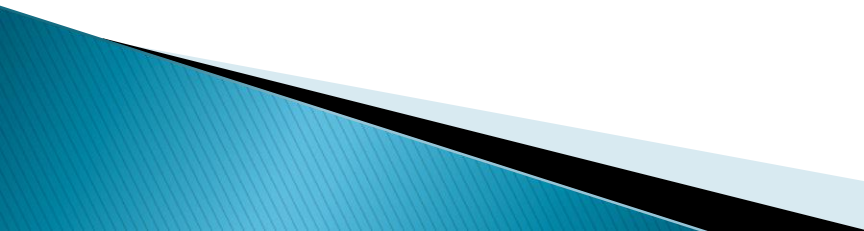
Effective protection ? Yes

- ▶ If a person under guardianship performs a legal act without permission of his guardian, the guardian can successfully claim that this legal act is void, legally not valid, and that the person under guardianship is not obliged to pay or to do anything. This claim always works in case of full guardianship. In case of protective trust or personal guardianship this claim is only successful if the other party knew or had to know about the guardianship

Recent changes that benefit the person under guardianship 1

- ▶ No plenary guardianship if a less intrusive alternative can be applied (subsidiarity)
 - ▶ A protective trust must be and in some cases can be registered in a public register; result: better protection because a third party could have known that there was a protective trust and that the person had limited legal capacity
 - ▶ Professional carers are authorized to request for a guardianship measure to be ordered or ended and for dismissal of the guardian
- 

Recent changes that benefit the person under guardianship 2

- ▶ Introduction of quality requirements for (prof) guardians from outside the family
 - ▶ Certain persons cannot be appointed (after bankruptcy you cannot become guardian for financial affairs and a professional carer of a patient cannot become a personal guardian for that patient); these (veto)rules do not apply for attorneys
 - ▶ After a period of max. 7 years continuation of the guardianship measure must be assessed
- 

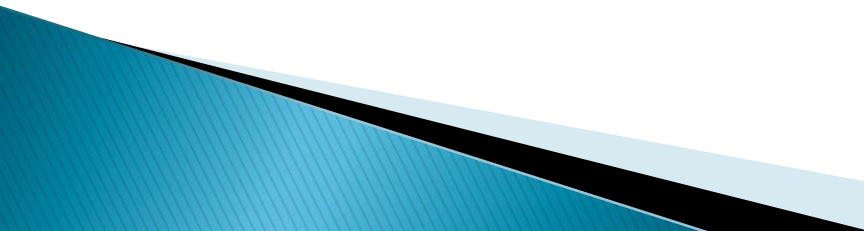
Dutch guardianship regulations in compliance with art 8 ECHR ?

- ▶ Our three guardianship measures not only result in the appointment of a representative but also ex lege/automatically in the limitation of the legal capacity of the adult concerned
- ▶ The decision of limiting the legal capacity of a person affects his right to respect for his private life (see e.g. the case of *Shtukaturvov v. Russia* , ECHR 44009/05, March 28, 2008); leading to the question: is interference with this right necessary in a democratic society?

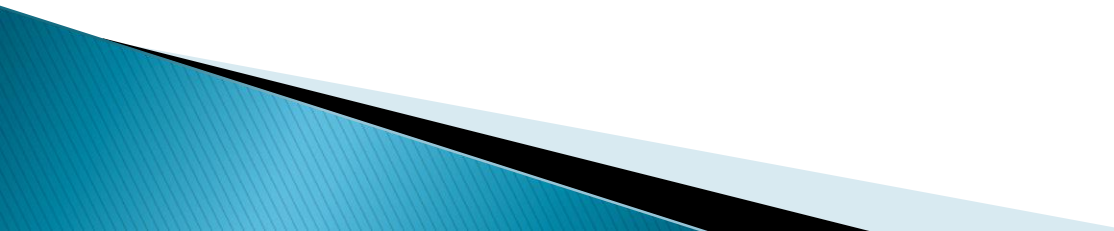
Dutch guardianship regulations in compliance with art. 12 CRPD ?

- ▶ The Netherlands became State Party to the Convention on the Rights of Persons with Disabilities (CRPD) on July 14 this year
- ▶ Art. 12 emphasizes supporting mechanisms and maximising and respecting the autonomy of persons with a disability (e.g. preference for continuing powers of attorney)
- ▶ Mechanisms and measures that limit the legal capacity of a person are only justified as a last resort and with safeguards such as 'tailored to the person's circumstances'

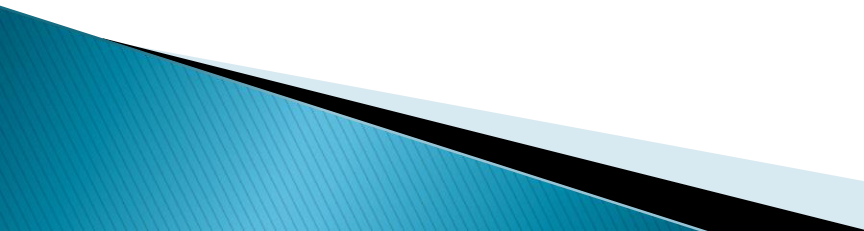
Effective protection, yes; Enough respect for the autonomy ?

- ▶ Human rights conventions such as the CRPD urge us to find a balance between protection and autonomy; see e.g. the leading principle is respecting the rights of the person (to be protected), and his will and preferences
 - ▶ At the point of respecting the autonomy (art. 3 and 12 CRPD) and the private life (art. 8 ECHR) the Dutch regulations cannot be said to be in line with the two human rights conventions
 - ▶ A major problem is the ex lege limitation of the legal capacity in the three measures
- 

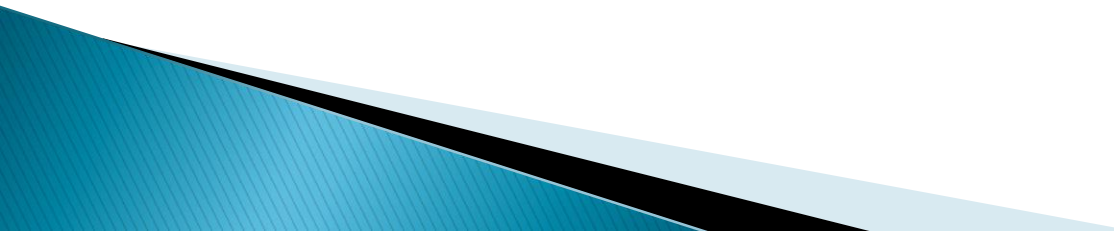
Thoughts about changing the ex lege limitation of legal capacity

- ▶ How often is limitation of legal capacity really necessary (in a democratic society)?
 - ▶ In a number of guardianship cases it is clear that a court-appointed representative is necessary, but it is not always convincingly clear that a limitation of the person's legal capacity is necessary
 - ▶ More in line with the CRPD would be if the judge only limits the legal capacity if the case requires this specific kind of protection
- 

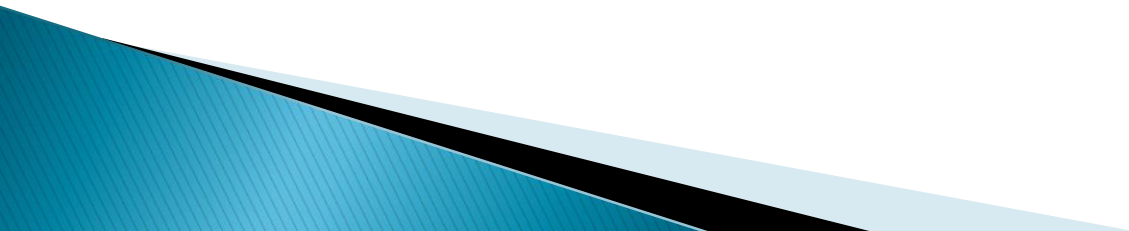
Personal guardianship: skipping the limitation of legal capacity ?

- ▶ Practise indicates that a number of full guardians and personal guardians, in accordance with health legislation, let their client make their own health decisions as long as they are actual capable of doing this
 - ▶ (mental) health legislation does create a massive exception upon the formal limitation of legal capacity in guardianship regulations (only the actual capacity is relevant)
 - ▶ Therefore in case of personal guardianship we do not need a limitation of legal capacity
- 

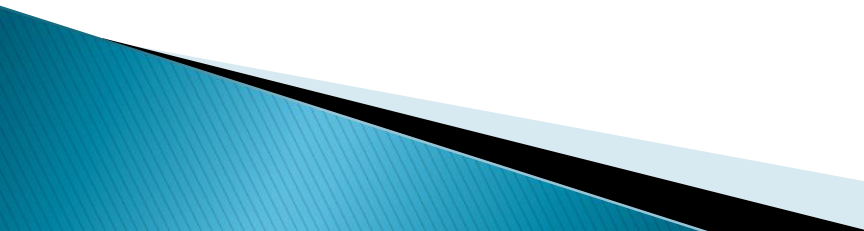
Looking for the right balance within the protective trust

- ▶ An elderly person with no relatives who can no longer take care of his financial interests, needs a supporter or representative, but not per se a formal limitation of his legal capacity
 - ▶ Organisations such as housing associations sometimes demand a protective trust to be in place and sometimes a self-appointed representative ('gevolmachtigde') has to be removed but that does not justify limiting the legal capacity of the person
 - ▶ The system does not leave much room for the person to make decisions such as major donations without the approval of the court
- 

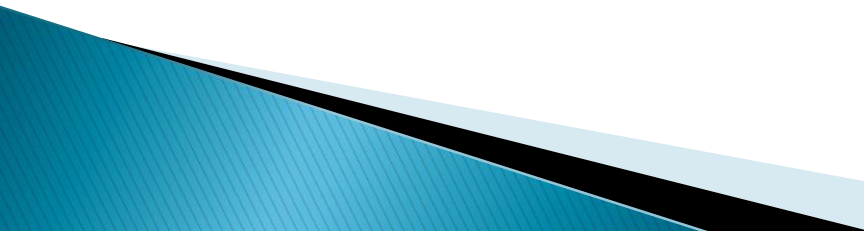
The future of full guardianship



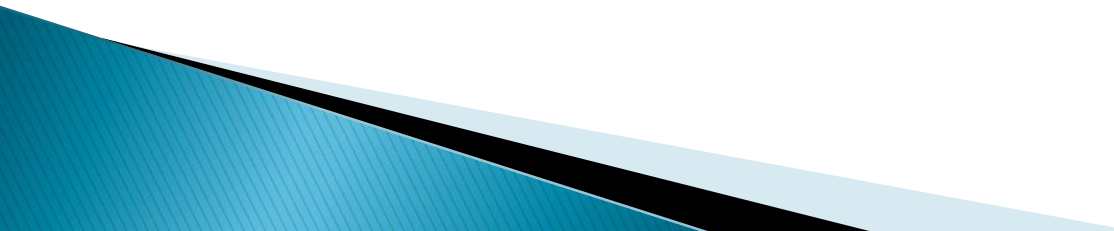
The future of full guardianship

- ▶ Full guardianship historically is not a human rights based measure and the loss of legal capacity as a starting point and basic element of this measure can no longer be justified
 - ▶ And except for situations of marriage and making a will, the protection offered by full guardianship equals the protection offered by protective trust and personal guardianship
 - ▶ Research is required to demonstrate that loss of legal capacity is needed, not vice versa
- 

Objections against change

- ▶ The Belgium and Scottish government had to change their guardianship legislation because their regulations were much more outdated
 - ▶ The German Civil Code probably offers a better protection to a person who commits a legal act during actual incapacity than the Dutch Civil Code does in art. 3:34 BW
 - ▶ Persons under guardianship with very little actual capacity do not suffer from losing their legal capacity; they don't notice / don't mind
- 

Concluding

- ▶ The adult guardianship measures offer a solid protection for the elderly but change is needed especially on the point of the ex lege limitation of legal capacity
 - ▶ Respecting the autonomy means promoting the use of continuing powers of attorney
 - ▶ From the perspective of international human rights the onus of proof rests with the Dutch government to defend/justify a system with an ex lege limitation of legal capacity
- 

**Thank you for your
attention**