



RESPECTING RIGHTS: Legal Capacity, Rights and Decision-Making



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Presented to:

Community Network of Specialized Care Staff

Presenters Today

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ARCH is a Legal Aid Clinic for Persons with Disabilities

- ARCH is a specialty legal aid clinic that gives legal help to people with disabilities in Ontario
- ARCH provides legal services directly to people with disabilities
- ARCH does most of its work in priority areas:
 - Education: rights of students with disabilities to be accommodated at primary, secondary and post-secondary school
 - Attendant Services: rights of people who receive attendant care services
 - Developmental Services: rights of people who receive developmental services
 - Capacity: rights of people with disabilities to make their own decisions

Today's Presentation

- Respecting Rights
- What legal rights do people with disabilities have to make decisions about their lives?
- When does the law allow other people (family members, PGT, and others) to make decisions for people with disabilities?
- What is the role of service providers?

Respecting Rights



Province-wide rights initiative at ARCH

An ARCH lawyer, a self-advocate & an advocacy staff present together

We present to people labelled with intellectual disabilities, families, and developmental services agencies

Why is it important to talk about legal capacity and rights?

Role Plays

Write down the 3 most important things in the world to you



Why is it important to talk about rights?

- Cultural change: people are demanding more autonomy, control, participation in decision-making
- People with disabilities are asking for a different kind of protection: don't make decisions for me, help me make my own decisions
- Law requires respect for rights of persons with disabilities
- Many people don't have legal information

FILM



FAB: Friends of Andrew Bloomfield

Produced by Josee Boulanger

To watch the whole film go to:

<https://vimeo.com/189787285>

Capacity and Autonomy



- Legal capacity = power provided by law to make decisions, enter into contracts, take legal action, etc.
- The ability to make decisions for one's self is an important element of autonomy and human dignity.
- A person's right to make decisions should be promoted and protected to fullest extent possible - even if it is inconvenient or challenging to do so.

Convention on the Rights of Persons with Disabilities

- CRPD is an international law that sets out the rights of people with disabilities.
- Article 12 states that:
 - people with disabilities have the right to legal capacity on an equal basis as others
 - Governments must provide supports to enable people to exercise their legal capacity
 - Governments must put safeguards in place to prevent abuse of people with disabilities who try to exercise their legal capacity
- Canada ratified the CRPD in 2010



Ontario Law: Presumption of Capacity

- In Ontario all adults are considered mentally capable of making decisions affecting them unless there is clear evidence to the contrary
- A person who is 18 or older is presumed capable of entering into a contract
 - Substitute Decisions Act, s.2
- A person who is 16 or older is presumed capable of giving or refusing consent regarding personal care (health care, nutrition, shelter, clothing, hygiene, safety)

Ontario Law: When Can Others Make Decisions?

- In Ontario: if there has been a legal finding that the person is incapable of making their own decisions then another person can make those decisions on behalf of the “incapable” person
- Legal finding of incapacity often made by a medical doctor or capacity assessor
- Other person is called substitute decision maker
- Examples: powers of attorney, guardians, PGT, litigation guardians, etc.

CRPD: When Can Others Make Decisions?

- Under article 12 CRPD: **Never!** All people have legal capacity by virtue of being human. Substitute decision making should be abolished. Supported decision making is the way to go.
- States must provide supports to enable people with disabilities to make decisions that have legal effect.
- If significant efforts have been made and it is not possible to determine the will and preference of a person, then the best interpretation of will and preference must be used

Goal: Move Towards Supported Decision Making

- Disability community, UN: we must move towards supported decision making. We must support people with disabilities to make or be involved in making their own decisions

How can agencies and staff help people with disabilities and their families do this?

Goal: Move Towards Supported Decision Making

- Starting point: assume the person with a disability has legal capacity and can make decisions independently
- Remember: capacity is not about making “good” decisions
- If appropriate, help people with disabilities develop supported decision making mechanisms – so that they will be able to make their own decisions with some supports
 - What supports might the person need?
 - Are there trusted family members, friends or others who the person with a disability would like to support them to make decisions?

Supported Decision Making in Action: Support Circle



Peter decided he wanted to have a circle to help him make decisions so he could be in control of his choices

He chose friends he trusts to help them make decisions

This way, he has the help of people with different abilities

Decisions, Decisions



Have you ever
asked someone
for advice to
make a decision?



“I can’t make your decision for you. I will be there for you, but you have to make your own decisions. Bad or good, I support your decisions”.

A friend of Paul’s who helps him make his own decisions.

Goal: Move Towards Supported Decision Making

- Do not automatically let others who claim to be the person with a disability's guardian, power of attorney or substitute decision-maker make decisions. Ask to see the legal document which gives authority to the substitute decision-maker.
- If you must rely on substitute decision making, ask whether it can be limited to what is absolutely necessary
 - Time-limited?
 - Limited to a particular type of decision?
 - Build in periodic reviews
 - Support the SDM to fulfill their obligations to involve the person as much as possible, take into account person's values beliefs wishes, etc.

Goal: Move Towards Supported Decision Making

- Investigate whether there is a viable alternative to guardianship:
 - What are you trying to achieve? (eg: applying for DSO services, managing ODSP, opening a bank account, managing bill payments and spending money, etc)
 - In many situations families do not need to become guardians in order to help the person with the disability (eg: SSPSIPDDA says anyone can apply for DSO – do application with family member, ODSP can be managed by an informal trustee, create joint banking accounts, etc)

Goal: Move Towards Supported Decision Making

- Encourage families to learn about supported decision making
- Encourage families to consider: is there a real risk of harm?
- Review agency policies and practices: do existing policies and practices encourage supported decision making or substitute decision making?
 - Example: intake forms that require staff to fill in who is the guardian or SDM
 - Example: agency practice to first call a person's parents or family if there is a dispute involving the person

ARCH ALERT

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THANK YOU

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The information in the presentation materials are current as of the date of the presentation.