The Right to Decide.

Intellectual Disability and the Right to Decide

Resource #4: Legal capacity and intellectual disability: A cautionary tale for capacity assessors, lawyers, and judges

This document provides an in-depth critical analysis of a recent decision of the Ontario Superior Court of Justice to place a young woman under the guardianship of her parent.

Community Living Ontario
Intégration communautaire Ontario

The Right to Decide Project – Overview

'Legal capacity' refers to people's experience of being recognized as persons before the law, exercising rights, accessing the civil and judicial system, entering into contracts, making decisions about their own life and property, and communicating on their own behalf.

In many situations (for example, in the case of guardianship) substitute decision-making removes people's legal capacity, i.e., the right to direct their own lives, including managing their money, making health-related decisions, and deciding where and with whom they live.

From 2018 to 2023, Community Living Ontario worked with five front line service organizations to understand how people who have an intellectual disability exercise their right to legal capacity – that is, how they make choices and decisions, and the barriers they face in doing so.

Our collaborative work uncovered many enablers of legal capacity, as well as many barriers. This resource is part of a series of documents that address this important issue.

Our local partners in the project were Community Living Dryden & Sioux Lookout, Brockville & District Association for Community Involvement, Durham Family Resources, and Community Living Windsor in partnership with Windsor Essex Brokerage for Personal Supports.

Special thanks to the Institute for Research and Development on Inclusion and Society (IRIS), PooranLaw, and Inclusion Canada.

For more information and resources related to this project, please visit our Right to Decide resource page.

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Legal capacity and intellectual disability: A cautionary tale for capacity assessors, lawyers, and judges

1. Introduction

Despite the work done by ARCH Disability Law and others in shining a light on abusive and neglectful guardianships, recent case law in Ontario demonstrates that guardianship continues to be widely seen as beneficial and unproblematic. Further, it is our strong opinion that Ontario's legal system is decidedly weighted against the rights and decision-making power of people labelled as having an intellectual disability.

Again and again, people in positions of power (including capacity assessors, lawyers, and judges) blow past the guardrails set out in the *Substitute Decisions Act* and the *Health Care Consent Act* – including the primary guardrail, the presumption of mental capacity. The systems that have been set up to protect people with cognitive impairments are influenced by the biases and stereotypes that infuse the broader discourse, with negative effects for people who have little or no power within these systems.

2. How the system is supposed to work

If a person is found to be incapable of managing their own property or personal care in Ontario, they can appeal that decision to the province's Consent and Capacity Board. Many of the decisions of the Consent and Capacity Board include one or more references to a 1997 Ontario Superior Court of Justice case known as Koch (Re). In Koch (Re), Justice Joseph Quinn offers a useful overview of what is at stake and what is required in the course of a capacity assessment. The justice's words are worth quoting directly:

"The mechanisms of the Substitute Decisions Act (SDA) and the Health Care Consent Act (HCCA) are… formidable. They can result in the loss of liberty, including the loss of one's freedom to live where and how one chooses."

"Any procedure by which a person's legal status can be altered (which is the inevitable result on a finding of mental incapacity) must be cloaked with appropriate safeguards and capable of withstanding rigorous review."

"Compelling evidence is required to override the presumption of capacity…"

"There is a distinction to be drawn between… *failing* to understand and appreciate risks and consequences and *being unable* to understand and appreciate risks and consequences. It is only the latter that can lead to a finding of incapacity." (Emphasis added)

"It is to be remembered that mental capacity exists if the appellant is able to carry out her decisions with the help of others."

"It is immaterial whether [a person's] deeds and choices appear reasonable to the assessor/evaluator. Reasonableness in the eyes of the assessor/evaluator (or the [Consent and Capacity] Board) is not the test. The assessor/evaluator (and the

Board) are not to inject their personal values, judgments and priorities into the process."

"It is mental capacity and not wisdom that is the subject of the *Substitute Decisions Act* and the *Health Care Consent Act*. The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. The State has no business meddling with either. The dignity of the individual is at stake."

Justice Quinn also notes the following:

- Capacity assessors' views of the best interests of people being assessed are irrelevant and not to be confused with the state of a person's cognitive capacity.
- Capacity assessors have a duty to probe and verify information that is heard in the course of a capacity assessment.
- Assessors must "be alive to the presence of improper motives of those who seek to have another found to be without mental capacity."

3. How the system actually works

Despite the fact that the Koch (Re) decision was published in 1997, in 2023 we still see capacity assessors, lawyers and judges who seem to be ignorant of its guidance and wisdom (as well as being ignorant of the province's official capacity assessment guidelines).

For example, a January 2023 Ontario Superior Court decision involves a guardianship application from a parent whose 19-year-old daughter (referred to as "A.L.") has an intellectual disability and regularly engages in behaviour that may put her in situations of physical danger.

In this decision, guardianship is described by the judge as the "least restrictive option," despite a clear understanding within the legal system that guardianship is one of the most restrictive things that can happen to a person. It is helpful to be reminded of the things that guardians are given control over, as outlined in Ontario's *Substitute Decisions Act*. They can, for example:

- Do nearly anything with respect to a person's finances and property except for making a will.
- Decide where the person will live, how they access health care, what they eat, whether or not they can access education and training, what clothing they can purchase, and what they can do in their spare time.
- In many cases, work with police to apprehend the person, "using such force as may be necessary."[2]

Apart from having a person sterilized, donating their tissue, adopting a child on their behalf, or changing the custody of their child, there aren't many things that guardians with plenary decision-making powers can't do. They have nearly complete control and act in place of the person.

In the Ontario Superior Court decision noted above, we learn that "A.L." has literacy skills and attends school. She engages actively in counselling, following a period of unstable mental health. She understands what a bank is, and is aware of what debit and credit cards are used for. She understands that she needs assistance understanding and managing her finances, and holds a joint bank account with her mother, who also acts as trustee of her ODSP benefits. Since at least the age of 15, A.L. has communicated with people online and has had the capacity to follow through on plans to meet people in the community.

In the past, A.L. engaged in some worrying behaviours. For example, she would sometimes meet men she didn't know well for sex, putting her at risk of physical and emotional harm. On one occasion she took knives to her school, and on another she set fire to the walls of a classroom. However, by January 2022 it seems that she was engaging in less risky behaviour and experiencing improved mental health.

Because they are so often viewed by others as 'forever children,' it is common for people who have an intellectual disability to be undereducated about romantic and sexual relationships. As a result, they may experience difficulty maintaining and negotiating their safety with sexual partners. In response, practitioners across the world have developed various tools to assist people to learn about themselves, understand sexual dynamics, and manage relationships safely.[3]

In the case of A.L., everyone involved seems to have been unaware of a less restrictive alternative wherein the young woman could be supported to guard her own safety while making decisions that lead to sexual and/or romantic fulfillment. The details of the case suggest that stereotypes and biases about intellectual disability, as well as a failure to consider reasonable alternatives, played a strong role in the decision to impose guardianship.

The judge notes that "A.L. has Autism Spectrum Disorder, Bi-Polar II, and other intellectual disabilities," and (using misinformed and arguably dehumanizing language) that she "… reads and writes at a grade 5 level. She is not permitted to obtain a driver's licence and will likely never be employed." He also writes that her "capacity is fixed and unlikely to vary or improve over time."[4]

These statements set a tone that is infused with disability-related bias, and positions A.L. as a forever-child. It is curious, for example, that a 19-year-old adult is referred to as someone who has "run away from home," rather than as a person who leaves on their own accord and goes into the broader community.

As noted above, the judge expressed concern about information (provided by the parent) that A.L. "would often run off to engage in sexual encounters with older adult males whom she met online," which seems to be the key concern that led to a capacity assessment and the application for guardianship. Justice Quinn's statements in Koch (Re) are directly relevant here and worth repeating: "The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. The State has no business meddling with either."

In the 2023 decision about A.L., Justice Deluca clearly ignores the guidance set out in Koch (Re). This includes:

- A lack of awareness of the potential presence of improper motives of the person who requested the assessment, i.e., A.L.'s mother.

- A failure to interrogate the adequacy of the capacity assessment, including an analysis of whether or not A.L. failed to understand key pieces of information, or was unable to understand this information.

- A failure to take seriously the fact that A.L. did not have independent legal representation, or any supporters that she herself chose.

- A total disregard of the possibility that A.L. could access support in decision-making, despite the fact that she is actively engaged with medical professionals, counselling professionals, a vocational program, and services for people who have an intellectual disability.

Ironically, the remedy that was put in place, i.e., guardianship, is unlikely to have any effect on A.L.'s risky actions. She will still have freedom of movement and will continue to attend school. Somewhat incredibly, the judge went as far as advising the parent that, although she did not have the right to detain or confine her daughter, she may gain that right if her daughter were to be placed under a community treatment order.

The judge's decision (which was supported by the Ontario Public Guardian and Trustee, which is required to appear as a respondent in such cases) does not mention the risks involved in signing over a person's rights to a parent. It does not review cases where guardians have been found to be abusive or neglectful. It does not consider the possibility that the parent is to some extent responsible for the risky actions of the adult child. It does not think forward to what happens when a parent is no longer able to act as substitute decision-maker. The judge seems to carry the belief that giving one person control over another's life is the safest and best approach.

This recent decision flies in the face of Koch (Re), disregards important provisions of the *Substitute Decisions Act*, and ignores decades of progress in rights-based support of people labelled with intellectual disability. It is just one example of multiple and well-known failings in Ontario's legal capacity regime.

These failings underscore the pressing need for changes that will support, honour and respect the exercise of legal capacity by people who have an intellectual disability.

For more information and resources related to this project, please visit our Right to Decide resource page.

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Notes

1. S.B. v. A.L., 2023 ONSC 1426. https://www.canlii.org/en/on/onsc/doc/2023/2023onsc1426/2023onsc1426.html.

2. Substitute Decisions Act, 1992, section 59 (2) and 59 (3).

3. See, for example: A. Nethercott & A. Bianchi (2023). Risky business. The International Journal for Support Professionals, 12(7).

4. The Law Commission of Ontario maintains that "Legal capacity, by its nature, frequently fluctuates. Some people will develop greater decision-making abilities over time as they learn and acquire access to social resources, others will experience declines in their decision-making abilities, and others will cycle in and out of legal capacity."

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CELEBRATING 70 YEARS OF POSSIBILITIES

Community Living Ontario is a non-profit provincial association that has been advocating with people who have an intellectual disability and their families for 70 years. We proudly work alongside more than 115 local agencies and advocate on behalf of more than 100,000 people across Ontario.

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