

Equal Recognition Before the Law

Article 12 CRPD

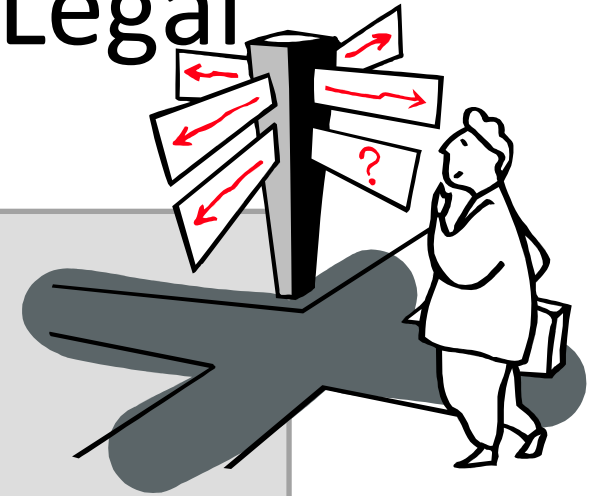
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What is the Right to Legal Capacity?



Article 12:

1. Right to recognition as a person
2. Right to legal capacity on equal basis with others
3. State duty to provide supports
4. Safeguards in measures related to legal capacity

Legal Capacity: Making Decisions About



Health Care



Finances/Property



Personal Life – where and how
to live, work, be supported;
relationships

The Problem that Article 12 Addresses

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Recognition of the right to legal capacity has excluded people with intellectual, cognitive, or psycho-social disabilities... which harms their social and legal personhood.





Article 12 gives us the 'green light' for an inclusive approach to legal capacity.

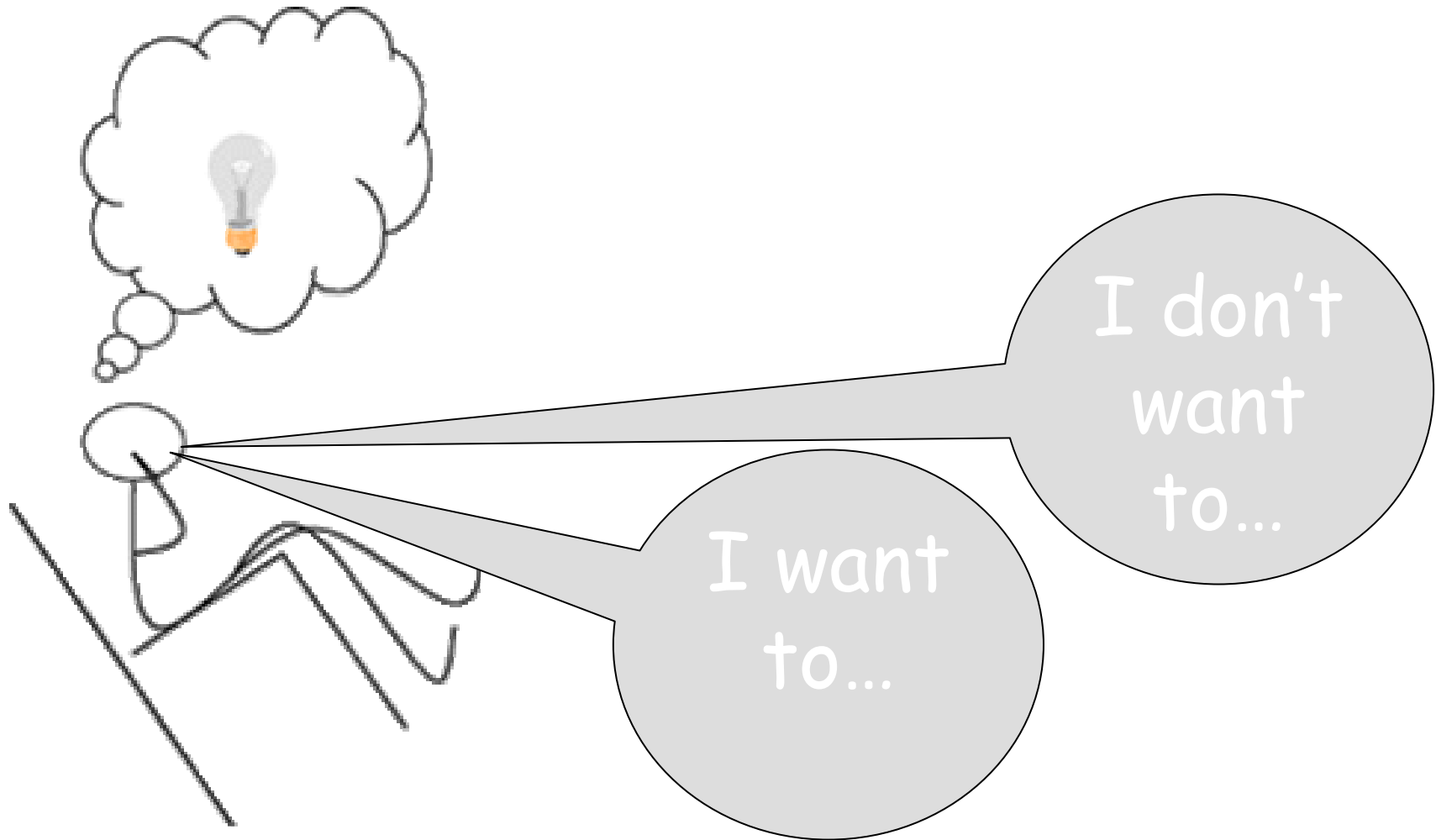
To develop an inclusive approach to legal capacity we need to rethink 'Who' exercises it and 'How'

Usual Criterion of Personhood: On their own, a person can:

- Understand relevant information for a decision
- Appreciate all consequences of options
- Communicate decision to others

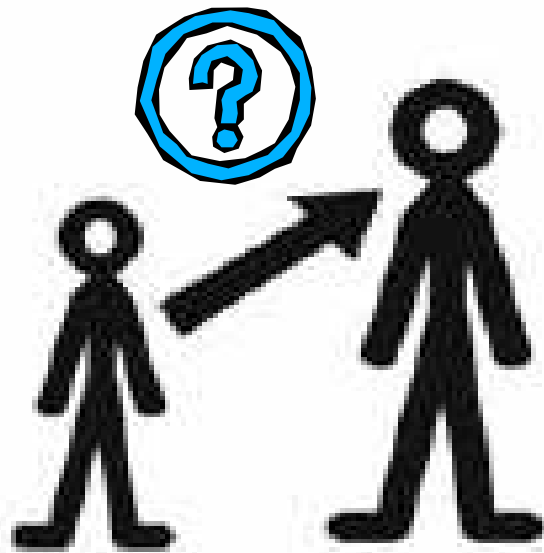
But there are other criteria of personhood....

Someone who expresses intention and
'will' to others



Someone who has a 'personal identity' through time

An individual who is recognized as being the same person through time. Family and friends can tell a life story that makes sense of a person's actions and behaviour.



Growing up

Principles for an Inclusive Approach to Legal Capacity

- All individuals have a will – which can be expressed by the individual... or interpreted and described by others
- A person's will or intention forms the basis for competent decision making...
 - People are not incompetent or incapacitated – Decision-making processes are...

... Principles

- All individuals have potential to evolve their capacities
- Other party's interests and liability concerns do not, on their own, justify removing a person's decision-making rights.

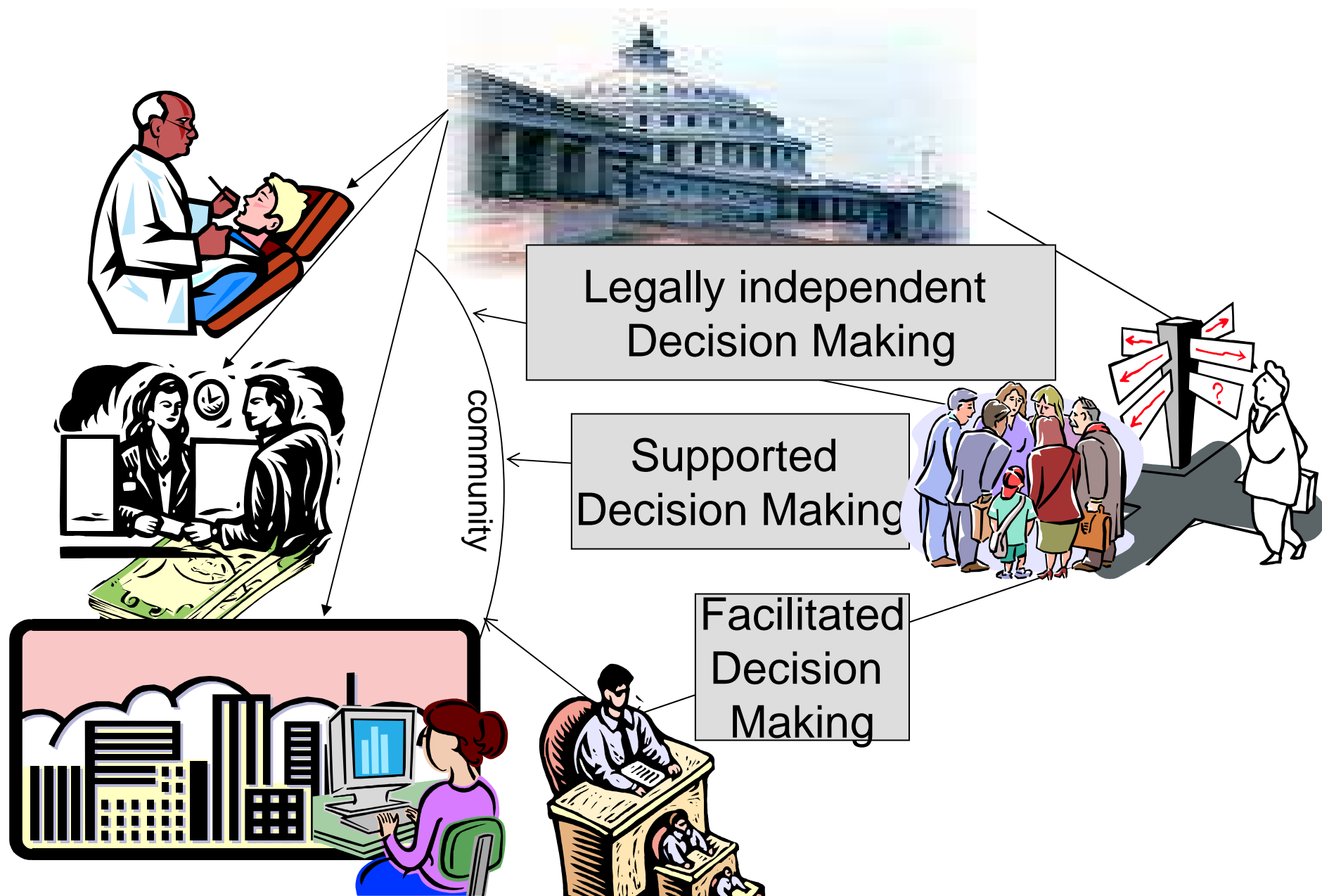
‘Who’ Exercises Legal Capacity?

An adult/person of the age of majority – to whom, at a minimum, at least one other person can describe their will and intention.

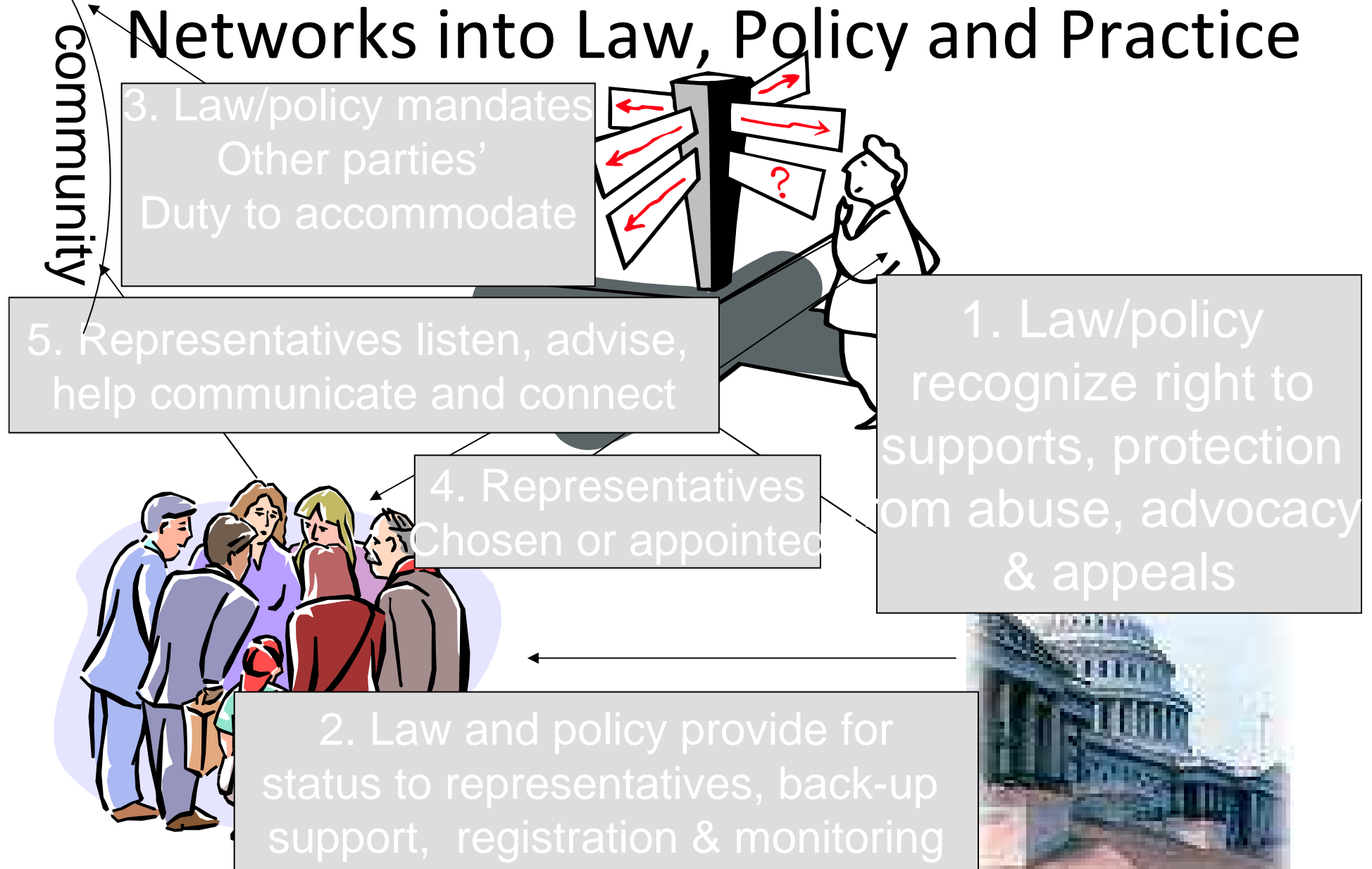
Types of Decision Making Supports

- Life Planning – for meaningful decisions
- Independent Advocacy – to advise and challenge other parties
- Communicational and Interpretive – to assist in communication
- Representational – to help represent a person to others
- Relationship-Building – to facilitate personal relationships & support networks/representatives
- Administrative – to assist in implementing agreements

Types of Decision Making Status



Putting Support Representatives and Networks into Law, Policy and Practice



Representation Agreements

- A form indicating:
 - Who will be representatives
 - Who will be a monitor of the representatives and decision making process
 - Particular ways of communicating, expressing

Test of 'incapacity' for entering a representation agreement

- (a) whether the adult communicates a desire to have a representative make, help make, or stop making decisions;
- (b) whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;
- (c) whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult;
- (d) whether the adult has a relationship with the representative that is characterized by trust.

Representation Agreement

In accordance with the *Representation Agreement Act* R.S.B.C. 1996 c. 405 as amended ("*RA Act*"), this Representation Agreement ("*Agreement*") is made on _____, 20____
(month, day) (year)

Adult's information:

This Representation Agreement belongs to

(PRINT adult's legal first, middle and last names. Indicate "commonly used name" E.g. Patricia Jane Smith "Pat")

of

(current address)

phone:

(area code + number)

date of birth:

(month, day, year)

Naming of representative:

I choose the following person to be my representative,

Representative:

(PRINT full name of representative)

of

(current address)

who is my

(relationship to adult: spouse, sister, friend)

phone:

(area code + number)

Authority of representative:

My representative is authorized to assist me to make decisions or to make decisions on my behalf for any and all of the following standard powers under Section 7 of the *RA Act*:

- routine management of my financial affairs, as defined in the regulation in effect on the date this Agreement was made;
- obtaining legal services and instructing counsel to begin proceedings (except divorce) or to continue, compromise, defend or settle any legal proceedings on my behalf;
- minor and major health care as defined in the *Health Care (Consent) and Care Facility (Admission) Act* including but not limited to decisions about medications, tests, assessments, immunizations, surgery, dental care, occupational therapy, physiotherapy, as required for therapeutic, preventive, palliative, diagnostic, cosmetic or other purpose related to health and including a plan for minor health care or participation in a medical research program approved by an ethics committee designated by regulation;
- personal care, including but not limited to decisions about where I live and with whom including admission to a care facility or other types of supported living including hospice or palliative care, assessment and planning for support or services, arranging and managing support or services, managing staff in my employ, diet, exercise, education, personal safety and participation in activities.

As provided in Section 18 of the *RA Act*, my representative has the right to all information and documents to which I am entitled and that relate to the representative's areas of authority.

Naming of monitor:

I appoint the following person to be the monitor,

Monitor:

(PRINT full name of monitor)

of

(current address)

who is my

(relationship to adult: spouse, sister, friend)

phone:

(area code + number)

In disagreements:

How do we decide who gets
what decision-making status
and what supports for what
decisions?

Legally Independent

With decision-making supports and reasonable accommodation on the part of other parties, are the other parties able to understand the person's will/intention sufficient to enter an agreement? But without formally appointed representatives.

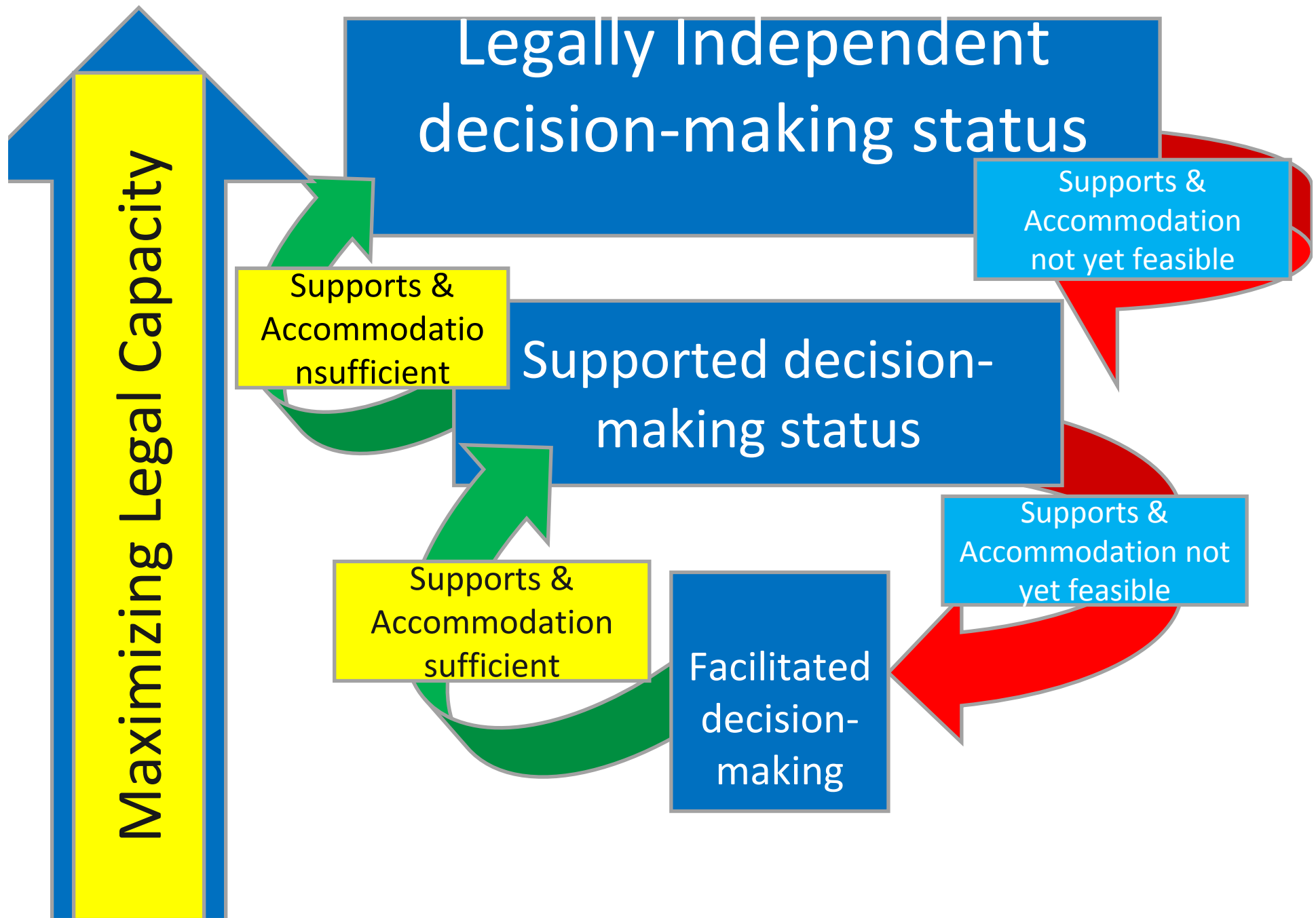
Supported Decision Making

If not legally independent,

- is the person able to appoint a trusted representative/network to assist in expressing will/making decisions? Or
- is there a person or group of persons who know and understand the person and are committed to assisting and representing? Or
- Can someone be appointed who the person could communicate with, and who would assist?

Facilitated Decision Making

If not, as a last resort, appoint a facilitator – time-limited, decision-specific to facilitate making of needed decisions based on best understanding of person's intention, with ongoing duty to invest in creation of decision-making supports – especially personal relationships.



Safeguards – Why?

OVER-protection

or

UNDER-protection

How do we get the balance right?

Safeguards: Principles

- Respect for autonomy and right to make individual decisions
- Personal dignity and integrity – right to privacy, bodily integrity, individual personality and identity
- Duty to protect against substantial and serious risk, abuse, neglect

Areas to Safeguard:

- Access to supports and accommodation for decision making
- Integrity of the decision-making process – for legally independent, supported and facilitated
- Against serious and substantial risk, abuse and neglect

Main Safeguards

1. Legislated community-based agency to:
 - Provide information and assistance with respect to decision-making supports and accommodations
 - Maintaining a complete and up to date register of all existing support representatives, facilitators and monitors

Main Safeguards

2. An administrative tribunal with powers to:

- hear concerns/complaints from individuals, third parties, supporters, concerned citizens
- rule on duty to accommodate and State provision of supports
- rule on decision-making status in a particular situation – independent, supported or facilitated – e.g. ‘is the person able to appreciate and understand on his/her own’ with supports and accommodations?

Main Safeguards

2. Administrative tribunal – continued...

- appoint co-decision makers and facilitators and sets the terms and restrictions of their role and duties.
- appoint monitors where they have evidence showing that supporters or facilitators are not meeting their legal obligations.
- provide for a right of review of the decisions of the administrative tribunal

Main Safeguards...

3. Legal Capacity and Support Office

- Acts as facilitator of last resort
- Act as a monitor of last resort
- Inquires into/investigates allegations of abuse and neglect
- Arranges for supports as required to address situations where people are experiencing or may experience abuse and neglect and there is reason to believe that their ability to make or act on decisions will be enhanced by such supports.

Main Safeguards

4. Access to advocates

For anyone for whom an issue has been raised about their decision-making status or ability. The roles played by the advocate could include the following:

- advise people of their rights to decision making and supports.
- provide information to people in relation to legal processes
- assist people to make and communicate their decisions
- explain to an individual who is the subject of a proceeding about decision-making supports or status the nature and implications of the proceeding

Main Safeguards

5. Access to legal counsel

- For representation before the administrative tribunal

6. Access to Monitors of Supported and Facilitated Decision-Making arrangements

- Whomever is creating the decision-making status/arrangements may appoint a monitor to ensure supporters and facilitators comply with their legal duties.

Main Safeguards

7. Legislated duties of supporters, facilitators

- To raise concerns, inquire and report to authority as needed
- To monitor investment in relationship building for those in facilitated status

Safeguarding: Access to Supports and Accommodations

Disputes resolved by Community Agency or Tribunal

- Is the person able to access needed accommodations and supports – life planning, independent advocacy, communicational, etc.?
- Legal independence - Does the person ‘appreciate and understand’ the nature and consequences of the particular decision – Are more supports and accommodations needed? A different decision-making status?
- What does the person want? Conflict among supporters/facilitators?

Safeguarding: Integrity of Decision-Making Process

- Mandate duty to accommodate & provide supports
- Legislate responsibilities of third parties
- Require monitors for supported & facilitated
- Provide access to independent advocacy and relationship building
- Provide for making complaints and investigating allegations of lack of accommodation, supports, or that supporters or facilitators are not meeting their responsibilities.

Safeguarding: Against Risk, Abuse, Neglect

Legal Independence

- Is the person able to act legally independently? Appreciate and understand risks and outcomes? If yes...
- Do the person's decisions or non-decisions, or those of others place him/her at substantial risk of harm or result in serious adverse effects? If yes, at the person's direction supports options are explored with the individual and arrangements are made as required.
- Is the situation of serious effect or risk – harm to oneself or others? If not, and person is legally independent, inquiry ends. People can choose risk.

...Against Risk, Abuse, Neglect

Legal Independence

- If actions *do* place others at substantial risk or serious adverse effects, then options are explored:
 - Mandate supports
 - Interventions pursuant to Mental Health legislation and/or the Criminal Code
 - Unanswered Questions
 - Restraints?
 - Involuntary commitment and treatment?

Safeguards – Risk, Abuse, Neglect

Supported and Facilitated Decision Making Status

- Is the person experiencing or likely to experience serious adverse effects?
- If not, the inquiry ends.
- If yes, is there a breach of responsibilities on the part of supporters or facilitators
 - Unintentional breach? – mandate supports
 - Intentional breach? – remove the supporters or facilitators

Safeguards – Risk, Abuse, Neglect

Supported or Facilitated Decision Making

If actions *do* place others at substantial risk or serious adverse effects, then ask:

- Intentional or Unintentional Breach?
- What supports are needed?
- Are other interventions needed pursuant to Mental Health legislation and/or the Criminal Code?
 - Unanswered Questions
 - Restraints?
 - Involuntary commitment and treatment?

Safeguards

- Major non-therapeutic interventions cannot be decided outside of legally independent status
 - If there is question about whether an intervention is ‘therapeutic’ a hearing is required at the tribunal.