

ACCESS TO OLDER ADULTS

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Presently, there is no comprehensive legislation dealing with the issue of access to seniors. The Advocacy Centre for the Elderly gets calls from individuals complaining that they are unable to access a parent, spouse or friend because a family member, caregiver or other individual is prohibiting access.

Capacity

The fundamental principle in dealing with issues of personal contact – whether it be telephone calls, mail, e-mails or visits – is that every capable adult has the legal right to choose whether or not he or she wishes to communicate with family members. A mentally capable older adult has no legal obligation to have any form of communication with friends and family members, and is legally entitled to refuse to communicate with them. The perplexing quandary in an individual case can be in knowing whether the right to refuse contact is exercised capably and with volition.

a) Capable Older Persons

In situations respecting personal contact, “capable” refers to the mental capacity to understand information that is relevant to making a decision, and to appreciate the reasonably foreseeable consequences of making or not making a decision. Capacity is situational to the decision in question; in this case, it means whether or not to receive visitors or have other communication with friends and family members. Even if the older person has been found to be incapable for other purposes (such as managing finances or deciding about admission to a long-term care home), he or she might still be able to understand information and appreciate the reasonable foreseeable consequences of decisions about visitors. This is a very low level of capacity. It is not reasonable to assume that because the person is incapable of something else, he or she can also not make capable decisions about visits and personal communications. Similarly, the presence of dementia does not necessarily mean that the person is incapable of this type of decision.

Persons who are competent to decide who they want to visit may have trouble exercising this right. They may have physical limitations, such as the inability to use a telephone or the inability to ambulate. They have mental limitations. Even if an individual has no physical or mental limitations, it could be that their access is limited because they are in a setting where access is controlled by another individual.

b) Incapable Older Persons

An older adult may continue to enjoy contact with relatives and acquaintances long after he or she has stopped being able to manage property or to make treatment decisions, for example. The comfort derived from human contact is a very basic comfort which affects an individual's quality of life.

If an older adult is mentally incapable of making personal care decisions and has a guardian of the person or an attorney for personal care, there are principles of substitute decision-making that the guardian or attorney must follow. These include encouraging the incapable person, to the best of his or her abilities, to participate in the guardian's decisions, as well as fostering regular personal contact between the incapable person and supportive family members and friends. The guardian or attorney must consult from time to time with supportive family members and friends of the incapable person, who are in regular personal contact with the incapable person, and with persons from whom the incapable person receives personal care. Further, the guardian or attorney is required to foster the person's independence, and to take the least restrictive and intrusive course of action that is available and appropriate in the circumstances.

All of these principles suggest that the denial of access between an incapable older adult and his or her supportive friends and family members is harmful and goes against the principles of substitute decision-making. Good communications should be fostered. Even if there are circumstances where personal contact is not appropriate, such contact should be denied only in the clearest circumstances. Where communications completely break down, the results can be harmful, intrusive, and expensive to the older adult and his or her friends and family.

Settings

The settings for disputes over access to an older adult can arise almost anywhere. Sometimes, the older adult lives in his or her own home, or the home of another person, where a live-in spouse, family member, or caregiver comes to dominate the older person's life. The older adult may be extremely vulnerable, as the care provider may in fact be the abuser who controls all contact with the outside world. Access problems in this type of setting may be the most intractable, as the owner of the home may issue a "no trespass order."

Disputes over access to older adults most frequently involve a long-standing family disagreement. Financial matters are the most common source of discord. There may be issues of perceived favouritism on the part of the older adult between his or her offspring or other family members. New friends might be suspected of "gold digging." Family members are sometimes worried about their estate interests so they will attempt to exert control over who has access to the older person in an effort to preserve their future inheritance. At other times, there are issues of perceived financial abuse, to the detriment of the older person and his or her estate. In all of these cases, the control of older persons is necessary to gain control of his or her estate.

Other times, the older person may reside in a long-term care home, a retirement home or other place where another person may have been instrumental in arranging the admission. In these cases, access may be prohibited by the care providers on the instructions of the attorney for property, the attorney for personal care, or the person who controls the older adult's finances. On occasion, the care providers may prohibit or limit access to an older person because the visitor is deemed too demanding, troublesome or interfering. Access may also be limited because of legitimate concerns such as elder abuse.

Options to Facilitate Contact

a) Non-Confrontational Communications

The key to resolving issues is to foster non-confrontational communications that worked in the past with the older adult and the other person under whose control he or she is living.

b) The Police and the Criminal Code of Canada

If all avenues of communications are closed, it might be possible to ask the local police to visit the older person and make inquiries about whether he or she wishes to live in the present situation, and to have contact with friends and other family members. Forcible confinement is a criminal offence under section 279(2) of the *Criminal Code of Canada*, but an investigation and charge of this type would be extremely unlikely.

More often, if involved, the police would merely try to meet with the older person to ask about his or her wishes. If it turns out that the older person appears to be mentally capable and unwilling to have communication with the friends or family members in question, those wishes must be respected. If the older person appears to be incapable, and unwilling to have communication, then those incapable wishes might also be respected unless there is a strong reason to disregard them.

c) Court Appointed Guardians

As a last resort, if the older person appears to be incapable of making his or her own personal care decisions, a friend or family member could bring an application to the Superior Court of Justice to be appointed as the older person's guardian. This is a very expensive and complex legal procedure so it is beneficial for the person applying for guardianship to retain a lawyer. Legal fees would need to be paid, which may eventually be reimbursed from the older person's estate if the application succeeds and there is enough money in the estate to allow reimbursement. Further, court proceedings are usually highly confrontational resulting in the division of families and the destruction of relationships. It is also very intrusive into the life of the older person who, capable or not, may be hostile to being placed under guardianship. However, where an incapable older adult is placed in a position of harm by the denial of access to friends and family, a guardianship application may be the only legal recourse.

d) Investigations by the Public Guardian and Trustee

The Office of the Public Guardian and Trustee has a Guardianship Investigations Unit that can investigate allegations where a person incapable of personal care decisions is suffering or is at risk of suffering serious adverse effects. The investigation may result in the court appointing the Public Guardian and Trustee as the person's guardian on a temporary basis. The Public Guardian and Trustee can be contacted at 416-327-6348 or 1-800-366-0335.

Conclusion

The friends and family of older adults, either living independently or in settings where another person has control over access to the older adult, frequently report difficulty and confrontation in arranging personal contact with their loved one. In cases where personal contact between the older person and somebody important in his or her life is denied, the issue of volition should be front and centre. It is important to know whether the older person is voluntarily choosing to avoid contact or whether there is some other reason beyond the person's control.