



Comparing and sharing experiences - A lesson we can learn

Australian Guardianship and Administration
Council Conference

“Upholding rights, preventing abuse and
promoting autonomy”

March, 15th 2019



Content and Introduction

- Article 12 UNCRPD
- Legal systems
 - Civil Law
 - Common Law
- Legal capacity (rechtliche Handlungsfähigkeit)
 - legal concept
 - legal construction
 - Elements of a legal decision
- Findings



Article 12 UNCRPD

Article 12 – Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy **legal capacity** on an equal basis with others in all aspects of life.
3. ...



Legal Systems

- Civil Law System - general and abstract
 - Acts of parliament
- Common Law System – personalized
 - Jurisdiction; acts of parliament
- Approach



Concept of Legal Capacity

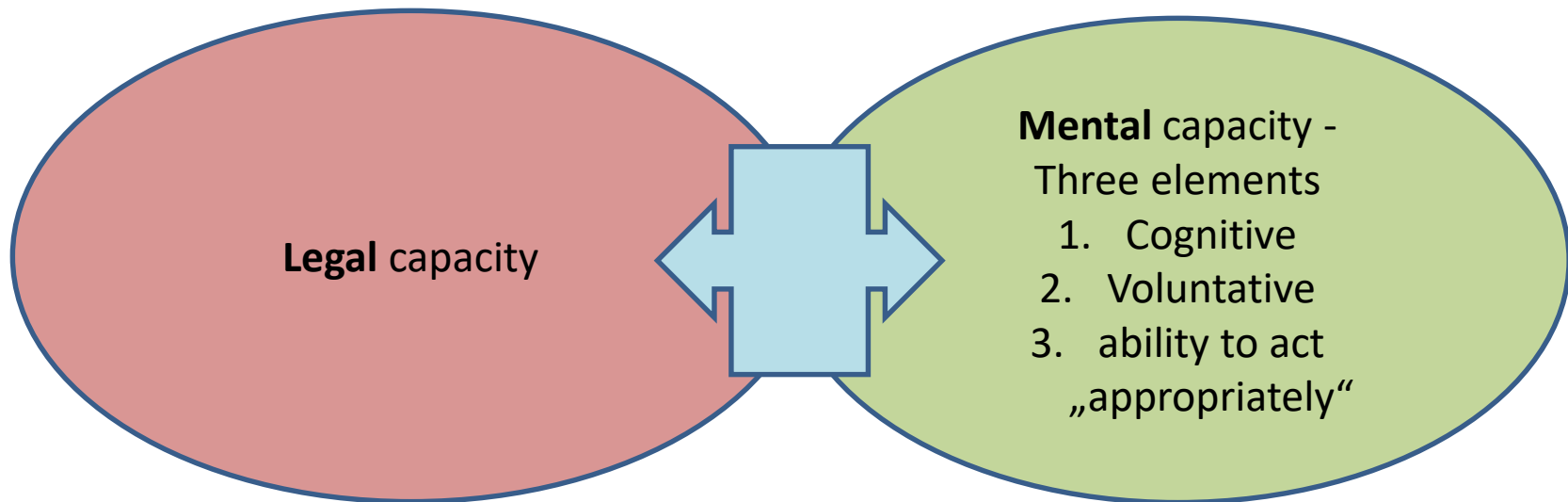
Rechtliche Handlungsfähigkeit

- Legal standing - holder of rights
- Legal agency - capacity to be a legal person in a legal system
- Social-legal construction
- “power and opportunity to act within a legal system” (Commissioner for Human Rights of the European Union)
- “by the recognition of a person's decision” (European Union Agency for Fundamental Rights)



Concepts of capacity

- Concepts of **legal** and **mental** capacity





Terms of legal capacity and mental capacity

capacity to conclude (or make) a contract - *Vertragsfähigkeit, Geschäftsfähigkeit*;
contractual capacity – *Vertragsfähigkeit, Geschäftsfähigkeit*; **have contractual capacity** - *vertragsfähig sein, geschäftsfähig sein*; **capacity to marry** - *Ehefähigkeit*;
capacity to contract a marriage - *Ehefähigkeit*; **capacity to sue** – *Prozessfähigkeit, Aktivlegitimation*; **capacity to be sued** - *Passivlegitimation*; **a person of unsound mind is without legal capacity** - *ein Geisteskranker ist geschäftsunfähig*; **be without (full) legal capacity** - *geschäftsunfähig sein*; **of (or having) legal capacity** - *rechtsfähig; geschäftsfähig*; **person deprived of legal capacity** - *entmündigte Person*; **testamentary capacity** - *Testierfähigkeit*; **capacity to make a will** - *Testierfähigkeit*; **capacity to incur liability** - *Verpflichtungsfähigkeit (WechselR)*; **capacity to pay** - *Zahlungsfähigkeit*;
capacity to work - *Arbeitsfähigkeit*; **capacity limit** - *Kapazitätsgrenze*; **financial capacity** - *finanzielle Leistungsfähigkeit*.

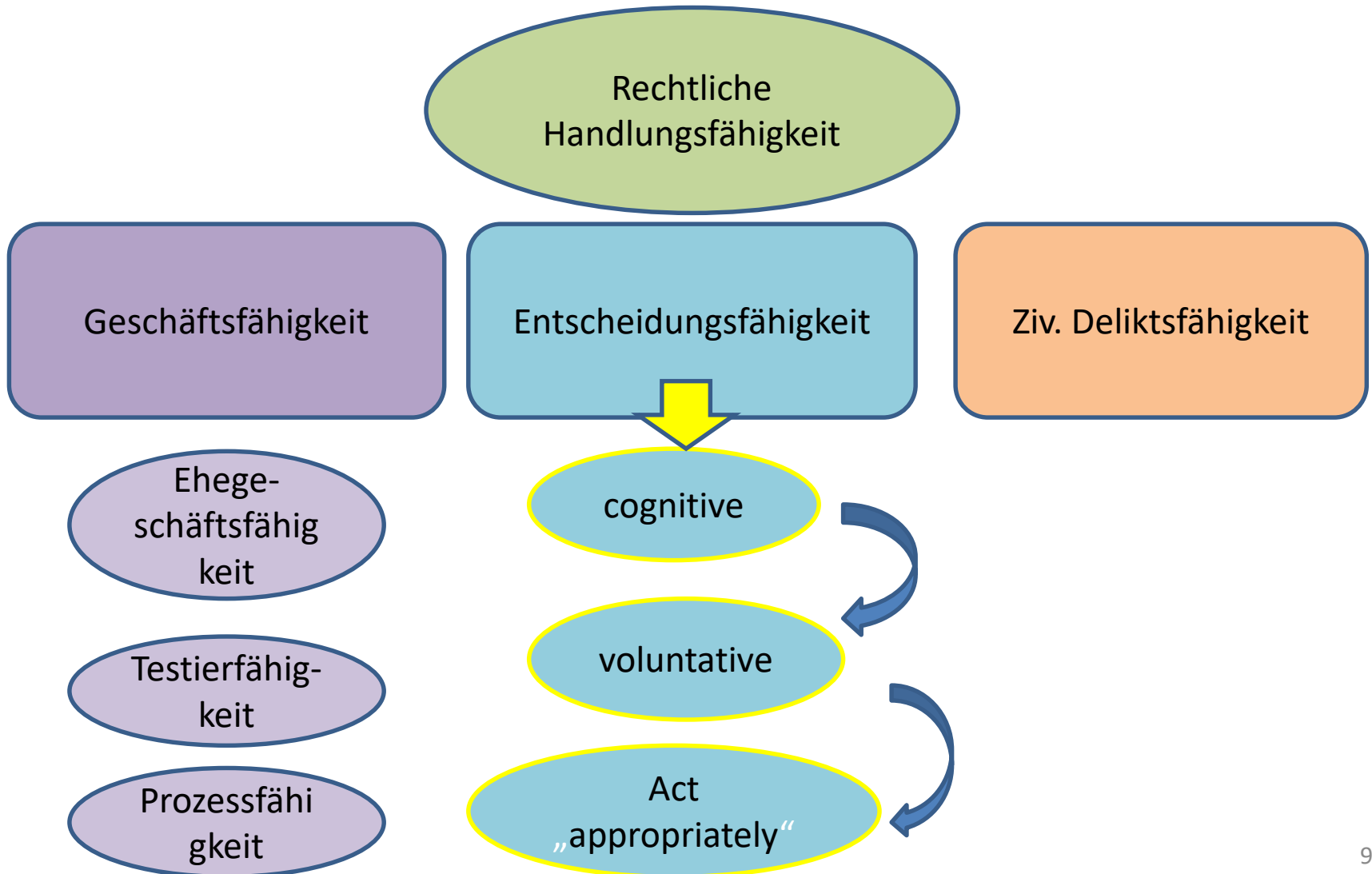


System of legal capacities (*System der rechtlichen Handlungsfähigkeit*)

- Austrian Structure
- Australian Structure

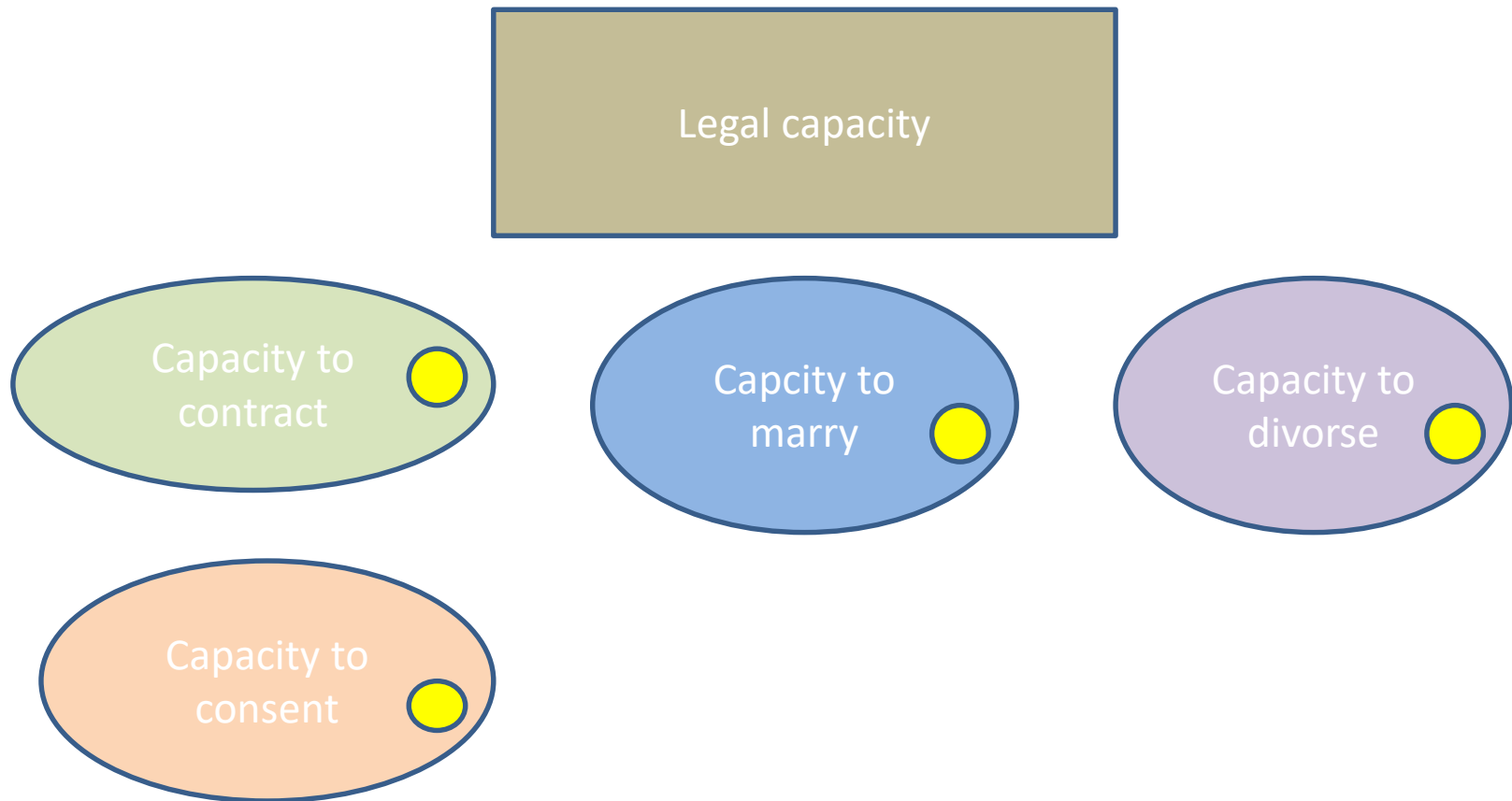


Austrian Structure





Australian Structure





Elements of a legal decision

- *Einwilligungsfähigkeit* (capacity to consent)
 - natural ability to grasp the benefits of interfering with a legal good
 - ability to rationally assess the associated risk and
 - to weigh the benefits and risks against each other
- Distinguish the natural ability to understand and to assess from the natural ability to create a preference (*natürliche Willensfähigkeit*) and the capacity to agree (*Einverständnisfähigkeit*).



- Incapable to consent (minority or mental or psychological impairment) = Unable to
 - record the value or rank of the legal interests and interests of the person affected by the consent decision
 - understand the consequences or risks for the person resulting from the consent decision
 - and understand which alternative measures of achieving the goals are possible through consent and which measure puts less strain on the person
- Aspects of a decision to consent to medical treatment
 - Subjective value decision
 - Decision of facts
 - Conflict decision



Findings

- Civil Law System - general and abstract
- Common Law System – individualized
- Knowing and recognizing three elements of the legal capacity to consent
- Knowing and recognizing elements of a legal decision
- Every person is able to make a legal decision, even when the decision may not be understandable and reasonable for a third party – change perspective
- Think on an individual basis



Thank You For Your Attention!

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