



CHECKLIST: CAPACITY TO GRANT/REVOKE A CONTINUING POWER OF ATTORNEY FOR PROPERTY (“CPOAP”)

Capacity Generally

There is no single definition of capacity nor, is there a general test or statutory criteria to apply for establishing capacity, mental capacity, or competency.

Capacity is decision-specific, time-specific, and situation-specific in every instance, in that legal capacity can fluctuate. There is a legal presumption of capacity unless and until the presumption is legally rebutted.¹

Determining whether a person is, or was, capable of making a certain decision, is a legal determination or a medical/legal determination depending on the decision being made and/or assessed.²

In determining the ability to understand information relevant to granting or revoking a Continuing Power of Attorney for Property the following capacity characteristics and determining criteria are provided for guidance purposes:

Capacity to Grant or Revoke a Continuing Power of Attorney for Property

A person can revoke a CPOAP, if capable of giving one.³

Pursuant to section 8 of the *Substitute Decisions Act*,⁴ to be capable of granting a CPOAP, a grantor requires the following:

- knowledge of what kind of property he or she has and its approximate value;
- awareness of obligations owed to dependants;
- knowledge that the attorney will be able to do on the person’s behalf anything in respect of property that the person could do if capable, except make a Will, subject to the conditions and restrictions set out in the CPOAP;

¹ *Palahnuk v. Palahnuk Estate* 2006 WL 1135614; *Brillinger v. Brillinger -Cain* 2007 WI 1810585; *Knox v. Burton* (2005), 14 E.T.R. 3d 27; *Calvert v. Calvert* [1997] O.J. No. 533 (G.D.) at p. 11(Q.L.), aff’d [1998] O.J. No 505 (C.A.) leave ref’d [1998] S.C.C.A. No. 161.

² *Estates, Trusts & Pension Journal*, Volume 32, No. 3, May 2013.

³ *Substitute Decisions Act*, RSO 1992, c 30, s. 8(2) [SDA].

⁴ *Ibid*, SDA.

- knowledge that the attorney must account for all dealings with the person's property;
- knowledge that if capable, the CPOAP may be revoked at any time;
- appreciation that unless the attorney manages the property prudently its value may decline; and,
- appreciation of the possibility that the attorney could misuse the authority granted.

If a grantor is incapable of managing property, a CPOAP granted, can still be valid so long as the grantor meets the test for capacity for granting that CPOAP at the time the CPOAP was made.⁵

If, after granting a CPOAP, the grantor becomes incapable of giving a CPOAP, the document remains valid so long as the grantor had capacity at the time it was executed.⁶

This checklist is intended for the purposes of providing information and guidance only and is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive. Dated March 11, 2022.

⁵ *Ibid*, SDA, s. 9(1).

⁶ *Ibid*, SDA, s. 9(2).