



30th Annual Conference

REFOCUS. RECHARGE. RECONNECT.

November 2 - 4, 2022 | Niagara-on-the-Lake, ON

Capacity to Retain & Instruct a Lawyer

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Overview

Today's discussion will focus on:

Determining requisite **decisional capacity** to:

- ▶ Retain a Lawyer
- ▶ Instruct a Lawyer



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Societal Context

Globally facing the largest demographic shift:

- ▶ 2019: 1 in 11 people – over 65
- ▶ **2050: 1 in 6 people – over 65**
- ▶ 2019: 143 million people over 80
- ▶ **2050: 426 million people over 80**



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Societal Landscape: Canada BY 2068



29.5%
POPULATION
+65

1/2 Million



**CANADIANS LIVING WITH
DEMENTIA, INCLUDING
ALZHEIMER'S**



25,000

New cases of dementia every year



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Capacity is Complex

- ▶ **Presumption of capacity**
- ▶ Various capacity “tests” (colloquial), factors, criteria or indicators





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Capacity is ...

- ▶ Decision-specific
 - ▶ Unique tasks – capacity for one but not another
- ▶ Time-specific
 - ▶ “good” days and “bad” days – time of day
- ▶ Situation-specific
 - ▶ Stressful situations, ie. Home vs. Doctor's office
- ▶ But it is not a “**TEST**”





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Assessing Capacity

What: legal and medical factors (legislation and common law)

Who: expert capacity assessor, doctor, lawyer, etc.

When: current or retrospective

Balance: protection and personal autonomy



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Capacity to Retain and Instruct Counsel

- ▶ A retainer is a specific type of contract between a lawyer and client for legal services.
- ▶ A retainer may be validly entered if the client had capacity at the time of creation
- ▶ *Sylvester v. Britton*, 2018: dementia did not preclude a litigant from instructing counsel and making wishes known



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Capacity to Instruct Counsel

Costantino, 2016

to have capacity to instruct counsel, a person must:

- a) understand what they have asked the lawyer to do for them and why;
- b) be able to understand/process the information, advice, and options the lawyer presents; and
- c) appreciate the advantages/drawbacks/consequences associated with the options



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Voiding a Retainer for Incapacity

▶ *Guardian Law v. LS*, [2021 ABQB 591](#)

▶ Valid or Void-Retainer Agreement:

- 1) Did the client, at the time of entering into the retainer agreement, have the capacity to understand its terms and form a rational judgment of its effect on his or her interests?



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Voiding a Retainer for Incapacity

- 2) Did the lawyer know that the client lacked capacity, and more specifically,
 - ▶ Were there sufficient indicia of incapacity known to the lawyer to establish a suspicion that the client lacked the requisite capacity?
 - ▶ If yes, did the lawyer take sufficient steps to rebut a finding of actual or constructive knowledge of incapacity?



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Overarching Capacity Principles?

► *Ball v Mannin* (1829)

- Does the “capable of understanding what he did by executing the deed in question when its general purport was fully explained to him”
- individual understand the nature and effect of the decision they are making, provided they have been given a proper explanation of that decision?
- But only one part of the analysis
- “generality” (*Ball v Mannin*) vs “specific” (*Banks v Goodfellow*)



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Red Flags & Best Practices

- ▶ Intellectual impairment, memory problems, disorientation, poor attention
- ▶ Unaware of risks to self and others
- ▶ Irrational behavior, reality distortion: delusions
- ▶ Unresponsive and inability to make a decision
- ▶ Cannot easily identify assets or family members





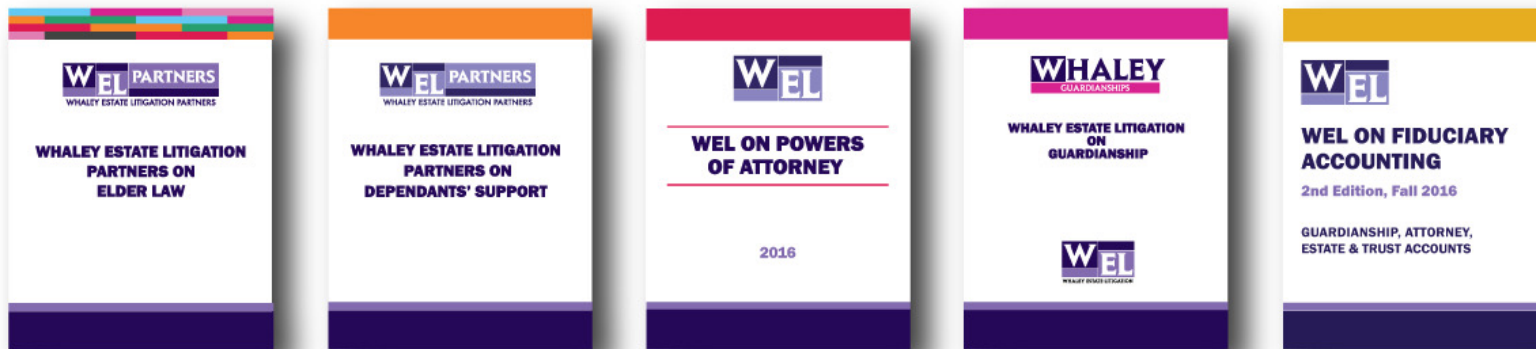
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WEL Partners Resources

WEL resource books are available to download in PDF format.



Elder Law: welpartners.com/resources/WEL-on-elder-law.pdf

Fiduciary Accounting: <http://welpartners.com/resources/WEL-on-fiduciary-accounting.pdf>

Guardianship: <http://welpartners.com/resources/WEL-on-guardianship.pdf>

Powers of Attorney: <http://welpartners.com/resources/WEL-on-powers-of-attorney.pdf>

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Thank you! Questions?





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