

Decisional Capacity-the Lawyer's Role & Its Importance

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Agenda



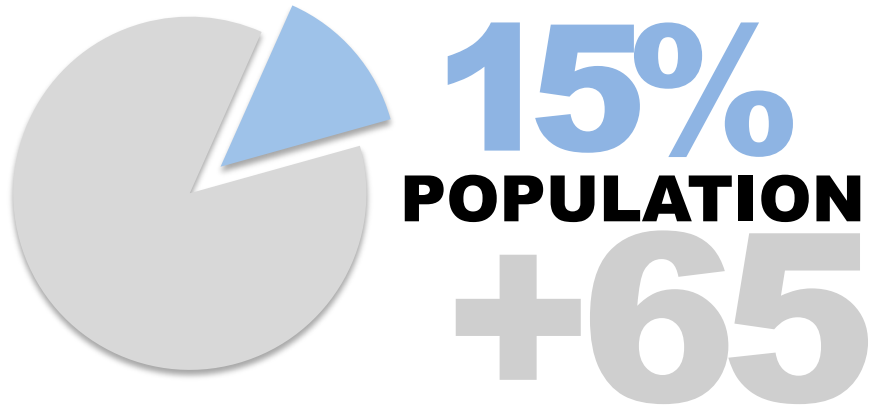
- Introduction
- Societal Context
- Overview of Decisional Capacity
- *Rules of Professional Conduct*
- When Lawyers Must Assess Capacity
- Red Flags/Best Practices/Guidelines
- Conclusion/Questions

Societal Context



- Rapidly aging population
- As the older adult lives longer, there is increased propensity to develop physical and cognitive impairments that make them vulnerable and more susceptible to abuse, including in the nature of financial exploitation through rights obtained through marriage or cohabitation as a spouse

Societal Context



11 million
SENIORS
BY 2036

AVERAGE LIFE EXPECTANCY

89



86

Another reported case of
ALZHEIMER'S
EVERY **69** SECONDS



WHALEY
ESTATE LITIGATION

Societal Context



1 in 11  **>65**
**CURRENTLY HAS ALZHEIMER'S
OR RELATED DEMENTIA**

DEMENTIA AFFECTS

20% **>80**
years old

40+% **>90**
years old



Alzheimer's is the **6th** leading cause of death (in US) with **NO CURE** worldwide

Capacity



- Capacity issues and proceedings are complex, giving rise to medical and legal considerations.
- Medical issues affecting cognition/decisional capacity include: Alzheimer's disease, dementia in varying degrees, delusional disorders, schizophrenia, alcohol and drug abuse, addiction, normal aging etc.
- Various capacity “tests” per se (colloquial), factors, criteria or indicators



Capacity in General



- No single legal definition for “capacity”
- Capacity for what? To do what?
- Certain factors are to be considered in an assessment of requisite mental capacity to make a *certain decision/undertake a certain task at a particular time*
- Capacity is decision, time and situation-specific
- Capacity may fluctuate

Capacity is Decision-Specific



- Capacity to grant a CPOAP vs. capacity to grant a POAPC
- Capacity to execute a Will vs. capacity to marry or make an *inter vivos* gift etc.
- Each decision has its own specific capacity criteria/factors/considerations
- But it is not a “**TEST**”



Capacity is Time-Specific



- Legal capacity can fluctuate over time
- The law provides for good days vs. bad days
- Experts' opinions vary
- Any expert capacity assessment, or examination of capacity, must state date and time



Capacity is Situation-Specific



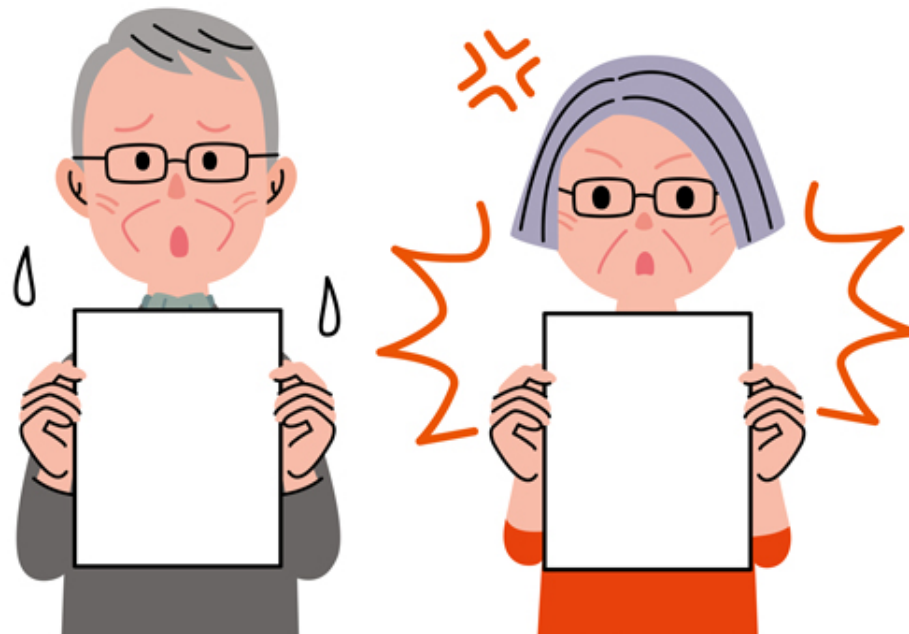
- Under different circumstances a person may have differing capacity
- At home vs. in doctor's office
- During stressful situation



Capacity in General



- Ability to understand all of the information that is relevant to the decision being made and possible implications of the decision in question



Capacity Assessments



Decision-specific

Based on medical and legal factors

Less than perfect science

Retrospective assessments in contentious estate litigation, could be comprehensive and compelling evidence where medical records exist

Legislation vs. Common Law



- Certain capacity decisions are governed by legislation such as the *Substitute Decisions Act* (“SDA”)
- Others have developed over time through precedent, court cases/common law

Autonomy vs. Protection



- Serious ramifications of a finding of incapacity on a person's autonomy and ability to make future decisions
- Loss of liberty, loss of freedom to make decisions affecting oneself



RULES OF PROFESSIONAL CONDUCT

Guidance for Dealing with Clients with Diminished Capacity



- **3.2-9 Client with Diminished Capacity**
- “When a client’s ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, **as far as reasonably possible, maintain a normal lawyer and client relationship.**”

Confidential Information



- **Rule 3.3-1 Confidential Information**
- A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless
 - a) expressly or impliedly authorized by the client;
 - b) required by law or by order of a tribunal of competent jurisdiction to do so;
 - c) required to provide the information to the Law Society; or
 - d) otherwise permitted by rules.

Withdrawal from Representation



- **3.7-1 Withdrawal from Representation**
- A lawyer shall not withdraw from representation of a client except for good cause and on reasonable notice to the client.

The Lawyer as Advocate



- **5.1-1 The Lawyer as Advocate**
- When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.



THE ROLE OF THE LAWYER

What You Need to Know

Drafting Solicitor



- A drafting solicitor must be mindful of the client's capacity to complete the task at hand
- Lawyer's duty to assess capacity is particularly significant if the client is elderly, infirm, dependant or if instructions vary substantially from previous documents



Capacity to Instruct Counsel



- *Wolfman-Stotland v. Stotland* 2011 BCCA 175
- There exists a rebuttable presumption that an adult client is capable of instructing counsel
- To ascertain incapacity to instruct counsel, involves a delicate and complex determination requiring careful consideration and analysis relevant to the particular circumstances

Capacity to Instruct Counsel



- An excellent article to access on this topic: “*Notes on Capacity to Instruct Counsel*” by Ed Montigny. In that article, Ed Montigny explains that in order to have capacity to instruct counsel, a client must understand:
 - what they have asked the lawyer to do for them and why
 - the information, advice and options the lawyer presents them, and
 - appreciate the advantages, disadvantages and potential consequences of the options



Drafting Lawyer is Responsible for Assessing:

- Capacity to Grant/ Revoke CPOA for Property
- Capacity to Grant / Revoke a POA for Personal Care
- Testamentary Capacity
- Capacity to Gift (depending on size and context)
- Although a formal assessment can be obtained



Capacity to Grant or Revoke POA for Property: (S. 8 SDA)

- Knowledge of property / approximate value
- Awareness of obligations to dependants
- Knowledge that attorney can do anything in respect of property that grantor could do if capable, except make a will (subject to the conditions)



Grant/Revoke POA for Property

- Knowledge that attorney must account
- Knowledge that the grantor may revoke
- Appreciation that the property may decline in value;
and
- Appreciation of that the attorney could misuse the
authority



Grant/Revoke POA for Property

- Do not need capacity to *manage* property to grant/ revoke a POA for property
- **Drafting solicitor** is responsible for assessing capacity (although a formal assessment could be requested)



Testamentary Capacity (Capacity to Make A Will)

Banks v. Goodfellow (1870) L.R. 5 Q.B. 549

- a) Ability to understand the **nature and effect** of making a will;
- b) Ability to understand the **extent of the property** in question; and
- c) Ability to understand the claims of the persons who would normally **expect to benefit** under a will of the testator

Testamentary Capacity



- Be “able to comprehend, of its own initiative and volition, the essential elements of Will making, property, objects, just claims to consideration, revocation of existing dispositions, and the like”
- Capacity at time when instructions given, not necessarily when Will is executed but see case of *Parker v. Felgate*
- **Drafting solicitor** assesses testamentary capacity

Testamentary Capacity



Testamentary Capacity: Recent Developments

- *Laszlo v. Lawton* 2013 BCSC 916
- “non-vitiating” delusions:
 - she could communicate telepathically with objects by touching them;
 - that characters on television were communicating with her;
 - and that unidentified individuals had stolen significant amounts of money

Testamentary Capacity



Laszlo v. Lawton cont.

- Delusions were not *obviously connected* to her decision to disinherit her husband's family who, on the evidence, were her previously-named beneficiaries and deserving of her generosity
- Evidence she still possessed cognitive faculties at time Will was executed, despite delusions
- The Court concluded that the deceased lacked testamentary capacity



Testamentary Capacity: Required to Revoke a Will

- As well as to make a:
 - codicil
 - testamentary designation, and
 - Trust (*inter vivos* trust less clear)

Capacity to Make a Gift



Capacity to Make a Gift: Legal Considerations

- *Royal Trust Co. v. Diamant* [1953] 3 D.L.R. 102 (B.C.S.C.)
- Similar to capacity to contract
 - a) The ability to understand the **nature** of the gift; and
 - b) The ability to understand the specific **effect** of the gift in the circumstances

Capacity to Make a Gift: Legal Considerations

- Nature and Extent
- Evidence/onus for capacity to gift changes if the gift is significant in value in relation to donor's assets estate:
Testamentary Capacity
- Does not have to be *only* asset of value, just significant for testamentary capacity to be required



GUIDELINES & BEST PRACTICES

for Drafting Lawyers



Red Flags, Guidelines and 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



Guidelines & Best Practices



- An individual who comes with client to every meeting?
- Familial circumstances: supported?
- Conflict within family?
- Support network?
- Isolated?
- Reliance on one individual for personal and financial support?

Guidelines & Best Practices



- Made any recent gifts? Significant?
- Medical events or health changes?
- Communication issues – language barriers?
- Client's opinions tend to vary?
- Any medical opinions?
- Physical impairment?

Guidelines & Best Practices



- Physically dependent?
- Vulnerable?
- Ask lots of probing questions
- Take the required time to make enquiries
- Take good notes
- Trust your instincts

Recent Notable Decisions



Most Recent Notable Decisions:

- *Gajewski v. Wilkie* 2014 ONCA 897
- *Babiuk v. Babiuk* 2014 SKQB 320
- *Walman Estate v. Walman* 2015 ONSC 185



Other Tools / Resources and Checklists

- Undue Influence Checklist: http://whaleystatelitigation.com/resources/WEL_Undue_Influence_Checklist.pdf
- Capacity Checklist: The Estate Planning Context: http://whaleystatelitigation.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf
- *“Between A Rock And A Hard Place: The Complex Role and Duties Of Counsel Appointed Under Section 3 of the Substitute Decisions Act, 1992”* by Kimberly A. Whaley and Ameena Sultan, Advocates Quarterly, November 2012, Volume 40, Number 3: <http://whaleystatelitigation.com/blog/?s=section+3+counsel>



Other Tools / Resources and Checklists

- “*Capacity and the Estate Lawyer: Comparing the various Standards of Decisional Capacity*” (2013) E.T.& P.J. 215-250: <http://whaleystatelitigation.com/blog/?s=ETPJ>
- Predatory Marriages: Legal Capacity to Marry and the Estate Plan: <http://whaleystatelitigation.com/blog/2014/06/paper-predatory-marriages-legal-capacity-to-marry-and-the-estate-plan/>
- John Poyser, text: “*Capacity and Undue Influence*” and his article in the E.T. & P.J. Vol. 30 (2014) “*Are Lawyers Being Fooled on Undue Influence?*”



QUESTIONS?