



CAPACITY CHECKLIST

Capacity Generally

There is no single definition of capacity, nor is there a general test or 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 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 making a particular decision, and to appreciate the consequences of making a particular decision, or not, the following capacity characteristics and determining criteria are provided for guidance purposes:

Testamentary Capacity

The question of testamentary capacity is almost wholly a question of fact.

The assessment or applicable criteria for determining testamentary capacity to grant or revoke a Will or testamentary document, requires that the testator has the ability to understand the following:

- (a) The nature of the act of making a Will (or testamentary document) and its effects;
- (b) The extent of the property of which he or she is disposing of; and
- (c) The claims of persons who would normally expect to benefit under the Will (or testamentary document).³

Further elements of the criteria applied for determining testamentary capacity that the testator must have, are:

- A “*disposing mind and memory*” to comprehend the essential elements of making a Will;
- A sufficiently clear understanding and memory of the nature and extent of his or her property;
- A sufficiently clear understanding and memory to know the person(s) who are the natural objects of his or her Estate;

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

- A sufficiently clear understanding and memory to know the testamentary provisions he or she is making; and
- A sufficiently clear understanding and memory to appreciate all of these factors in relation to each other, and in forming an orderly desire to dispose of his or her property. ⁴

The legal burden of proving capacity is on those propounding the Will, assisted by a rebuttable presumption described in *Vout v Hay*⁵:

“If the propounder of the Will proves that it was executed with the necessary formalities and that it was read over to or by a testator who appeared to understand it, the testator is presumed to have known and approved of its contents and to have testamentary capacity.”

Notably, the court recently opined on delusions and the effect on testamentary capacity finding their existence alone is not sufficient to determine testamentary capacity, but are a relevant consideration under the rubric of suspicious circumstances.⁶

Capacity to Make Testamentary Dispositions Other than Wills

The *Succession Law Reform Act* ⁷ defines a “Will” to include the following:

- (a) a testament,
 - (b) a codicil,
 - (c) an appointment by will or by writing in the nature of a will in exercise of a power, and
 - (d) any other testamentary disposition. (“testament”)
- A testamentary disposition may arguably include designations as part of an Estate Plan in a Will for example; For example, designations respecting RRSPs, RIFs, Insurances, Pensions, and others.⁸ Therefore, capacity is determined on the criteria applied to determining testamentary capacity
 - A testamentary disposition may arguably include the transfer of assets to a testamentary trust.⁹ The criteria to be applied, is that of testamentary capacity.
 - The capacity required to create an *inter vivos* trust is less clear. The criteria required for making a contract or a gift may be the applicable standard. If the trust is irrevocable, a more onerous criteria may be applied to assess capacity.

⁴ The test for testamentary capacity is addressed in the following cases: *Murphy v. Lamphier* (1914) 31 OLR 287 at 318; *Schwartz v. Schwartz*, 10 DLR (3d) 15. 1970 CarswellOnt 243 [1970] 2 O.R. 61 (Ont.) C.A. ; *Hall v. Bennett Estate* (2003) 64 O.R. (3d) 191 (C.A.) 277 D.L.R. (4th) 263; *Bourne v. Bourne Estate* (2003) 32 E.T.R. (2d) 164 Ont. S.C.J.); *Key v. Key* [2010] EWHC 408 (ch.) (Baill)

⁵ *Vout v Hay*, [1995] 7 E.T.R. (2d) 209 209 (S.C.C.) at P 227

⁶ *Laszlo v Lawton*, 2013 BCSC 305, SCBC

⁷ R.S.O. 1990 c.s.26 as amended subsection 1(1)

⁸ S.51(10 of the *Succession Law Reform Act* (SLRA).

⁹ S 1(1)(a) of the SLRA.

Capacity to Grant or Revoke a Continuing Power of Attorney for Property (“CPOAP”)

Pursuant to section 8 of the *Substitute Decisions Act*,¹⁰ to be capable of granting a Continuing Power of Attorney for Property (“CPOAP”), a grantor requires the following:

- (a) Knowledge of what kind of property he or she has and its approximate value;
- (b) Awareness of obligations owed to his or her dependants;
- (c) 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 power of attorney;
- (d) Knowledge that the attorney must account for his or her dealings with the person’s property;
- (e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;
- (f) Appreciation that unless the attorney manages the property prudently its value may decline;
and
- (g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

A person is capable of revoking a CPOAP if he or she is capable of giving one.¹¹

If a grantor is incapable of managing property, a CPOAP granted by him or her, can still be valid so long as he or she meets the test for capacity for granting that CPOAP at the time the CPOAP was made.¹²

If, after granting a CPOAP, the grantor becomes incapable of giving a CPOAP, the document remains valid as long as the grantor had capacity at the time it was executed.¹³

When an Attorney should act under a CPOAP

If the CPOAP provides that the power granted, comes into effect when the grantor becomes incapable of managing property, but does not provide a method for determining whether that situation has arisen, the power of attorney comes into effect when:

- the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor’s capacity and has found that the grantor is incapable of managing property; or
- the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act* ¹⁴

¹⁰ R. S.O. 1992, c 30, as am.

¹¹ *SDA*, subsection 8(2)

¹² *SDA*, subsection 9(1)

¹³ *SDA*, subsection 9(2)

¹⁴ R.S.O. 1990, c. M.7

Capacity to Manage Property

The criteria for assessing the capacity to manage property is found at section 6 of the *SDA*. Capacity to manage property is ascertained by:

- (a) The ability to understand the information that is relevant in making a decision in the management of one's property; and
- (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.¹⁵

*A person may be incapable of managing property, yet still be capable of making a Will.*¹⁶

Capacity to Grant or Revoke a Power of Attorney for Personal Care ("POAPC")

Pursuant to section 47 of the *Substitute Decisions Act*, to be capable of granting a Power of Attorney for Personal Care ("POAPC"), a grantor requires the following:

- (a) The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
- (b) The appreciation that the person may need to have the proposed attorney make decisions for the person.¹⁷

A person who is capable of granting a POAPC is also capable of revoking a POAPC.¹⁸

A POAPC is valid if at the time it was executed, the grantor was capable of granting a POAPC, even if that person was incapable of managing personal care at the time of execution.¹⁹

When an Attorney should act under a POAPC

- In the event that the grantor is not able to understand information that is relevant to making a decision concerning personal care, or is not able to appreciate the reasonably foreseeable consequences of a decision, or lack of decision, the attorney must act having regard to S.45.

Capacity to Make Personal Care Decisions

The criteria required to determine capacity to make personal care decisions is found at section 45 of the *SDA*. The criterion for capacity for personal care is met if a person has the following:

- (a) The ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and
- (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

¹⁵ See also *Re. Koch* 1997 CanLII 12138 (ON S.C.)

¹⁶ *Royal Trust Corp. of Canada v. Saunders*, [2006] O.J. No. 2291

¹⁷ *SDA*, subsection 47(1)

¹⁸ *SDA*, subsection 47(3)

¹⁹ *SDA*, subsection 47(2)

“Personal care” is defined as including health care, nutrition, shelter, clothing, hygiene or safety.

Capacity under the Health Care Consent Act, 1996²⁰

Subsection 4(1) of the *Health Care Consent Act, 1996 (HCCA)* defines capacity to consent to treatment, admission to a care facility or a personal assistance service as follows:

- (a) The ability to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service; and
- (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Capacity to Contract

A contract is an agreement that gives rise to enforceable obligations that are recognized by law. Contractual obligations are distinguishable from other legal obligations on the basis that they arise from agreement between contracting parties.²¹

A contract is said to be valid where the following elements are present: offer, acceptance and consideration.²²

Capacity to enter into a contract is defined by the following:

- (a) The ability to understand the nature of the contract; and
- (b) The ability to understand the contract’s specific effect in the specific circumstances.²³

The presumptions relating to capacity to contract are set out in the *Substitute Decisions Act, 1992 (“SDA”)*.²⁴ Subsection 2(1) of the *SDA* provides that all persons who are eighteen years of age or older are presumed to be capable of entering into a contract.²⁵ Subsection 2(3) then provides that a person is entitled to rely on that presumption of capacity to contract unless there are “reasonable grounds to believe that the other person is incapable of entering into the contract.”²⁶

Capacity to Gift

In order to be capable of making a gift, a donor requires the following:

- (a) The ability to understand the nature of the gift; and

²⁰ S.O. 1996, C.2 Schedule A

²¹ G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003).

²² *Thomas v. Thomas* (1842) 2 Q.B. 851 at p. 859

²³ *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant*, [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6

²⁴ *SDA*, *supra* note 2

²⁵ *SDA*, subsection 2(1)

²⁶ *SDA*, subsection 2(3)

- (b) The ability to understand the specific effect of the gift in the circumstances.²⁷

The criteria for determining capacity must take into consideration the size of the gift in question. For gifts that are of significant value, relative to the estate of the donor, the test for testamentary capacity arguably may apply.²⁸

Capacity to Undertake Real Estate Transactions

Most case law on the issue of real estate and capacity focuses on an individual's capacity to contract,²⁹ which as set out above, requires the following:

- (a) The ability to understand the nature of the contract; and
- (b) The ability to understand the contract's specific effect in the specific circumstances.³⁰

If the real estate transaction is a gift, and is significant relative to the donor's estate, then the standard for testamentary capacity applies, which requires the following:

- (a) The ability to understand the nature and effect of making a Will/undertaking the transaction in question;
- (b) The ability to understand the extent of the property in question; and
- (c) The ability to understand the claims of persons who would normally expect to benefit under a Will of the testator.

Capacity to Marry

A person is mentally capable of entering into a marriage contract only if he/she has the capacity to understand the nature of the contract and the duties and responsibilities it creates.³¹

A person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected by the marriage.³²

Arguably the capacity to marry is commensurate with the requisite criteria to be applied in determining capacity required to manage property.³³

²⁷ *Royal Trust Company v. Diamant*, *Ibid.* at 6; and *Bunio v. Bunio Estate* [2005] A.J. No. 218 at paras. 4 and 6

²⁸ *Re Beaney* (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.), *Mathieu v. Saint-Michel*[1956] S.C.R. 477 at 487

²⁹ See for example: *Park v. Park*, 2013 ONSC 431 (CanLII); *de Franco v. Khatri*, 2005 CarswellOnt 1744, 303 R.P.R. (4th) 190; *Upper Valley Dodge v. Estate of Cronier*, 2004 ONSC 34431 (CanLII)

³⁰ *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant*, [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6

³¹ *Hart v Cooper* (1994) 2 E.T.R. (2d) 168, 45 A.C.W.S. (3D) 284 (B.C.S.C.)

³² *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)

³³ *Browning v. Reane* (1812), 161 E.R. 1080, 2 Phill.ECC 69; *Spier v. Spier (Re)* [1947] W.N. 46 (P.D.); and *Capacity to Marry and the Estate Plan*, The Cartwright Group Ltd. 2010, by K. Whaley, M. Silberfeld, H. McGee and H. Likwornik

The capacity to separate and divorce is arguably the same as required for the capacity to marry.³⁴

Capacity to Instruct Counsel

Capacity to instruct counsel is derived from case law including the case of *Lengyel v TD Home and Auto Insurance*³⁵ where the Court's view towards evaluation of capacity to instruct counsel was stated as follows:

Therefore, in reading Rule 1.03 together with sections 6 and 45 of the SDA, a party to litigation is "under disability" where they are unable to understand information that is relevant to making decisions concerning issues in the proceeding or are unable to appreciate the reasonably foreseeable consequences of making or not making decisions in the proceeding. Simply put, in order to have capacity for the purposes of litigation a person must meet both the "understand" and "appreciate" components of the test.

It should be noted that there exists a rebuttable presumption that an adult client is capable of instructing counsel.

As stated in *Torok v. Toronto Transit Commission*³⁶, at para. 40: "The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision in the litigation includes the ability to consider a reasonable range of possible outcomes, including those that are unfavourable. This ability is essentially the capacity to assess risk, which requires consideration of a variety of results, both positive and negative."

To ascertain incapacity to instruct counsel, involves a delicate and complex determination requiring careful consideration and analysis relevant to the particular circumstances. An excellent article to access on this topic: "*Notes on Capacity to Instruct Counsel*" by Ed Montigny.³⁷ That article was cited in the case of *Costantino v Costantino* 2016 ONSC 7279 where the court concluded that a client must:

- (a) Understand what they have asked the lawyer to do for them and why,
- (b) Be able to understand and process the information, advice and options the lawyer presents to them; and
- (c) Appreciate the advantages, disadvantages, and potential consequences of the various options.³⁸

Capacity to Sue (Or where a Litigation Guardian is Required)

The factors to be considered in determining whether a party is capable of commencing an action (or is in need of a litigation guardian) are set out in case law:

- (a) A person's ability to know or understand the minimum choices or decisions required to make them;

³⁴ *A.B. v C.D.* (2009) BCCA 200 (CanLII), leave to appeal to S.C.C. denied October 22, 2009, [2009] 9 W.W.R. 82; and *Calvert (Litigation Guardian of) v Calvert*, 1997 CanLII 12096 (O.N.S.C.), aff'd 1998 CarswellOnt 494

³⁵ *Lengyel v TD Home and Auto Insurance* (2017) ONSC 2512, 278 ACWS (3d) 830

³⁶ *Torok v. Toronto Transit Commission* 2007 CarswellOnt 2834

³⁷ Staff lawyer at ARCH Disability Law Centre.

³⁸ *Costantino v Costantino* 2016 ONSC 7279 citing Montigny, at page 3. See also *Evans v Evans* 2017 ONSC 5232 and *Sylvester v Britton*, 2018 ONSC 6620.

- (b) An appreciation of the consequences and effects of his or her choices or decisions;
- (c) An appreciation of the nature of the proceeding;
- (d) A person's ability to choose and keep counsel;
- (e) A person's ability to represent himself or herself;
- (f) A person's ability to distinguish between relevant and irrelevant issue; and
- (g) A person's mistaken beliefs regarding the law or court procedures.³⁹

On a related note, Section 7 of the *Limitations Act, 2002* SO 2002 c 24 Sch B provides that the basic two year limitation period does not run during any time in which the person with the claim is "incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological conditions".⁴⁰

Voiding a Retainer Agreement for Lack of Capacity

A retainer is a specific type of contract between a lawyer and their client for legal services. As such, the capacity to enter a retainer agreement is very closely connected to the capacity to instruct counsel.

There are distinct differences in the contractual nature between the capacity to instruct counsel and the capacity to enter into a retainer agreement, in that, capacity is only assessed at the time the contract is found, i.e., when the retainer agreement is entered. Accordingly, it follows that a retainer may be validly entered into if the client had capacity at the time it was created. If the client's capacity subsequently diminished over time, such that a lawyer can no longer accept instructions, the retainer would not be voidable if it was signed at the time of capacity.

In *Guardian Law Group v. LS, Jones J.* proposed the following novel test for voiding a 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?

The essence of this inquiry should include whether the client could understand and appreciate the consequences of the retainer agreement.

- 2) Did the lawyer know that the client lacked capacity, and, more specifically,
 - a) Were there sufficient indicia of incapacity known to the lawyer to establish a suspicion that the client lacked the requisite capacity?
 - b) If yes, did the lawyer take sufficient steps to rebut a finding of actual or constructive knowledge of incapacity?⁴¹

³⁹ See *Costantino v Costantino* 2016 ONSC 7279, *Huang v. Braga* 2016 ONSC 6306 at para 19 and repeated in *Hengeveld v. Ontario (Transportation)* 2017 ONSC 6300 at para 21.

⁴⁰ See *Carmichael v Glaxosmithkline Inc.* 2019 ONSC 2037

⁴¹ *Guardian Law Group v. LS*, 2021 ABQB 591 at para. 57

In *Guardian*, Jones J. endorsed a non-mandatory, non-exhaustive list which may be helpful to the analysis:

- 1) The retainer pertains to proceedings which concern the client's capacity;
- 2) Whether the client appreciates the nature of the proceedings;
- 3) A past history of being unable to keep and choose counsel;
- 4) Psychological or documentary evidence of incapacity;
- 5) How the client presents when meeting counsel;
- 6) Inability to communicate objectives and priorities clearly;
- 7) A repeated focus on irrelevant issues or facts;
- 8) Mistaken beliefs regarding court procedures;
- 9) Reliance on another party to communicate with counsel; or,
- 10) Increasing isolation from friends and family.

Lists may illustrate some of the different kinds of indicators of capacity or incapacity, however, they are not authoritative. For this notable reason, the Court in *Guardian* held that the analysis must proceed on a case-by-case basis. The fact-specific nature of capacity means there could be many relevant factors to consider; no single factor will necessarily lead to a finding either way.

Issues Related to Capacity

Undue Influence

Undue influence is a legal concept where the onus of proof is on the person alleging it.⁴²

Case law has defined "undue influence" as any of the following:

- Influence which overbears the will of the person influenced, so that in truth, what he or she does is not his or her own act;
- The ability to dominate one's will, over the grantor/donor/testator;
- The exertion of pressure so as to overbear the volition and the wishes of a testator;⁴³
- The unconscientious use by one person of power possessed by him or her over another in order to induce the other to do something; and

⁴² *Longmuir v. Holland* (2000), 81 B.C.L.R. (3d) 99, 192 D.L.R. (4th) 62, 35 E.T.R. (2d) 29, 142 B.C.A.C. 248, 233 W.A.C. 248, 2000 BCCA 538, 2000 CarswellBC 1951 (C.A.) Southin J.A. (dissenting in part); *Keljanovic Estate v. Sanseverino* (2000), 186 D.L.R. (4th) 481, 34 E.T.R. (2d) 32, 2000 CarswellOnt 1312 (C.A.); *Berdette v. Berdette* (1991), 33 R.F.L. (3d) 113, 41 E.T.R. 126, 3 O.R. (3d) 513, 81 D.L.R. (4th) 194, 47 O.A.C. 345, 1991 CarswellOnt 280 (C.A.); *Brandon v. Brandon*, 2007, O.J. No. 2986, S.C. J.; *Craig v. Lamoureux* 3 W.W.R. 1101 [1920] A.C. 349; *Hall v. Hall* (1868) L.R. 1 P & D.

⁴³ *Dmyterko Estate v. Kulilovsky* (1992) 46 E.T.R.; *Leger v. Poirier* [1944] S.C.R. 152, at page 161-162

- Coercion⁴⁴

The hallmarks of undue influence include exploitation, breach, or abuse of trust, manipulation, isolation, alienation, sequestering, and dependency.

The timing, circumstances, and magnitude of the result of the undue influence may be sufficient to prove undue influence in certain circumstances and may have the result of voiding a Will.⁴⁵

Actual violence, force, or confinement could constitute coercion. Persistent verbal pressure may do so as well, if the testator is in a severely weakened state as well.⁴⁶

Undue influence does not require evidence to demonstrate that a testator was forced or coerced by another under some threat or inducement. One must look at all the surrounding circumstances and determine whether or not there was a sufficiently independent operating mind to withstand competing influences.⁴⁷

Psychological pressures creating fear may be tantamount to undue influence.⁴⁸

A testamentary disposition will not be set aside on the ground of undue influence unless established on a balance of probabilities that the influence imposed was so great and overpowering that the document ... "cannot be said to be that of the deceased."⁴⁹

Undue influence must be corroborated.⁵⁰

Suspicious circumstances will not discharge the burden of proof required.⁵¹

* See *Undue Influence Checklist*

Suspicious Circumstances

Suspicious circumstances relating to a Will may be raised by and is broadly defined as:

- (a) circumstances surrounding the preparation of the Will;
- (b) circumstances tending to call into question the capacity of the testator; or

⁴⁴ *Wingrove v. Wingrove* (1885) 11 P.D. 81

⁴⁵ *Scott v Cousins* (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.)

⁴⁶ *Wingrove v. Wingrove* (1885) 11 P.D. 81

⁴⁷ *Re Kohut Estate* (1993), 90 Man. R. (2d) 245 (Man. Q.B.)

⁴⁸ *Tribe v Farrell*, 2006 BCCA 38

⁴⁹ *Banton v. Banton* [1998] O.J. No 3528 (G.D.) at para 58

⁵⁰ S. 13 of the *Ontario Evidence Act*: In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R.S.O. 1990, c. E.23, s. 13.; *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*, 2011 CarswellOnt 10659; 2011 ONSC 3043, 71 E.T.R. (3d) 210, 208 A.C.W.S. (3d) 224

⁵¹ *Vout v Hay*, at p. 227

- (c) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.⁵²

The existence of delusions (non-vitiating) may be considered under the rubric of suspicious circumstances and in the assessment of testamentary capacity.⁵³

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

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2022

⁵² *Eady v. Waring* (Ont. C.A.) 974; *Scott v. Cousins*, [2001] O.J. No 19; and *Barry v. Butlin*, (1838) 2 Moo. P.C. 480 12 E.R.1089; *Vout v Hay*, [1995] 7 E.T.R. (2d) 209 209 (S.C.C.)

⁵³ *Laszlo v Lawton*, 2013 BCSC 305 (CanLII)