

DEFINITIONS AND TESTS OF MENTAL CAPACITY

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1. INTRODUCTION

Legal relationships are part of life from beginning to end and involve the consideration and making of legally enforceable commitments that will impact the individual's interests. Things like renting, buying or selling a home, buying or selling a car, and getting married are all types of legal relationships.

Not surprisingly given the legally binding nature of these arrangements, courts are called upon from time to time to consider whether a person had the capacity to properly enter into a particular arrangement. The following information is intended to assist in gaining a better understanding of these sometimes complicated considerations, and what you can do to be prepared.

2. MEANING OF LEGAL CAPACITY

The personal ability to understand and make rational decisions about the things that will be legally binding on the decision maker and their property is the essence of the notion of legal capacity. A person must have legal capacity in order to make decisions that are legally binding on them.

There are 2 elements to the concept of legal capacity.

The first element is that a person must have reached the age of majority for the jurisdiction. Age of majority is a term that signifies the age at which, by law, a person becomes legally responsible for the management of his or her legal affairs. In British Columbia, the age of majority is 19 years.

The second element is mental capacity. Generally speaking, mental capacity refers to a person's ability to understand and appreciate the impact and consequences of their actions.

In most cases: Legal Capacity = age of majority + mental capacity

Age of Majority

In British Columbia, the *Age of Majority Act* states that a person reaches the age of majority upon becoming 19 years of age. The terms "minor" and "infant" are used in various statutes to refer to someone under the age of 19 years. For consistency, those terms will be used in this material as well.

There are some exceptions to the general requirement to reach age of majority in order to have legal capacity. Some examples are:

The *Wills Estates and Succession Act* (section 36) provides that a person may make a Will once they have reached 16 years of age.

The *Workers Compensation Act* (section 121(a)) states that, for the purposes of the compensation provisions of that act, a worker who is a minor has the capacity of a person who has reached 19 years of age.

The *Insurance Act* (section 88) deems that a beneficiary of life insurance proceeds who has reached the age of 18 years has the capacity of a person who has reached the age of 19 years for the purposes of receiving insurance money payable to the beneficiary and giving a discharge for it.

The *Infants Act* (section 17) provides that an infant may consent to health care whether or not that health care would, in the absence of consent, result in unlawful contact to the infant's body. If an infant provides that consent, the consent is sufficient and it is not necessary to obtain a consent to the health care from the infant's parent or guardian. Importantly, section 17 also imposes a duty on the health care provider receiving the consent to be satisfied that the infant understands the nature and consequences and the reasonably foreseeable benefits and risks of the health care.

The *Infants Act* (section 19) states that a contract generally cannot be enforced against an infant. There are a few exceptions that are specifically set out in law, such as a contract for a student loan from the government. However, if an application is made to the court, the court may make an order that an infant has capacity to enter into a contract if the court finds it is beneficial to the infant to do so (section 21). This occurs for example when a person under age 19 is an actor, and is contracted to act in movies or television shows. Once the court order granting capacity is made, the contract can be enforced against the infant.

Mental Capacity

In British Columbia, the *Adult Guardianship Act* (section 3) says that until the contrary is demonstrated, every adult (person who has reached the age of majority) is presumed to be capable of making decisions about their own personal care, health care and financial affairs. A court order or certificate of incapability can establish that a person is not capable of making such decisions. An adult's way of communicating with others is not grounds for deciding that they are incapable of making those decisions.

Legal Capacity, Aging and Estate Planning

A person's capacity to understand and make rational decisions about matters, can be reduced by injury, disease or aging. There are arrangements that a person can make to plan for such circumstances.

Preparing a Will while capacity is still clearly present is a way of ensuring that your testamentary wishes will be carried out. There are also other documents (legal arrangements) that you can use to ensure that you will have assistance from people you choose, in managing your affairs, should that become necessary due to diminished capacity. These arrangements include preparing a Representation Agreement, Power of Attorney, and/or Nomination of Committee, and are discussed in more detail below.

The Court Can Decide Questions of Capacity

In order to protect vulnerable individuals from exploitation, the court can be called on to review the circumstances surrounding any legal arrangements the person made, in order to determine whether a particular person may have lacked the legal capacity necessary to properly decide to enter into the arrangement. In doing so, the courts have developed various tests for capacity. Where it is established that an individual lacked the capacity to enter into a specific arrangement, the arrangement or relationship may be set aside.

Capacity is Task Specific

At their core, the various tests for capacity are concerned with a person's ability to understand at the time the decision is made, what they are doing and the effects and consequences of their decisions and actions. However, since individual legal arrangements vary widely in scope and complexity, multiple tests for capacity have arisen. There are individual considerations for the following (and other) areas of capacity:

- Making a Will
- Giving a gift
- Entering into a contract
- Appointing an attorney or agent
- Hiring and instructing a lawyer
- Getting married or beginning a spousal relationship
- Separating from a spouse
- Making a Representation Agreement
- Nominating a committee

Each individual test for capacity has regard to the specific elements of the decision actually being made. It is important that an individual understand both what is involved in the arrangements being considered, and the way in which the arrangements will affect the interests of the individual. This understanding is at the heart of what constitutes capacity to engage in a reasoned consideration of the decisions being made. In other words, it is a person's capacity to understand all of the aspects of the arrangements that is being considered. If the person has that capacity, then the person will have capacity to enter into the arrangement and legally bind themselves.

It should be noted that capacity to understand is not the same thing as actual understanding. A person may have capacity to understand something, but because they did not take the time or care necessary, they somehow misunderstood the matter. It is the capacity to understand that is the focus of these tests.

The following is a simplified explanation of some of the various tests for capacity. ***This is not legal advice and is meant as a guide to assist in understanding the concept of capacity and the similarities and differences associated with various considerations of capacity. If you require assistance with a legal matter involving capacity, you should seek the advice of a lawyer who practices in and is familiar with this area of the law.***

3. IMPORTANT TYPES OF CAPACITY TESTS

Making a Will

To be satisfied that a will maker understood the nature of their actions and the effects of those actions a court will look to see that the will maker knew and understood:

- The kinds of property being dealt with in the will, how much property was involved, and what the property was worth;

- The people who were receiving gifts under the will, as well as the moral claims of people (such as family members and others having a close relationship with the will maker) who the will maker ought to have had in mind while thinking about who will receive the benefit of will maker's estate; and
- The actual gifts being given in the will.

Whether a person is able to understand and keep these things in mind while making decisions and giving instructions for the will, is the basis for considering whether that person has capacity to make a will.

Giving a Gift

Making a gift is essentially the act of transferring property while the giver is alive, to another individual, with the intention of the recipient becoming the owner of that property without the gift giver receiving anything in return.

The test for capacity draws from elements of both the tests for capacity to make a will and capacity to enter into a contract. When considering whether an individual may have lacked capacity to make a gift, the court will consider whether at the time the gift was given, the gift giver understood the nature and effect of the transaction and will consider such things as gift giver's understanding of:

- The kind of property that has been gifted and its value;
- The size (or value) of the gift in relation to the value of all of the other property owned by the gift giver;
- The impact on the gift giver resulting from giving away the property;
- The effect of the gift on the recipient.

Entering into a Contract

A contract is a private arrangement between parties that gives rise to legally enforceable obligations between the parties to the contract. The parties normally have a large degree of flexibility in determining things such as what is to be done by each party, what is to be received by each party and who bears the risk that something may go wrong in the transaction. Contracts terms can range from relatively simple to extremely complex.

A person entering a contract must have the ability to understand the contract terms.

That person must also have the ability to form a rational judgement about the effect the contract will have on that person's legal and financial interests.

The other contracting parties must not have knowledge that any of the other parties lacks mental competence.

Hiring and Instructing a Lawyer

This is a special category of contract.

In addition to the general capacity to enter into a contract (to hire the services of the lawyer) there is usually consideration of an ongoing capacity to receive and understand the advice of that lawyer and to provide that lawyer with instructions to take certain steps on the client's behalf.

Throughout the lawyer client relationship, the client needs to have the ability to understand the issues being dealt with and their effect on the client's interests, the ability to understand the advice and guidance given by the lawyer in relation to those issues, and the ability to understand the potential consequences of the choices to be made and to formulate rational instructions to the lawyer on how to proceed.

Getting Married or Beginning a Spousal Relationship

At a simple level, marriage is another special type of contract. It involves the formalization of mutual promises and agreement. The marriage relationship occupies a prominent place in the history of social organization. The act of entering a marriage affects a person's obligations and property rights. The test for capacity to get married reflects the significant impact of the decision to enter into such a relationship.

For many years courts have considered the capacity to marry on the basis that marriage is a contract. If a person understands the duties and responsibilities which the marriage contract creates, then capacity to marry is present.

Elements of the contract include the fact that marriage is indeterminable (non-ending) except by death or divorce, it requires monogamy of the parties as one of its elements and involves mutual support obligations.

In addition to marriage, one may also enter into a "marriage-like" relationship. Such relationships often develop gradually and the existence of a "marriage-like" relationship requires an examination of the facts surrounding the relationship. The law concerned with determining whether a marriage-like relationship exists, engages some focus on the intentions of the parties. No formal statement of capacity to enter into a marriage-like relationship exists. However, to the extent that intention is required, consideration of a party's ability to understand the nature and effect of the action and form a rational intention should be considered.

Separating from a Spouse

The act of separating from a spouse requires specific intention. Accordingly, an individual must have sufficient capacity to reasonably form the intention to separate from their spouse.

The capacity to separate involves the ability to appreciate what it means to separate from your spouse and the consequences that will result from abandoning the marriage (or marriage-like) relationship.

An individual having that capacity must then form the intention to separate from their spouse and act upon it.

Giving a Power of Attorney

In general terms, an attorney is an agent that is appointed by agreement. The person making the appointment is called the principal. The person accepting the appointment to become the agent is called the attorney. The attorney makes legal and financial arrangements and carries out actions on behalf of the principal. An attorney cannot make personal or health care decisions for the principal. The actions of the attorney are binding on the principal. Appointing an attorney or agent requires the

principal to understand the nature of this special relationship and the consequences of making the appointment.

Because, in general, the law of agency requires that an attorney must always act according to the instructions of the principal, there is an ongoing requirement for the principal to have capacity to instruct the attorney to take steps on behalf of the principal.

In British Columbia, the *Power of Attorney Act* governs the power of attorney arrangements in the province. There are two separate types of principal/attorney arrangements set out in the *Act*. Part one of the *Act* covers the usual arrangements; where the attorney acts according to the instructions of the principal. Part two of the *Act* creates a special type of power of attorney that allows for the appointment of an attorney who can continue to act for the principal even after the principal no longer has capacity to give instructions to the attorney. This is called an Enduring Power of Attorney, because the authority created for the attorney to act endures beyond the time that the principal has lost capacity to give instructions.

The special enduring nature of this appointment requires that the principal be able to specifically understand the special authority being given. The *Power of Attorney Act* (section 12) states that an adult is not capable of understanding the nature and consequences of the proposed enduring power of attorney if the adult cannot understand all of the following:

- (a) The property the adult has and its approximate value;
- (b) The obligations the adult owes to his or her dependants;
- (c) That the adult's attorney will be able to do on the adult's behalf anything in respect of the adult's financial affairs that the adult could do if capable, except make a will, subject to the conditions and restrictions set out in the enduring power of attorney;
- (d) That, unless the attorney manages the adult's business and property prudently, their value may decline;
- (e) That the attorney might misuse the attorney's authority;
- (f) That the adult may, if capable, revoke the enduring power of attorney;
- (g) Any other prescribed matter.

Making a Representation Agreement

A Representation Agreement is a document that allows a person to appoint someone to make decisions, including personal and healthcare decisions, on their behalf. These appointments are provided for and governed by the *Representation Agreement Act*.

The *Representation Agreement Act* states that a person is presumed to be capable of making, changing or revoking a representation agreement, and making decisions about personal care, healthcare and legal matters until the contrary is demonstrated. The act also states that an adult's way of communicating with others is not grounds for deciding that the adult is incapable of understanding anything referred to in the presumption of capability.

Consideration of an adult's capability to make a representation agreement will be based on the adult's ability to understand the nature of the decision made in the appointment and to appreciate the possible consequences flowing from that appointment. The question of capability therefore will be considered in the context of the specific decision-making power that is given to the representative.

Nominating a Committee

A committee is someone appointed by the court to manage the affairs of a person who is not capable of managing their own affairs. The *Patients Property Act* provides a process for the Supreme Court to appoint someone who will make decisions on behalf of a person who has become incapable, should such an appointment be necessary. The process requires the court to first determine that the individual is in fact incapable of managing their affairs. The person who is then appointed is called a committee of the incapable adult. The committee can be appointed to manage a person's legal and financial affairs, or personal affairs, or both.

The *Patients Property Act* also allows for an individual to anticipate that a committee may be appointed for them at some point in the future, and to nominate a person of their own choosing to be their committee. If a person nominates someone to be their committee that nominated person must be appointed committee by the court unless there is good and sufficient reason for refusing the appointment.

A nomination of committee must be made at a time when the person making the nomination was of full age and of sound and disposing mind, and must be signed and witnessed in accordance with the requirements for making a will. In order to have capacity to make a valid nomination of committee the person making the nomination must be capable of understanding both the nature of a nomination of committee and the effect that making the nomination has on their interests.

4. ADDITIONAL RESOURCES

British Columbia Law Institute – Report on Common-Law Tests of Capacity
<https://www.bcli.org/publication/report-on-common-law-tests-of-capacity>

British Columbia Law Institute – Materials relating to capacity
<https://www.bcli.org/?s=capacity>

Seniors First BC (formerly known as the BC Centre for Elder Advocacy and Support)
<http://seniorsfirstbc.ca/for-professionals/capacity/legal-capacity-different-transactions/>

BC Government information on Substitute Decision-Making and Incapacity Planning
<https://www2.gov.bc.ca/gov/content/family-social-supports/seniors/financial-legal-matters/substitute-decision-making>