



Capacity to Make a Will or Powers of Attorney

When you ask a lawyer to prepare a Will, Power of Attorney for Property, or Power of Attorney for Personal Care, it is important that your ability to give instructions and to sign such documents is taken into consideration. This is imperative to reduce the possibility that these documents could be declared invalid as a result of a subsequent challenge by others who may have an interest in your affairs and who may not agree with your choices. Knowing that you are capable of giving instructions and of signing a Will and Powers of Attorney is also essential to ensure that your documents are legally valid and that your wishes can be carried out.

When we meet with you to take instructions for drafting any of these documents, if we have any concerns about your mental capacity or if you indicate that there is a possibility of a challenge to the contents of these documents and the people you have chosen to act on your behalf, we may recommend that you have a capacity assessment by a qualified capacity assessor. A capacity assessor is a person who meets the Ontario government's requirements for conducting capacity assessments of individuals to determine mental capacity to give instructions and to sign a Will or Powers of Attorney. The capacity assessor charges a fee for these services and will discuss this with you when you meet. For all clients, we assess whether or not we have any concerns about capacity. We will discuss them with you if we do and discuss the options for addressing such concerns.

What is Testamentary Capacity?

"Testamentary capacity" refers to the mental ability to give Will instructions and to sign a Will. In Ontario, there is no legislation that describes what is meant by testamentary capacity. Instead, we must rely on judge-made law which has been developed

over the past century or more. It is generally understood that to have testamentary capacity, you need to be able to answer these questions:

1. Do you know who your logical beneficiaries are such as spouse, children, siblings, other close relatives?
2. Are you aware that possible claims for support could be made against your estate by those whom you support or whom you may have an obligation to support?
3. What are your assets and their approximate value and do you understand which assets can be disposed of by Will and which will not be affected by your Will (such as those which are jointly owned or for which there is a designated beneficiary)?
4. Can you explain any unusual distribution among beneficiaries, such as leaving unequal amounts to various children?
5. Have you thought about who would act as your Estate Trustee (Executor) and how suitable this person would be for the job?
6. Are you making your Will voluntarily or is there any undue influence from anyone about the amounts or the beneficiaries that you are naming (or not naming)?

What is Mental Capacity?

"Mental capacity" refers to the mental ability to give instructions to have Powers of Attorney prepared and to sign these documents. There are two kinds of Powers of Attorney – one for property and one for personal care. The standard of mental capacity required for each is different. In Ontario, the *Substitute Decisions Act* sets out the criteria for

determining if a person has the mental capacity required to ensure that a Power of Attorney is legally valid.

Power of Attorney for Property – Determining Mental Capacity

To give instructions to have a Power of Attorney for Property drafted and to sign it, you need to be able to answer these questions:

1. What kind of property do you have and what is its approximate value?
2. Are you aware of support obligations owed to your dependants (and who are they, if any – children, spouse, parents)?
3. Do you understand that your attorney (substitute decision-maker) can do on your behalf anything in respect of property that you could do if capable, except make your Will, subject to any conditions and restrictions in the Power of Attorney for Property?
4. Do you know that your attorney must account for his/her dealings with your property?
5. Do you know that if capable, you may revoke the continuing Power of Attorney for Property at any time?
6. Do you understand that unless your attorney manages your property prudently, its value may decline?

7. Do you understand that it is possible that your attorney could misuse the authority given to him or her?

Power of Attorney for Personal Care – Determining Mental Capacity

To give instructions to have a Power of Attorney for Personal Care drafted and to sign it, you need to be able to answer these questions:

1. Do you understand that the person you are appointing has a genuine concern for your welfare?
2. Do you appreciate that the person you are appointing may need to make decisions for you with regard to health care, nutrition, shelter, clothing, hygiene or safety?

For more information about Powers of Attorney and Wills, please see our brochures entitled *Do I Need a Will?*, *Information About Powers of Attorney*, and *Acting Under a Power of Attorney*.

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