

Mental Capacity and Elder Abuse

Mental capacity is the ability to understand and appreciate the nature and consequences of one's decisions.

All legal adults (age 18+ in Alberta) are **presumed** to have mental capacity unless and until established otherwise, as required by law (usually by medical opinion and/or a judge's decision).

When we use the law as a tool against abuse, the **capacity** of the person being abused is a key factor in determining the options that are available.

Before losing capacity, an older adult can decide:

- > to share personal decision-making with someone
- > to share financial decision-making with someone
- > who will make personal decisions on his/her behalf after a loss of capacity
- > who will make financial decisions on his/her behalf after a loss of capacity

If an older adult loses capacity before these decisions have been made:

- > legal processes must be followed to determine who will make decisions on his/her behalf.

From Black and White to a Continuum

Legally, mental capacity is a black and white concept—according to the law, you are capable or you are not capable.

In **day-to-day life**, however, capacity is more of a continuum—clear capacity to make a decision at one end and the clear incapacity to make a decision at the other end, with a range in between.

Factors affecting capacity can be influenced by:

- > a medical condition
- > stress and/or anxiety in difficult circumstances (e.g., abuse) or events (e.g., death of a family member)
- > the effect of medication and/or forgetting to take medication
- > exhaustion and time of day
- > diabetes and fluctuating blood sugar levels
- > alcohol and recreation drug use

Who Determines Capacity?

Lawyers

- › Will ask questions to ensure that the person understands what he/she is signing.
- › Speak only to capacity at that very moment.
- › Do not sign any document indicating that the person has or has lost capacity.

Doctors

- › Determine whether a person has mental capacity.
- › Alberta *Personal Directives Act* prescribes a “Declaration of Incapacity” form that must be used to officially deem a person “incapable” of making personal decisions.
- › Declaration of Incapacity must be filled out and signed by one or two medical professionals, depending on the Personal Directive.
- › May make declarations of incapacity regarding Enduring Powers of Attorney.

Capacity Assessors

- › Determine capacity based on Capacity Assessment Process legislated in the *Alberta Adult Guardianship and Trusteeship Act*
- › CAP provides a very specific method of determining an adult’s cognitive and functional capacity.
- › CAP can be used at any time a decision about capacity is required.
- › Capacity Assessors may include medical practitioners (e.g., doctors), psychologists, registered nurses of various specialties, occupational therapists, and social workers, who meet established standards of conduct and undergo training and continuing education.

Incapacity: Where Does It Say So?

- › Alberta *Personal Directives Act*’s prescribed Declaration of Incapacity Form is used to activate a Personal Directive for personal decisions only.
- › Alberta *Powers of Attorney Act* does **not** prescribe a declaration form for the purposes of indicating when a Power of Attorney comes into effect for making someone’s financial decisions.
- › In the absence of such a form, options include:
 - asking the doctor to create a Declaration of Incapacity form
 - asking a social worker (who sometimes has a template)
 - asking a lawyer to create a Declaration of Incapacity form
 - using a designated Capacity Assessor

ADDITIONAL RESOURCES ON CAPACITY

- › *Guardianship*
CPLEA’s booklet on the *Alberta Adult Guardianship and Trusteeship Act*.
 - › *Trusteeships and Guardianships*
www.humanservices.alberta.ca/guardianship-trusteeship/opg-adult-guardianship-trusteeship.html
 - › *Personal Directives*
www.humanservices.alberta.ca/guardianship-trusteeship/opg-personal-directives.html
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