



SUMMARY OF CAPACITY CRITERIA

The following is a synopsis which attempts to summarize the various criteria or factors, and/or 'test' so to speak respecting certain decisional capacity evaluations:

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
Manage property	<i>Substitute Decisions Act, 1992¹ ("SDA"), s. 6</i>	(a) Ability to understand the information that is relevant in making a decision in the management of one's property; <u>and</u> (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.
Make personal care decisions	<i>SDA, s. 45</i>	(a) 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; <u>and</u> (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
Grant and revoke a POA for Property	<i>SDA, s. 8</i>	(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; <u>and</u> (g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

¹ S.O. 1992, c.30

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Grant and revoke a POA for Personal Care	SDA, s. 47	(a) Ability to understand whether the proposed attorney has a genuine concern for the person's welfare; <u>and</u> (b) Appreciation that the person may need to have the proposed attorney make decisions for the person.
Contract	Common law	(a) Ability to understand the nature of the contract; <u>and</u> (b) Ability to understand the contract's specific effect in the specific circumstances.
Gift	Common law	(a) Ability to understand the nature of the gift; <u>and</u> (b) Ability to understand the specific effect of the gift in the circumstances. <i>In the case of significant gifts (i.e. relative to the estate of the donor), then the test for testamentary capacity arguably applies. Intention is a factor in determining the gift.</i>
Make a Will <i>Testamentary Capacity</i>	Common law	(a) Ability to understand the nature and effect of making a Will; (b) Ability to understand the extent of the property in question; <u>and</u> (c) Ability to understand the claims of persons who would normally expect to benefit under a will of the testator.
Revoke a Will	Common law	(Same as above – to Make a Will)
Make a codicil	Common law	(Same as above – to Make a Will)
Make a testamentary designation	Common law	(Same as above – to Make a Will)
Create a trust	Common law	(a) Ability to understand the nature of the trust; <u>and</u> (b) Ability to understand the trust's specific effect in the specific circumstances. <i>In cases of a testamentary trust, likely Testamentary Capacity/Capacity to Make a Will required (see above)</i>

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Capacity to Undertake Real Estate Transactions	Common law	<p>(a) Ability to understand the nature of the contract; <u>and</u></p> <p>(b) Ability to understand the contract's specific effect in the specific circumstances.</p> <p><i>In the case of gift or gratuitous transfer, likely Testamentary Capacity/Capacity to Make a Will required (see above)</i></p>
Capacity to marry	Common law	<p>Ability to appreciate the nature and effect of the marriage contract, including the responsibilities of the relationship, the state of previous marriages, and the effect on one's children.</p> <p>Also possibly required: capacity to manage property and the person</p> <p>Dr. Malloy² stated that for a person to be capable of marriage, he or she must understand the nature of the marriage contract, the state of previous marriages, as well as his or her children and how they may be affected.</p>
Capacity to separate	Common law	Ability to appreciate the nature and consequences of abandoning the marital relationship (same as capacity to marry) ³ .
Capacity to divorce	Common law	Ability to appreciate the nature and consequences of a divorce (same as capacity to marry) ⁴ .
Capacity to reconcile	Common Law	<p>More than just expressing a desire to live with someone. Must have:</p> <p>a) Ability to understand the information relevant to making the decision (relevant facts); and</p> <p>b) Ability to understand the consequences of a decision to reconcile with spouse (such as</p>

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

³ *Calvert (Litigation Guardian of) v. Calvert*, 1997 CanLII 12096 (ON S.C.), aff'd 1998 CarswellOnt 494; 37 O.R. (3d) 221 (C.A.), 106 O.A.C. 299, 36 R.F.L. (4th) 169, leave to appeal to S.C.C. refused May 7, 1998 [hereinafter *Calvert*]

⁴ *Calvert*

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		changing the financial status quo between them, changing the date of separation for the purposes of the <i>Divorce Act</i> , the emotional impact if the attempted reconciliation fails, etc.) ⁵
Capacity to instruct counsel	Common law	Understanding of what the lawyer has been asked to do and why; Ability to understand and process the information, advice and options the lawyer presents to them; <u>and</u> Appreciation of the advantages, disadvantages and potential consequences of the various options. ⁶
Capacity to Sue (or where Litigation Guardian Required)	Common Law	(a) A person's ability to know or understand the minimum choices or decisions required to make them; (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 ⁷
Capacity to give evidence	<i>Evidence Act</i> , ⁸ ss. 18(1), 18(2), 18(3)	18. (1) A person of any age is presumed to be competent to give evidence. 1995, c. 6, s. 6 (1). Challenge, examination (2) <i>When a person's competence is challenged, the judge, justice or other presiding officer shall examine the person. 1995, c. 6, s. 6 (1).</i>

⁵ See *Chovalo v Chovalo* 2018 ONSC 311 at paras 33 and 61-62.

⁶ *Costantino v Costantino*, 2016 ONSC 7279, Ed Montigny, ARCH Disability Law Centre, "Notes on Capacity to Instruct Counsel", www.archdisabilitylaw.ca/?q=notes-capacity-instruct-counsel-0, see also *Evans v Evans* 2017 ONSC 5232 and *Sylvester v Britton* 2018 ONSC 6620.

⁷ *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 and *Carmichael v Glaxosmithkline Inc* 2019 ONSC 2037 at para 40.

⁸ R.S.O. 1990, c..E.23, S 18(1), 18(2), 18(3)

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	<p>Canada Evidence Act,⁹ s. 16(1)</p>	<p>Exception</p> <p><i>(3) However, if the judge, justice or other presiding officer is of the opinion that the person’s ability to give evidence might be adversely affected if he or she examined the person, the person may be examined by counsel instead. 1995, c. 6, s. 6 (1).</i></p> <p>Witness whose capacity is in question</p> <p><i>16. (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine</i></p> <p><i>(a) whether the person understands the nature of an oath or a solemn affirmation; and</i></p> <p><i>(b) whether the person is able to communicate the evidence</i></p>
<p>Capacity to Enter into a Retainer Agreement</p>	<p>Common Law</p>	<p>1) <i>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?</i></p> <p><i>In other words, could the client understand and appreciate the consequences of the retainer agreement?</i></p> <p>2) <i>Did the lawyer know that the client lacked capacity, and, more specifically,</i></p> <p><i>a) Were there sufficient indicia of incapacity known to the lawyer to establish a suspicion that the client lacked the requisite capacity?</i></p>

9 R.S.C. 1985, c.C-5, S. 16(1)

CAPACITY TASK/DECISION	SOURCE	DEFINITION OF CAPACITY
		<p><i>b) If yes, did the lawyer take sufficient steps to rebut a finding of actual or constructive knowledge of incapacity?¹⁰</i></p>

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

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March 2022

¹⁰ *Guardian Law Group v. LS*, 2021 ABQB 591 at para 57.