

Capacity and the Duties of a Lawyer

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Drafting Personal Directives and Enduring Powers of Attorney

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INTRODUCTION

When a lawyer is asked to draft and then witness the execution of a Personal Directive (“PD”) or an Enduring Power of Attorney (“EPA”) for a client, they have a duty to assess capacity. This paper will address the issues of assessing capacity for the purposes of PDs and EPAs, what to do if capacity is at issue and good practice with respect to taking notes and gathering evidence to determine capacity. Capacity is at the forefront for creating a valid Will, but the standards for PDs and EPAs are not as well developed or documented.

CAPACITY

Capacity is not only an issue for executing Wills, but also for PDs and EPAs. The *Personal Directives Act*, RSA 2000, c P-6, defines capacity as **“the ability to understand the information that is relevant to the making of a personal decision and the ability to appreciate the reasonably foreseeable consequences of the decision.”**² Section 9(1) of the *Personal Directives Act* states that a PD only “has effect with respect to a personal matter only when the maker lacks capacity with respect to that matter.” Under section 1(l), a personal matter means any matter of a non-financial nature that relates to an individual’s person and without limitation includes: health care, accommodation, with whom the person may live and associate, participation in social, educational and employment activities, and legal matters. In accordance with section 3(2) of the Act, “a person who is at least 18 years of age is presumed to understand the nature and effect of a personal directive.” The threshold then for capacity for a PD is only that the maker understands that she is empowering another individual to make decisions on her behalf when she is no longer able to make those decisions for herself.

The *Powers of Attorney Act*, RSA 2000, c P-20 does not define capacity, but section 3 provides that an “enduring power of attorney is void if, at the date of its execution, **the donor is mentally incapable of understanding the nature and effect of the enduring power of attorney.**”³

In *McCardell’s Estate v. Cushman*⁴, McDonald, J. confirms that a donor must understand the nature and effect of the document in order to create a valid EPA:

¹ I wish to acknowledge the contribution to the preparation of this paper of Victoria Hockley, a lawyer in the Tax and Private Client Services Group of Miller Thomson LLP, Calgary.

² *Personal Directives Act*, RSA 2000, c P-6, s.1 (b). [emphasis added]

³ *Powers of Attorney Act*, RSA 2000, c P-20, s.3. [emphasis added]