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## Wills & EPAs - Commonly Occurring Issues

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# **Challenging Power of Attorney Documents and Acting for Partially Capacitated Donors**

*Wills & EPAs - Commonly Occurring Issues*

LESA Library

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## VALIDLY ENTERING INTO AN ENDURING POWER OF ATTORNEY

Under what circumstances is an enduring power of attorney void or voidable? To what extent does a client need capacity before he or she can validly make or revoke one?

### Capacity Necessary for an EPA

A single and overarching test for legal capacity developed as part of the common law. A person needs to have the necessary mental capacity to validly conduct a legal act. That is true whether the act in question is to marry, to vote, to enter a contract, or to sign a power of attorney. The basic test was expressed in 1829 in the Irish decision *Ball v. Mannin*,<sup>1</sup> and is whether the person purporting to conduct the legal act would have been “capable of understanding what he did by executing the deed in question when its general purport was fully explained to him.”<sup>2</sup> Later cases added the phrase “nature and effect” to the test. A person has the mental capacity to validly perform a juridical act if that person enjoys the powers of mind necessary to understand the nature and effect of the juridical act if given a proper explanation of its basic terms.

That general test carried forward in England and remains in current usage for the powers of mind necessary to enter into an enduring power of attorney. It was expressed in England by Hoffmann J. in *In re K (Enduring Power of Attorney)*:<sup>3</sup>

It is well established that capacity to perform a juristic act exists when the person who purported to do the act had at the time the mental capacity, with the assistance of such explanation as he may have been given, to understand the nature and effect of that particular transaction....

That statement of law was later noted with approval by the English Court of Appeal in *In re W (Enduring Power of Attorney)*.<sup>4</sup>

The Legislature in Alberta (in common with several other provinces) simply codified the common law “nature and effect” test developed in England and repeating it in the body of the *Powers of Attorney Act RSA 2000, Chapter P-20*:

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<sup>1</sup> *Ball v. Mannin* (1829) 3 Bli NS 1, 1 Dow & CL 380, 4 E.R. 1241, HL, 33 Digest (Repl) 592 (Irish Court of Exchequer).

<sup>2</sup> *Ibid. [Ball v. Mannin]*, at page 21.

<sup>3</sup> *In re K (Enduring Power of Attorney)*, [1988] Ch 310 (Eng. Ch.), at page 313.

<sup>4</sup> *In re W (Enduring Power of Attorney)* [2001] Ch 609 (Eng. Ch.), at page 613.

## Incapacity at execution

3 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.

Our Alberta test is unique in that it is expressed in terms of “incapacity” rather than capacity. That might have the effect of importing the idea that the onus, at least in Alberta, is on the attacker to prove incapacity to make the power of attorney, rather than the normal onus which would be on the person alleging that the power of attorney is valid to prove capacity. Alberta Courts do not appear to have addressed that nuance.

The “nature and effect” test is by its nature very vague. Powers of attorney documents tend to be the same basic legal act regardless of who signs them. Whether the maker is rich or poor, young or old, man or woman, the effect of a general power of attorney remains essentially the same: “I appoint A to handle all of my financial affairs.” That homogeneity has emboldened the courts to elaborate on what “nature and effect” means when dealing with the capacity to enter into an enduring general power of attorney. A multiple element capacity test has gradually developed. This is not a different test. It is still the “nature and effect” test, but just particularized and expressed in a way specific to powers of attorney. It has developed in parallel, in England as well as in Alberta and other provinces such as Manitoba.

The Alberta Queen’s Bench expressed the multiple element version of the “nature and effect” test in 2014 in *Midtdal v. Pohl*:<sup>5</sup>

Capacity to execute the power of attorney would be established if the donor understood that:

- (a) the attorney would be able to assume complete authority over the donor's affairs;
- (b) the attorney could do anything with the donor's property that the donor could have done;
- (c) that the authority would continue if the donor became mentally incapable; and
- (d) would in that event become irrevocable without confirmation by the court.

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<sup>5</sup> *Midtdal v. Pohl* (2014), 2014 CarswellAlta 1933, 2014 ABQB 646, [2014] A.W.L.D. 4949, [2014] A.W.L.D. 4950, 246 A.C.W.S. (3d) 917, 3 E.T.R. (4th) 225, 598 A.R. 136 (Alberta QB), at para. 92. Also see the larger summary of other cases, including those from England, as appears at paragraphs 89 to 93.