

Working with elderly clients on a real estate transaction



Jacques Robert
**REAL ESTATE
LAW**

By 2036, it is predicted that 1 in 4 Canadians will be over the age of 65. For real estate lawyers, this means that there will be more and more elderly people selling homes and possibly buying to downsize. But this also means that real estate lawyers will need to become further aware of issues that may affect an elderly client's capacity, such as dementia or memory loss.

The fact that a client has dementia, Alzheimer's or memory loss does not automatically mean that the client is incapable of making legal decisions. Each client must be assessed by the lawyer on an individual basis. Further, capacity will often need to be assessed on a regular basis for the same client on the same file.

Some conditions leave clients fully capable of making legal decisions for themselves one day but not on another day. For example, we have had clients suffering from dementia who could fully appreciate the legal matter, give instructions and appreciate the nature of the decision and its consequences on a given day; on another day, those clients might not remember why they need a lawyer or what they have asked the lawyer to do. In such cases, we assess capac-

ity routinely and work with the clients' caregivers to have the client come in on a "good day".

The though process, not the actual decision, is the issue when judging capacity. For example, someone who is removed from the Will by a parent may claim that the parent lacked the capacity to make a proper decision. However, the parent would be deemed to have the capacity to make legal decisions if the parent:

- Understood what they had asked the lawyer to do,
- Understood the options presented to them, and
- Appreciated the pros and cons and the consequences of the options and decisions.

Often elderly clients may also have physical disabilities that may make signing legal documents challenging, e.g. arthritis or Parkinson's. Where there is no question that the client is fully capable, the lawyer will assist the client by finding an accommodation that will work for the individual. For example, the clients may find that they can no longer sign their name in the script they once used. It is completely acceptable for clients to sign documents using the signature they now have or by using an "x". If you or a fam-

ily member find signing a signature challenging or the person's signature is rapidly deteriorating, consider going into the bank to provide a sample of the current signature on a regular basis.

If intermittent incapacity is an issue or may become an issue, then appointing a power of attorney for property is highly recommended. A power of attorney can only be appointed and the documents drawn up by the individual with the assistance of a lawyer when the client still has capacity. If the client no longer has capacity, the court will become involved to appoint a power of attorney.

As our population ages and more elderly people experience mental health and physical disabilities, it is important to remember that the capacity to make legal decisions does not stop as soon as the client turns 65 or is diagnosed with a disease like Parkinson's or Alzheimer's. An individual's capacity is to be assessed for each specific decision. If capacity may become an issue in the future, see your estate's lawyers for advice about appointing a power of attorney for property and perhaps a power of attorney for personal care as well.

Co-authored by Robin Goski, Associate Lawyer

Jacques Robert is an Ottawa real estate lawyer. For more information, visit www.jacquesrobert.com



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