



Things to Know About the Law and Decision-Making

The Canadian Centre for Elder Law's Dementia + Decision-Making project encompasses a range of resources designed to help caregivers, care partners and health care providers support people living with dementia to participate in decisions regarding their care and well-being. Please see www.bcli.org/ccel-projects/dementia-decision-making-project/ web page for a full list of materials and resources.

The journey of dementia is different for every person, including family and friend caregivers and care partners and the person living with dementia. Every person has the right to participate in decisions that affect them. There are certain legal concepts that apply to making decisions. This information sheet is intended to give a brief description of the legal concepts surrounding our decision-making rights with a view to understanding decision making as it relates to dementia.



The resources were developed with perspectives from caregivers, care partners, health care providers and people living with dementia. The full package of resources can be found on the CCEL **Dementia + Decision-Making** webpage www.bcli.org/ccel-projects/dementia-decision-making-project/

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To access **Dementia + Decision-Making**, use the QR code, or visit www.bcli.org/ccel-projects/dementia-decision-making-project/

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Dementia + Decision-Making
Empowering People Living with Dementia and Their Caregivers

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 **CANADIAN CENTRE FOR ELDER LAW**
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Capacity

Capacity is a person’s ability to make decisions about their life. We must presume a person is capable to make decisions unless it is proven they are not. The law says someone is capable if they understand what kind of decision it is and what might happen, or the consequences, if they make a certain decision. Legal professionals may want to ask a health care provider about a person’s capacity, but it is the legal professional who must decide whether the person is capable of making the legal decision or forming the legal relationship, like signing a contract. If a person does not have capacity, their decision may not be valid.

Decision-Making is the Right of the Person

We always start with the presumption a person living with dementia is capable to make a decision for themselves. Even if you think a person living with dementia may not be capable of a specific decision, they must be involved in decision-making. If you think the person living with dementia needs help to understand the decision and risks better, you can ask the health care provider to explain it differently. You should also try to work with the person living with dementia to determine their preferences when making decisions. Remember, a person

living with dementia is allowed to make a decision you do not agree with as long as they are capable and have enough information to make the decision.



Undue Influence

If someone else pressures, tricks, or lies to change a person’s decision, that decision is no longer valid. This means that the person is not making the decision “freely”, or without influence. Preventing undue influence is why a lawyer wants to meet with a person alone when the person is making a legal decision. You may want to support the person living with dementia or feel it is important for you to be present, but some decisions must be made without you there. This is done to protect the client and their decision. It also helps to make sure you do not influence a person’s decision, even if you do not mean to.



Fiduciary Duty

When you are acting as a person’s substitute decision-maker in any fashion, you owe them a special duty called a fiduciary duty. Part of this means when you make decisions for a person, you consider their needs and interests before anything else. This includes acting in their best interest and making decisions based on what you know they would have considered important. You cannot think about what other people want for the person, including what you want, because you are to make decisions as if you were the person living with dementia.

The Law Cares About a Person’s Best Interests

If it happens that you can no longer involve a person living with dementia in decision-making and you are the substitute decision-maker, there are certain things you must think about when making decisions. All substitute decision-makers must make decisions based on what they know are a person’s wishes, values, and beliefs. This means you should think about what the person living with dementia may have decided in this situation. Sometimes you may not know what their wishes, values, or beliefs are. If that happens, you must consider what is in their best interests based on the information you have.



Informed Consent

You may hear doctors or lawyers use the phrase “informed consent” when asking you or the person living with dementia for about health care a decision. Informed consent is a legal term, and it has two parts. The first part is that enough information is given about the decision to understand what the decision is. For example, a doctor gives you enough information about getting a cast instead of surgery for a broken arm and that you understand the decision is about a choice to get a cast or have surgery.

The second part is that you have enough information about the decision to understand the risks of agreeing or not agreeing with the decision. For example, if you do not have the surgery, you may be in pain for a long time. Also, the cast may not fix the injury fully. If you do have the surgery, there are risks with the surgery process, but the recovery is faster. In this case, you can decide which treatment you prefer and give “informed consent” for the treatment you choose. If a person does not have all information they need, their decision is not “informed” and may not be valid.

Avoid a Gap in Decision-Making

If a person does not have anyone appointed to assist them or to make decisions for them, the law generally does not let anyone make decisions for a person unless there is an emergency. Emergencies about money may mean the Public Guardian and Trustee, an agency dedicated to protecting vulnerable adults and children, may take control until a committee is appointed. Emergencies about health care may mean a doctor speaks to someone based on priority. The list, in order of priority, is spouse, child, parent, sibling, grandparent, other relative, close friend, and then in-law.

Appointing a Committee is a Big Deal

A committee is a substitute decision-maker appointed by the court. The court can appoint a person(s) as committee of estate (for financial and legal decisions) or a committee of person (for personal and health care decisions). This is a serious matter because it means that the person is declared legally incapable, and the committee is now responsible for decision-making for the person. The court does not take this step lightly because of what it means for the person being declared incapable. This can be an expensive and lengthy process so if the person living with dementia is capable, you should encourage them to speak to a legal professional to make sure they have all the legal tools they need to avoid a committee.

