

Capacity

Introduction

Capacity is the level of mental competence required before a valid legal document can be signed:

A customer who...	must...
sets up an enduring power of attorney (EPA)	appreciate that: <ul style="list-style-type: none"> • they are giving power of attorney for property and/or personal care and welfare to a third party • the power of attorney may come into force immediately or in the event that they become incapable in the future.
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]



They do not need to be fully capable of managing their property matters at the time of the appointment, but they do need to have sufficient capacity to appreciate the consequences of doing so.

The Trustee's and Multi-Channel Adviser's role is to check if there is uncertainty, or if someone may claim the customer didn't have capacity at a later date.

A trustee may seek advice from Retail Legal if there is any reason to suggest that the customer giving instructions is not of sound mind or lacks capacity. Prompt action is required to establish capacity (or lack of it) in each case. A careful record needs to be made of the enquiries and circumstances.

If possible, the situation should at least be discussed with a medical practitioner before any documents are signed. The trustee needs to record the medical practitioner's advice immediately.

Click below for information on:

What to look for

A trustee looks for signs that alert them that the customer's capacity may be impaired, including:

- restricted vocabulary
- short attention span
- difficulty understanding the questions
- inappropriate answers
- problems with memory.

These signs are checked by asking questions throughout the interview, e.g. today's date, who the customer wants to appoint as their attorney, etc. The trustee determines whether to obtain a medical certificate from the answers the customer gives, and the way the customer interacts with them during the meeting.

Only a medical practitioner whose scope of practice includes the assessment of mental capacity can determine if someone has lost capacity.

Urgent cases

Where there is doubt regarding a customer's capacity, the trustee must also determine if there is urgency. Sometimes a customer may be about to undergo surgery or there is a risk they may die or become too ill to sign documents before a medical certificate is obtained.

In these situations, the trustee checks with a Retail Legal Solicitor to see whether the documents can be signed without a medical certificate. The customer's general practitioner (GP) may be consulted for a verbal indication of the customer's capacity (with confirmation in writing). This must be recorded in the Interview Notes in PT Online.

There are risks to Public Trust in accepting instructions for any business if there is doubt regarding the customer's mental capacity. However, if the person's health is likely to deteriorate in the near future, there may also be risks in delaying. A delay while the doctor's certificate is received may mean the customer has been denied the opportunity to sign the document they want. In these situations, the trustee seeks input from their manager or Legal Services.

Obtaining a medical certificate

When there is concern about a customer's capacity but there is no urgency, the trustee asks the customer to obtain a medical certificate from their **health practitioner**.

Instances where a medical certificate is likely to be required:

- If the customer is requesting something radical
- Where a new Will or EPA is created which is markedly different from the last one
- Where the customer is over the age of 80

A standard letter containing instructions of what is required is sent to the medical practitioner when Public Trust arranges the medical certificate/report. The letter also:

- includes a standard certificate for them to complete and send back to Public Trust.

Following is a list of the standard letters that you can send to the medical practitioner:

NavOne Template Code	Name
[REDACTED]	[REDACTED]
EPA LTR 12	Ltr to doctor with certificate re capacity - EPA

Public Trust must receive a report on the customer's capacity from the medical practitioner before:

- any instructions are taken
- any documents are completed
- an EPA is activated at the request of a third party.

The medical certificate or report outlines the customer's capacity and provides information, such as whether they are able to understand the:

- implications of signing an EPA

What we do when a customer refuses to complete a medical certificate

A customer is within their rights to refuse to obtain a medical certificate when we have requested. Obviously there are many benefits to obtaining the medical certificate, but if they are not convinced and you have concerns around their capacity you should still take the instructions. The courts have made it clear that in cases where capacity is in doubt we should still be preparing the document(s). In these cases though it is really important that we have good notes, so if issues are raised later we can show that we met our duty – both for us and for the client. The Interview Notes should include any relevant information the trustee has, but at a minimum need to:

- Explain why you have concerns and what your concerns are
- Confirm that you explained the advantages in getting a medical certificate and that the client declined to do so
- Cover off any potential undue influence issues – this is particularly important in these situations.

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