Mental Competence
Public Legal Education and Information Service of New Brunswick (PLEIS-NB) is a non-profit charitable organization. Its goal is to provide the public with information about the law. PLEIS-NB receives funding and in-kind support from the federal Department of Justice, the New Brunswick Law Foundation and the Department of Justice and Office of the Attorney General of New Brunswick.

We gratefully acknowledge the cooperation of the Faculty of Law, University of New Brunswick; members of the Law Society of New Brunswick; the Public Trustee, and the New Brunswick Medical Society.

This booklet does not contain a complete statement of the law in the area of mental competence. Anyone who needs specific advice about their own legal position should contact a lawyer.

Published by:

Public Legal Education and Information Service of New Brunswick

P.O. Box 6000
Fredericton, NB, E3B 5H1
Phone: 453-5369
Fax: 462-5193
Email: pleisnb@web.ca
Website: www.legal-info-legale.nb.ca

Reprinted March 2020
ISBN: 978-1-55471-436-0
Mental Competence

Mental competence is the key to rational decision making. Unfortunately, disease or injury can affect the mind making it hard for a person of any age to make sound decisions. Sometimes it may be impossible for the person to look after themselves or their affairs. Some people may be incapable of handling their own affairs from birth.

This booklet will tell you about some of the legal consequences when an adult becomes mentally incompetent. It does not deal with mental disorders or adult protection.

Why is mental competence important?

Mental competence is the basis for many activities in life. For example a person must be mentally competent to:

• enter contracts
• make a will
• get married
• consent to medical treatment
• drive a vehicle
• give a power of attorney

Our laws assume every adult is mentally competent until a court decides otherwise. This recognizes people’s capacity to understand the nature and consequences of their actions and their fundamental right to make decisions about themselves and their affairs.
What does mental competence mean legally?

From a legal perspective, the concern that arises is not whether a person is mentally incompetent or not; rather the concern is whether a person has sufficient competence to take certain significant steps that have legal consequences, such as making a will or getting married.

The degree of competence required will vary according to the nature and legal impact of the step they wish to take. A person who doesn’t remember whether or not they are married and has children may no longer be competent to make a will. However, a person who cannot easily recall all the names of their children but remembers that there are five of them and that they are all adults and still alive may still be competent to make a will. The level of competence required to make other legal documents may be lower or higher than this.

Determining competence can be confusing since a healthcare provider may assess the competence of an elderly person on a different basis than a lawyer. For example, a physician may find that the person is too frail to live independently without supervision; yet that same person may have the level of competence required to make a Power of Attorney.
What exactly is mental incompetency?

In legal terms, the *Infirm Persons Act* defines a mentally incompetent person as someone whose mind is affected either from birth, disease, injury or by a disorder to such a degree that they require care, supervision, and control for their own protection, the protection of others, or the protection of their property.

Why should individuals be concerned about mental incompetency?

Anyone could lose their ability to make decisions and control their lives. However, the elderly and their caregivers may have particular concerns. So too might persons who are concerned about the future of someone they look after such as a dependent adult child with a mental disability or an infirm relative. Concerns may arise due to:

- an illness such as Alzheimer’s disease
- a stroke
- an accident
- advanced age
- abuse and neglect

What happens when a person can’t handle their own affairs?

If mechanisms are not in place to deal with possible mental incompetence, someone may have to take legal steps to become that person’s substitute decision-maker and/or handle their financial matters. However, before the courts get
involved, it is likely that the person will undergo a mental competency assessment to determine their ability to make decisions.

Mental Competency Assessment

When is it necessary to do a mental competency assessment?

Over time, many people experience subtle changes in their mental capacity – and yet they continue to manage their affairs or some aspects of their affairs. Such changes could be temporary, for example, a stroke may only impair someone for a few months, while others are permanent, for example memory loss due to dementia. Sometimes, people are in denial about their ability to manage their affairs.

Normally, a friend or relative with concerns about another person’s ability to manage their own personal or financial affairs asks a health care professional to do an assessment. For example, family members may have noticed that the bills are going unpaid and there is little food in the refrigerator. It is not always clear cut when a person has become incompetent.

What is a mental competency assessment?

It involves tests designed to find out if the person being assessed has the specific abilities needed to make decisions about their well-being. The assessment tries to determine which abilities a person still has, and which abilities a
person may have lost. The assessment is intended to be thorough and fair. The kinds of health care and services provided to the person may depend on the outcome of the assessment.

A finding of mental incompetency could mean that somebody will have to get legal authority to make decisions for the person. When this happens, the assessment may be presented as evidence in court. The court would use this information to help it decide what kinds of decisions the guardian can or cannot make on behalf of the other person.

**Who conducts a mental competency assessment?**

An experienced health care professional conducts the assessment. It usually takes place in a person’s home and often there is more than one assessment.

**Can a person refuse to have an assessment?**

Yes. However, if a person refuses an assessment, a family member or caregiver can ask a court to order a competency assessment. It is better to come to an agreement, if possible.
How is mental competency assessed?

Mental competency is assessed through a series of questions that try to determine if a person is capable of making decisions. The questions may vary and health care professionals may have different methods of assessment. Generally an assessment examines a person’s:

- thoughts
- perceptions
- mood
- awareness
- judgment
- memory

When is a mental competency assessment necessary?

An assessment may be necessary when, for example:

- a person is not receiving the care they need
- a person is no longer able to care for their affairs
- a person needs to show legal competence to do something, such as make a will
- a person refuses to accept help and there is a possibility of harm
- a person’s safety is at risk and they are unable to fix the situation
- a person is declared mentally incompetent and wishes to appeal the finding.
When is a mental competency assessment not necessary?

An assessment may not be necessary when, for example:

- a person’s behaviour has always been eccentric or unusual
- a person is occasionally forgetful
- a person’s behaviour is not harmful to themselves or others
- a person has an illness or disability (People with similar medical problems often have different abilities)
Appointing Someone to Manage the Financial and/or Personal Care of Another Person

Sometimes it is necessary for a court to declare a person mentally incompetent or infirm and appoint another person or group of people to make decisions on their behalf. In some cases, a relative or friend may apply to the court to appoint them as the guardian of the mentally incompetent person.

In New Brunswick this process is governed by the *Infirm Persons Act*. This is sometimes referred to as adult guardianship. Since a person can be mentally incompetent in one way and not in another, the law provides for guardianship of either the estate (i.e. property and finances) or the person, and if necessary, both. The legal term for this type of guardian is a **Committee of the Estate** and/or **Committee of the Person**.

A **Committee of the Estate** would be responsible for making decisions about the mentally incompetent person’s finances and property.

A **Committee of the Person** would be responsible for making personal decisions on behalf of the mentally incompetent person, including health care decisions and decisions about daily living.
What if there are no family members to apply?

If a person has no family members or friends who are able to apply to be appointed as a Committee, a Public Trustee may be appointed. Public Trustee services are administered by the New Brunswick Legal Aid Services Commission. The Public Trustee may act as a Committee of the Estate and/or Person to make decisions about finances or property and/or to make decisions about personal care. Any individual can make a referral in writing to the Public Trustee by completing an Application for Services - Adult Services.

How does someone apply to the court to manage a mentally incompetent adult’s personal or financial matters?

The first step is to file a Notice of Application with the court. Sworn statements in writing from at least one medical practitioner and from someone who knows the person must accompany the notice. The medical practitioner must give reasons why they believe the person is mentally incompetent.

Normally the person named in the Notice must receive a copy of the Application. If the court believes that the person lacks the mental capacity to understand it, or that it would aggravate their condition, it may waive this requirement. The person named in the Notice may wish to contact a lawyer or advocacy group for more information.
Who can apply to be appointed as a Committee?

Under the law a spouse, a relative or in-law can apply to become the Committee of the Estate and/or Person on behalf of a mentally incompetent person. If there is no relative, a friend or even a creditor can apply. A Public Trustee may also be appointed to ensure that a person’s wishes are respected.

How does the court decide if someone is mentally incompetent?

The court decides by looking at the evidence. To make a decision at the first hearing, the applicant must show that a person is mentally incompetent beyond a reasonable doubt. This is a high standard of proof. If the evidence is sufficient, the court will declare the person mentally incompetent. However, if the evidence does not show this, the court may set a time and place for another hearing. If necessary, the court will ask for more medical information. The court may order the person to take a medical examination. Generally, the court will only order an examination if there is existing medical proof of the person’s mental incompetence. A person has the right to appeal any decision the court makes.

What happens if the court finds a person to be mentally incompetent?

If the court finds a person mentally incompetent, it will appoint a Committee of the Estate and/or Person to make decisions on behalf of the mentally incompetent person.
What decisions can a Committee make?

Depending on the circumstances, the court will authorize the Committee to make decisions that the person cannot make.

A Committee of the Estate may make decisions about the person’s money and property to pay off debts, pay for the person’s care or support the person’s dependants. The Committee of the Estate must not use the money for any personal gain and will have to post security with the court in the form of a bond.

Depending on the degree of the person’s incompetence, the court may decide it is also in the person’s best interest to appoint a Committee of the Person to make decisions about health care including consent to medical treatment.

Who will the court appoint as Committee?

The person who applies to the court often asks to be the Committee. If this does not happen, the court usually gives preference to family members. However, the court always looks at what is in a person’s best interest. For example, if a person’s spouse cannot handle the financial affairs, then the court may appoint someone else who can.

What if the mental incompetence is only temporary?

Sometimes a Committee only needs to make decisions for a mentally incompetent person for a short period of time. If the condition is only temporary, such as a stroke, then
when circumstances change, the person or a representative can ask the court to set aside the order that appointed the Committee. This request can be made any time after one year, or sooner if the court believes it is necessary. If a person becomes capable of managing their own affairs, the court will declare the person mentally competent.

What if a mentally competent person just needs help with their affairs or personal care decisions?

The Court has the authority to appoint a Committee to handle the affairs of an individual who is mentally competent, but who is incapacitated or infirm due to:

- disease
- advanced age
- habitual drunkenness
- drug use

When a Committee is appointed by the court, this court order overrides the powers set out in a power of attorney. However, the court may appoint a Committee to make only specific decisions. If such a Committee is appointed, they would have the final authority only over the matters specified. The remaining powers set out under a power of attorney would continue.
Where can people get more information and advice about these matters?

For more information, advice, support or advocacy, check your phone book for the following:

- Doctor
- Extra-Mural Program
- Department of Social Development
- Department of Healthy and Inclusive Communities
- Seniors’ organizations
- Premier’s Council on the Status of Disabled Persons
- Associations such as the Alzheimer Society, Canadian Rehabilitation Council for Disabled, Canadian Mental Health Association, and so on
- The Third Age Centre / l’Université Troisième Âge
- New Brunswick Association for Community Living
- Mental Health and Addiction Services
- Public Trustee Services
- Lawyer or legal advice clinic
- Public Legal Education and Information Service