QUESTIONS To Determine Mental Capacity To Create Or Change An Estate Plan

Top 15 starting questions and explanations

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15 QUESTIONS To Determine Mental Capacity

HOW TO USE THESE QUESTIONS EFFECTIVELY

Individuals who lack mental capacity to create or change an estate plan may be able to answer certain questions on this list. A person’s mental capacity is determined by weighing the questions, answers, and circumstances. No one question is determinative of a person’s mental capacity.

These are provided as examples to provoke additional questions and to highlight topics for discussion. Questions do not have to be asked in the order listed. The answers should come from conversation rather than interrogation.

Most individuals, especially elders, who lack or have diminished capacity try to hide their “disabilities.” Thus, be sensitive to their needs and level of comfort. Reframe the questions to add personal touch and sensitivity. For example, ask “What goals do you hope to accomplish at this meeting/discussion?” instead of “What is your purpose for being here?”

Hope you find these questions helpful!
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1 DATE. What is today’s date? What month? What year?
Explanation: Individuals who lack capacity often do not know the current month or year. Individuals with diminished capacity, however, may not know today’s date but may know the month or year.

2 PLACE. Where are you? How did you get here?
Explanation: Individuals who lack capacity often do not know where they are or how they got there when in unfamiliar places, such as an attorney’s office. Individuals with diminished capacity, however, may know where they are or how they got there or both.

3 PURPOSE. Do you know why you are here? What motivates you to be here?
Explanation: Individuals who lack capacity often do not know why they are there when in unfamiliar places, such as an attorney’s office; they may share that a family member encouraged them to be there. Individuals with diminished capacity, however, may be able to explain the reasons of their presence.
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4 PEOPLE. Who is here in this room? Why is that person here with you? What is your relationship to each person who is here with you? 
Explanation: Individuals who lack capacity may recognize people they have close personal relationship with, but not people they recently met on few occasions such as an attorney.

5 FAMILY MEMBERS. Are you married? Do you have children? What are the names of your spouse and each child? What are the names of your grandchildren? 
Explanation: Individuals who lack capacity may remember all or only few names of their children but are confused about the circumstances of each family member, such as a spouse’s death; they still believe that the spouse is living, although they have been repeatedly reminded of the spouse’s death.

6 RELATIONSHIP WITH EACH FAMILY MEMBER. When did you last communicate (telephone, email, facebook, or in person) with your son? Daughter? 
Explanation: Individuals who lack capacity have difficulty conceptualizing time frame of events, such as when a communication or visitation happened.
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7 PROPERTIES. What are your assets---such as checking account, stocks, real estate? What is the estimated value of each asset? How are titles held for each asset?

Explanation: Individuals who lack capacity may remember certain assets they own but not the values of those assets or how titles are held.

8 ASSET MANAGEMENT. Who is paying the bills? Who manages the assets?

Explanation: Individuals who lack capacity often have not paid their bills or manage their own assets but believe they are in control of their own finances.

9 PERSON TO HELP WITH FINANCES. If you are not able to pay bills and take care of your finances, who do you prefer to help you? And why?

Explanation: Individuals who lack capacity may be able to name the person they prefer to help them, most likely a spouse or child; some may be able to give an explanation for choosing such person.
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10 TESTAMENTARY WISHES. If something happens to you, to whom do you want to give your home? Stocks? Bank accounts? *Explanation:* Individuals who lack capacity may be able to express a general and simple wish such as “everything to my wife” or “everything equally to my children.” They are not able to express complex tax saving gifting scheme.

11 TAX PLANNING. Describe in generality the tax savings to be achieved by creating or changing this document? *Explanation:* Individuals with mental capacity often understand the basic tax saving strategies included in estate planning documents and their effects such as creating subtrusts. But those who lack mental capacity often cannot follow the conversation about tax saving strategies and cannot understand or appreciate their effects.

12 DISINHERITANCE. Explain the reason for disinheriting your spouse/child. *Explanation:* Individuals who lack mental capacity often cannot consistently explain the reasons for disinheriting someone.
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13 ASSET PROTECTION. Explain your reason for protecting your assets from your spouse’s children from a prior relationship; for restricting distribution to a child beneficiary.

Explanation: Individuals who lack mental capacity may not be able to give reasons for protecting their assets from the reach of a group of individuals.

14 INCONSISTENCY WITH PRIOR WISHES. Why do you want to give your home to daughter instead of your son, to whom you wanted to give it in the prior living trust?

Explanation: Individuals who lack capacity often cannot consistently explain the reasons for changing their wishes.

15 PRIOR COMMUNICATION WITH ANOTHER PERSON. Besides this discussion, did you talk with anyone about your money? Property? Will? Trust? With whom did you discuss it? When was the discussion? Who was present?

Explanation: Individuals who lack capacity may remember the discussion took place but are often mistaken about the substance and time of the discussion.
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Lack of mental capacity is only one of the two most common reasons to void an estate plan. The other common reason is undue influence. For information on undue influence, read our blog Beneficiaries Disinherited From Estate Plans Created By Undue Influence.

If you have questions about the validity of an estate plan or would like us to review your estate plan, feel free to call our office for a FREE initial consultation.

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408-625-7963