

Capacity and consent: an overview of the requirements for medical assistance in dying (MAiD)

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In 2016, the blanket prohibition in the *Criminal Code* pertaining to voluntary euthanasia and assisted suicide was modified to allow such measures where a person is suffering from a “grievous and irremediable medical condition”. Under the original legislation, a person was deemed to be suffering from a grievous and irremediable medical condition if (a) such person had a serious and incurable illness, disease or disability; (b) such person was in an advanced state of irreversible decline in capability; (c) the illness, disease or disability or the state of decline caused enduring and intolerable physical or psychological suffering; and (d) such person’s natural death had become reasonably foreseeable.

The law was amended in 2021 with the passing of Bill C-7, which established a two-track approach to qualifying for MAiD; one track facilitates access in circumstances where a person’s natural death is reasonably foreseeable, and the other track eliminates the requirement that death be foreseeable but introduces additional procedural safeguards.

In this bulletin we will explain the current criteria for MAiD, the consent and capacity requirements under each of the two tracks and what can (and can’t) be done under current law to express a desire for MAiD in estate planning documents.

What you need to know

- To qualify for MAiD, (a) a person must have a serious and incurable illness, disease or disability; (b) a person must be in an advanced state of irreversible decline in capability; and (c) the illness, disease or disability or the state of decline must cause enduring and intolerable physical or psychological suffering.
- A person must make a voluntary request for MAiD and, immediately before receiving MAiD, must be given an opportunity to withdraw their request and must expressly consent to MAiD. However, if a person’s natural death is reasonably foreseeable, and if the person is at risk of losing decision-making capacity before the scheduled date of administration, such person may waive the “final consent” requirement by written agreement with the medical practitioner (medical doctor) or nurse practitioner who is to administer MAiD.
- A request for, or consent to, MAiD in a Living Will (a document that sets out an individual’s wishes regarding end-of-life care) and/or by an attorney under a Power of Attorney for Personal Care (a document that names an attorney to make medical decisions on behalf of an individual who lacks the capacity to make such decisions) is ineffective under current law.

Access to MAiD

The procedures for accessing MAiD will depend on whether a person's natural death is reasonably foreseeable. The purpose of this distinction is twofold: first, it facilitates access for those whose natural death is reasonably foreseeable, and second, it ensures that additional time and expertise are devoted to MAiD requests from those whose natural death is not foreseeable.

In general, to become eligible for MAiD a person must satisfy the following criteria:

- be 18 years of age or older and have decision-making capacity;
- be eligible for publicly funded health care services;
- make a voluntary request that is not the result of external pressure;
- give informed consent to receive MAiD, meaning that the person has consented to receiving MAiD after they have received all information needed to make this decision;
- have a serious and incurable illness, disease or disability (currently, a mental illness is not considered to be an illness, disease or disability but this is under review);
- be in an advanced state of irreversible decline in capability; and
- have enduring and intolerable physical or psychological suffering that cannot be alleviated under conditions the person considers acceptable.

When death is reasonably foreseeable

In cases where a person's death is reasonably foreseeable, such person must make a request for MAiD in writing, the person must be assessed by two medical professionals, the person must be informed that their request can be withdrawn at any time, and immediately before MAiD is provided, the practitioner must give the person an opportunity to withdraw the request and must ensure that the person gives express consent.

If the person is at risk of losing decision-making capacity before the scheduled date of administration, the "final consent" requirement may be waived by written agreement between such person and the practitioner—under these circumstances, MAiD will be administered even if the person lacks capacity to consent at the time (unless the person demonstrates refusal or resistance to the administration of MAiD by words, sounds or gestures).

When death is not reasonably foreseeable

If a person's natural death is not reasonably foreseeable, in addition to the procedures set out above, there are additional requirements to receive MAiD: (a) the period from the person's first assessment to the administration of MAiD must be at least 90 days (or less if the person is at risk of losing decision-making capacity); (b) one of the two assessors must have expertise in the condition causing the person's suffering; (c) the person must be informed of, and connected to, resources available to relieve their suffering; and (d) the person and the practitioners must agree that the person has seriously considered all means available to alleviate such person's suffering.

There is no waiver of the "final consent" requirement; the person wishing to receive MAiD must give full and informed express consent at the time of administration, meaning the person must have capacity to consent on the date MAiD is provided.

What can you do now?

As described above, there is some flexibility to waive the requirement that consent to MAiD be provided immediately before MAiD is administered; however, this requires (a) that the person's natural death be reasonably foreseeable and (b) that the waiver be agreed to in writing by the person and the practitioner. Accordingly, consent to MAiD in a Living Will or consent provided by an attorney under a Power of Attorney for Personal Care will be insufficient to meet the procedural requirements for the administration of MAiD. Notwithstanding these limitations, given the evolution of the law in this area, some individuals opt to include a request for MAiD in their Living Will in the hope that the law will become more flexible in the future.

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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