

Ageing with grace

The Mental Capacity Act and lasting power of attorney offer important safeguards for an ageing society

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SINGAPORE is ageing. Almost 12 per cent of Singapore residents are now aged 65 years and over. According to the *2013 Population White Paper*, the number of people in this age group is set to triple by 2030. This will have wide implications for our society and social supports.

What legal assistance might this older cohort need? Beyond the usual requirements for estate planning, wills and trusts, they may also want advice on personal care and how to pay for it, and how to secure their housing needs and healthcare. These issues become more pertinent as a person's physical health and mental faculties decline with age. How can we ensure that these legal needs are met?

One partial answer to that question has been provided by the recently revised Mental Capacity Act (MCA). The MCA was first introduced in Singapore in 2010 and sets out the regulatory framework of who can be appointed to act for a person who lacks capacity to make his or her own decisions. These include decisions on housing needs and healthcare. The law is necessarily complex, as it effectively confers the authority to make decisions for a person to a proxy, while also seeking to ensure the autonomy of that person and that his or her best interests are served. These issues have been brought into stark relief by recent cases such as the dispute over whether Chinese tour guide Yang Yin manipulated the wealthy and elderly widow Chung Khin Chun into granting him a lasting power of attorney and hence control over her fortune.

What does it mean to lack "capacity"?

To understand how and when the MCA is relevant, it is necessary to understand the definition of "capacity". According to the law, a person lacks capacity in relation to a matter if he is unable to make a decision because of an impairment of, or a disturbance in the functioning of, the mind or brain.

This means that he is unable

- to understand the information relevant to the decision;
- to retain that information (however, just because a person could only retain information for a short period does not render him as being unable to make a decision);
- to use or weigh that information as part of the process of making the decision; or
- to communicate his decision (whether by talking, using sign language or any other means).

Five statutory principles

Conferring the authority to make decisions on another person can have profound implications, which is why the MCA sets out a number of safeguarding principles.

i) Presumption of mental capacity

- Importantly, the law assumes – and rightfully so – that a person has capacity unless it is established that he or she lacks capacity. This sets the fundamental tone of the MCA, in that a person's autonomy and dignity must be respected.

ii) Being helped to make a decision

- A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

iii) Permitting unwise decisions

- A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- Just because a person decides to spend an exorbitant sum of money on a pair of shoes does not make that person lacking in capacity, no matter how unwise that decision may be.

iv) Pursuing best interests

- An act done, or a decision made, under the MCA for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

v) Least restriction of a person's rights and freedom

- All decisions should be evaluated to see if the intended objective can be achieved in a way that is less restrictive of the person's rights and freedom of action.

How may a person be appointed to make decisions for a person who lacks capacity?

Under the MCA, a person may be appointed to make decisions for an individual by two means. First, while the individual still has capacity, he could appoint a donee or donees through a lasting power of attorney. Second, a deputy may be appointed on application to the Court.

Deputy applications

Deputy applications are complex and understandably so: The Court would need to be satisfied that the individual indeed lacks capacity, and that the person that would be appointed as deputy is a suitable one. The application to Court needs to be supported by, among other things, a doctor's medical report attesting to the individual's lack of capacity in the forms prescribed by the Court. The medical report would need to contain sufficient details and information to assist the Court in determining whether the individual lacks capacity in relation to his personal welfare, or his property and affairs, or both.

Deputy applications may be expedited under certain circumstances, but such applications will still incur time and costs. This can be problematic, for example where the family needs to access an individual's assets to pay for healthcare, as these assets will be frozen until a deputy is appointed.

Lasting power of attorney

Under the MCA, a lasting power of attorney (LPA) can be drawn up before a certificate issuer (a medical practitioner accredited by the Public Guardian, a practising lawyer, or a registered psychiatrist) and registered with the Office of Public Guardian. Broadly, an LPA allows the donor to ap-

point a donee or donees who will have authority to make decisions on his behalf when he lacks capacity. A donee can be given power over two domains: personal welfare, which includes decisions on care and where to live; and property and affairs, which includes financial matters, such as dealing with banks and selling of property.

The law imposes some additional restrictions on a donee – for instance, donees cannot execute a will or make insurance nominations on the donor's behalf. An LPA can also be customised – for example, a donor could stipulate that his habitual residence should not be sold or that cash gifts should not be made.

In March 2016, Parliament passed a bill that seeks to amend the MCA by introducing professional donees and professional deputies. Potentially, this could give LPA donors more choice of donees.

In England and Wales (whose Mental Capacity Act 2005 is very similar to the Singapore statute), professionals have always been permitted to act as attorney or deputy and it is very common for them to do so. Many appointees are lawyers but accountants, financial advisers and local authority officials are also often appointed. Many donors of LPAs choose a combination of a family member and a professional. Trust corporations can also be appointed, but only for financial matters.

Furthermore, the MCA 2016 Amendment Act empowers the Court to refuse the registration of an LPA (or revoke the LPA if the donor lacks capacity to do so) if a donee of an LPA is convicted (or in some cases simply charged) of an offence of criminal misappropriation, criminal breach of trust, cheating, theft or extortion or any other offence involving fraud or dishonesty, whether against the donor or another person.

Naturally, the choice of donees is important. Should a donor appoint one or two separate donees for the separate powers concerning personal welfare, and property and affairs? The spheres of the two powers can overlap – for instance, a "personal welfare" donee is empowered to decide where the donor should live.

However, in practice, there is the financial question of how to pay for the accommodation. What if there are two separate donees for each type of power but they are not able to work together? These are just some of the practical issues that a donor would have to think through when drawing up an LPA. A customised LPA may be drawn up by a lawyer to suit the specific circumstances and considerations of the donor within the limits of the law.

Ultimately, the law is a creature that evolves to suit the needs of the society it serves. The MCA and lasting power of attorney offer important safeguards for an ageing society, but they should serve as just the starting point for any discussion of legal protections into one's old age. **W**

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