

RODYK & DAVIDSON LLP

MENTAL CAPACITY ACT 2008: LEGAL IMPLICATIONS

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LEGAL IMPLICATIONS

> TOPICS

> Introduction

> Assessment of capacity

> Whistle blower protection

> Undue Pressure

INTRODUCTION

> Terms:

> Accredited GP

> Assessment of capacity

> Certification

INTRODUCTION

> Accredited GP

> Paragraph 4.8.3 of the draft Code of Practice

“Formal Assessment

Accredited GPs who have been specially trained to conduct mental capacity assessments and specialists in mental health, such as psychiatrists, can conduct formal assessments. (The names of accredited GPs who have been trained can be found at [OPG website]”

INTRODUCTION

- > Assessment of capacity
 - > Form filling
 - > Conduct of assessment

INTRODUCTION

- > Certification – Purposes:
 - > Whether mental capacity to make a LPA
 - > Whether mental capacity to make certain decision(s)

INTRODUCTION

- > Whether donee of a LPA can make certain decision(s)
- > Application to court to make certain decision(s)
- > Application to court to appoint a deputy

ASSESSMENT OF CAPACITY

- > WHO CAN MAKE FORMAL ASSESSMENTS OF MENTAL CAPACITY?
 - > A general practitioner who is on the panel of accredited GPs who are entitled under the Act to make such assessments. This GP would have had to go through the requisite training and passed the tests jointly organised by MCYS and the College of Family Physicians

ASSESSMENT OF CAPACITY

> WHEN?

- > When a third party such as the lawyer acting for the parties in the sale and purchase of a property needs to verify whether a person empowered under a Lasting Power of Attorney has proper authority to carry out the transaction on behalf of the incapacitated person

ASSESSMENT OF CAPACITY

- > A donee of a Lasting Power of Attorney can only exercise the powers given to him when the donor no longer has the mental capacity to make the decisions relating to the matters specified in the Lasting Power of Attorney – more on this later

ASSESSMENT OF CAPACITY

> FORMALITIES

- > The GP would have to comply with the formalities prescribed by the Code of Practice issued by MCYS. This includes the completion of the prescribed Mental Capacity Assessment Form

ASSESSMENT OF CAPACITY

- > Reasonable care must be taken in assessing the incapacitated; akin to making a diagnosis
- > Ensure that Part A of the assessment form is completed by person requesting the assessment

ASSESSMENT OF CAPACITY

- > Understand the reasons for the assessment as set out in the completed Part A
- > Complete Part B of the assessment form

ASSESSMENT OF CAPACITY

- > The GP should not be related in any way to the person to be assessed or have any interest (financial or otherwise) in any matter concerning the person to be assessed.
- > If the GP's assessment is inconclusive, the GP should decline to make the certification in the assessment form or indicate his decision accordingly in the form.

ASSESSMENT OF CAPACITY

- > WHAT IF THE PERSON REFUSES TO UNDERGO A FORMAL ASSESSMENT?
 - > A person cannot be forced to undergo such an assessment. It may help to explain why such an assessment is necessary and the consequences of refusing to undergo the formal assessment.

[Paragraph 4.1 of the Code of Practice]

ASSESSMENT OF CAPACITY

- > Under the current draft of the Code of Practice, it is acceptable to conduct an assessment on the person even if he lacks the capacity to decide whether or not to go for the assessment, provided that the assessment is made in his best interest

WHISTLE BLOWER PROTECTION (SECTION 43 OF THE ACT)

- > Persons who lack mental capacity are vulnerable; they may not be aware that they are being ill-treated
- > The Act provides that it is a criminal offence if a person ill-treats or causes or permits such an incapacitated person to be ill-treated. Ill-treatment includes physical, sexual and emotional abuse

WHISTLE BLOWER PROTECTION (SECTION 43 OF THE ACT)

- > Generally, a healthcare worker owes duty of confidentiality to his patient
- > The Act gives protection to a healthcare worker who notifies the Public Guardian of a person whom the healthcare worker knows or has reason to suspect lacks capacity and is in need of care or protection

WHISTLE BLOWER PROTECTION (SECTION 43 OF THE ACT)

- > Such notification would not be regarded as a breach by the healthcare worker of the duty of confidentiality to his patient
- > If the healthcare worker acted in good faith in making the notification, he would not incur any civil or criminal liability in respect of such notification.

WHISTLE BLOWER PROTECTION (SECTION 43 OF THE ACT)

- > Any person appearing as a witness in any proceedings in any court or person authorised by law to hear evidence may not disclose the identity of any person who has made such notification or produce any information or document disclosing the identity or likely to lead to the disclosure of such person's identity

UNDUE PRESSURE

- > This term is used in the Act in connection with the formalities and validity of a Lasting Power of Attorney. There is no definition of this term in the Act

UNDUE PRESSURE

- > If the Court finds that undue pressure had been used to induce a donor to execute a Lasting Power of Attorney, the Court can direct that this should not be registered or order that it be revoked

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THANK YOU

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