

## FUTURE CARE PLANNING WITH FAMILIES: THE MENTAL CAPACITY ACT, DEPUTYSHIP, AND THEIR IMPLICATIONS

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### ABSTRACT

**This article is intended to give an overview of the current state of the Mental Capacity Act (“MCA”) and provide some thoughts on how deputyship works under the MCA framework. The article discusses the different categories of proxy decision makers and some of the limitations of proxy decision-making. It also seeks to stimulate some thoughts about the refinement of the current state of care for persons with no or reduced mental capacity.**

**Keywords: Deputyship, MCA, Mental Capacity, Court, Proxy Decision-Making**

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### INTRODUCTION

Since The Mental Capacity Act (MCA) came into effect in 2010, much has been written and discussed about it, from interpretation of the clauses to the application in practice. This article is intended to give an overview of the current state of the MCA and provide some thoughts on how deputyship works under the MCA framework.

To place the significance of the MCA in context, the law protects persons with mental incapacity (hereafter referred to as “P”) by rendering actions taken by them while mentally incapacitated to be void. For example, any contract made by a person while mentally incapacitated would be void. Following this, third-party service providers to P would be unable to take instructions from P, or to act on any decisions made by P, if the service providers are unsure of P’s mental capacity. While the law seeks to protect P, the law recognises that there is a need for a mechanism that allows for decisions to be made for P in order for P to continue to enjoy a certain quality of life. If there is no such mechanism, even if P should have the resources, he would be unable to access the resources for his own care.

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### GENERAL FRAMEWORK OF THE MCA

The MCA provides a framework for how P should be treated and mechanisms that can be put in place for decisions to be made for P. It is worth noting that the MCA relates to decisions to be made for P in the future. This article does not intend to reproduce the various sections but rather to give a brief overview of the provisions.

Section 3 of the MCA sets out the principles of which P should be treated. The five guiding principles are:

- a. A person is assumed to have capacity unless it is established that he has no capacity.
- b. A person is not to be treated as unable to make a decision unless all practical steps have been taken without success.
- c. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- d. An act done or decision made for or on behalf of a person who lacks capacity must be done or made in his best interests.
- e. Before the act is done or decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.

Sections 4 and 5 lay out the test for mental capacity. It is important to keep in mind that the test is decision- and time-specific.

Section 6 provides some guidance on acting in the best interests of P while Sections 7-10 give authority to caregivers and medical practitioners to make decisions for P in relation to care and treatment without liability.

Sections 11-18 provide the establishment of the Lasting Power of Attorney while Sections 19-25 set out the general powers of the court and the appointment of deputies, including the provisions for professional deputies.

Section 26 sets out the decisions that cannot be made by any proxy decision-makers and Sections 30-37 establishes the Office of the Public Guardian.

Section 41 allows the ministry to issue codes of practice to guide practitioners through the various instruments and processes established by the MCA. Section 42 makes it an offence to ill-treat persons with mental incapacity where the punishment can be a fine, an imprisonment, or both, and Section 43 is the whistle-blower provision, which protects the whistle-blower from being identified and protects any healthcare worker from liability and breach of professional code.

## PROXY DECISION-MAKERS

As can be seen from the general framework of the MCA, we have laws that seek to provide the means in which assistance can be rendered to P and at the same time protect the interests of P by giving power to third parties to make decisions for P.

These proxy decision-makers can be:

- a. **The Court:** The Court can exercise the widest powers when making decisions for P. Anyone wishing for decisions to be made on behalf of P can make an application to the Court for the Court to make the decisions. This power, however, is not unlimited. Section 26 of the MCA lists the decisions that even the Court cannot make for P. These include decisions relating to matters such as sterilisation, consenting to touching of a sexual nature, and renunciation of religion. Moreover, it must be noted that the Court will only make decisions when an application is made to the Court for a decision.
- b. **A donee under the Lasting Power of Attorney:** The MCA provides for a person,\* while still in possession of his mental capacity, to appoint a donee or donees to be his proxy decision-maker should he lose his mental capacity. As the donee or donees are selected by the person (the doner), the doner can decide the extent to which he would like the donee to make the decisions for him. It can be as wide as giving the donee all the decision-making powers in relation to his personal welfare and property and affairs or as narrow as making decisions relating only to his bank account. Again, these powers are not unlimited. The MCA provides that certain powers must be retained for decision-making by the Court such as making a will for P.† Needless to say, a donee will not have powers that are not given specifically under the LPA and must resort to seeking the assistance of the Court to make such decisions.
- c. **A deputy or deputies appointed by the Court‡:** Upon application, the Court can appoint a deputy to make decisions for P. The powers delegated would be specifically listed in the court order and the deputy will need to seek the Court's approval should he require more decision-making powers. The application can be cumbersome and costly. The deputy may also be required to seek the Court's approval each time he needs to make certain decisions if the Court believes that it is in the best interests of P to not empower the deputy with broad powers. The deputy is also required to file an annual report with the Office of Public Guardian (OPG).
- d. **Caregivers and medical treatment providers under Section 7 of the MCA:** The MCA specifically provides for caregivers, doctors, and nurses to make decisions in the care of P, such as when and what to feed P, what P should wear, and deciding on necessary medical treatment.

## DEPUTYSHIP

There are situations where either no LPA is made, or the proxy decision-maker's powers are limited, or the proxy decision-maker is no longer able to make decisions for P, or P is not able to make an LPA as he never had the mental capacity to do so. The appointment of a deputy by the Court will assist the family and caregivers in making decisions to care for P. A deputy can also be allowed access to P's funds. This will enable the caregiving decisions to be carried out without any fear of liability or being out of pocket as long as the deputy adheres to the court orders and acts in the best interests of P.

When the Court is faced with an application for a person to be appointed a deputy for P, the Court has to decide on three main issues. First, the Court has to decide if P has mental capacity in the specific areas that the applicant has applied for powers to make decisions for P. Second, the Court has to decide if the applicant will be the right person to confer the powers. Third, the Court has to decide on the extent of the powers to confer upon the deputy. The Court is very conscious of the fact that P has not selected the proxy decision-maker. The Court will, apart from being very careful on making a declaration that P has no mental capacity, also need to be cautious on who the proxy decision-maker is, and how much power to give to the proxy decision-maker.

## THE TEST FOR MENTAL CAPACITY

Section 4(1) of the MCA lays down the test for mental capacity as follows:

For the purposes of this Act, a person who lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or the brain.

This is a 2-step test. The functional component requires the person to be unable to make a decision for himself in relation to the matter, while the clinical component requires the inability to be due to an impairment of or a disturbance of the mind or the brain. It also requires the test to be applied each time a decision is to be made.

The Court will require the evidence of the medical practitioners to determine if the clinical component of the test is satisfied. The medical practitioners will need to identify the impairment and state if and how the impairment would affect P's abilities to make decisions. The Chief Justice in *Re BKR#* states that "We need medical professionals to tell us whether P has a mental impairment based on the observable symptoms and any other diagnostic tools available, and if so, what that impairment is, and what effect it has on P's cognitive abilities".#

However, in respect of the functional component, the Chief Justice in *Re BKR* opined that "But as to the functional

component, it is in our judgment a question for us to grapple with leaving perhaps a limited scope for the involvement of the medical experts”.<sup>#</sup>

The Chief Justice then went on to point out that “... it is ultimately the court [that] must decide whether P lacks the ability to make decisions within the meaning of §5(1) of the MCA...”.<sup>#</sup>

## **TYPES OF ORDERS**

Once the Court, on a balance of probabilities,<sup>♦</sup> finds that P is unable to make the specific decisions, the Court has to decide on whether it is in the best interests of P to appoint a deputy. If so, is the applicant a suitable deputy? Should the applicant be suitable, the Court then has to decide to what extent the powers should be conferred. Bearing in mind that proxy decision-makers are to assist in making specific decisions at specific points in time, the Court will refrain from making broad orders. The Court will generally prefer to make the orders only when there is a need at that point in time, e.g., if there is no immediate need to liquidate the shares of P, due to sufficient money in P’s bank accounts for P’s needs, an application for powers to sell shares of P would not be granted.

The Court has to balance between efficacy and the protection of P’s interests.

## **PROFESSIONAL DEPUTIES**

As our society becomes more complex, family and friends may be reluctant to step up to act as proxy decision-makers for P for fear of the responsibilities and the onerous duties involved. Deputies owe fiduciary duties to P and, in addition to having to adhere to the court order and the codes of conduct, they will also have to complete an annual report to the OPG, which is subject to scrutiny by the OPG. Deputies are only reimbursed for their expenses. There will be beneficiaries of P’s estate who will be reluctant to step up as they benefit the most from P’s estate if left intact upon the demise of P.

The MCA was amended in 2016<sup>♥</sup> to allow for the appointment of professional deputies. These professional deputies can be reimbursed from P’s assets for serving as proxy decision-makers for P and essentially taking care of P. Such professional deputies cannot be relatives of P, whether by blood or marriage, and must be registered with the OPG. The professional deputies structure is regulated by the Mental Capacity (Registration of Professional Deputies) Regulations 2016. With this development, if P has a reasonably substantial estate, professional deputies can be appointed, and these deputies (and P) would have the benefit of insurance in the event of claims against the deputies or if the professional deputies has acted negligently. As this option is relatively new, we will need time to see how effective this option is as there are issues such as to the quantum of fees that such professional deputies can charge.<sup>♦</sup>

Professional deputies currently must be individuals (unless it is a licensed trust company for financial matters) and issues concerning succession have yet to be resolved.

## **ARE THERE ALTERNATIVES TO DEPUTYSHIP?**

Deputyship may not always be immediately required as soon as a person is diagnosed with dementia or as soon as an intellectually disabled child turns 21. The key issue is whether there are decisions that may need to be made by P at that point in time. If there is a caregiver who is already taking care of P and has sufficient resources to take care of P, there may be no need for the appointment of a deputy.

Setting up a trust for P may be an alternative to the appointment of a deputy. A caregiver or parent could set up a trust with a Licensed Trust Company where the resources are placed with the trust companies. The parent or caregiver can set out his wishes on how P is to be cared for. Some trust companies will manage personal welfare together with property and affairs, but the fees charged will be high and indemnities will need to be provided to the trust companies.

It is important to mention that in Singapore, the Special Needs Trust Company Ltd (SNTC) has been set up to assist caregivers for people with special needs to provide trust services for nominal fees. The money injected into the trust will be managed by the Public Trustee and the principal amount of the trust money is guaranteed by the government. However, even though the SNTC will only manage the financial matters for P via the trust fund, it is staffed with social work-trained case managers and will commit to conducting visits to P periodically to ensure P’s wellbeing. In many cases, this may be a solution if a suitable deputy cannot be appointed.

## **CONCLUSION**

The MCA has indeed provided “A law to support dignified living”.<sup>♦</sup> It provides guidance on how mental capacity should be assessed and the mechanisms for planning ahead, as well as proxy decision-making. Since coming into effect in 2010, refinements have been made such that the application of the law is easier and smoother for doctors, lawyers, and caregivers. The application for deputyship can be daunting, laborious, and expensive, and the Court has introduced a simplified online application for applications made by relatives of P and for use of sums not exceeding \$80,000.<sup>♦</sup> This has provided relief to numerous parents of intellectually disabled children as they will be able to access funds from government grants, which require payment into the bank account of P, as well as making medical decisions and the like for P. The OPG has also made filing of the annual reports easier with an online system coming live in the near future which has functions that allow deputies to track the expenses and income of P.

However, as our society becomes more sophisticated, we need to keep up with the developments and needs in the care process from what we have learnt since 2010. Some areas for consideration could be whether, for personal welfare decisions, a proxy decision-maker can be an organisation instead of being restricted to an individual. Such organisations could be a social work agency or a law firm. Caregivers would not have to worry about any disruption to the care of P should the deputy appointed be unable to act for P in the future.

We must always remember that we should respect those who cannot take care of themselves, and we must continually strive to maintain their dignity. The MCA is a significant and progressive piece of legislation that strives to balance autonomy and protection for mentally incapacitated people. More awareness and knowledge about the MCA would increase our ability to fully appreciate and utilise the MCA as a formidable tool for the care and protection of such vulnerable people.

Footnotes:

<sup>1</sup>The Mental Capacity Act (Cap 177A, 2010 Rev Ed) §13

<sup>2</sup>The Mental Capacity Act (Cap 177A, 2010 Rev Ed) §25

<sup>3</sup>The Mental Capacity Act (Cap 177A, 2010 Rev Ed) §18

<sup>4</sup>Re BKR [2015] 4 SLR 81 at [134]

<sup>5</sup>The Mental Capacity Act (Cap 177A, 2010 Rev Ed) §4; it is worth noting that the civil standard of balance of probabilities is the standard to apply for determination of mental capacity as opposed to the criminal standard of having to prove beyond reasonable doubt. i.e., evidence shows that it is more probable or more likely than not.

<sup>6</sup>Mental Capacity (Amendment) Act 2016 (Act 10 of 2016) §8

<sup>7</sup>The Office of Public Guardian has issued a Code of Practice Professional Deputies and Donees, which provides some guidance on how the fees can be charged.

<sup>8</sup><https://www.msf.gov.sg>: analytics report

The application can be made via The Integrated Family Application Management System, also known as iFams <<https://ifams.gov.sg/sop/process/iFAMS/MCAHomes#iFAMS>>

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## LEARNING POINTS

- **There is a need for proxy decision-makers when a person loses or has no mental capacity as decisions made by persons without mental capacity are void.**
  - **The Mental Capacity Act is the legislation that provides for a mechanism for proxy decision-makers and for the care of persons without mental capacity.**
  - **The Court must balance between efficacy and protecting P's interests in making decisions relating to P's personal welfare, property, and affairs.**
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