

MENTAL INCAPACITY: DO WE HAVE THE WILL TO CARE FOR THOSE WHO ARE VULNERABLE?

PART 2: LEGAL AFFAIRS



(i) The Singapore experience

Presented by Sim Bock Eng TEP

Chair STEP Singapore

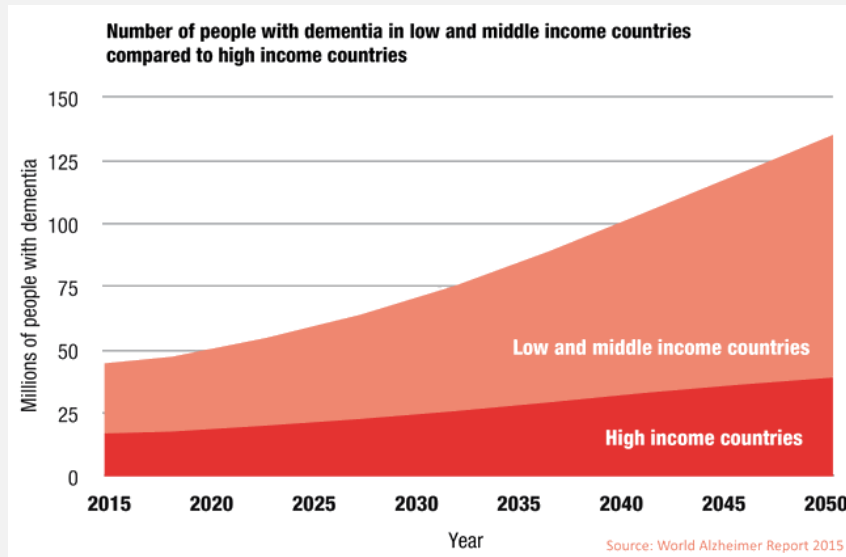
Mental Capacity – A Singapore Perspective

SIM Bock Eng

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ASEAN | CHINA | MIDDLE EAST

Dementia



For Malaysia (Statistica 2019)

2015 – 123,000

2030 – 261,000

2050 – 590,000

For Singapore

2018 – 82,000

Mental Capacity Act

- Wef 1 March 2010
- “replaced” Mental Disorders and Treatment Act
- Change in approach

- Office of Public Guardian
- When a person lacks mental capacity
- Lasting Power of Attorney
- Deputyship
- Limitations on authority

Principles

- Presumption of capacity
- Being helped to make decision
- Unwise decisions
- Best interest
- Less restrictive

Section 3 Mental Capacity Act

When a person lacks capacity

“... a person 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 brain.”

(emphasis added)

Section 4(1) Mental Capacity Act

When a person lacks capacity

Functional component - Inability to decide

If P is unable to

- understand the information
- retain the information
- Use or weigh the information
- Communicate the decision

For the court to decide.

Clinical component - Because of impairment/ disturbance

- Undue influence
- Duress
- Must be the “effective” cause” but need not be the only effective cause

Medical professionals to ascertain based on symptoms and diagnostics tools

When a person lacks capacity

- Time specific
- Decision specific
- Impairment – alcohol, medication

- Subjective test

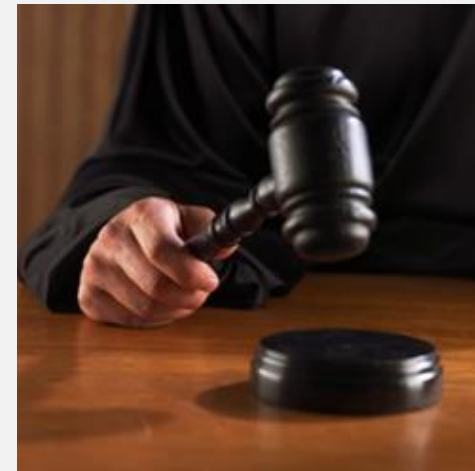
Re Gav [2014] SGDC 215

- Schizophrenic
- Able to make decisions



Consequences

- Hsu Ann Mei Amy v. OCBC Ltd [2011] SGCA 3
- Riaz LLC v. Sarin bin Abbas [2013] SGHCR 18
- Re BKR [2015] SGCA 26



Lasting Power of Attorney

- A power of attorney which allows Donor to appoint one or more Donee to make decision on his behalf if Donor should lose his mental capacity.

- **Two broad areas:**

- Personal welfare
- Property and affairs

- **Donees**

- Individuals older than 21 years old; no remuneration
- Professional donees – not related to P by blood or marriage
- Corporate professional donees – only for property and affairs



Lasting Power of Attorney

- Types of decision making

- What donee can do
- What donee can do if expressly allowed
- Excluded matters
 - Marriage, divorce, adoption
 - Sex, religion, gender change
 - Donation of organs, corpse, sterilisation
 - Advanced Medical directive
 - Nominations under insurance policies, for CPF monies

Lasting Power of Attorney

- 2 Forms

- Donor and Donees to sign
- Certificate issuer
- Must be registered with Office of the Public Guardian (OPG)

- Form 1 (standard)

- Up to 2 Donees, one replacement Donee
- All matters relating to personal welfare
 - Option – clinical trial
- All matters relating to property and affairs
 - option –
 - not to deal with one property
 - Make gift

Lasting Power of Attorney

- Form 2 (customised)

- Must be drafted by a lawyer
- Few limits
 - Cannot have donees acting by majority decision

- Revocation

- By Donor when he has capacity
- By court



Appointment of Deputy

- Court may

- Make decision for P
- Appoint a deputy to make decision for P

- Principles

- Preference for decision by the court
- Limited scope and duration of powers of deputy

- Court's power

- Prohibiting contact with persons
- Carrying on of P's trade/ business
- Nomination under insurance policies and for CPF monies
- Execution of will
- Provision for maintenance of spouse
- Power to act as trustee

Appointment of Deputy

- **Need permission of court unless:**
 - Application by person related by blood or marriage to P
 - Interim application
- Application must be served on:
 - P
 - Defendant
 - “relevant persons”



Appointment of Deputy

- Relevant Persons

- P's spouse
- P's children (aged 21 and above)
- P's parents or guardians
- P's brothers or sisters (aged 21 and above)
- Others??

- Unless there are circumstances which reasonably indicate that they should not be served.

Acts in connection with care and treatment

- No liability for acting without consent if:

- Before acting – D takes reasonable step to establish whether P has capacity and
- When doing the act, D reasonably believes that P lacks capacity and that it is in P's interest

- If act involves restraining P – additional conditions:

- D reasonably believes that it is necessary to prevent harm to P
- Act is a proportionate response to the likelihood of P suffering harm and the seriousness of the harm.

Cross border issues

- LPAs from other jurisdictions (Second Schedule, para 7 Sg MCA)
- Difficulties re LPAs or Orders made under Sg MCA
 - Eg setting aside of trust in Re BKR – BVI Trustees

Social issues

- **Appointment of deputies**
 - Professional donees and deputies
 - MSFD program for application of deputyship
- **Set up of trusts**
 - Special Needs Trust Company Ltd (SNTC)

Thank you



SIM Bock Eng

Head – Specialist & Private Client Disputes

d +65 6416 8108

f +65 6532 5722

e bockeng.sim@wongpartnership.com