

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

PART 2: LEGAL AFFAIRS



(ii) Mental incapacity: the legal framework

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Mental Incapacity – the legal framework in Malaysia

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Mental Incapacity – the legal framework in Malaysia today

- Relevant Definitions of mental disorder and incapacity in Malaysia law today.
- Social protection Laws.
- What you can do:
 - ✓ Powers of Attorney Act 1949
 - ✓ Private wills and trusts
- Court powers under Mental Health Act 2001.

Meaning of “Mental Capacity”

- **Section 3 Trustee Act 1969**

“mentally disordered person” means any person found by due course of law to be unsound mind and incapable of managing his affairs;

“person of unsound mind” means any person, not a minor, who, not having been found to be a mentally disordered person, is incapable from infirmity of mind of managing his own affairs;

- **Section 2 Income Tax Act 1967**

"incapacitated person" means a minor or a person adjudged under any law to be in a state of unsoundness of mind (however described);

- **Section 2 Persons with Disabilities Act 2008**

persons with disabilities" include those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society;

Meaning of “Mental Capacity”

- **Section 2 & 51 Mental Health Act 2001 (came into operation only on 15 June 2010)**

“mental disorder” means any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any other disorder or disability of the mind however acquired; and “mentally disordered” shall be construed accordingly;

“mentally disordered person” means any person found by due course of law to be mentally disordered and incapable of managing himself and his affairs;

- **Section 2 of the Probate and Administration Act 1959**

“person of unsound mind” refers to definitions in the old Mental Disorders Ordinance 1952 [*Ord. 31 of 1952*], the Lunatics Ordinance of Sabah [*Cap. 74*] and the Mental Health Ordinance 1961 of Sarawak [*Ord. 16 of 1961*] which have all been repealed by the Mental Health Act 2001. Hence to follow the definitions in the Mental Health Act 2001.

Meaning of “Mental Capacity”

General consensus: *incapable of managing oneself and one’s affairs*

- Not necessary to have to have a medically recognized mental disorder, in a conventional sense.
- Can include illnesses such as dementia.

Social Protection Laws

Laws that provide for the protection of vulnerable persons:

- **Persons with Disabilities Act 2008**
 - ✓ Provides for social protection services in areas such as health, rehabilitation and education for persons with disabilities;
 - ✓ National Council for Persons with Disabilities;
- **Mental Health Act 2001 and Mental Health Regulations 2010**
 - ✓ Court powers through the appointment of committees to manage the affairs of a mentally disordered person.
- **Private Healthcare Facilities and Services Act 1998**
 - ✓ Private sector driven.
 - ✓ Seeks to regulate private healthcare facilities and services.
- **Care Centres Act 1993**
 - ✓ Regulates residential care centre and a day care centres.
- **Private Aged Healthcare Facilities and Services Act 2018 (not yet in force)**
 - ✓ Private sector driven.
 - ✓ Seeks to regulate private aged healthcare facilities and services, for example retirement villages.

What you can do

What can an individual do to protect himself?

- **Power of Attorney Act 1949.**
 - ✓ Most countries use the concept of a lasting power of attorney:
 - Singapore – Lasting Power of Attorney under the Mental Capacity Act 2008;
 - UK - Mental Capacity Act 2005 – extends to personal welfare/property and affairs;
 - New Zealand- Protection of Personal and Property Rights Act 1988 sets out the laws on Enduring Powers of Attorneys. EPA is a legal document which sets out who can take care of your personal or financial matters if you are unable to make or communicate decisions yourself because of accident, illness or incapacity;
 - Ontario, Canada - Substitute Decisions Act 1992 allows you to appoint someone you trust, in advance, “attorney for personal care” to make decisions for you if you become mentally incapable;
 - South Africa - Assisted Decision-Making: Adults with Impaired Decision-Making Capacity (Bill not in force yet);
 - Ireland - Assisted Decision-Making (Capacity) Act 2015.
- **Private Wills and Trusts.**

What you can do - Powers of Attorney Act 1949

- Execute a Power of Attorney under the Act to delegate authority to the donee to make decisions on the donor's behalf if the donor loses capacity in the future **specifically in accordance with sections 6 and 7.**
- Protection in the event of loss of capacity is entrenched via sections 6 and 7 of the Act:
 - ✓ an irrevocable power of attorney or a power of attorney expressed to be irrevocable for a fixed time, given for valuable consideration, shall not be revoked at any time by, among other things, the mental disorder and unsoundness of mind of the donor.
 - ✓ section 6(1)(b) provides that any act done at any time by the donee in pursuance of the power shall be valid as if the mental disorder or unsoundness of mind of the donor of the power had not happened. Neither the donee of the power or the purchaser shall at any time be prejudicially affected by notice of the mental disorder and unsoundness of mind of the donor during the power.

What you can do - Power of Attorney Act 1949

- **Limitations**

- ✓ the powers which may be exercised by the donee is limited by the scope of the powers granted by the donor. Therefore, where a power of attorney was granted under sections 6 or 7 of the Act is in relation to **a specific power**, e.g. the sale of a specific property, in the event the donor loses capacity, the donee will only be able exercise the powers granted to him under the power, which in this case will be the power to sell the specific property, and not the power to deal with the donor's affairs generally.
- ✓ The power under the Act must be for valuable consideration – hence question mark where a general power to manage affairs in the event of mental incapacity will satisfy the valuable consideration test.

What you can do - Power of Attorney Act 1949 – section 6

Section 6. Powers of attorney given for valuable consideration.

(1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser—

(a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and

(b) any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(c) neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power.

(2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

What you can do - Power of Attorney Act 1949 – section 7

Section 7. Powers of attorney expressed to be irrevocable for a fixed time.

If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, then, in favour of a purchaser—

(a) the power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and

(b) any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(c) neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

What you can do - Power of Attorney Act 1949

- **Ensure validity of the Power of Attorney by complying with all formalities under the Act:**
 - ✓ Authentication by one of the following persons :
 - if executed within Peninsular Malaysia, the instrument is executed before (i) a Magistrate; (ii) a Justice of the Peace; (iii) a Land Administrator; (iv) a Notary Public; (v) a Commissioner for Oaths; (vi) an advocate and solicitor; or (vii) an officer, acting in the course of his employment, of a company carrying on the business of banking in Peninsular Malaysia and incorporated by or under any written law in force in Peninsular Malaysia;
 - if executed outside Malaysia, the instrument is executed before (i) a notary public; (ii) a commissioner of oaths; (iii) any judge; (iv) a magistrate; (v) a British Consul or Vice-Consul; (vi) a representative of Her Britannic Majesty; (vii) on and after Merdeka Day, any Consular Officer of Malaysia; (viii) in the case of an instrument executed in the Kingdom of Saudi Arabia, the Malaysian Pilgrimage Commissioner; or (ix) in the case of an instrument executed in the Republic of Singapore, an advocate and solicitor of the Supreme Court of the Republic; or an officer, acting in the course of his employment, of a company carrying on the business of banking in the Republic and incorporated by or under any written law of the Republic.

What you can do – Power of Attorney Act 1949

- **Authentication in the following prescribed format:**

- ✓ Power of attorney executed by an individual

I (Magistrate, Justice of the Peace, Land Administrator, Notary Public, Commissioner for Oaths, Bank Official *or* Advocate and Solicitor of the High Court in Malaya) officiating [*or* practising] at....., hereby certify that the signature/thumb-mark of the donor above named was written/affixed in my presence on this day of 20, and is, to my own personal knowledge, [*or* according to information given to me by trustworthy and respectable persons, namely of and of, which information verily believe,] the true signature/thumb-mark of who has acknowledged to me that he is/is not of full age and that he has voluntarily executed this instrument.

Witness my hand

- **Deposit of Power of Attorney in the High Court of Malaya**

- ✓ For a power of attorney to be effective in West Malaysia, the power of attorney will have to be deposited with the High Court of Malaya under section 4 of the Powers of Attorney Act 1949. There is a fee to be paid for the deposit of the power of attorney.

What you can do – Private Wills and Trusts

- **Private Wills – deals with a testator’s wishes and distributions after death.**
 - ✓ **Living wills** – or advance decision or advance directive, is a document to record your decisions as to the circumstances and types of medical treatment that you wish to refuse in the event that you do not have the capacity to communicate the decision yourself.
- **Private Trusts – allows a settlor to transfer assets and investment decisions to the trustee when living. Trust provides the trustee will have full decision making powers upon death or incapacity.**

Court powers under Mental Health Act 2001

- **Where no powers of attorney have been executed**
- ✓ On an application made to the High Court, the High Court may order an inquiry to determine whether a person is mentally disordered and incapable of managing himself and his affairs due to such mental disorder.
- ✓ High Court may, by its powers under section 54 require the applicant to produce the person alleged to be mentally disordered at such time and place as the High Court may appoint, for the purpose of being personally examined by the High Court or by a psychiatrist from whom the Court may desire to have a report of his mental capacity and condition.
- ✓ The psychiatrist shall consider the nature and degree of the person's condition, the complexity of his estate, the effect of the condition of the person upon his conduct in administering his estate and any other circumstances the psychiatrist considers relevant to the estate and the person and his condition. The assessment of capacity is a question of fact.
- ✓ Section 58 provides that where a person who is alleged to be mentally disordered is found by the High Court to be incapable of managing himself and his affairs due to his mental disorder, **the High Court may appoint a committee or committees of the person and of the estate of the person.** However, if the person is found incapable of managing his affairs due to his mental disorder but is not dangerous to himself or to the others, the High Court may appoint a committee of his estate without appointing a committee of his person.

Court powers under Mental Health Act 2001

- In the event of incapacity, affairs are handled primarily an appointment of committee through a court process to manage a mentally disordered person's affairs.

- ✓ **Section 58. Appointment of committees.**

(1) If the Court finds that the person who is alleged to be mentally disordered is incapable of managing himself and his affairs due to his mental disorder, the Court may appoint a committee or committees of the person and of the estate of the person and may, as the Court deems fit, make an order—

(a) as to the remuneration, if any, of the committee or committees out of the person's estate; or

(b) as to the giving of security by the committee or committees.

(2) Where the Court finds that the person alleged to be mentally disordered is incapable of managing his affairs due to his mental disorder but is not dangerous to himself or to others, the Court may appoint a committee of his estate without appointing a committee of his person.

- ✓ **Section 59. Powers of management of estate of mentally disordered person.**

(1) Subject to subsection (2), the Court may, on the appointment of a committee of the estate of a mentally disordered person, direct by the appointment or by any subsequent order that the person to whom the charge of the estate is committed shall have such powers for the management of the estate as the Court deems necessary and proper, regard being had to the nature of the property, whether movable or immovable, of which the estate may consist.

(2) The powers of management conferred under subsection (1) shall not extend to the sale or charge of the estate or any part of the estate or to the letting of any immovable property for a term exceeding three years.

Court powers under Mental Health Act 2001

Court has extensive powers:

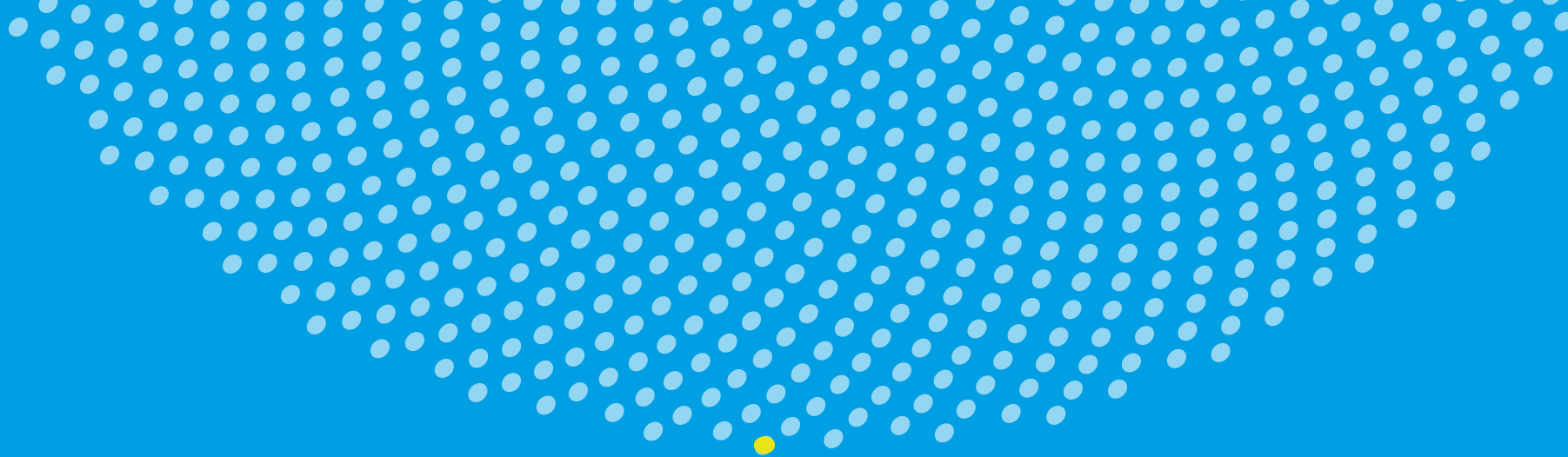
- Order that property, movable or immovable, be sold or charged for the purpose of raising money for the payment of debts, including debts for the maintenance of the mentally disordered person, discharge of encumbrance on his estate, maintenance expenses for his family;
- Order that the committee of the estate of the mentally disordered person shall execute all conveyances and instruments of transfer in relation to any sale or charge;
- Order that a partnership that the mentally disordered person is in, be dissolved;
- Order the committee to sell and dispose of business premises, and the proceeds be applied in such manner as the Court decides;
- Order the committee to surrender, assign or dispose of a lease or sublease that the mentally disordered person is entitled to;
- Order the transfer of stock, securities, shares or debentures owned by the mentally disordered person, and the subsequent receipt and payment of dividends in such manner as the Court thinks fit;
- Order the committee to effect the transfer of property outside Malaysia, to the committee, curator or manager or otherwise, and to receive and pay over any proceeds or profits of the property as the Court thinks fit;
- Where a committee is not appointed, Court may order for the mentally disordered person to be received into a government psychiatric hospital or a gazetted private psychiatric hospital.

Court powers under Mental Health Act 2001

- Possible to annul Court proceeds if a person ceases to be mentally disordered:

- ✓ **Section 74. Annuling proceedings.**

- (1) Where a person has been found to be incapable of managing himself and his affairs due to his mental disorder and it is subsequently shown to the Court—
 - (a) on the application of that person;
 - (b) on the application of a person acting on his behalf; or
 - (c) on the information of any other person,that there is reason to believe that such incapability has ceased, the Court may make an order for an inquiry to determine whether the person is now capable of managing himself and his affairs.
- (2) The inquiry under subsection (1) shall be conducted in the same manner as that prescribed for an inquiry into whether a person alleged to be mentally disordered is incapable of managing himself and his affairs.
- (3) Where upon an inquiry under this section the Court finds that the person is now capable of managing himself and his affairs the Court shall order all proceedings in the matter to cease or to be set aside on such terms and conditions as it deems proper.



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