

In our second instalment on the topic of vulnerable adults, we provide a brief introduction to the Mental Capacity Act.

Part 2:

The Mental Capacity Act

The Mental Capacity Act was enacted so as to provide the legislative framework and guidelines required to be followed when loved ones or third parties are appointed to act for incapacitated persons.

As a start, let us be reminded that persons who have executed a Lasting Power of Attorney (known as the Donor) would have identified the individual or individuals chosen to be the decision-makers for the Donor (known as the Donee/Donees).

The Lasting Power of Attorney will typically contain a list of instructions for the Donee to perform, whether such instructions are broadly worded or specifically drafted. An example of a broad instruction is the direction to the Donee to manage the Donor's HDB flat or all the Donor's cash in bank accounts. An example of a specific instruction may be to have the Donee arrange for the Donor to be taken care of for full time at a specified nursing home on the occurrence of a specific event.

Where there is no Lasting Power of Attorney, the Mental Capacity Act spells out the process by which the Court may appoint suitable family member/members to be the incapacitated person's decision maker (known as the Deputy/Deputies). The Court is empowered to make directions and orders in relation to the elder's property affairs and/or personal welfare matters.

This legislation has been invoked for suitable persons to step forward to act for elders at risk when the elder in question has lost the mental capacity to manage his/her personal welfare, and/or property and affairs.

The Act has also been invoked in cases where a Lasting Power of Attorney has been signed. In cases where the Donee appointed by virtue of a Lasting Power of Attorney fails to act in the interest of the incapacitated Donor, the Court is empowered to step in to provide legal redress. In other words, where circumstances show that there is an abuse of power, misconduct, or over-stepping of authority on the part of the Donee, the Court acts as a protector of the elder's best interest.

Anyone who has experience in caring for an elder or anyone with a mental infirmity will know that it is often not an easy task to discern what is or what is not in the best interest of the incapacitated person. How is a Deputy/Donor to step into the mind of the infirm to ascertain what he/she would do if there was no loss of mental incapacity?

For the sake of illustration, let us suppose that an elder had, prior to the onset of her dementia, developed a close friendship with her domestic helper. To reward the helper's loyalty and affection, she had generously lavished the helper with cash gifts on special occasions. The question emerges whether the Deputy ought to perpetuate the giving of such cash gifts after the elder loses capacity due to advanced dementia. If the answer is Yes, would the answer still be Yes if the domestic helper subsequently develops an addiction to online betting, and she would squander all cash to feed her addiction? Would the response be any different if the elder has previously expressed her wish to take care of her domestic helper for life as if she was her own daughter?

The Mental Capacity Act serves to set out the important principles by which the Deputy is required to adhere to in the decision making and management process on behalf of the elder. In considering whether the elder has or has not lost her capacity, the guidelines are:

1. It is assumed that she has her mental capacity unless proven that she does not.
2. She shall not be treated as unable to make a decision unless all practicable steps to help her to do so have been taken without success.
3. That the elder had made bad decisions in itself does not mean that she has no capacity.

In assessing whether a person has the capacity to make his/her own decision, questions to be asked are:

1. Can he/she understand the information needed for him/her to make a decision?
2. Can he/she remember the information?
3. Can he/she use the information to help himself/herself to decide?
4. Is he/she able to communicate his/her decision?

Example
John is diagnosed with Alzheimer's disease. He may be able to make simple decisions for himself, such as his food choices to consume for the day. But John might not have the capacity to make more complex decisions such as those relating to his finances and assets.

Unless the person is in a comatose state or advance stages of mental impairment, there may be varying degrees of his cognitive functions. In assessing whether or not one has no or lost the mental capacity, all relevant facts and circumstances must be considered.

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