The Mental Capacity Act 2008

WHAT CAN YOU DO when someone close to you is mentally incapacitated? How can you arrange to organise his affairs? A common situation which we encounter in our private clients practice is where the family breadwinner suddenly becomes mentally incapacitated (e.g., after a stroke or an accident) and his dependants are not able to access his bank account to pay the bills. Other problems arise where a person has been mentally incapacitated since birth.

Present law: A mentally incapacitated person is legally incapable of granting a power of attorney to a friend or relative to take care of his affairs. Also, being of unsound mind, he cannot make a watertight will. There is a procedure for the appointment of a family member (known as a “committee”) to manage a mentally disordered person’s affairs. But this procedure is cumbersome and time consuming.

Future law: The Mental Capacity Act 2008 (“MCA”) passed on 15 September 2008 and expected to come into force within 2009, seeks to plug gaps in the present law in situations concerning persons lacking mental capacity, whether the incapacitating condition has been present since birth or where a person loses his mental capacity later in life.

Appointment of deputy: The MCA will confer upon the High Court a general power to make decisions and/or appoint a “deputy” to make decisions on behalf of a person lacking mental capacity in relation to his personal welfare or property and affairs. A person who is a “committee” under the present law will be deemed to have been appointed as a “deputy” under the MCA.

Lasting Power of Attorney: Another important new feature to be introduced by the MCA is the “lasting power of attorney” (“LPA”). In general, a power of attorney is automatically revoked in the event of the donor’s death, unsoundness of mind (i.e., mental disorder) or bankruptcy. By creating an LPA in the prescribed form and in compliance with prescribed procedure, an individual (the “donor”) will be able to appoint a family member or friend (the “donee”) to make decisions on his behalf in the event that he loses his mental capacity.

Wills: Also, the High Court will have power to make a will on behalf of a person who loses his mental capacity, on the application of a person (e.g., a dependant) who would suffer inappropriate, unfair and unjust results because of the absence of a will.

Recourse to Courts: Persons who will be able to apply to the High Court to exercise its powers under the MCA include an official to be known as the Public Guardian, individuals alleged to lack mental capacity, donors and donees under an LPA and deputies.

Safeguards against abuse: Since the MCA potentially gives donees very wide powers, there is concern about potential abuse of these powers. Safeguards include:

- The donor of the LPA must be over the age of 21 years and have mental capacity at the time of creating the power.
- A donor may revoke an LPA at any time while he has capacity to do so.
- A donee may make gifts on behalf of the donor only if there is express authorization in the LPA and subject to preserving the donor’s assets as far as is reasonably practicable, for maintenance of the donor during his lifetime.
- The MCA prescribes certain decisions which the donee under an LPA cannot make on behalf of the donor. A few examples of these are: consenting to marriage; adopting or renouncing a religion; consenting or revoking consent to treatment for sexual sterilization; consenting or revoking consent to treatment to terminate pregnancy; and, making or revoking a CPF nomination.
- Third parties who deal in matters relating to an individual’s property, e.g., banks, may request for proof in the form of a certificate from a registered medical practitioner that the individual’s lack of capacity is likely to be permanent before accepting the donee’s authority to transact on behalf of the individual.

For more information, you are welcome to contact:

QUEK Li Fei
Partner
DID: +65 6349 8687
Email: LFQuek@cnplaw.com

Simon TREVETHICK
Senior Associate Manager
DID: +65 6349 8714
Email: STrevethick@cnplaw.com