

DEMENTIA AND THE LAW: COMMON LEGAL ISSUES FACED BY CAREGIVERS OF DEMENTIA PATIENTS

Posted on May 23, 2020



Category: [CNPupdates](#)

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Date Published: 23 May 2020

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Introduction

Singapore is an aging population. According to a study done by the Institute of Mental Health in 2015, 1 in 10 people above the age of 60 may have dementia. Often, the onset of dementia may not be clinically diagnosed as the symptoms are not obvious.

When a clinical diagnosis of dementia is made, a heavy burden falls on the family and loved ones of the patient to care for the patient and make important decisions for the patient when the decision-making ability of the patient becomes questionable.

This article explores a few common questions relevant to the care of a dementia patient and the possible answers which can be found in the parameters of the [Mental Capacity Act](#) ("the MCA").

(1) Can it be assumed that a dementia patient lacks mental capacity to make decisions?

Under Section 4 of the MCA, a person who lacks capacity is defined as one who is unable to make a decision for himself in relation to a matter because of an impairment or disturbance in the functioning of the mind or brain. It is specifically provided for in the MCA that it does not matter whether the impairment or disturbance is permanent or temporary.

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In the case of *Re BKR* 4 SLR 81, the Singapore Court of Appeal clarified that the test for capacity in Section 4 of the MCA consists of two aspects. The first aspect is a clinical component which requires medical professionals to provide an opinion of whether the patient 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 the patient's cognitive abilities. The second aspect is the functional component which would be determined by the Court. Based on evidence, the Court will make an assessment as to the degree to which the patient's mental impairment affects the patient's ability to make decision when he needs to. For instance, whether the patient is able to retain, understand, use and weigh information relevant to the decisions he has to make.

The case of *Re BKR* concerned an elderly woman who had poor memory. It was observed that her lapses in memory extended to events which she ought to remember and her relationships with the people closest to her. She was also observed to be paranoid without basis at times which affected her actions. It was determined that her condition was situated somewhere between a mild cognitive impairment and dementia. It was concluded by the Court held that she lacked mental capacity within the meaning of Section 4 of the MCA.

It must be recognized that not all dementia patients lack mental capacity to make decisions. There are different types of dementia with varying degrees on how it affects a patient. Therefore, it cannot be assumed that a dementia patient lacks mental capacity to make decisions. In our experience, the Courts take a tailored approach towards each case in assessing the varying degrees in which the mental disability may affect the patient. For instance, a patient may retain the mental capacity to make decisions for his personal welfare such as where to live, what to eat and what daily activities he wishes to engage in. However, he may no longer have the mental capacity to make decisions for his property and affairs such as how to invest his money, whether to rent out his property and how to manage his assets.

(2) How does a patient's family determine if the patient is capable of making his own decision?

When the family and caregivers receive news from a patient's doctor that the patient is diagnosed with mild or early stage dementia, but the patient is able to function and still make certain decisions for himself, a conundrum arises. In what situations do the family or caregivers let the patient make decisions for himself, and when should they take on the responsibility in making such decisions?

Section 3 of the MCA sets out the applicable principles for family members and caregivers:

- A person must be assumed to have capacity unless it is established that he lacks capacity.
- A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success. In this regard, the family should not exert pressure or impose their views on the patient in helping him make a decision. Different forms of communication such as pictures, drawings, or sign language can also be adopted to explain and communicate information to

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the patient.

- A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- Consideration should be given as to whether the patient will at some point in time have capacity in relation to the matter in question and when that is likely to be; and whether the purpose for which an act or decision is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Therefore, if the patient has the ability to make his own decisions in respect of his own affairs, he should be given the opportunity to consider the matter and make his own decision. A family member or caregiver should not intervene or assert any pressure on the patient on the decision that he makes.

In a situation where the family member or caregiver has reason to believe that the patient is unable to make his own decision in a matter, despite providing information and explaining the matter in question to the patient for his consideration and decision, a decision can be made by the family or caregiver in the absence of a **lasting power of attorney ("LPA")** which grants such powers to an appointed donee. Section 7 of the MCA provides that if a person reasonably believes that the patient lacks capacity in relation to a matter relating to the patient's care or treatment and it will be in the patient's best interests for such a decision to be made on the patient's behalf, generally no liability can arise from such a decision under the MCA unless there is negligence or the decision or act contravenes the **Advance Medical Directive Act**, laws relating to the conduct of a clinical trial or human biomedical research.

(3) What happens when there are disputes between family members on the decisions to be made for a mentally incompetent patient?

In cases where the patient has made a LPA, it is clear that the donee appointed under the LPA shall act or make decisions for the patient in accordance to the principles and regulations under the MCA and the restrictions specified in the LPA. If the donee has engaged in conduct which contravenes the authority granted under the LPA, or acted against the patient's best interests, an application can be made to revoke the LPA. The LPA can also be revoked if the donee is convicted of an offence of criminal misappropriation, **criminal breach of trust**, cheating, theft, or offences involving fraud or dishonesty.

In the absence of a LPA, the family may make an application to Court to determine the appropriate person(s) to be appointed as deputy/deputies under Section 24 of the MCA when a dispute arises as to who should be the right person(s) to make decisions for a patient.

Under Section 24(4) of the MCA, the Court may appoint 2 or more deputies to act jointly; or jointly and severally. The Court may also appoint the deputies to act jointly in respect of some matters but jointly and severally in respect of other matters. This would mean that certain decisions must be made jointly by the deputies but decisions falling within a specified category do not require the joint decision of all deputies. The Court also has the power to impose restrictions on the deputies' powers under Section 25 of the MCA.

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It is often stressful and painful for family members to try to resolve disputes between each other when making decisions for the patient. In order to help families to resolve issues amicably, the Singapore Courts encourage parties to attend mediation when an application for the appointment of deputies under the MCA is filed. Mediation may enable the family members to appreciate different perspectives in the hope of finding an optimal solution that is in the patient's best interests.

(4) Can family members/ caregivers use the patient's money and sell or rent out the patient's flat to pay for his medical and living expenses?

It is provided for in Sections 9 and 10 of the MCA that it is lawful for family members and caregivers to use money in the patient's actual possession to meet the expenses for necessary goods or services. It is also lawful for family members and caregivers to reimburse themselves from monies in the patient's actual possession or be indemnified by the patient.

However, if the patient's monies are being held in bank accounts under the patient's sole name, these monies are not held in the patient's actual possession. As such, it would not be lawful for withdrawals to be made by the family and caregivers. Since the bank account should only be operated by the patient, the family and caregivers would need to consider if it is necessary to make an application for a deputy or deputies to be appointed by the Court to manage the patient's property and affairs. This would allow the appointed deputy/ deputies to have access to the patient's monies held in bank accounts, CPF accounts, investments etc. Any payment made for the patient's expenses can then be paid or reimbursed from the monies held by the deputy/ deputies in trust for the patient.

If there is a need to sell or rent out a patient's property, such powers must be specifically prayed for in an application to the Court for deputy/ deputies to be appointed and proven to be necessary.

Under the MCA, the appointed deputies have to adhere to strict laws and regulations binding on his appointment and follow the [Code of Practice](#) prescribed by the [Office of Public Guardian](#). There is also a duty for the deputy/deputies to submit accounts to the Office of Public Guardian on an annual basis or at such intervals as may be directed.

Conclusion

The Mental Capacity Act was enacted to protect those who lack mental capacity and are vulnerable. Therefore, it is important for the family and caregivers of dementia patients to address their minds to the principles set out in the MCA before making any decision for the patient. If the family has doubts as to whether the patient has the ability to make decisions and the type of decisions that the patient remains capable of making, they should consult the patient's doctor and obtain an assessment.

If a patient's family wishes to make an application to appoint deputies for the patient under the MCA, an

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application under the fast-tracked procedure can be made if the patient's case is a simple and straightforward case. Further information can be found in our previous article: Newly introduced fast-track application for the appointment of Deputies and the making of a Lasting Power of Attorney under the Mental Capacity Act. Where necessary, legal advice should be sought on steps that can be taken in order to protect the patient's interests.

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