

## THE MENTAL CAPACITY ACT: LPA AND THE GENERAL PRACTITIONER'S ROLE

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### ABSTRACT

**This article is intended to give an overview of the proxy decision-makers under the MCA, and the roles of the general practitioner as a certificate issuer and provider of the medical report for activation of the LPA. The article will also provide a guide on certification and preparation of the medical report.**

**Keywords: MCA, Mental Capacity, Proxy Decision-Making; Lasting Power of Attorney, Certification**

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### INTRODUCTION

#### Proxy Decision-Makers

The Mental Capacity Act Cap 177A, 2008 ("The Act")<sup>1</sup> provides a mechanism to balance the need to protect people who are unable to make decisions for themselves and the need for autonomy. This mechanism is in the form of proxy decision-makers. If a person lacks capacity to make a certain decision, the law protects that person as any decisions made would be void. However, this protection can create a situation where the person lacking in capacity may not be able to access his own resources for his own care.

The Act has set out four categories of decision makers that would be able to make decisions on behalf of the person who is unable to do so (hereafter referred to as "P").<sup>2</sup>

They are:

1. **The Court:** The Court can exercise the widest powers when making decisions for P. Anyone wishing for decisions to be made on behalf of P can make an application to the Court for the latter to make the decisions. This power, however, is not unlimited. Section 26 of The Act lists the decisions that even the Court cannot make for P. These include decisions relating to matters such as sterilisation, consenting to touching of a sexual nature, and renunciation of religion.

2. **A donee under the Lasting Power of Attorney:** The Act provides for a person, while still in possession of his mental capacity, to appoint a donee or donees to be his proxy decision maker should he lose his mental capacity. As the donee or donees are selected by the person ("the donor"), the donor can decide the extent to which he would like the donee to make the decisions for him. It can be as wide as giving the donee all the decision-making powers in relation to his personal welfare and property and affairs or as narrow as making decisions relating only to his bank account. Again, the powers are not unlimited. The Act provides that certain powers must be retained for decision-making by the Court, such as making a will for P. Needless to say, a donee will not have any power that is not given specifically under the LPA and must resort to seeking the assistance of the Court to make such decisions.

3. **A deputy or deputies appointed by the Court:** Upon application, the Court can appoint a deputy to make decisions for P. The powers delegated would be specifically listed in the court order and the deputy will need to seek the Court's approval should he require more decision-making powers.<sup>3</sup>

4. **Caregivers and medical treatment providers under Section 7 of the MCA:** The Act specifically provides for caregivers, doctors, and nurses to make decisions in the care of P, such as when and what to feed P, what P would wear, and deciding on necessary medical treatment. This section protects caregivers and medical treatment providers providing day-to-day care of P without having to apply for formal authorisation. Sections 9 and 10 of The Act further provide that this caregiver or medical treatment provider may be reimbursed for his expenses out of P's assets. This statutory protection does not extend to any liabilities arising out of that caregiver or medical treatment provider's negligence in the care of P.

Healthcare workers (widely defined as any registered medical practitioner, dentist registered under the Dental Registration Act 1999, pharmacist registered under the Pharmacist Registration Act 2007, therapist, psychologist, social worker, counsellor, nurse, attendant, or other person providing healthcare services) are encouraged to protect such persons lacking in mental capacity by making notifications to the Public Guardian. Under Section 43(2),<sup>4</sup> such healthcare professionals will not be liable in any civil or criminal liability nor would have breached their professional ethics or code of conduct.

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## ROLE OF MEDICAL PROFESSIONALS AS CERTIFICATE ISSUER

Section 11 of The Act establishes a new form of power of attorney called the Lasting Power of Attorney ("LPA"), which allows a person, while he still has mental capacity, to choose someone to be his proxy decision maker should he be unable to do so in the future.<sup>2,5,6</sup> The LPA must be completed in a prescribed form, certified by a certificate issuer, and registered with the Public Guardian.

Regulation 7 of the Mental Capacity Regulations 2010 provides that three categories of people may be a certificate issuer under the MCA.<sup>2</sup> They are:

1. a legally qualified medical practitioner who is registered as a specialist in psychiatry under the Medical Registration Act (Cap 174);
2. a legally qualified medical practitioner who is accredited by the Public Guardian to issue LPA Certificates; and
3. an advocate and solicitor of the Supreme Court who has in force a practising certificate under the Legal Professional Act (Cap 161).

A certificate issuer must also pay attention to regulation 7 and not provide certification under the following circumstances:

- a. If the certificate issuer is a family member of the donor. Family member is defined as spouse, child including adopted and stepchild, parent, parent-in-law, sibling, or any individual related by blood or marriage living in the same household;
- b. if the certificate issuer is also the donee;
- c. if the certificate issuer is a donee of any other LPA that has been executed by the donor whether revoked or not;
- d. if the certificate issuer is a family member of the donee in (b) and (c) above;
- e. if the certificate issuer is a director or employee of the person acting as donee;
- f. if the certificate issuer is a business partner or employee of the donor;
- g. if the certificate issuer is a business partner or employee of a donee;
- h. if the certificate issuer is an owner, director, manager, or employee of any care facility where the donor lives or is cared for; and
- i. if the certificate issuer is a family member of anyone under (h).

It is prudent to avoid potential issues of conflict. In case of doubt, it is advisable to seek guidance from the Public Guardian.

## CERTIFICATION PROCESS

The certificate issuer is required to sign on the LPA to state that he has seen the donor and is of the opinion that the donor understands the purpose of the LPA and the powers he has granted to the donees are as stated in the LPA. The certificate issuer must be satisfied that there is no fraud or undue influence exerted on the donor, and that there is nothing else that would prevent the LPA from being created.

While it may be easier to detect fraud, undue influence is more subtle. It relates to situations where certain relationships exist between the parties and the donor is influenced by that party in such a way that the donor is not making a decision independently. Such relationships include parent-child relationship, doctor-patient relationship, and lawyer-client relationship. Undue influence can be in the form of persistent persuasion and harassment. However, persuasion and advice would not be undue influence if, ultimately, the donor is free to make his own decision.

The certificate issuer should ensure that the donor has read the important information on the prescribed form, and that the donor understands that he has by completing and signing the document is giving authority to the donee to make decisions on his behalf should he lose mental capacity. He should also ask the donor questions in order to be satisfied that the donor has not been induced to sign the document under fraud or undue pressure. He should pay attention to any signs that may give the certificate issuer concerns over the creation of the LPA and take some time to explore the possible scenarios that may happen upon activation of the LPA with the donor. It is prudent for the certificate issuer to err on the side of caution as the LPA can be invalidated under the said circumstances.

When asking questions to ensure that the donor understands and is aware of his actions, questions and issues relating to legal matters are often intertwined. This often relates to the powers concerning property and affairs or relating to family issues such as inheritance or divorce. Medical practitioners should be mindful of giving advice in legal matters.

## ROLE OF MEDICAL PRACTITIONERS IN CERTIFYING MENTAL INCAPACITY FOR ACTIVATION OF LPA

In order for the donee to exercise the power given to him under the LPA, e.g., to operate the donor's bank account, such third-party institutions would require a medical certification of P's mental capacity.<sup>7</sup> Each institution may have its own procedures and guidelines and may require the medical report to be in different formats. A template is provided for guidance on the website of the Office of Public Guardian. There is no requirement for any accreditation of a medical practitioner to issue such a report. However, if there is a dispute, the final assessment of mental capacity rests with the Court. As such, for situations where assessment may be difficult, it is advisable to refer the assessment to a specialist.

When preparing the report, the medical practitioner must have regard to sections 3, 4, and 5 of The Act. These sections refer to the five principles of dealing with persons that lack mental capacity, and the tests for mental capacity and inability to make a decision.

## CONCLUSION

While the law and the rules and regulations appear to be complicated and difficult to administer, they are necessary to safeguard a fast-growing sector of our community. It is important to take time to discuss with the donor of an LPA to ensure that the donor has carefully thought through the decision to appoint a donee and the powers that he has decided to give to the donee. As the process of certification is going to be paperless in the near future, it is all the more important for a certificate issuer to review the form with the donor that the donor would have completed online.

## REFERENCES

1. Mental Capacity Act (Cap 177A, 2010 Rev Ed)
2. Mental Capacity Regulations 2018
3. Office of Public Guardian, Code of Practice (3<sup>rd</sup> Ed, 2016)
4. Allen Sng and Kah Wai Tan: The Deputyship Regime under Singapore's Mental Capacity Act : An introduction, Published on e-First 25 February 2020
5. Senior Judge Denzil Lush, Mental Capacity Act – A New framework, Law Gazette 2010
6. Mental Capacity Matters [Internet]. Ministry of Social and Family Development. [cited 2022Sep20]. Available from: <https://www.msf.gov.sg/policies/mental-capacity-matters/Pages/default.aspx>
7. Handling Mental Capacity Act - Lasting Powers of Attorney [Internet]. ABS. [cited 2022Sep20]. Available from: <https://www.abs.org.sg/consumer-banking/consumers/handling-mental-capacity-act---lasting-powers-of-attorney-court-deputies>

## LEARNING POINTS

- **A general practitioner must be accredited by the Public Guardian before certifying an LPA, but he does not need to be accredited to certify the mental state for activating the LPA.**
- **When certifying the LPA, the certificate issuer must avoid the situations where he may be in a position of conflict.**
- **When preparing the medical report to activate the LPA vis-à-vis third parties, the form and documents required may vary from organisation to organisation.**