

MENTAL CAPACITY ACT 2008

CHONG YUE-EN

ADVOCATE & SOLICITOR, BETHEL CHAMBERS LLC

DEPUTIES & DONEES WORKING WITH SNTC

Glossary:

- Patients ('P') – A person who is (i) unable to make a decision (ii) at a material point of time (iii) because of a impairment/disturbance in the functioning of the mind or brain (s.4)
- Person who makes decisions for P – a deputy (s.20) or a donee (s.11)
- Donee – A person chosen by a donor (the P when P still had mental capacity) under a Lasting Power of Attorney (s.11) when P has Mental Capacity.
- Deputy – A person appointed by the Court to manage P's decisions.

DEPUTIES & DONEES WORKING WITH SNTC

Lay Deputy/Donee	Professional Deputy/Donee
Lay Donee – Anyone Lay Deputy – Anyone – but need permission of the Court in some cases	Class of Persons: Lawyers, Nurses, Doctors, Chartered Accountants, Public Accountants, Allied Health (e.g. Psychologist) & Social Workers
No remuneration for services rendered	Professional Donee – remuneration determined by the market Professional Deputy – remuneration determined by the Court
Can claim reimbursements for services rendered for P	Professional Donee – Scope of Services determined between Donor and Donee Professional Deputy - Scope of services and reimbursements pre-determined by a 'P-focus' plan

DEPUTIES & DONEES WORKING WITH SNTC

2 Main Areas relating to Decisions that (Professional) Deputies or Donees can Make for P

- **Personal Welfare:** Accommodations day-to-day decisions (choice of clothing, food), payment of bills, medical and dental treatment, participation in social activities, payment of income tax (s. 22)
- **Property & Affairs:** Management powers over assets – to buy and sell assets, to rent out assets, voting rights in company shares, to pay maintenance (financial support) for spouses, children, (below 21 years old unless intellectually disabled) (s. 23)
- Example of Assets: Houses, Apartments, Bank Accounts, Shares, Central Provident Fund Monies (i.e. pension monies), Insurance Policies with value, vehicles, luxury items etc

PRINCIPLES OF THE MCA (SECTION 3)

- 3(2): A person must be **assumed to have capacity** unless it is established that the person lacks capacity
- 3(3): A person is not to be treated as unable to make a decision **unless all practicable steps to help the person to do so have been taken without success.**
- 3(4): A person is not to be treated as unable to make a **decision merely because the person makes an unwise decision.**
- 3(5): An act done, or a decision made, under this Act for or on behalf of a person who lacks capacity **must be done, or made, in the person's best interests.**
- 3(6): Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is **less restrictive of the person's rights and freedom of action.**

BEST-INTERESTS FRAMEWORK (SECTION 6)

- 6(1): In determining for the purposes of this Act what is in a person's best interests, the person making the determination **must not** make it merely on the basis of —
 - (a) the person's age or appearance; or
 - (b) a condition of the person, or an aspect of the person's behaviour, which might lead others to make unjustified assumptions about what might be in the person's best interest
- 6(2): The person making the determination **must consider all the relevant circumstances** and, in particular, take the steps specified in subsections (3) to (9).
- 6(3): He or she must consider —
 - (a) whether it is likely that the person will **at some time** have capacity in relation to the matter in question; and
 - (b) if it appears likely that the person will, when that is likely to be.

BEST-INTERESTS FRAMEWORK (SECTION 6)

- 6(4): He or she must, so far as is reasonably practicable, **permit and encourage the person to participate, or to improve the person's ability to participate, as fully as possible** in any act done for the person and any decision affecting the person.
- 6(5): Where the determination relates to **life-sustaining treatment**, he or she **must not**, in considering whether the treatment is in the best interests of the person concerned, **be motivated by a desire to bring about the death of the person concerned**.
- 6(6): Where the determination relates to the giving, refusal or revocation of —
 - (a) appropriate consent of the person concerned under the Human Biomedical Research Act 2015 — he or she must take into account such matters, considerations and procedures as may be prescribed under Part 3 of that Act; or
 - (b) consent of the person concerned under any written law relating to a clinical trial — he or she must take into account such matters, considerations and procedures as may be prescribed in such written law.

BEST-INTERESTS FRAMEWORK (SECTION 6)

- 6(7): Where the determination relates to the disposition or settlement of the person's property, he or she must be motivated by a desire to ensure, so far as is reasonably practicable, **that the person's property is preserved for application towards the costs of the person's maintenance during the person's life.**
- 6(8): He or she must consider, so far as is reasonably ascertainable —
 - (a) **the person's past and present wishes and feelings** (and, in particular, any relevant written statement made by the person when the person had capacity);
 - (b) **the beliefs and values** that would be likely to influence his or her decision if the person had capacity; and
 - (c) **the other factors that the person would be likely to consider** if the person were able to do so.

BEST-INTERESTS FRAMEWORK (SECTION 6)

- 6(9): He or she must take into account, if it is practicable and appropriate to consult them, the views of —
 - (a) **anyone named by the person as someone to be consulted** on the matter in question or on matters of that kind;
 - (b) anyone **engaged in caring for the person or interested in the person's welfare**;
 - (c) any **donee of a lasting power of attorney** granted by the person; and
 - (d) any **deputy appointed** for the person by the court,as to what would be in the person's best interest and, in particular, as to the matters mentioned in subsection (8).

MENTAL INCAPACITY TEST (SECTION 5)

- 5(1): For the purposes of section 4, a person is **unable to make a decision** for himself or herself if the person is unable —
 - (a) to understand the information **relevant to the decision**;
 - (b) to **retain** that information;
 - (c) to **use or weigh that information** as part of the process of making the decision;
or
 - (d) to **communicate** his or her decision (whether by talking, using sign language or any other means)

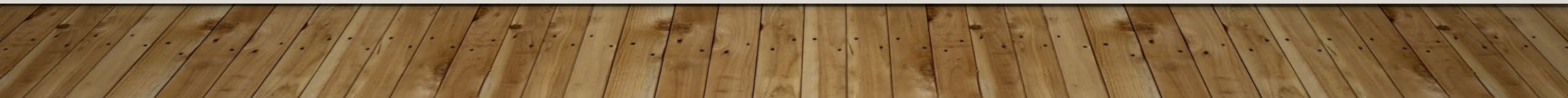
MENTAL INCAPACITY TEST (SECTION 5)

- 5(2): A person is not to be regarded as unable to understand the information relevant to a decision if the person is **able to understand an explanation of it given to him or her in a way that is appropriate to his or her circumstances** (using simple language, visual aids or any other means).
- 5(3): The fact that a person is able to retain the information relevant to a decision for a short period only **does not** prevent the person from being regarded as able to make the decision.
- 5(4): The information relevant to a decision includes information about the **reasonably foreseeable consequences** of —
 - (a) **deciding one way or another**; or
 - (b) **failing to make the decision**

PROFESSIONAL DEPUTIES (CASE STUDY)

Question: How Does Professional Deputies and Donees work with SNTC to organize and safeguard the assets of mentally incapacitate elderlies in Singapore?

Possible Situations:

- ❖ Donor/Patient does not have any close relatives or friends (foreigners/abandoned)
 - ❖ Donor/Patient does not trust their close relatives or friends (but personality disorder?)
 - ❖ Donor/Patient's assets are too complicated for close relatives or friends to manage
 - ❖ Donor/Patient does not want to bother their close relative and friends to make decisions for them (close relatives or friends living far away)
- 

PROFESSIONAL DEPUTIES (CASE STUDY)

- Mr. Tan, 78 years old was found in his dirty home, hungry, in soiled clothes and unable to care for himself after the neighbours complained of a very 'smelly smell' coming from his apartment. Mr. Tan has no known relatives and has not interacted with his neighbours for the past 10 years. He lives in his 150 square meters Government-Built apartment (Singapore Government-built apartment range from 40 sq m to 150 sq m). He resisted leaving his home and the social workers from the Adult Protective Team from the Ministry of Social and Family had to get a court order under the Vulnerable Adults Act 2018 to have Mr. Tan admitted into a place of safety. Mr. Tan was later diagnosed by the psychiatrist as having moderate dementia.
- In his nursing home, Mr. Tan was observed to be very uncomfortable and frightened by his other roommates in his 16-bed ward. He seemed to indicate to the nurses that he did not want to be close to them. The cost of a single bed ward in an unsubsidised private nursing home is between SGD \$4500 to SGD \$9000.

PROFESSIONAL DEPUTIES (CASE STUDY)

- The nursing home where Mr. Tan is living informs the Agency of Integrated Care <https://www.aic.sg/> which is a corporate entity under the Ministry of Health Holdings,
- The AIC runs a 'clearing house' where the Nursing Homes can submit cases which they need a Professional Deputy.
- The Professional Deputies are informed by AIC about cases.
- The Professional Deputies submit bids stating their rate and the cost of the Court deputyship application.
- A committee awards the cases to the best bid.

PROFESSIONAL DEPUTIES (CASE STUDY)

- The Professional Deputy goes to court, representing himself/herself, or engages a lawyer to help with the deputyship application.
- The deputyship application consist of these following legal documents:
 - The Originating Summons containing the powers that the Pro-Deputy wishes to have
 - The Supporting Affidavit which the Pro-Deputy puts in the information on the Patient
 - The P-Focus Plan that set out the tasks that the Pro-Deputy has to do for the Patient and the estimate time and cost for the Patient
 - The doctor's Form 224 Mental Capacity Assessment Report where the doctor concludes that the extent of the Patient's Mental Incapacity.

PROFESSIONAL DEPUTIES (CASE STUDY)

- Standard Course of Action:
 - i. The Pro-Deputy gets power to: (a) open a new bank account (b) sell Mr. Tan's apartment for \$1,000,000.00 Singapore Dollars (c) withdraw \$300,000.00 from Mr. Tan's CPF account (d) close all existing bank accounts (e) sell Mr. Tan's shares and deposit the proceeds in his new bank account.
 - ii. The Pro-Deputy gets the power to open a SNTC Trust Account. The Pro-Deputy deposits all the proceeds from the new bank account into the SNTC Trust Account and closes the new bank account.
 - iii. The Pro-Deputy applies to the Court to discharge himself as the Pro-Deputy, after sending a final report to the Office of Public Guardian and submitting an affidavit to inform the Court that all work has been done.
 - iv. SNTC then takes over to pay for the nursing home bills for Mr. Tan's new private single room.

PROFESSIONAL DONEES (CASE STUDY)

- Mrs. Tan is a 70 years old foreigner in Singapore. Her husband, who is local Singaporean has passed away. Mrs. Tan's family is all in Europe, but she likes Singapore where she enjoys the food, culture and have friends. She is not close to her family in Europe. She does not have any children. Mrs. Tan has diabetes that is not well controlled – she loves eating Singapore food and she is quite overweight.
- Mrs. Tan wishes to age in community, i.e. to grow old and die in Singapore. She does not want to live in a nursing home. This is the home that her husband, an architect, built for her as his gift of love. She thinks that she can sometimes feel him in the house with her.... The house is a big house that is worth at least 20 million dollars where she has her huge art collection that is worth at least 10 million dollars. She has inheritance, investments, savings and insurance policies that is worth 80 million dollars. She does not wish to bother her friends to make decisions for her. She wishes now to engage a Professional Donee in order to make decisions for her when she loses mental capacity.
- She has some wishes that some of her artwork shall be donated to the Singapore's National Art Gallery once she pass away.
- In terms of lifestyle, she enjoys attending the church that she has been attending for 40 years, previously with her husband when he was alive and not alone after his death. This is where her friends and community are. She enjoys a trip back to Europe twice a year to see her family. However, she makes it clear that she does wishes to die in Singapore and to have her ashes placed next to her husband's in their church.
- As a Professional Donee, how can you help Mrs. Tan?

PROFESSIONAL DONEES (CASE STUDY)

- Planning Work:
 - Inventorying all of Mrs. Tan's assets
 - Seeking Mrs. Tan's detailed wishes on which assets are meant to be used for her passive income, for her personal, medical and household expenditure and which are meant for legacy purposes.
 - To get her detailed wishes on her personal lifestyle: To continue to assist her to go to her church for services, to continue to help her have her favourite food but subject to doctor's recommendation.
 - Whether you are to accompany her back to Europe and back to Singapore twice a year.
 - What sort of private nursing she would need if she loses mental capacity.
 - Advance Care Plan (ACP): On her end stage medical palliative care.
 - How frequent the check-in with her when she still has mental capacity.
 - Does the Professional Donee Takes on the Role of a Family member to the Donor? The Son that she never had?

PROFESSIONAL DONEES (CASE STUDY)

- Food for thought:
 - Professional Donees are not supervised by the office of Public Guardian.
 - Anyone can whistle blow if they suspect the Professional Donee to be abusing the Patient, and the Public Guardian can investigate. But would this be too late?
 - Would the Professional Donee want to set up a Trust Account (with a Private Trust Company or Bank) to hold some of the assets?
 - Does the Professional Donee wish to introduce some form of check-and-balances? How should this be done.

ありがとうございます!

QUESTION & ANSWERS

Chong Yue-En 鍾岳恩

Founder, Managing Director of M/s Bethel Chambers LLC

cye@bethelchambers.com

+65 6980 0230

www.bethelchambers.com

Add me on LinkedIn: <https://www.linkedin.com/in/yueen/>

