

CODE OF PRACTICE

MENTAL CAPACITY ACT (CHAPTER 177A)

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1. WHAT IS THE MENTAL CAPACITY ACT?

1.1 KEY DETAILS

The *Mental Capacity Act* (the Act) is a law which:

		DEFINITIONS
1.1.1	Addresses the need to make decisions for persons who are 21 years or older when they lack mental capacity to make those decisions for themselves.	<p>Lasting Power of Attorney (LPA) A legal document that a person (donor) signs which allows him to choose one or more persons called donees to make decisions about his personal welfare and/or property & affairs matters on his behalf when he lacks mental capacity. To find out more, read Chapter 8.</p> <p>Deputy A deputy is a person appointed by the court to make certain decisions on behalf of a person who lacks mental capacity when the person has not made an LPA and has no donee to decide on his behalf in respect of those decisions. To find out more, read Chapter 9.</p>
1.1.2	Allows persons who have mental capacity to voluntarily make a Lasting Power of Attorney (LPA) to appoint one or more persons (donee(s)) to make decisions and act on their behalf if and when they lack mental capacity in the future.	
1.1.3	Allows the court to appoint a deputy to make decisions and act on behalf of a person who lacks mental capacity where the person has not made an LPA.	
1.1.4	Allows parents of children with intellectual disabilities who are below the age of 21 years to apply to the court to appoint a deputy to ensure that their child's future care is arranged if the parents pass away or lose their mental capacity.	
1.1.5	Gives legal protection for acts done by anyone in connection with the care and treatment of a person who lacks mental capacity if certain conditions are met, including the requirement that the act is done in the best interests of that person.	
1.1.6	Provides for the appointment of a Public Guardian whose functions include maintaining a register of LPAs and a register of court orders appointing deputies, supervising deputies and dealing with allegations of abuse by donees and deputies. The Public Guardian is supported by the Office of the Public Guardian (OPG), a division under the Ministry of Social and Family Development (MSF).	

<p>1.1.7 Provides safeguards to protect persons lacking capacity. The Act gives the Public Guardian supervisory and investigative powers and makes ill-treatment of persons who lack capacity by caregivers and decision makers a criminal offence. It also prohibits certain decisions from being made on behalf of a person who lacks capacity.</p> <p>For example:</p> <ul style="list-style-type: none"> • consenting to marriage and • adopting or renouncing a religion. <p>The list of excluded decisions is in paragraph 1.4 below.</p>	DEFINITIONS
	<p>Best interests</p> <p>Decision makers have a duty to consider many factors that focus on what is best for the person lacking capacity. To find out more, read Chapter 6.</p>

1.2 APPLICATION OF THE ACT

The Act applies to everyone who deals with a person over 21 years of age, who lacks mental capacity to make specific decisions. These individuals include (but are not limited to) donees of an LPA, deputies appointed by the court and people who provide care or treatment (whether paid or not).

1.3 ACTIONS AND DECISIONS COVERED BY THE ACT

The Act covers a wide range of decisions made and actions taken on behalf of a person who lacks capacity. This includes decisions covering day-to-day matters, such as what to eat and wear, as well as major decisions such as moving house and undergoing surgery.

1.4 ACTIONS OR DECISIONS EXCLUDED UNDER THE ACT

- 1.4.1 Section 26 *Mental Capacity Act*
The Act does not allow certain decisions to be made on behalf of a person lacking mental capacity. These decisions are:

a. consenting to marriage	
b. consenting to touching of a sexual nature	
c. consenting to a decree of divorce on the basis of three years' separation	
d. consenting to a making of an adoption order under the <i>Adoption of Children Act</i>	
e. adopting or renouncing a religion	
f. receiving treatment for change of gender	

g. consenting or revoking consent to treatment for sexual sterilisation	
h. consenting or revoking consent to treatment to terminate pregnancy	
i. registering or withdrawing an objection under section 9 of the <i>Human Organ Transplant Act</i> regarding the removal of an organ from any person upon death	<p>Human Organ Transplant Act</p> <p>A separate law that automatically allows doctors to remove your organs when you are dead, for transplant to someone else, unless you have opted out earlier in writing.</p>
j. making or revoking an Advance Medical Directive under section 3 or 7 of the <i>Advance Medical Directive Act</i>	<p>Advance Medical Directive</p> <p>A legal document you sign under a separate law known as the <i>Advance Medical Directive Act</i> that tells the doctor who is treating you for a terminal illness that you do not wish to have your life artificially prolonged.</p>
k. making or revoking a gift of a body or any part of a body under section 3 or 9 of the <i>Medical (Therapy, Education and Research) Act</i>	<p>Medical (Therapy, Education and Research) Act</p> <p>A law that provides a scheme where people can pledge their organs or any body part for the purposes of transplant, education or research after they die.</p>
l. other matters as may be prescribed by the Minister for Social and Family Development	

1.4.2 *Mental Health (Care and Treatment) Act* matters [section 27 *Mental Capacity Act*]
Where a person's treatment for mental disorder is regulated by the *Mental Health (Care and Treatment) Act*, the *Mental Capacity Act* does not authorise anyone to:

- give the person medical treatment for mental disorder, or
- consent to the person being given medical treatment for a mental disorder.

1.4.3 Voting rights [section 28 *Mental Capacity Act*]
The Act does not permit anyone to make a decision on voting at an election for any public office, or at a national referendum on behalf of a person who lacks mental capacity.

1.5 SCOPE OF THE ACT

The Act does not legalise or provide for euthanasia. Nothing in the Act affects the law on murder, culpable homicide not amounting to murder or abetment of suicide [section 29 *Mental Capacity Act*].

1.6 LIFE SUSTAINING TREATMENT OR TREATMENT TO PREVENT SERIOUS DETERIORATION

1.6.1 A donee of an LPA for personal welfare matters does not have, and a court appointed deputy may not be given, the power to refuse life sustaining treatment or treatment required to prevent a serious deterioration in the condition of the person lacking capacity.

1.6.2 Life sustaining treatment in relation to a person, means treatment which, in the view of another person providing healthcare for that person, is necessary to sustain life [section 2(1) *Mental Capacity Act*]. The Act does not define the meaning of treatment to prevent a serious deterioration in the person's condition.

1.6.3 The doctor will usually make these decisions based on the best interests of the patient. Sometimes the court may have to make these decisions. This may occur if there is an unresolved conflict over what the best interests of the patient are.

2. WHAT IS THE CODE OF PRACTICE?

2.1 KEY DETAILS

The Code of Practice (the Code) provides guidance and information about how the *Mental Capacity Act* (the Act) works in practice.

2.2 PURPOSE OF THE CODE

The Code provides guidance for people to:

- 2.2.1 Understand their responsibilities and rights under the Act.
- 2.2.2 Be aware of what steps they can take to prepare for a time in their future when they may lack capacity.
- 2.2.3 Be aware of best practices in caring for persons lacking mental capacity and follow those practices.

The scenarios and examples in this Code are for illustration only and use fictitious characters and situations. They are not a substitute for professional advice in appropriate cases and are not in any way to be taken as precedents for decisions that need to be made in similar situations. They are also not indicative of how a court would decide any particular case, as that would depend on the actual facts of each case before the court, which may include relevant facts that are not considered in the examples.

2.3 TO WHOM DOES THE CODE APPLY?

- 2.3.1 The Code applies to everyone who deals with a person lacking mental capacity. This includes those who are under a formal duty such as professionals and paid caregivers as well as informal caregivers, family and friends of the person who lacks capacity.
- 2.3.2 The Act states that the following categories of individuals have a particular duty to consider the Code when acting in relation to a person lacking mental capacity:
 - a. donee of a Lasting Power of Attorney (LPA);
 - b. deputy appointed by the court;
 - c. people who act in a professional capacity, for example, a lawyer, healthcare professional, accountant, or ambulance crew; and
 - d. people who act for remuneration, for example, a paid caregiver or masseur.

2.4 WHAT HAPPENS IF PEOPLE DO NOT COMPLY WITH THE CODE?

Although the Code itself is not a law, the guidelines laid out in the Code should be followed. A failure to follow the Code can be used as evidence in court. For example, the court can use someone's failure to follow the Code as evidence that he has not acted in the best interests of a person lacking capacity.

JOHN'S STORY

John is an 80-year-old man suffering from advanced dementia. He is a resident at the Sunny View Nursing Home. John made an LPA for his personal welfare and property & affairs matters before he lost capacity. He appointed his son, James, as his donee. He had put aside \$50,000 for his care in a nursing home should the need arise. Unfortunately, James died last month. There is still some \$40,000 left to cover John's nursing home fees at Sunny View. In the LPA, John appointed his nephew, Jun Hoe, as the replacement donee for James. Jun Hoe has removed John from Sunny View and placed him in a rented flat. John has been left to fend for himself.

Jun Hoe has failed to observe the guidance on the best interests principle in the Code. The court may find that his failure to do so is evidence that he has not acted in John's best interests. The court has the power to revoke the LPA.

3. WHAT ARE THE STATUTORY PRINCIPLES?

3.1 KEY DETAILS

3.1.1 The *Mental Capacity Act* (the Act) seeks to balance a person's right to make his own decisions and the need to protect him where he lacks mental capacity to make those decisions.

3.1.2 It sets out five statutory principles that anyone making any decision or taking any action for a person who appears to lack capacity must apply:

Principle 1: A person must be assumed to have capacity unless it is established that he lacks capacity.

Principle 2: 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.

Principle 3: A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

Principle 4: 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 his best interests.

Principle 5: Before an act is done or 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.

The statutory principles help the individual to take part as far as possible, in making decisions that affect him and protect him when he lacks capacity to do so. The idea is to assist and support people to make particular decisions, not restrict and control them.

3.2 WHO MUST APPLY THE STATUTORY PRINCIPLES?

Everyone should apply the statutory principles when dealing with or caring for (paid or unpaid) persons with capacity issues. When acting or making decisions on behalf of a person who lacks mental capacity, these principles should be read alongside the provisions in the Act to ensure that the appropriate action or decision is taken in each case.

3.3 PRESUMPTION OF CAPACITY

Principle 1: “A person must be assumed to have capacity unless it is established that he lacks capacity.” [section 3(2) Mental Capacity Act]

The assumption is that a person has capacity to make a decision for himself unless there is proof that it is more likely than not that he lacks capacity to make the decision at the time it needs to be made. This assumption applies to persons 21 years of age or older.

SHANTI'S STORY

Shanti Sandhu is a 66-year-old divorcee who lives alone in a walk-up apartment. Her children were tragically killed in a road traffic accident six months ago.

Shanti used to be active in the community, taking part in local activities and volunteering at Resident Committee activities. Since the accident, she does not speak to anyone.

The apartment block committee is organising a health talk and free health screening activity. The committee is considering excluding Shanti as they feel she does not have capacity to contribute to organising the activities.

The organising committee should not assume that, just because Shanti lives alone and does not talk with anyone, it means that she lacks mental capacity. A person is presumed to have capacity unless it is proven otherwise. The organising committee should consider inviting Shanti. Whether she chooses to be involved is her choice.

KENG SONG'S STORY

Keng Song has made and registered a Lasting Power of Attorney (LPA). He appointed his daughter, Chin Lee, to manage his property & affairs matters in the event he lacks mental capacity to manage them himself. Keng Song has now been diagnosed with dementia.

Chin Lee is worried that he is becoming forgetful about money matters. However, she must assume that her father has the capacity to manage his property & affairs matters unless she has good reasons to believe otherwise. She must help him to make the decisions himself.

At the market, she notices that her father is able to choose what to buy and successfully handles money to make payment. However, she notices that he gets confused about his bank accounts and investments even though he previously handled these on his own.

Chin Lee carefully explains to her father about his bank accounts and investments and his options in managing them. However, Keng Song does not understand the information.

Chin Lee concludes that her father is capable of handling money for daily purchases and he can continue to do so. However, he is unable to make banking and investment decisions and she can use the LPA to make those decisions for him. (see paragraph 8.15.5 for further information).

Chin Lee is correct not to assume that her father lacks capacity to make all financial decisions and to establish what decisions he can or cannot make.

The assessment of a lack of capacity cannot be based simply on the person's appearance, age, condition or behaviour (see paragraph 4.3.2). So, people should be allowed to make their own decisions where they can. It cannot be assumed that they cannot make decisions unless the incapacity is established. However, it does not mean that individuals who deal with a person whom they suspect to lack capacity can act on that person's decision without checking that the person actually has capacity to act. They must act reasonably to ascertain that the person has capacity to carry out the transaction.

3.4 GIVING ALL PRACTICABLE HELP

Principle 2: “A person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success.” [section 3(3) Mental Capacity Act]

- 3.4.1 Caregivers, family members, donees, deputies and professionals who care for or treat a person who may have difficulty in making a particular decision should take all practicable steps to help the person make his own decisions. They should not exert pressure or impose their views on the person they are supporting when helping him make a decision. The type of support the person should receive depends on the type of decision he has to make and the circumstances.
- 3.4.2 The individual should not make a decision on behalf of a person simply because that person has difficulty communicating. Instead, the individual should provide support, for example, by providing information in more accessible formats such as large fonts and drawings, and using different forms of communication such as sign language, Braille and so on.
- 3.4.3 In emergency situations, for example, serious injury from an accident, it may not be practicable to take as many steps to support a person to make his own decisions. All that can be done may be to keep the person informed of what is going on and why procedures are being done.

TIM'S STORY

Several police officers find Tim, a middle-aged man, living underneath a bridge on the Pan Island Expressway. He is very dirty and has a big cut on his leg which looks infected. They take him to the hospital.

The hospital staff ask for Tim's personal details and relatives they could contact. To help him communicate, these enquiries are made in several languages. Tim remains silent and does not want to cooperate with the doctor who wants to examine his injury.

The doctor tells Tim that if the injury is not treated, he may lose his leg and makes a sawing motion over his leg in an attempt to explain the situation to him. He appears to pay more attention after that and starts pointing at his mouth and ears while shaking his head.

A nurse realises that Tim may be a deaf mute, so she gives him a paper and pen, and calls in a person who knows sign language. He calms down and starts communicating to the hospital staff in writing.

Tim may not have been able to communicate orally but that does not mean he cannot make a decision about his treatment. The medical team should not conclude that he does not have the capacity to decide about treatment before giving him all practicable help to make and communicate his decision.

3.5 UNWISE DECISION

Principle 3: “A person is not to be treated as unable to make a decision merely because he makes an unwise decision.” [section 3(4) Mental Capacity Act]

- 3.5.1 A person is free to make his own decisions even if those decisions are unwise in the view of others, for example, relatives, care staff and doctors. This is a very important principle in autonomy (freedom) which recognises the right of a person to make his own choices. Just because a decision is unwise does not mean that the person has lost mental capacity.
- 3.5.2 However, there is a difference between a person making an unwise decision (which the person who decides may make) and his making a decision when he lacks the ability to understand, remember or use the information necessary to make the decision (see paragraph 4.6).
- 3.5.3 If a person makes several decisions which are unusual bearing in mind his usual behaviour or makes decisions which make it easy for him to be exploited or harmed, then further investigation into that person's capacity should be conducted.

SANDRA'S STORY

Sandra is a middle-aged woman with mild intellectual disabilities. She lives in a flat with her parents and younger brother. Sandra works as a food packer at a market and earns \$500 a month. When she is walking along Orchard Road, a promoter for a slimming centre approaches her and persuades her to sign up for a slimming course costing \$888 and she agrees. She wants to look as slim as the lady in the advertisement. She weighs only 50 kg and is in the healthy weight range for her 1.6m frame. Sandra's parents believe she made an unwise decision and question if she lacks mental capacity.

As long as Sandra has the mental capacity to make that specific decision at the particular time, she is free to do so. Individuals may make unwise decisions. This does not mean they lack mental capacity to make those decisions.

AH HUAT'S STORY

Ah Huat is 73 years old. He is a widower and lives alone. Last week, a window installer named Paul visited Ah Huat at his home. Paul convinces Ah Huat to change the window in his bathroom because it is rusty. The next day, Paul returns and advises Ah Huat to change the windows in his bedroom. Paul charges Ah Huat \$500.

Ah Huat's son, Ah Seng, is concerned about his father. Ah Huat is normally careful with his finances because he is retired.

Paul returns for a third time and Ah Huat agrees to change the remaining windows in his flat for \$1500. Ah Seng, who examined the windows earlier, noticed they are still in good condition and do not need to be changed. He believes that Paul has taken advantage of his father and wonders whether Ah Huat is capable of making similar purchasing decisions.

Ah Huat explains that he prefers to get the windows replaced all at once because he gets a better bargain. He believes that all the windows will need to be replaced in one or two years' time.

Ah Seng cannot just assume that because his father, Ah Huat, is 73 years old and has decided to change all the windows in his flat, he lacks mental capacity. If Ah Huat's usual pattern of behaviour continues to change and causes concern, then Ah Seng should consider getting his mental capacity assessed by a doctor.

3.6 BEST INTERESTS

Principle 4: "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 his best interests." [section 3(5) Mental Capacity Act]

Every act or decision made on behalf of a person who lacks capacity must be made in his best interests. Whether a decision is made in the person's best interests will depend on the circumstances of the case. Please see Chapter 6.

RON'S STORY

Kevin and his wife Sally have three children. Their eldest, Ron, who is 23 years old, has an intellectual disability and has been working at a sheltered workshop operated by a charity.

The charity also has a programme which offers temporary residence to persons like Ron to acquire basic life skills for more independent living. With some support, they are also taught how to take public transport. These life skills help them to be better suited for open employment.

A place in the residential programme becomes available and the social workers at the charity recommend that Ron take up the offer.

Kevin and Sally know that Ron will like to become more independent. However, they are worried that if Ron takes up the offer, they will not be able to look out for him and he will spend less time with them.

If Ron has the mental capacity to make the decision on the residential programme, then Kevin and Sally should not decide for him. If Ron lacks the capacity to make this decision, Kevin and Sally must remember that they should be acting in Ron's best interests and not their own.

3.7 LESS RESTRICTIVE

Principle 5: "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." [section 3(6) Mental Capacity Act]

- 3.7.1 When acting or making a decision on behalf of a person who lacks capacity, the action or decision taken should be one which is less restrictive on that person's right and freedom to act. The less restrictive option is usually also the option that is in the best interests of the person. Sometimes, that includes not taking any action or decision at all. All actions taken or decisions made, or decisions not to take any actions, must be taken in the person's best interests.
- 3.7.2 If there is more than one option available, then the options must be weighed up and the decision taken must be determined by both the best interests and less restrictive option principles.

AH MEI'S STORY

Ah Mei lives with her 80-year-old mother, Madam Kwong, who has dementia. When Ah Mei goes to work, she locks her mother in her room to prevent her from injuring herself or wandering off. She leaves food and water in the room. Madam Kwong wears adult diapers. When Ah Mei returns home in the evening, she bathes and feeds her mother.

Even though Ah Mei is acting out of concern for the safety of her mother and is a filial daughter, this form of care is not the less restrictive option. She must consider other more suitable care arrangement such as placing Madam Kwong in a dementia day care centre.

4. LACK OF MENTAL CAPACITY AND HOW IT IS ASSESSED

4.1 KEY DETAILS

Mental capacity is assessed according to the ability of a person to make a specific decision at the time the decision needs to be made. Informal assessments of a person's capacity to make day-to-day decisions, such as what to eat and wear, are usually made by the caregiver. Registered medical practitioners and medical specialists in mental health, such as psychiatrists, can conduct formal assessments of mental capacity. A formal assessment of capacity may be required when it is doubtful the person has capacity to make a serious decision, for example, selling property, undergoing surgery or moving into a nursing home.

4.2 CONDITIONS THAT CAN CAUSE A LACK OF MENTAL CAPACITY

These are some conditions that may cause a lack of mental capacity:

- Stroke
- Brain injury
- Dementia
- Mental health problems
- Intellectual disabilities

However, it must not be assumed that a person who suffers from any of these conditions necessarily lacks mental capacity.

4.3 MENTAL CAPACITY

“For the purpose of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.” [section 4(1) Mental Capacity Act]

- 4.3.1 Mental capacity is assessed according to the ability of a person to make a decision about a matter at a particular time (the time that decision needs to be made). It is not about a person's ability to make decisions in general. A person may have capacity to make some decisions but not others. For example, a person may be able to go to the market and buy food but not be able to handle large sums of money or make investment decisions. However, there will be cases where the mental impairment may be so severe that the person may lack capacity for a broad range of decisions. Mental capacity may fluctuate (change), improve or degrade over time.

4.3.2 Mental capacity must be assessed on a case-by-case basis and cannot be assumed based only on the person suffering a particular medical condition. Furthermore, a person's lack of mental capacity cannot be based only on his:

- age;
- appearance – this covers all aspects of the way a person looks. It includes the physical characteristics of certain conditions (for example, features linked to Down's syndrome or muscle spasms caused by cerebral palsy) as well as aspects of appearance like dressing or state of cleanliness;
- condition – this includes physical disabilities, intellectual disabilities, age-related illnesses or temporary conditions such as drunkenness; or
- aspect of behaviour – this may include behaviour that appears unusual to others, for example, rocking back and forth, talking to oneself or inappropriate laughing. It also includes extroverted behaviour, for example, shouting and gesticulating, and withdrawn behaviour, for example, refusing to speak or avoiding eye contact (section 4(3) *Mental Capacity Act*).

JIA MING'S STORY

Jia Ming, who is in his 20s, has suffered minor injuries in a road traffic accident. The paramedics ask him where he is injured. Jia Ming starts uttering profanities. He has motor tics that cause him to jerk his head repeatedly.

The paramedics should not assume that Jia Ming does not have mental capacity merely because of this aspect of his behaviour.

Note that a person can lack mental capacity even though the loss of capacity is temporary or partial [Section 4(2) *Mental Capacity Act*].

4.4 TYPES OF MENTAL INCAPACITY

4.4.1 Permanent incapacity.

- Incapacity is long-term.
- Sometimes, the person will not be able to communicate in any way to anyone and therefore lacks mental capacity because his ability to communicate is one of the criteria in the test for mental capacity (see paragraph 4.6.4 below).
- There have been cases where persons have recovered their capacity in part or full, so regular checks should be conducted to establish whether capacity has returned.

Type	Examples
Permanent incapacity	A person suffering from: <ul style="list-style-type: none"> • A persistent vegetative state • Locked-in syndrome • Advanced dementia

SAMANTHA'S STORY

Samantha, a 30-year-old woman, has locked-in syndrome. Her brain functions are normal and she appears awake and aware but she is unable to communicate in any way, not even by blinking. She is assessed by her doctor to be permanently lacking in capacity for all decisions because she is totally unable to communicate and the prognosis for recovery is poor.

MADAM ENG'S STORY

Madam Eng is a 72-year-old lady who suffers from Alzheimer's disease. She has been diagnosed to be at Stage 6 of the Global-Deterioration-Scale guide. She remembers little of her earlier life and is largely unaware of recent events, experiences and her surroundings. The doctor assesses her to be permanently incapacitated because she is at an advanced stage of dementia and has become globally impaired.

4.4.2 Temporary incapacity.

- The effects of mental incapacity may last for a short time.
- If the person made a Lasting Power of Attorney (LPA) before losing capacity, the donee should only make decisions on behalf of the person, within the scope of the LPA, if the decision is an urgent one. Non-urgent matters can wait until the person has regained mental capacity.
- If the person did not make an LPA, the appropriate decision maker will make a decision if the matter is urgent. Non-urgent matters can wait until the person regains capacity (see paragraph 6.2).
- There are some decisions that cannot be made by anyone other than the person lacking capacity. So, everyone must wait until the person recovers capacity. For example, if a man suffers from a temporary loss of capacity before his wedding and does not recover in time, no one else can consent to the marriage on his behalf. The wedding will have to be postponed until he regains capacity.

Type	Examples
Temporary incapacity	<p>A person is/has:</p> <ul style="list-style-type: none"> • Drunk or abusing drugs • Affected by prescribed medication drugs • Delirium from toxic and metabolic effects of acute infections, for example, septicaemia, pneumonia, cholecystitis or cholangitis, or urinary tract infection • Infections without irreversible damage to the brain • Cerebral vascular accidents which are able to recover • Head injury without irreversible damage to the brain

MATTHEW'S STORY

Matthew, a 40-year-old bond trader, has become a drug addict. He has been using cocaine for the past year. He owns a unit at a condominium with his wife, Irene. Matthew has lost his job and must sell the condominium. He has to sign the legal documents but he overdoses on cocaine and has been admitted to hospital. The overdose has caused him to lose consciousness.

The doctors believe he may recover consciousness in a few days. Matthew has earlier made a LPA and appointed Irene as his donee with power to make decisions about his property & affairs matters. Irene informs the lawyers of the situation and the process of signing of the legal documents is put off for a few days until Matthew recovers.

Where it is possible, the making of significant decisions (including the signing of the legal documents) should be delayed until Matthew regains capacity since he is expected to regain consciousness within a few days.

4.4.3 Fluctuating capacity.

- The person's capacity changes from time to time (for example, his condition changes from good to bad and bad to good) — it is variable.
- The person should be supported to make decisions at times when he has capacity (for example, when his condition is good).
- Persons who have mental capacity for even a short time can make decisions during the periods when they have capacity.

Type	Examples
Fluctuating incapacity	<p>A person with:</p> <ul style="list-style-type: none"> • Early stage dementia • Clinical depression • Schizophrenia

DANIELLE'S STORY

Danielle, aged 72, suffers from early Alzheimer's disease. Her mental capacity fluctuates. When she has mental capacity, she has a good grasp of her financial affairs. At other times, she becomes forgetful and makes payment several times for the same goods and services and gives away cash to strangers. When she realises what she has done, she gets very upset with herself.

Her family members note that Danielle's mental capacity tends to be better in the morning compared to the rest of the day.

Morning will be a better time for them to talk to her about instructing the bank to reduce the limit of her daily withdrawals so that she will not have as much cash to dispose of during the times she suffers a lapse in her mental capacity.

4.5 ASSESSING MENTAL CAPACITY – TWO-STAGE TEST FOR LACK OF CAPACITY

The definition of "lack of capacity" provides a two-stage test for mental capacity [section 4(1) *Mental Capacity Act*]:

STEP 1:	Is the person suffering from an impairment of, or disturbance in the functioning of the mind or brain?
STEP 2:	If yes, does the impairment or disturbance cause the person to be unable to make a decision when he needs to?

4.6 WHAT IS THE MEANING OF "UNABLE TO MAKE A DECISION"?

A person is unable to make a decision when he cannot do one or more of these things in relation to making a specific decision at the time it needs to be made [section 5(1) *Mental Capacity Act*]:

- Understand the information.
- Remember the information.
- Weigh up the information.
- Communicate the decision.

All practicable steps must be taken to help the person make his own decision (see paragraph 3.4 and Chapter 5).

4.6.1 Understand the information.

The person must be able to understand the information that is relevant to the decision. To help him understand the information, it may be necessary to explain it in a way that is appropriate to his circumstances, such as using simple language, visual aids or some other means [section 5(2) *Mental Capacity Act*]. The person should not be rushed or pressured to make a decision but given time to understand the information.

He needs to understand the:

- nature of the decision to be made;
- reasons the decision needs to be made;
- options available, if there is more than one, regarding the decision to be made;
- consequences that can be expected if he chooses each of those options; and
- consequences if no decision is made.

Example	What to do (not exhaustive list)
Simon has a learning disability that affects the way his brain processes verbal information.	Present the information in other ways such as in drawings or actions to help him understand the information.
Lena is more alert in the morning compared to the afternoon.	Give the information and discuss the decision to be made with Lena in the morning when she is more alert.

SUSIE'S STORY

Susie suffers from autism. She has been feeling unwell and her sister, Linda, took her to see her GP, Dr Sara Said. Dr Said examined Susie and suspects that she has developed diabetes. In order to confirm the diagnosis, she needs to run a blood and urine test. Susie is very anxious about the tests. Dr Said spends some time explaining to Susie about:

1. diabetes,
2. the diagnostic tests for diabetes, and
3. the risks of not having the tests.

She then gives Susie several leaflets that provide similar information on diabetes in plain English with simple drawings. Dr Said tells Susie to think about what she has said and return in seven days. Linda helps Susie read and understand the leaflets supplied by Dr Said. When Susie sees Dr Said a week later, she is feeling more confident about the tests. She nods in agreement when Dr Said asks her whether she wants to have the tests. Susie points to the syringe and beaker when Dr Said asks her which equipment she will need to conduct the tests. Dr Said concludes that Susie has the mental capacity to make the decision to have the tests and she proceeds to carry out the tests.

Giving Susie the explanation, the leaflets and the opportunity to read and consider the matter at home are some suitable ways to help her to understand the information. It is important to ascertain her understanding of relevant information as part of the assessment of her capacity to make the decision.

4.6.2 Remember the information.

It is sufficient if the person remembers the information for a short period of time as long as he can remember it long enough to understand it, weigh it up and communicate his decision.

Example	What to do
Siew Hua is in the early stages of dementia and can be forgetful.	Assist Siew Hua by recording information as reminders, for example, providing photographs and drawings can help her to remember the information. When she is making a decision, check that she remembers the information relating to the decision.

HARRY'S STORY

Harry was recently diagnosed as an early sufferer of dementia. Occasionally, he forgets the names of his family members, favourite restaurants and how to get home when he goes out unaccompanied. However, he has clear moments and remembers the names of his family members when he sees them.

Harry has a \$10,000 insurance policy that is about to mature. Harry's wife, Jean, asks him what he would like to do with the money. She is careful to ask him when he has a clear moment. Harry wants to leave the money to his two grandchildren for their education. He says that a good education is the most valuable thing a person can have.

In these circumstances, it is clear that Harry has made the decision when he has capacity, and can explain his reasons for making the decision. Therefore, despite his short-term memory problems, Harry has the mental capacity to make the decision.

4.6.3 Use or weigh up the information.

The person must be able to weigh up the information and use it to make a decision. Sometimes people may understand the information but an impairment or disturbance of the mind or brain prevents them from using it. In other cases, the impairment or disturbance leads them to make decisions without understanding or using the information.

LI LING'S STORY

Li Ling has been diagnosed with schizophrenia. She cut her hand but refuses to allow her family to attend to the wound because she is experiencing hallucinations and paranoia that causes her to believe that her family members are plotting to harm her.

She is unable to accept anything they say to her about the nature of her wound and the treatment they wish to administer.

An informal assessment of Li Ling's capacity shows that she is unable to use or weigh the information to make a decision about whether to accept or reject the treatment.

4.6.4 Communicate the decision.

The person must be able to communicate his decision. Some people find it difficult to communicate and need help to do so. All practicable steps should be taken to help the person to communicate, for example, by using sign language, by writing or some other means. Sometimes it is not possible for a person to communicate, for example, a person who is:

- unconscious;
- in a coma; or
- suffering from locked-in syndrome.

Example	What to do
Mei Fang is bedridden and cannot speak but can write.	Provide pen and paper to enable her to write.
Boon Huat is recovering from a stroke and has difficulty speaking.	Engage professional help, for example, from a speech therapist, to assist him to speak again.

JOHAN'S STORY

Johan is a salesman who suffered a brain injury due to an accident. He has been recovering in hospital for the past three months. Johan is conscious but he cannot speak or move.

His wife, Miriam, is considering mortgaging their flat to get a loan to pay for his medical expenses. She is his donee under an LPA with authority to decide on property & affairs matters. When she tells him of this option, Johan starts blinking furiously, something he has not done in the past.

Miriam suspects that Johan is trying to communicate with her. She works out a system with Johan that enables him to communicate with her, so that Johan blinks once for 'yes' and twice for 'no'. When Miriam asks Johan whether he agrees to mortgage the flat, he blinks twice.

As she explores his reasons, she realises that he wants her to sell some of the shares in their joint investment account (that either person may operate independently) to raise the money for the medical expenses instead of mortgaging their flat.

Johan has mental capacity because he is able to understand, remember and weigh up the information, and communicate his decision. So, Miriam cannot act under the LPA.

4.7 WHEN SHOULD CAPACITY BE ASSESSED?

- 4.7.1 An assessment should be carried out when a person's capacity is in doubt and he has to make a particular decision. This doubt may arise for various reasons, for example, because of the person's behaviour or circumstances or because the person was previously diagnosed with an impairment of or disturbance in his mind or brain and lacked capacity to make some other decision.
- 4.7.2 Sometimes people can improve their decision making capabilities. For example, persons with learning disabilities may be taught new skills to improve their capacity to make certain decisions. So, their capacity should be reviewed from time to time.

4.8 WHO SHOULD ASSESS CAPACITY?

- 4.8.1 Different individuals may be involved in assessing a person's capacity for different decisions. The assessor is usually the individual directly concerned with the person at the time the decision needs to be made.
- 4.8.2 Informal assessment.
- An individual who has not been specially trained to conduct mental capacity assessments carries out an informal assessment. These assessments are appropriate for most day-to-day decisions, for example, whether the person can go out alone. The assessor is likely to be the person's caregiver.
 - The assessor must apply the statutory principles (see paragraphs 3.2 to 3.7) and give all practicable help to the person to make his own decision. If the person is still unable to make a decision, the assessor must conduct an informal assessment to determine if the person can make the specific decision. If the person lacks capacity to make the decision, the caregiver will make the decision on behalf of the person.
 - For acts of care or treatment, the individual must do the following to obtain protection under section 7 of the *Mental Capacity Act*:
 - take reasonable steps to determine whether the person lacks capacity about the matter in question before doing the act, and
 - reasonably believe that the person lacks capacity and the act to be done is in the person's best interests when doing the act (see Chapter 6).
 - If the decision concerns medical treatment, the healthcare professional will assess the patient's capacity to consent to or refuse treatment. If the healthcare professional is uncertain whether the patient has the capacity to make the decision, he may request a formal assessment of capacity (see 4.8.3 below). In complex cases, a multi-disciplinary team may be involved in making the assessment.

4.8.3 Formal assessments.

- Registered medical practitioners and specialists in mental health, such as psychiatrists, can conduct formal assessments.
- The registered medical practitioner may charge a fee for conducting the assessment. To avoid any conflict of interest, the assessor should not be related to the person being assessed or the individual seeking the formal assessment of the person.
- A professional such as an accountant must consider the best practices of their profession in determining whether to obtain a formal assessment of mental capacity of the person where they have doubts about the person's capacity to instruct them.
- It is prudent for the donee of an LPA to seek a formal assessment where they have doubts about the person's capacity especially if the decision the person has to make is an important one or the donee anticipates a dispute over the decision. Examples of important decisions are:
 - moving house;
 - emigrating to another country;
 - selling assets; or
 - transferring assets to another individual or organisation.

- 4.8.4 For a legal transaction, such as making a will, lawyers must assess the client's capacity to instruct them. They must assess whether the client has the capacity to satisfy any relevant legal test. If they have any doubts about the client's capacity to instruct them or to make a decision or do an act, they should get an opinion from a doctor or other professional expert(s).

RODNEY'S STORY

Rodney is an elderly gentleman who wants to change his will. He has consulted his lawyer and old friend, Jasminder. Jasminder welcomes Rodney into her office and starts talking to him about their time at university together. Rodney, who is normally very chatty, does not say very much. When Jasminder asks him about his recent birthday party, which she attended, he cannot remember it. He also did not remember the names of some of his family members. Jasminder must ensure that Rodney has the mental capacity to change his will. She telephones Rodney's wife, Melinda, and enquires about his health. Melinda tells Jasminder about her concerns for Rodney's health but Rodney has refused to see a doctor. Jasminder is uncertain if Rodney has the mental capacity to change his will. She convinces Rodney to see a doctor to get a formal assessment before he changes his will.

A will is a legal document. It would be invalid if it is made when Rodney lacks capacity. A formal assessment is appropriate because of the changes Jasminder has observed in Rodney and his inability to remember significant information.

- 4.8.5 An individual or an organisation, such as a bank, that deals with a donee of an LPA on a matter relating to the property of the donor, may require the donee to produce a certificate from a registered doctor stating that the donor's lack of capacity relating to the matter is likely to be permanent [section 13(10) *Mental Capacity Act*]. To obtain this certificate, the donee must first get the donor's capacity formally assessed. If the donee fails to produce the certificate, the individual or organisation may refuse to accept the donee's authority to act for the donor.

QI-YANG'S STORY

Qi-Yang made an LPA appointing his wife, Farah, as his donee for property & affairs matters. Last week, Qi-Yang was involved in a road accident and he is in a coma in hospital. The doctors have told Farah that he is unlikely to wake up from the coma in the near future. Qi-Yang has \$100,000 savings in his bank account. The account is held in his sole name. That money was set aside to pay for their son's education. Farah wants to withdraw \$10,000 to pay for their son's college fees. As Qi-Yang's donee, Farah has the authority to manage his finances. The bank may only allow Farah to withdraw the funds if she can obtain a certificate from a registered medical practitioner, stating that Qi-Yang's incapacity is likely to be permanent.

The bank's request for the medical certificate is in accordance with [section 13(10) of the *Mental Capacity Act*]. The certificate is to satisfy the bank that Qi-Yang has lost capacity so that Farah may operate his bank account as his donee under his LPA.

4.9 REFUSING FORMAL ASSESSMENTS OF MENTAL CAPACITY

- 4.9.1 A person cannot be forced to undergo a formal assessment of mental capacity. It may help to explain to him why it is necessary and what the consequences of refusal would be.
- 4.9.2 If the person lacks the capacity to decide whether to have the assessment or not, he can be taken for the assessment. This is acceptable as long as the decision to have the assessment is made in his best interests.
- 4.9.3 If the person is a danger to himself or others because of mental disorder, then the *Mental Health (Care and Treatment) Act* allows for admission and detention of the person into psychiatric care.

4.10 PROOF REQUIRED TO SHOW A PERSON LACKS MENTAL CAPACITY

The Act requires a person to prove on the balance of probabilities that another person lacks mental capacity [section 4(4) *Mental Capacity Act*]. The balance of probabilities is a legal test applied to civil matters by the court. It means that an individual claiming another person lacks mental capacity must be able to show that it is more likely than not that the person lacks capacity to make the specific decision.

4.11 OTHER LEGAL TESTS OF MENTAL CAPACITY

There are other legal tests of mental capacity from our common law (cases decided by judges in the courts). Note that the two-stage test for lack of capacity is for the purposes of this Act only [section 4(1) *Mental Capacity Act*].

The other tests include the capacity to:

- make a will;
- enter into a contract;
- make a gift; and
- litigate (to start or be subjected to legal proceedings).

If you need advice on whether a person has capacity to make a will, enter into a contract, make a gift or start litigation, you should contact a lawyer.

5. PRACTICABLE STEPS TO HELP PEOPLE MAKE THEIR OWN DECISIONS

Principle 2: “A person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success.”

5.1 KEY DETAILS

- 5.1.1 Under Principle 2 of the statutory principles (see paragraph 3.4), people should be helped to make their own decisions. Therefore, before deciding that a person lacks capacity to make a specific decision at a particular time, all practical and appropriate steps must be taken to help the person make his own decision.
- 5.1.2 In an emergency situation, there may not be time to go through as many steps as in a non-emergency. It will depend on the nature of the emergency. In urgent situations, such as in a medical emergency, decisions may have to be made in the person’s best interests without consulting him, his caregivers, donees or deputies.

5.2 STEPS TO HELP A PERSON MAKE HIS OWN DECISIONS

The steps listed below are intended as a guide but is not an exhaustive list because much will depend on the person, the circumstances and the nature of the decision to be made. A person-centred approach should be adopted to help persons to make their own decisions. This approach focuses on the person’s best interests. When supporting a person’s decision making you should:

- listen carefully,
- truly seek to understand what the person wants, and
- find appropriate ways to support the person’s decision making.

Provide relevant information

Example	Relevant information (not exhaustive list)
Ching Ching needs to make a decision on whether to undergo medical treatment A or medical treatment B.	<p>Explain:</p> <ul style="list-style-type: none"> • Purpose and effect of each treatment. • Consequences of each treatment. • Consequences of not having either treatment. <p>(Note that where Ching Ching has a choice, the options should be presented to her in a fair manner).</p>

5.2.1 Communicate in a way appropriate to the person.

The way in which we communicate to people who may have mental capacity issues should be tailored to their needs, for example, their educational level, specific intellectual disabilities, etc. It may be a good idea to speak to the person's relatives, caregivers, etc, before you start communicating with the person to determine what the person is comfortable with when communicating. Here are some factors to consider when communicating with a person with capacity issues:

- Speed and manner in which the information is presented.
- Use of supplementary material, for example, picture boards, DVDs, leaflets, etc, as appropriate.
- Cultural and religious sensitivities.
- The need for an interpreter.

Example	Appropriate communication (not an exhaustive list)
Tze Yin has autism and wants to buy a new computer.	<ul style="list-style-type: none"> • Do not assume that a person with autism cannot communicate or understand what is said. • Present the information and supplement it with additional materials as appropriate. • Allow Tze Yin to respond in the way she feels comfortable, for example, typing a response on a word processor, using a voice synthesizer, etc.

5.2.2 Make the person feel relaxed enough to make a decision.

People who may have capacity issues should be made to feel relaxed in the way suited to their needs and preferences. Here are some factors to consider when making a person feel relaxed so they can make the specific decision at the particular time:

- Select a place that makes the person feel relaxed, for example, his own home.
- It may be appropriate to take the person to the location where the decision will be carried out.
- The person may need privacy to make a decision.
- Select a time of day when the person is more alert.
- Do not rush or put pressure on the person to make a decision.
- Some people may prefer to have a close relative with them to support their decision making.

Example	Appropriate communication (not an exhaustive list)
The adult children of Joan, who is in the early stages of dementia, would like her to consider moving to a nursing home.	It may be appropriate to take Joan to the nursing home so she can see the facilities, talk to staff members, etc. This may reduce any fears she may have about the nursing home environment.
Michelle has intellectual disabilities and needs to decide whether to have an operation or not. She has just received some medication that causes drowsiness.	If it is not an emergency, wait until the drowsiness has worn off before discussing the operation with her.

6. BEST INTERESTS

6.1 KEY DETAILS

- 6.1.1 Every decision that is made on behalf of persons lacking capacity must be made in their best interests. This rule applies whether the decision relates to an everyday matter or a life-changing one, a medical matter or a non-medical one.
- 6.1.2 There is no single definition for the meaning of best interests in the *Mental Capacity Act* (the Act). What is in the best interests of a person will depend on many factors such as his circumstances, health and family situation. This section lists some of the factors that must be considered when determining what is in the best interests of a person lacking capacity to make a specific decision at a particular time. These factors are listed in a checklist and explained in the paragraphs referred to in the checklist.

HAH NEE'S STORY

Hah Nee is 75 years old and suffers from dementia. She did not make a Lasting Power of Attorney (LPA). Her husband died recently and she lives on her own. Her son Jonah lives in a three-room flat with his wife, Ann, and four children. Jonah is worried about his mother living on her own. Jonah is unable to take Hah Nee to live with him. There is not enough room in his flat and Ann is unable to care for Hah Nee because she is already taking care of the children. Jonah wants his mother to move to a nursing home.

This is a life-changing decision. Jonah should take his mother to a medical practitioner for a formal mental capacity assessment to determine whether she has the capacity to make this decision. He should also discuss the matter with other family members. If the medical practitioner concludes that she lacks capacity to make this decision, any decision taken by the family members for Hah Nee must be in her best interests. The statutory principles and best interests checklist below must be applied.

6.2 WHO IS THE DECISION MAKER?

Throughout this Code of Practice (the Code), the individuals who make decisions on behalf of persons who lack capacity will be known as the **decision makers**. They include caregivers, nurses, doctors, donees of an LPA and court appointed deputies. The decision maker must, so far as reasonably practicable, permit and encourage the person to participate in any act done or decision taken for him [section 6(4) *Mental Capacity Act*]. All decisions taken on behalf of the person must be made in his best interests.

Scenario	Effect of a Lasting Power of Attorney (LPA)	Decision maker
Road traffic accident <ul style="list-style-type: none"> Paramedics arrive Zainal is unconscious and bleeding 	<ul style="list-style-type: none"> This is an emergency situation. If the paramedics wait to consult family members or the donees, it may be too late to save Zainal's life. Therefore, the donee of an LPA who is authorised to make decisions on personal welfare matters (including medical treatment) does not need to be consulted in this scenario. 	Paramedics
Care home setting <ul style="list-style-type: none"> Sheila has dementia Decision concerning whether to go for walk or play mahjong 	<ul style="list-style-type: none"> Sheila's day-to-day care will primarily be managed by the care staff and nurses at the care home, for example, the decision makers on day-to-day matters where the person lacks capacity are the care staff and nurses. The donee of an LPA who is authorised to make decisions on personal welfare matters does not need to be consulted over every minor decision concerning the person. However, the donee should have been involved in the decision to select a care home and devise a care plan together with the care home professionals. For these major decisions, the decision maker is the donee. 	Caregiver and/or donee of an LPA with power to decide on personal welfare matters.

Scenario	Effect of a Lasting Power of Attorney (LPA)	Decision maker
Car accident <ul style="list-style-type: none"> Wei Min has moderate brain injury sustained in a car accident Decision to be made if he should undergo knee surgery 	<ul style="list-style-type: none"> Wei Min's capacity to decide whether to have the knee surgery or not should be formally assessed. If the assessor concludes that Wei Min has capacity to make this decision, Wei Min should be supported to make his own decision. If the assessor concludes that Wei Min lacks capacity to make this decision, the ultimate decision maker is the personal welfare donee (see paragraph 8.2 and 8.3) if the donee has been specifically given the authority to consent or refuse consent to carrying out of medical treatment. The donee must consider the doctor's opinion. If the donee and doctor disagree on the decision, the court may have to make the decision. 	Donee of an LPA with power to decide on personal welfare matters and authority to decide on medical treatment.

6.3 BEST INTERESTS CHECKLIST

Section 4 of the *Mental Capacity Act* lists common factors that are to be considered by anyone who has to decide what is in the best interests of a person who lacks capacity. The factors are mentioned below in the checklist and explained in the paragraphs referred to in the checklist. (The decision maker must consider the statutory principles (see Chapter 3).)

Stage 1	Not to base determination of best interests merely on certain factors	Apply	
	The decision maker must not decide what is in a person's best interests or assess capacity merely based on his: <ul style="list-style-type: none"> • age, • appearance, • condition, or • aspect of behaviour. (see paragraph 6.4 for more details)	✓	
Stage 2	Things to consider or do	Extent of application	Apply
	1. Whether it is likely the person will regain capacity at some time in the future to make the decision in question and when that is likely to happen (see paragraph 6.5.1 below).	Must consider.	✓
	2. Permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him or any decision affecting him [section 6(4) <i>Mental Capacity Act</i>] (see paragraph 5.2 above).	So far as reasonably practicable.	✓
	3. If the decision relates to the disposition of or settlement of property, for example, sale of property or placing assets in trust, the decision maker must be motivated by a desire to ensure that the person's property is preserved for the person's maintenance during his life [section 6(6) <i>Mental Capacity Act</i>].	So far as reasonably practicable.	✓
	4. The person's past and present wishes and feelings, especially if they were written down when the person had capacity (see paragraph 6.5.2 below).	So far as reasonably ascertainable.	✓
	5. The beliefs and values likely to affect that person's decision if he had capacity; for example, cultural background, religious beliefs and past behaviour or habits (see paragraph 6.5.3 below).	So far as reasonably ascertainable.	✓
	6. Any other factors the person would likely to have considered, if he had capacity to do so (see paragraph 6.5.4 below).	So far as reasonably ascertainable.	✓

Stage 2	Things to consider or do	Extent of application	Apply
	7. The views of anyone named by the person as someone to be consulted on the matter in question or on matters of that kind (see paragraph 6.5.5 below).	Consult if practicable and appropriate.	✓
	8. The views of anyone engaged in caring for the person or interested in his welfare (see paragraph 6.5.5 below).	Consult if practicable and appropriate.	✓
	9. The views of any donee of any LPA granted by that person (see paragraph 6.5.5 below).	Consult if practicable and appropriate.	✓
	10. The views of any court appointed deputy (see paragraph 6.5.5 below).	Consult if practicable and appropriate.	✓
Stage 3	Special consideration – Life sustaining treatment		Apply
	Decisions regarding life sustaining treatment should not be made by anybody other than a doctor and the doctor must not be motivated by a desire to end the life of the person (see paragraph 6.5.6 below).		✓
Stage 4	Special consideration – Acts of care or treatment		Apply
	For acts of care or treatment, the individual must satisfy the following conditions to obtain protection under [section 7 <i>Mental Capacity Act</i>]: <ul style="list-style-type: none"> • take reasonable steps to determine whether the person lacks capacity about the matter in question before doing the act, and • reasonably believe that the person lacks capacity and the act being done is in the person's best interests when carrying out the act (see paragraph 7.6 below). 		✓
Stage 5	Special consideration – Restraint (acts of care or treatment)		Apply
	For acts of care or treatment, where restraint is considered, the decision maker must, in addition to the matters mentioned in Stage 4: <ul style="list-style-type: none"> • reasonably believe that the act of restraint is necessary to prevent the person from suffering harm, and • ensure the restraining act is a proportionate (balanced) response to the likelihood of the person suffering harm and the seriousness of that harm (see paragraph 7.7 and 7.8 below). 		✓
Stage 6	Not inconsistent with decision of donee or deputy		Apply
	The decision must not be inconsistent with any decision properly made by any donee or court appointed deputy [section 8(5) <i>Mental Capacity Act</i>].		✓

6.4 FACTORS THAT SHOULD NOT BE RELIED ON EXCLUSIVELY TO DETERMINE BEST INTERESTS

The law states that when deciding what is in a person's best interests, the decision maker cannot make the decision merely based on the person's:

- age;
- appearance – this covers all aspects of the way a person looks. It includes the physical characteristics of certain conditions (for example, features linked to Down's syndrome or muscle spasms caused by cerebral palsy) as well as aspects of appearance like dressing or state of cleanliness;
- condition – this includes physical disabilities, intellectual disabilities, age-related illnesses or temporary conditions such as drunkenness; or
- aspect of behaviour – this may include behaviour that appears unusual to others, for example, rocking back and forth, talking to oneself or inappropriate laughing. It also includes extroverted behaviour, for example, shouting and gesticulating and withdrawn behaviour, such as, refusing to speak or avoiding eye contact [section 6(1) *Mental Capacity Act*].

6.5 FACTORS THAT MUST BE CONSIDERED BY THE DECISION MAKER IN DETERMINING BEST INTERESTS

The decision maker must take all relevant circumstances into consideration, including the factors listed below, and weigh them up before coming to a decision [section 6(2) *Mental Capacity Act*]. The term "relevant circumstances" is defined in the Act as those circumstance which the decision maker is aware of and which are reasonable to regard as relevant [section 6(11) *Mental Capacity Act*].

6.5.1 Whether it is likely the person will regain capacity at some time in the future to make the decision in question and when that is likely to happen.

The decision maker must consider this factor. In some situations, the decision may be delayed until the person regains capacity and can make the decision. Sometimes, urgent decisions may have to be made in the person's best interests because it may not be possible to wait for the person to regain capacity. The types of situations that qualifies as an emergency will depend on the circumstances. One example would be emergency medical treatment where the person would die without immediate medical treatment. Here are some indicators that may point to a person regaining or developing capacity in the future:

- The cause of the lack of capacity is treatable, for example, with medication or therapy.
- The lack of capacity will decrease over time, for example, the person loses capacity temporarily because of a sudden shock.
- The person learns new skills or undergoes new experiences to cope with an intellectual disability so as to increase understanding and ability to make certain decisions.

- The person has fluctuating capacity, so it may be possible to get the person to make the decision at a time when he has capacity to make that specific decision.
- The person who previously could not communicate learns a new form of communication.

JAMES' STORY

James made an LPA appointing Boon Leng as his donee for property & affairs matters. James has contracted meningitis and it has caused him to temporarily lose consciousness. The doctors believe that he will recover and regain capacity in a few weeks. Before his illness, James was undecided whether or not to renew his club membership which carries an annual fee of \$10,000. The renewal is not due for another three months.

This decision is not urgent and Boon Leng should wait until James regains capacity and make the decision.

- 6.5.2 The person's past and present wishes and feelings, especially if they were written down when the person had capacity.
- This is a factor which must be considered in working out the person's best interests. It cannot be ignored. There are many ways people may reveal their wishes and feelings, for example, by speaking, drawing, or using sign language.
 - It is important that other individuals, such as relatives and friends, do not try to influence or apply pressure on the person to express views which are not the person's own.
 - The decision maker must consider the person's past and present wishes and feelings so far as they are reasonably ascertainable.
 - Decision makers should consider written statements carefully. If their decision does not follow something a person has put in writing, they must record the reasons why. They should be able to justify their reasons if someone challenges their decision.
 - A doctor is not obliged to follow the person's wish if it is against the person's best interests. Doctors should exercise their professional clinical judgement of what is in the best interests of the person as a patient to determine what treatment to provide.

ROHAN'S STORY

Rohan is a wealthy 80-year-old man with dementia. He shares a home with his unmarried sister, Siti. Rohan is very fond of his nephew, Jalil. Rohan has told his relatives and friends that he would like to be looked after by Jalil in his home, if Jalil and his wife agree to have him. Jalil has invited Rohan to move in with him and his family. Siti does not like Jalil much and would prefer to care for Rohan instead.

Even though Siti does not like Jalil, she should respect Rohan's wishes as long as it is in his best interests.

6.5.3 The beliefs and values likely to affect that person's decision if he had capacity.

A person's actions and decisions are usually guided by his beliefs and values. A person's beliefs and values can be ascertained from his cultural, religious or political views. Past behaviour may also indicate particular beliefs or values. The decision maker must consider these views so far as they are reasonably ascertainable. In an emergency, the decision maker may not have the opportunity to ascertain the beliefs and values.

SUSIE'S STORY

Shan is a donee under a registered LPA for personal welfare and property & affairs matters. The donor is her mother, Susie, who has slipped into a coma after a stroke. The doctors have conducted a formal assessment of mental capacity on Susie and concluded that she currently lacks capacity to make any decisions because she is in a coma. They have told Shan that Susie is unlikely to recover from the coma in the near future and have recommended that Susie be transferred to a nursing home. Shan can use her authority as a donee to transfer her mother to a nursing home and pay for the fees from Susie's property. Before her stroke, Susie was a very devout Buddhist. In particular, she did not eat meat and expressed her preference for a Buddhist nursing home.

Shan must respect her mother's beliefs and choose an appropriate nursing home for her.

6.5.4 Any other factors the person would likely have considered, if he had capacity to do so.

This would cover a wide range of factors including actions that could benefit other individuals as long as those actions are also in the best interests of the person.

ANDY'S STORY

Andy has suffered a stroke and is unconscious in hospital. Doctors are concerned that Andy's daughter may have a genetic disease. Relatives want to conduct a blood test to determine if Andy is a carrier of that genetic disease.

The test can be carried out if the decision maker determines that Andy's love and concern for his daughter would have caused him to undergo the test if he had capacity.

ANG LIN'S STORY

Ang Lin is in a coma after a road accident. The court has appointed a deputy to manage her affairs because she had not made an LPA. The doctors have advised that Ang Lin be transferred to a nursing home. Home A is near to her relatives' homes. Home B is much farther away. Both homes offer excellent care and facilities and charge similar rates.

The deputy can consider the distance the Homes are from the relatives' homes because it is likely that Ang Lin would have considered it if she has the capacity to do so. It is likely that Ang Lin will want regular visits from her relatives, and she would want the location of the home to be convenient for them.

6.5.5 Individuals who should be consulted when considering what is in the person's best interests.

The decision maker has to consult people who are close to the person who lacks capacity wherever practical and appropriate. The Act mentions the following:

- a. Anyone named by the person as someone he wants to be consulted.
- b. Anyone caring for him.
- c. Anyone interested in his welfare (such as family members, close relatives and friends).
- d. A donee under an LPA.
- e. A court appointed deputy.

DEIDRE'S STORY

Deidre has dementia. Her husband passed away recently. She now lives alone and lacks the capacity to decide whether to move in with her daughter, Celia, or son, Henry.

Deidre made an LPA before she developed dementia. She appointed her best friend, Tara, as her donee to make decisions about her personal welfare.

Both Celia and Henry want their mother to move in with them. Celia thinks it is in her mother's best interests to move in with her because she has a large garden and her mother likes gardening and she can be close to her two grandchildren. Henry thinks it is in his mother's best interests to move in with him because he is a registered nurse who can care for her when he is not working.

Deidre was also close to her pastor and confided in him. Tara does not share the same faith as Deidre and prefers to only consult Henry and Celia.

Tara must base her decision on Deidre's best interests after weighing up the benefits and disadvantages of Deidre living with Celia and Henry. She must apply the best interests checklist and consult all relevant persons before making her decision. Tara cannot refuse to consult a relevant person just because she does not like that person or does not agree with his or her views. She must be objective and fair in determining Deidre's best interests. Here, those persons will include Celia's children, her caregivers, other relatives, close friends and the pastor.

- 6.5.6 Life sustaining treatment or treatment to prevent a serious deterioration in a person's condition.
- A personal welfare donee (see paragraph 8.3.3) does not have the power to refuse life sustaining treatment or treatment required to prevent a serious deterioration in the condition of the donor who lacks capacity [section 13(8) *Mental Capacity Act*]. The doctor will usually make these decisions based on the best interests of the patient.
 - The position is the same for deputies appointed by the court [section 25(3)(c) *Mental Capacity Act*].
 - The decision maker must not be motivated by a desire to bring about the death of the person when deciding that person's best interests in relation to life sustaining treatment [section 6(5) *Mental Capacity Act*]. This provision reflects our other laws that prohibit euthanasia, suicide and murder.

RUPA'S STORY

Rupa is a 60-year-old lady. She has been unconscious since suffering a stroke two days ago. The doctors believe that she has mild to moderate brain damage but with therapy, she should recover and her quality of life should be reasonably good. Her only relative is her 24-year-old son, Ramlal, who is Rupa's donee for personal welfare matters. Rupa goes into cardiac arrest a few days later. Ramlal is present. He does not want the doctors to resuscitate her because he is afraid that she may be left in a vegetative state. The doctors ignore his request and resuscitate Rupa.

In these circumstances, resuscitation is a life sustaining treatment and the doctor's duty to act in the patient's best interests overrides the donee's wishes.

6.6 KEEPING RECORDS – GOOD PRACTICE

- 6.6.1 The following parties should keep clear and detailed records of all decisions and the steps leading up to decisions made in relation to persons who lack capacity:
- medical professionals (nurses, doctors, specialists, etc.);
 - professional caregivers (care staff in nursing homes, hospitals, hospices, etc.);
 - therapists (physiotherapists, occupational therapists, etc.);
 - donee(s) of an LPA;
 - deputies appointed by the court;
 - professionals (lawyers, accountants, etc.);
 - individuals acting or caring for the person for a fee; and
 - other professionals acting for a fee.

- 6.6.2 Decision makers must be able to explain and provide objective reasons for making a particular decision showing how it was in the best interests of the person lacking capacity.
- 6.6.3 They must keep records of who they consulted and if a particular person was not consulted, they must be able to explain why.
- 6.6.4 These records are important as a matter of best practice but are also useful in the event of a dispute. Not every decision needs to be recorded, for example, basic everyday decisions such as what to wear and eat. The more important the decision, the more detailed the records should be.

VIKRAM'S STORY

Vikram is a 42-year-old patient at a private nursing home with severe intellectual disabilities and other health problems. He slips and falls in the toilet and breaks his leg. He requires surgery on his leg. Dr Alkaff carries out a mental capacity assessment and concludes that Vikram does not have the capacity to consent to the surgery. Vikram's only relative is his sister, Pooja. Dr Alkaff tries to contact Pooja but she has emigrated and cannot be reached. He does not know when she will become contactable. Dr Alkaff tries to involve Vikram in the decision making process by explaining to him in simple terms about his injury and the treatment. Dr Alkaff decides it is in Vikram's best interests to have the surgery because any further delay will cause the leg to become infected or deformed.

It is a good practice for the decision maker to record the process by which he arrives at the decision and other relevant facts (such as the attempts made to contact Pooja). The decision maker should also follow the best interests checklist and include notes on the discussions with others involved in the care of the person who lacks capacity (such as related professionals at the nursing home) in coming to the decision.

7. ACTS IN CONNECTION WITH CARE OR TREATMENT

7.1 KEY DETAILS

- 7.1.1 People with capacity can consent to acts in connection with care and treatment, for example, consenting to have the flu jab or to be washed, if bedridden. In theory, the individuals carrying out the acts of care or treatment on persons who lack capacity may be committing a civil wrong or a criminal offence because they acted without the person's consent. The *Mental Capacity Act* (the Act) ensures that legal protection is given to such individuals if they meet certain conditions.
- 7.1.2 Section 7(1) of the Act offers legal protection to an individual acting in connection with the care or treatment of a person if:
 - before doing the act, he takes reasonable steps to establish whether the person lacks capacity about the matter in question, and
 - he reasonably believes that the person lacks capacity and the act to be done is in the person's best interests. However, the legal protection does not extend to all acts (see paragraphs 7.2.2 and 7.4 below for the matters not covered).

7.2 INDIVIDUALS WHO MAY BE PROTECTED UNDER SECTION 7

- 7.2.1 These individuals may be protected by Section 7 if they act in the person's best interests:
 - professional and family caregivers;
 - domestic helpers who act as caregivers;
 - healthcare and social care staff (for example, doctors, nurses, therapists, social workers, etc.); and
 - others who may occasionally care for a person who lacks capacity (for example, paramedics, police officers, volunteer workers, etc.).
- 7.2.2 If any of the individuals listed above go against a decision made by a deputy or donee of a Lasting Power of Attorney (LPA), they will not receive protection under section 7 [section 8(5) *Mental Capacity Act*]. Deputies and donees must be careful not to make decisions that exceed the scope of their authority as laid down by the court or LPA document respectively. If an individual disagrees with the decision of the deputy or donee, they should try to work out their differences. If this fails, the court may be asked to intervene and make a decision.

7.3 DEFINITION OF ACTS IN CONNECTION WITH CARE OR TREATMENT

The Act does not define “care” and it should be given its ordinary meaning. However, the Act states that treatment includes diagnostic and other procedures [section 2(1) *Mental Capacity Act*].

Examples – Acts in connection with care

- Washing, dressing and personal hygiene, for example, brushing teeth and toileting.
- Helping with eating and drinking.
- Helping with communication.
- Helping with moving around.
- Helping with shopping.
- Helping someone with educational, leisure or social activities.
- Arranging for a nurse or domestic helper to help in the home.
- Helping with the household chores; for example, laundry, washing dishes, etc.

Examples – Healthcare and treatment

- Carrying out diagnostic examinations and tests (to identify an illness, condition or problem).
- Providing professional medical, dental or similar treatment.
- Giving medication.
- Taking someone for professional medical, dental or similar treatment at an appropriate centre providing that treatment.
- Providing nursing care (in a professional setting, for example, care in a home or personal home setting).
- Carrying out necessary medical treatment or procedures.
- Providing emergency care.

7.4 WHAT SECTION 7 DOES NOT COVER

7.4.1 Section 7 does not protect individuals from civil liability (legal responsibility) for negligent acts and omissions (for example, a doctor who is negligent in treating a patient will still be liable under civil law) nor from criminal responsibility for negligent acts or omissions.

7.4.2 Section 7 does not apply to:

- a. clinical trials but a donee of an LPA who has been specifically given the authority under the LPA to give or refuse consent to the carrying out or continuation of treatment by a healthcare provider may decide on the conduct of clinical trials [section 13(7) *Mental Capacity Act*];
- b. acts where inappropriate restraint have been used (see paragraph 7.8 below); and
- c. acts not within the scope of the individual’s professional skills or experience, for example, a caregiver should not carry out acts relating to care or treatment that should only be performed by a trained healthcare specialist such as a physiotherapist or nurse.

7.4.3 In relation to individuals performing acts of care or treatment on persons lacking capacity, section 7 does not:

- a. give one individual more rights than another when carrying out these tasks;
- b. state which individual is authorised to act in any specific situation; or
- c. allow the individual to consent on behalf of the person lacking capacity on matters other than those on care or treatment.

7.4.4 Section 7 does not affect the operation of the *Advance Medical Directive Act*.

7.5 CHECKLIST FOR INDIVIDUALS CARRYING OUT ACTS OF CARE OR TREATMENT

The individual carrying out acts of care or treatment should apply the checklist below. All professionals should keep records on the steps taken when applying the checklist to a particular person who may lack mental capacity. Keeping records is a matter of good practice and will be useful if there is a dispute.

Stage 1	Have regard to the statutory principles	Apply
1.	When dealing with any person, he must be assumed to have mental capacity unless it is established otherwise.	✓
2.	A person is not to be treated as though he is unable to make a decision unless all practicable steps have first been taken to help him.	✓
3.	A person is not to be treated as lacking mental capacity just because he makes an unwise decision.	✓
4.	Any act or decision taken on behalf of a person who lacks mental capacity must be taken in his best interests.	✓
5.	Before an act or decision is taken on behalf of a person who lacks capacity, consider if there is any option which can as effectively achieve the purpose for which the act or decision is needed that is less restrictive of the person’s rights and freedom.	✓

Stage 2	Not to base determination of best interests merely on certain factors		Apply
	The decision maker must not decide what is in a person's best interests or assess capacity merely based on his: <ul style="list-style-type: none"> • age, • appearance, • condition, or • aspect of behaviour. (see paragraph 6.4 for more details)		✓
Stage 3	Assess capacity		Apply
	The decision maker must assess the person's capacity, applying the two-stage test. Informal assessments are appropriate for everyday matters. Formal assessments are conducted when the decision is an important or life-changing one (see paragraph 4.8.2 and 4.8.3 for more details).		✓
Stage 4	Involve and encourage participation		Apply
	The decision maker must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him or any decision affecting him [section 6(4) <i>Mental Capacity Act</i>] (see paragraph 5.2 for more details).		✓
Stage 5	Apply best interests checklist	Extent of application	Apply
	1. Whether it is likely the person will regain capacity at some time in the future to make the decision in question and when that is likely to happen (see paragraph 6.5.1).	Must consider.	✓
	2. The person's past and present wishes and feelings, especially if they were written down when the person had capacity (see paragraph 6.5.2).	Consider so far as reasonably ascertainable.	✓
	3. The beliefs and values likely to affect that person's decision if he had capacity, for example, cultural background, religious beliefs and past behaviour or habits (see paragraph 6.5.3).	Consider so far as reasonably ascertainable.	✓
	4. Any other factors the person would likely to have considered, if he had capacity to do so (see paragraph 6.5.4).	Consider so far as reasonably ascertainable.	✓

	5. The views of anyone named by the person as someone to be consulted on the matter in question or on matters of that kind (see paragraph 6.5.5).	Consult if practicable and appropriate.	✓
	6. The views of anyone engaged in caring for the person or interested in his welfare (see paragraph 6.5.5).	Consult if practicable and appropriate.	✓
	7. The views of any donee of any LPA granted by that person (see paragraph 6.5.5).	Consult if practicable and appropriate.	✓
	8. The views of any court appointed deputy (see paragraph 6.5.5).	Consult if practicable and appropriate.	✓
Stage 6	Special consideration – Life sustaining treatment		Apply
	Decisions regarding life sustaining treatment should not be made by anybody other than a doctor and the doctor must not be motivated by a desire to end the life of the person (see paragraph 6.5.6).		✓
Stage 7	Special consideration – Acts of care or treatment		Apply
	For acts of care or treatment, the individual must satisfy the following conditions to obtain protection under section 7 of the Act: <ul style="list-style-type: none"> • take reasonable steps to determine whether the person lacks capacity about the matter in question before doing the act, and • reasonably believe that the person lacks capacity and the act being done is in the person's best interests when doing the act (see paragraph 7.6 for more details). 		✓
Stage 8	Special consideration – Restraint (Acts of care or treatment)		Apply
	For acts of care or treatment, where restraint is considered, the individual must, in addition to the matters mentioned in stage 7: <ul style="list-style-type: none"> • reasonably believe that the act of restraint is necessary to prevent the person from suffering harm, and • ensure the restraining act is a proportionate (balanced) response to the likelihood of the person suffering harm and the seriousness of that harm (see paragraph 7.7 and 7.8 for more details). 		✓

7.6 MEANING OF REASONABLE BELIEF THAT A PERSON LACKS CAPACITY

- 7.6.1 For acts in relation to care and treatment, the individual assessing capacity must have a reasonable belief that the person lacks capacity to make that specific decision at the particular time [section 7(1) (b) *Mental Capacity Act*].
- 7.6.2 The individual must have taken reasonable steps to determine whether the person lacks capacity about the matter in question. The skills and knowledge of a health or social care professional will affect the meaning of “reasonable”. So, for example, a doctor is expected to show more skill in assessing capacity when compared to an individual without medical training. Therefore, qualified professionals such as psychiatrists, nurses and social workers would normally be expected to carry out a more thorough capacity assessment based on their skills and experience when compared with family members and other caregivers who have no relevant qualifications.
- 7.6.3 The question of whether the individual took reasonable steps to assess capacity will depend on the circumstances and urgency of the decision. So, in an emergency where a person’s life is threatened, there may be very little time to take steps which otherwise would have been taken.
- 7.6.4 It is prudent to record the steps taken to assess capacity and the reasons for the decision on capacity. In the event of a dispute, the individual assessing capacity must be able to show reasons for his conclusion.
- 7.6.5 Even if the court is not involved, people are still expected to have reasonable grounds for believing that they are acting in somebody’s best interests. Decision makers cannot simply impose their own views. They must have objective reasons for their decisions – and they must be able to demonstrate them. They must be able to show they have considered all relevant circumstances and applied all elements of the best interests checklist.

7.7 DEFINITION OF RESTRAINT

Restraint is defined as the use of, or threat to use, force by an individual to secure the doing of an act, which the person resists, or restricting the person’s freedom to move, whether or not the person resists [section 8(4) *Mental Capacity Act*]. A person can be restrained without physical force or threat of physical force being used.

Examples – Restraining actions and treatment

- Verbally threatening a person with physical force, for example, telling a person they will be tied up or locked up if they do not follow instructions.
- Taking a person, who does not refuse, to a place where he cannot leave – no actual use of physical force.

7.8 USING RESTRAINT

- 7.8.1 The individual must satisfy the following conditions to obtain protection under section 7 *Mental Capacity Act*:
- takes reasonable steps to determine whether the person lacks capacity about the matter in question before doing the act;
 - *reasonably believes* that the person lacks capacity;
 - *reasonably believes* that the act of restraint is necessary to prevent the person from suffering *harm*; and
 - ensures the restraining act is a *proportionate response* to the likelihood of the person suffering harm and the seriousness of that harm.

The terms in italics above are explained in detail at paragraphs 7.6, 7.8.5 and 7.8.6 respectively.

- 7.8.2 It is not appropriate to use restraint merely to make it easier for the individual providing care or treatment to “manage” the person. Individuals who are considering the use of restraint must give objective reasons why the restraint was necessary. These reasons should be detailed in the person’s records.
- 7.8.3 If a person who does not have capacity to consent demonstrates challenging behaviour or behaves in a way that may cause harm to others, healthcare and social service staff may restrain or remove the person to prevent harm befalling the person or anyone else. This duty is imposed by the common law on healthcare and social service staff regarding the persons they serve.
- 7.8.4 Statutory principle 5 (see paragraph 3.7) requires the action or decision taken to be one that has the less restrictive effect on the person’s rights and freedom of action [section 3(6) *Mental Capacity Act*].
- 7.8.5 Meaning of harm.

Harm is not defined in the Act. What is harm depends on the circumstances.

Examples – Harm

- A person with severe dementia may not understand that drinking liquid detergent is dangerous.
- A person suffering from moderate dementia may wander from home and become confused and be unable to find his way back.
- A person with schizophrenia undergoing an attack may suffer hallucinations and believe that the doctors are trying to poison him, and refuse the medication or treatment that he needs.

Usually, common sense measures can prevent incidents of harm from occurring without restraining the person. Examples include:

- locking up household chemicals,
- locking up sharp kitchen equipment, and
- placing grilles on apartment windows.

ISMAIL'S STORY

Ismail is a 75-year-old man with dementia. He is a resident at a dementia care home. Dr Lim, the doctor-in-charge of the home, has recommended influenza vaccination for all patients at the home as a preventive measure. Before Ismail developed dementia, he made an LPA appointing his daughter Rohani as his donee for personal welfare and gave her power to make healthcare decisions on his behalf. Dr Lim examines Ismail and determines that he does not have the mental capacity to decide whether to have the vaccination or not. He contacts Rohani and explains the situation to her. Rohani exercises her power as donee to consent to the vaccination on behalf of Ismail because she believes that the treatment is in his best interests.

In this particular instance, some restraint will be necessary in the best interests of Ismail in the form of holding the arm steady for the vaccine to be injected intramuscularly with the least trauma to the arm. Also, there may be a need for another person to hold Ismail down if he is restless.

This is restraint that is acceptable in the circumstances, but it nevertheless is restraint. As a good practice, Dr Lim will also inform Ismail what he is going to do.

7.8.6 Meaning of proportionate response.

A proportionate response is a balanced response in the particular circumstances. It means that where restraint is necessary it should:

- involve the minimum amount of force sufficient for the act, and
- be used for the shortest possible time.

In accordance with principle 5, the less restrictive option should be selected when using restraint [section 3(6) *Mental Capacity Act*].

REN ZHEN'S STORY

Ren Zhen is a 22-year-old woman who suffered brain damage at birth. She lives with her father, Mr Zhong, in a terrace house. She has the capacity to make day-to-day decisions like what to eat and can select items she wants to buy at the market although she cannot handle money at all. Whenever she goes out, her father or caregiver accompanies her. At home, Ren Zhen likes to spend time sitting on the swing in the garden. She can play in the garden unsupervised as long as the gate is locked.

Her father, Mr Zhong made some bad investments and lost a lot of money. To avoid going bankrupt, he sells the house and rents an HDB flat instead. Ren Zhen has never lived in a flat before. On the day they move into the flat, Mr Zhong notices Ren Zhen leaning over the window and nearly falling over. Mr Zhong is horrified and rushes to pull her to safety.

He makes enquiries about and then purchases metal grilles for installation on all windows in the flat. The contractor will install the grilles in three days. In the meantime, Mr Zhong concludes that it is not safe to leave Ren Zhen unattended in the flat. He has two options:

1. tie Ren Zhen to a chair to ensure her safety while he is out at work during the three days, or
2. move her to his sister's house temporarily.

Option 1 is not acceptable even if he needs to temporarily restrain Ren Zhen to go to the toilet himself. To tie the daughter up for the day while he goes to work will be even less acceptable.

Option 2 will be an appropriate solution. It is a less restrictive option.

7.9 CARE PLANS

7.9.1 A care plan is a document that details the care arrangements for a person who lacks capacity and may be prepared by:

- a multi-disciplinary team of professionals (individuals with different skills, for example, psychiatrists, physiotherapists and geriatricians),
- the donee of an LPA for personal welfare affairs (if the person has appointed one), and
- the person's relatives.

- 7.9.2 All care plans should contain an assessment of the person's mental capacity to consent to the acts of care and treatment proposed in the plan. It should also contain risk assessments and state the appropriate measures that need to be taken to minimise or prevent these possible risks.
- 7.9.3 The care arrangements drawn up in the plan must be in the best interests of the person concerned. When an appropriate care plan is in place, health and social care staff may generally work according to the care plan. However, they should still make every effort to communicate with the person to determine if he still lacks capacity and to see if the action is still in his best interests. Regular checks on a person's capacity to make a specific decision should be made because the circumstances of the person lacking capacity may change thereby impacting the capacity and best interests assessments. This is particularly true for persons with fluctuating capacity. Therefore, care plans should be regularly reviewed.

FRED'S STORY

Fred has advanced chronic liver disease that causes his mental capacity to fluctuate. The multi-disciplinary team treating him has drafted a care plan. It covers medication, physiotherapy and personal care. The team involves Fred in the preparation of the care plan. They consult and involve him in the process as far as possible, seeking out moments when his capacity is at a good level, applying the best interests checklist and statutory principles.

In following the care plan, the professionals delivering care or treatment to Fred must ensure that they take reasonable steps to communicate with him to explain their actions to determine whether he has the capacity to consent to the specific acts. If they conclude that Fred has capacity to consent to the specific act and he refuses, they must stop unless or until Fred consents.

8. LASTING POWER OF ATTORNEY

8.1 KEY DETAILS

- 8.1.1 A Lasting Power of Attorney (LPA) is a legal document that allows a person who is 21 years of age or older (donor), and who has mental capacity, to voluntarily appoint one or more persons (donee(s)), to make decisions and act on his behalf when he lacks mental capacity in the future.
- 8.1.2 Unlike a general Power of Attorney which ceases to have effect when the donor loses his mental capacity, an LPA takes effect when the donor loses capacity. The LPA allows a person to plan for such a future occurrence.
- 8.1.3 A donee may only make decisions on behalf of the donor if the donor lacks capacity, or the donee reasonably believes that the donor lacks capacity to make those decisions [section 13(1) *Mental Capacity Act*].

8.2 DECISIONS DONEES MAY BE AUTHORISED TO MAKE

- 8.2.1 The donor of an LPA may give the donee authority to make decisions about the donor's:
- personal welfare (including healthcare decisions) and/or
 - property & affairs (including finances) matters.
- 8.2.2 A donee appointed to make decisions about personal welfare matters cannot make decisions about the donor's finances unless the same donee is also authorised to make decisions about the donor's property & affairs matters.
- 8.2.3 A donee appointed to make decisions about property & affairs matters cannot make decisions about the donor's welfare unless the same donee is also authorised to make decisions about personal welfare matters.
- 8.2.4 The donor may restrict the scope or exclude the types of decisions that a donee may make, for example, the donor appointing a donee for property & affairs matters may state in the LPA that the donee cannot make any decisions on investments.
- 8.2.5 The donor may make a general LPA to give the donee authority to make wide-ranging decisions on behalf of the donor in respect of the donor's personal welfare as well as property & affairs matters. However, the law does not allow certain decisions to be made on behalf of the donor and there are some restrictions on some actions or decisions (see paragraphs 1.4 and 8.6).

8.3 POWERS OF A PERSONAL WELFARE DONEE

- 8.3.1 The types of decisions and actions a personal welfare donee may be authorised to make include:
- where the donor should live;
 - who the donor should live with;
 - day-to-day care decisions (for example, what to wear and eat);
 - what social activities to take part in;
 - handling the donor's personal correspondence; and
 - who the donor may have contact with.
- 8.3.2 The list above contains some examples of the types of decisions and actions a personal welfare donee may make but it is not a complete list. Donors may restrict the powers of the donee through conditions and exclusions, for example, a donor may state that the donee cannot disallow the donor's brother from visiting him.
- 8.3.3 Healthcare treatment.

A personal welfare donee may give or refuse consent to the carrying out or continuation of treatment by anyone providing healthcare (including the conduct of a clinical trial) IF AND ONLY IF the donor expressly states this in the LPA. However, a personal welfare donee does not have the power to refuse life sustaining treatment or treatment to prevent a serious deterioration in the condition of the donor. The doctor will usually make these decisions based on the best interests of the patient. If the donor has made an Advance Medical Directive (AMD) in accordance with the *Advance Medical Directive Act* while he still had capacity, the doctors have to comply with the AMD.

EVELYN'S STORY

Evelyn is a healthy 60-year-old retiree. She wants to plan for her future by making an LPA which authorises her donee to decide on personal welfare matters. Evelyn wants to appoint her younger sister, Doris, as her donee. Her brother does not get along with her sister because of a financial dispute 20 years ago. Evelyn wants to make sure that her brother can visit her in the future if she lacks mental capacity.

In the LPA document, Evelyn may give Doris power to make decisions relating to her personal welfare but specifically exclude Doris from restricting her brother from visiting her.

8.4 POWERS OF A PROPERTY & AFFAIRS DONEE

- 8.4.1 The types of decisions a property & affairs donee may be authorised to make include:
- dealing with property – buying, selling, renting and mortgaging property;
 - opening, closing and operating bank accounts;
 - receiving dividends, income, inheritance benefits or other financial entitlements on behalf of the donor;
 - handling tax matters;
 - paying the rent, mortgage repayments and household expenses;
 - investing the donor's savings; and
 - purchasing a vehicle or other equipment the donor needs.
- 8.4.2 The list above contains some examples of the types of decisions and actions a property & affairs donee may make but it is not a complete list. Donors may restrict the powers of the donee through conditions and exclusions, for example, by stating that the donee cannot make investment decisions.

MARTIN'S STORY

Martin is a 60-year-old bachelor who lives alone. His doctor tells him that his blood pressure is very high. Martin is worried that if he suffers a stroke and becomes incapacitated, no one will have access to his savings account with YZA Bank to pay for his expenses. He thinks of placing his savings in a joint account with his niece, Jessica, so that she will be able to use the money for his expenses if he becomes too ill to do so himself. He is uncertain about this idea because he would have to authorise her to access the account independently even when he is well and can manage his own affairs. He hears about the Mental Capacity Act and decides to make an LPA appointing Jessica as his donee for personal welfare as well as property & affairs matters.

This allows Martin to have sole control over his savings account for as long as he has capacity to manage his financial affairs.

8.5 DUTIES OF DONEES

Donees play an important role in carrying out their duties under an LPA. Donees must:

- 8.5.1 Follow the statutory principles.
- 8.5.2 Act in the donor's best interests.
- 8.5.3 Have regard for the guidance in the Code of Practice.
- 8.5.4 Carry out the donor's instructions and make decisions within the scope of the authority as stated in the LPA.
- 8.5.5 Carry out their duties with reasonable care and skill.
 - a. The level of care and skill donees must apply depends on whether they are paid and hold relevant professional qualifications.
 - b. Unpaid donees must carry out their duties with the same reasonable care, skill and diligence they would use with their own affairs.
 - c. Donees who are paid for their services must meet a higher standard of care and skill.
 - d. Professionals who are engaged as donees for their specific professional knowledge, for example, lawyers and accountants, must meet the high standards of their profession.
- 8.5.6 Not to take advantage of their position and not benefit themselves but to benefit the donor (fiduciary duty).
 - a. Donees are under a fiduciary duty not to take advantage of their position. They cannot put themselves in a position where their duties conflict with their personal interests, for example, they cannot accept a third party commission in any transaction involving the donor.
 - b. Donees should not allow considerations other than the best interests of the donor to influence the way that they carry out their duties.
 - c. Decisions taken by donees should benefit the donor, not themselves.
- 8.5.7 Not to pass on their authority to someone else.
 - a. Donees cannot pass on their authority to someone else.
 - b. They may seek professional or expert advice, for example, from doctors, financial advisors, etc.

- 8.5.8 Act in good faith.

Donees must act honestly and with integrity. For example, they should observe the wishes of the donor told to them insofar as those wishes are not contrary to the donor's best interests.
- 8.5.9 Respect confidentiality.
 - a. Donees must keep the donor's affairs confidential.
 - b. Two exceptions to this rule would be if disclosure of the information is required by law or in the donor's best interests.
- 8.5.10 Follow any directions from the court.
 - a. Donees must follow any directions made by the court.
 - b. Additionally, the court may also require donees to provide reports, accounts, records and information, for example, financial or healthcare reports on the donor.
- 8.5.11 Keep accounts.
 - a. Donees appointed to manage the donor's property & affairs must keep accounts of transactions carried out on behalf of the donor and submit them to the Public Guardian at times set by the court.
 - b. If the donor's financial affairs are simple, then records of income, expenses and bank statements may be adequate.
 - c. If the donor's financial affairs are complicated, then the records should be more detailed.
- 8.5.12 Keep the money and property of the donor separate from the donees'.
 - a. Donees should keep the donor's funds and property separate from their own and anyone else's.
 - b. If a donee is the donor's spouse, they may have agreed in the past to keep all funds in a joint back account. In these circumstances, it may be possible to continue this arrangement. However, it may not be advisable because it would be difficult to avoid mistakes or confusion.
- 8.5.13 Not give up the role without telling the donor (if the donor has capacity) and the Office of the Public Guardian.

Donees cannot give up their role as donees without following the appropriate procedures as laid down by the Office of the Public Guardian.

8.5.14 To inform the Public Guardian of any change of contact details and certain circumstances.

A donee is required to inform the Office of the Public Guardian of:

- any changes in his contact details,
- any changes in the donor's contact details, if the donor lacks capacity to do so, and
- the occurrence of any event which terminates the donee's appointment or cancels his power.

8.6 RESTRICTIONS ON DONEE'S POWER TO MAKE DECISIONS

A donee may only make decisions on behalf of the donor if the donor lacks capacity, or the donee reasonably believes that the donor lacks capacity to make those decisions [section 13(1) *Mental Capacity Act*]. To protect the donor, a donee cannot make the following decisions for or on behalf of the donor:

8.6.1 Excluded decisions.

A donee cannot make the decisions mentioned in paragraph 1.4.

8.6.2 Restrictions on personal welfare donee.

a. Medical issues

- A personal welfare donee may not give or refuse consent to the carrying out or continuation of treatment by a person providing healthcare (including the conduct of a clinical trial) unless the donor expressly states this in the LPA.
- The personal welfare donee may not make any decision with respect to the carrying out or continuation of:
 - life sustaining treatment on the donor, whether or not it is extraordinary life sustaining treatment within the meaning of section 2 of the *Advance Medical Directive Act* [section 13(8)(a) *Mental Capacity Act*]; or
 - any other treatment on the donor which a person providing healthcare reasonably believes is necessary to prevent a serious deterioration in the donor's condition [section 13(8)(b) *Mental Capacity Act*].

The doctors, who are governed by their professional duty to decide what is in the patient's best interests, will make these decisions.

b. Use of restraint

- The personal welfare donee may not use restraint unless:
 - the donee reasonably believes that the act of restraint is necessary to prevent the donor from suffering harm, and
 - the restraining act is a proportionate (balanced) response to the likelihood of the donor suffering harm and the seriousness of that harm [section 13 *Mental Capacity Act*].
- Restraint is the use or threat to use force by the donee or someone authorised by the donee to secure the doing of an act which the donor resists, or restricting the donor's freedom to move, whether or not he resists.
- An act may amount to restraint even though actual physical force or threat of physical force is not used.
- Refer to paragraphs 7.6, 7.8.5 and 7.8.6 for the definitions of reasonable belief that a person lacks capacity, harm and proportionate response respectively.

8.6.3 Restrictions on property & affairs donee.

a. Wills, insurance & Central Provident Fund (CPF) matters

- The property & affairs donee may not do any of the following on the donor's behalf:
 - make a nomination under section 49L(2) or 49M(2) of the *Insurance Act* (Cap. 142) [section 13(9)(a) *Mental Capacity Act*];
 - revoke any nomination made under section 49L(2) or 49M(2) of the *Insurance Act* (Cap. 142) by the donor or the court on the donor's behalf [section 13(9)(b) *Mental Capacity Act*];
 - execute a will [section 13(9)(c) *Mental Capacity Act*];
 - execute under section 15(6A) or 25(1) of the *Central Provident Fund Act* (Cap. 36), any memorandum under section 25(1) of that Act [section 13(9A)(a) *Mental Capacity Act*]; or
 - revoke any memorandum or nomination that had been made by him, or by the court on his behalf, under section 25(1) of the *Central Provident Fund Act* (Cap. 36) [section 13(9A)(b) *Mental Capacity Act*].

b. Gifts

- The property & affairs donee may not make gifts from the donor's property unless the donor in the LPA has specifically authorised the donee to do so.
- Where the donor authorises the donee to make gifts, the donor may state the value of the gift or gifts to be made in the LPA.
- Where the donor has not specifically stated the value of the gifts, the donee when making gifts:
 - must take into consideration that the value of the gifts is not unreasonable bearing in mind all circumstances and, in particular, the size of the donor's estate; and
 - must have regard for the principle that the donor's property should be preserved for the donor's maintenance during his life.

8.6.4 Restrictions on both donees.

Appointing substitute or successor donees

- Donees cannot appoint substitute or successor donees.
- However, the donor may specify in the LPA that a replacement donee be appointed if any of these events occur:
 - the donee formally refuses the appointment;
 - the donee dies;
 - the donee becomes bankrupt, or if the donee is not an individual, is in liquidation, wound-up, dissolved or under judicial management (for a property & affairs donee);
 - the marriage between the donor and donee is dissolved or annulled, and the LPA does not expressly provide that the donee should continue to act as donee; or
 - the donee lacks capacity.

8.7 SELECTING A DONEE

- 8.7.1 The donee should be someone trustworthy, reliable and competent to make decisions that the donor has authorised.
- 8.7.2 A donee cannot be appointed without being told of the appointment. The donee must sign a statement in the LPA consenting to the appointment.
- 8.7.3 Personal welfare donee.
- a. A personal welfare donee must be an individual who is at least 21 years old when the LPA is signed.
 - b. A company or business cannot be appointed as a personal welfare donee.
 - c. The donee must be identified by name, for example, "Fiona Fernandez", and not a job title, for example, "my lawyer".
- 8.7.4 Property & affairs donee.
- a. A property & affairs donee must be:
 - an individual who is at least 21 years old when the LPA is signed, or
 - a licensed trust company under the *Trust Companies Act* (Cap. 336), as prescribed by the mental capacity regulations.
 - b. An individual who is an undischarged bankrupt cannot be a property & affairs donee.

8.8 NUMBER OF DONEES

- 8.8.1 A donor can appoint a maximum of two donees and one replacement donee under Form 1. However, there is no limit to the number of donees to be appointed under a Form 2.
- 8.8.2 However, the donor should not appoint too many donees because it may be difficult to get them to agree on decisions. Also, people who deal with the donees may become confused about which donee to deal with and to take decisions from. The donor should choose donees that are willing to work together so differences in opinions may be resolved amicably thereby avoiding any deadlock.

8.8.3 If a donor appoints two or more donees to make decisions about the same matters, he can appoint them to act in any of the following ways:

a. **Jointly**

This means that the donees have to act together and cannot act separately.

b. **Jointly and severally**

This means that the donees can take the decision together or separately. Both types of decisions are valid.

c. **Jointly on some matters and jointly and severally on others**

This means that the donees have to act jointly on some matters, for example, sale of residential property, but may act separately on other matters, for example, paying household bills.

8.8.4 If the donor appoints more than two donees and does not specify how they are to act, the law assumes they are to act jointly [section 12(5) *Mental Capacity Act*].

8.9 DECISIONS THAT REQUIRE BOTH THE PERSONAL WELFARE DONEE AND THE PROPERTY & AFFAIRS DONEE TO WORK TOGETHER

8.9.1 Some decisions may involve both personal welfare as well as property & affairs. For example, a decision whether the donor should live in a nursing home or a live-in nurse be engaged involves both the personal welfare of the donor as well as access to the donor's funds to pay for these services.

8.9.2 In this scenario, if the donee for personal welfare decisions is also the donee for property & affairs matters, the same person can make these decisions.

8.9.3 If the donees are different, they will have to work together to ensure that the decisions are carried out in the best interests of the donor.

8.10 HOW TO MAKE AND REGISTER AN LPA

8.10.1 To make a valid LPA, you must:

a. Complete and sign the LPA Form that consists of the:

- portion to be completed and signed by the donor,
- certificate which must be signed by a certificate issuer (see paragraph 8.12.2 below), and
- statement to be signed by each donee, including replacement donee(s).

b. Complete and sign the application to register an LPA Form,

c. Post in the signed original LPA Form and application form to the Office of the Public Guardian (OPG) and to pay the application fee when contacted by OPG to do so. Both the LPA Form and the Application Form are available from the OPG and from the OPG website at www.msf.gov.sg/opg.

8.10.2 An LPA can be registered by the:

- a. donor,
- b. donee or donees (if the LPA appoints them to act jointly), or
- c. any of the donees (if the LPA appoints the donees jointly and severally).

8.10.3 The person making and registering an LPA should note that:

- a. The donor must be at least 21 years old and have mental capacity in order to make a valid LPA.
- b. It is not compulsory that a donor obtains legal advice before making an LPA but if his circumstances are complex, it would be prudent to do so.
- c. It is a criminal offence for a person who applies to register an LPA to knowingly make a false statement on a material matter. A person convicted of this offence can be fined up to \$10,000 or jailed for up to 2 years.

8.11 NOTIFICATION REQUIREMENTS WHEN REGISTERING AN LPA

The Public Guardian.

- a. The Public Guardian must notify the donee(s) that the donor has submitted an application to register the LPA.
- b. The Public Guardian must notify the donor that an application to register the LPA has been submitted by the donee(s).
- c. Where the LPA appoints more than one donee and not all the donees make the application to register the LPA, the Public Guardian must notify the donor and the other donee or donees that did not join in making the application, that such an application was submitted by one or some of the donees.

8.12 SAFEGUARDS FOR MAKING AND REGISTERING AN LPA

8.12.1 The donor.

- a. The donor must understand what an LPA is and its effect.
- b. To ensure that the donor understands the consequences of making an LPA, the LPA forms require the donor to state that:
 - he has read or someone has read to him key (prescribed) information about the LPA, and
 - he intends to give his donee the authority to act on his behalf when he no longer has capacity.

8.12.2 The certificate issuer.

- a. The certificate issuer must certify that when the LPA was made:
 - the donor understood the LPA and its scope,
 - the donor was not induced by fraud or undue pressure to create the LPA, and
 - there is nothing else that would prevent the LPA from being created.
- b. The following persons may be a certificate issuer:
 - an accredited medical practitioner (please refer to the OPG website at www.msf.gov.sg/opg),
 - a registered psychiatrist,
 - an advocate and solicitor of the Supreme Court who has in force a practising certificate under the *Legal Profession Act*, or
 - such other persons as may be prescribed by the Mental Capacity Regulations.
- c. To avoid possible conflicts of interest, the following persons should not be certificate issuers:
 - a donee or replacement donee appointed under the LPA or any other LPA made by the donor (whether cancelled or not);
 - a family member of such donee or replacement donee;
 - a director or employee of such donee or replacement donee who is a licensed trust company;
 - a business partner or employee of the donor or such donee or replacement donee;
 - the owner, director, manager or employee of the care facility where the donor resides or is being cared for, or a member of his family.

8.12.3 The donee.

- a. To ensure that the donee understands his obligations, he must sign a statement in the LPA that he:
 - has read or someone has read to him key (prescribed) information, and
 - understands his role and responsibilities under the LPA, in particular:
 - he has a duty to act according to the principles of the *Mental Capacity Act* [section 3] (see Chapter 3) and to have regard for this Code of Practice;
 - he can only act as donee after the LPA is registered with the OPG and when the donor lacks mental capacity;
 - he can only make decisions that are within the scope authorised by the LPA;
 - he can only make decisions if he is still eligible to act as a donee; and
 - he must always make decisions and act in the best interests of the donor.
- b. Individual donees must notify the Public Guardian if:
 - they become bankrupt (for property & affairs donees), or
 - their marriage to the donor is dissolved or annulled.
- c. Non-individual donees must notify the Public Guardian if:
 - their trust company licence is revoked or has lapsed, or
 - they are liquidated, wound up, dissolved or under judicial management.

8.12.4 The witness.

- a. The certificate issuer shall be the witness for the donor.
- b. The donor, other donee(s) and replacement donee(s) are not allowed to be a witness for the donee.

8.13 WHEN CAN A DONEE ACT?

- 8.13.1 The LPA must be properly made and registered. After registration, the donee may make decisions on behalf of the donor only when the donor lacks capacity to make those decisions [section 11(1) *Mental Capacity Act*].
- 8.13.2 The donee may only make decisions that he is authorised to make under the LPA.
- 8.13.3 The donee may not make any decision for the donor if he knows:
- the donor does not lack capacity or he does not reasonably believe the donor lacks capacity,
 - the LPA was not created (for example, he knew the donor lacked capacity when the donor signed the LPA), or
 - of circumstances that would have terminated his authority to act as a donee (see paragraph 8.14 below).

LATIFF'S STORY

Latiff has made and registered an LPA appointing his wife, Zaleha, as donee for personal welfare matters. Latiff suffered a stroke which caused some brain damage. He is unconscious and cannot communicate with anyone. Currently, Zaleha can act as donee and make all decisions relating to Latiff's personal welfare matters because he does not have the capacity to make any of them. However, Latiff did not appoint Zaleha as a donee for property & affairs matters because she is not good at handling financial matters.

Zaleha cannot make any decision relating to property or affairs matters for Latiff because she is not authorised under the LPA. If Latiff regains consciousness and can understand, retain and use information and communicate his personal welfare decisions, Zaleha's authority to make those decisions for him will cease.

8.14 CANCELLING AN LPA AND THE DONEE'S APPOINTMENT

- 8.14.1 The donor may revoke an LPA if he has the mental capacity to do so whether the LPA has been registered or not [section 15(2) *Mental Capacity Act*].
- 8.14.2 The donor must notify the Public Guardian of his revocation of the LPA if the LPA was registered. The Public Guardian will then cancel the registration of the LPA if he is satisfied that the donor has taken such steps as are necessary in law to revoke it. On the cancellation of the registration of the LPA, the original LPA, any certified and office copies of it must be delivered to the Public Guardian to be cancelled. The donor should notify the donee and anyone else whom the donor may have informed about the LPA that it has been revoked.
- 8.14.3 The LPA is revoked when the donor dies.
- 8.14.4 In addition to the above situations, the donee's appointment will be terminated in certain events. However, the termination of his appointment does not necessarily mean that the LPA is revoked.
- 8.14.5 Personal welfare donee.
- The donee's appointment is revoked if the:
 - donee dies;
 - marriage between the donor and donee is dissolved or annulled unless the LPA itself specifically provides that it will not;
 - donee formally refuses the appointment of being donee; or
 - donee lacks mental capacity.
 - However, the LPA is not revoked and remains valid if there is a replacement donee appointed under it or there is one or more surviving donee(s) appointed to act jointly and severally on any matter.
 - The power conferred by the LPA will be revoked if the LPA appoints two or more donees to act jointly and the power to one of those donees is revoked.

8.14.6 Property & affairs donee.

- a. If the donor becomes a bankrupt, the power conferred by the LPA is revoked so far as it relates to property & affairs matters.
- b. The appointment of the donee for property & affairs matters is revoked if the:
 - donee (an individual) dies or becomes a bankrupt;
 - donee is a trust company whose licence has lapsed or been revoked;
 - donee (being a trust company) is liquidated, wound-up, dissolved or under judicial management;
 - marriage between the donor and donee is dissolved or annulled unless the LPA itself specifically provides that it will not;
 - donee formally refuses the appointment; or
 - donee lacks mental capacity.
- c. However, the power conferred by the LPA is not revoked and remains valid if there is a replacement donee appointed under the LPA or there is one or more surviving donee(s) appointed to act jointly and severally on any matter.
- d. The power conferred by the LPA will be revoked if the LPA appoints two or more donees to act jointly and the power to one of those donees is revoked.

8.14.7 Court's power to revoke an LPA.

- a. The court may revoke an LPA if it is satisfied that fraud or undue pressure was used to induce the donor to make the LPA.
- b. The court may also revoke an LPA (if there is only one donee) or the powers of a donee (where there are two or more donees) if the donee has behaved, is behaving or proposes to behave in a way that contravenes his authority or is not in the donor's best interests [section 17(3) & (4) *Mental Capacity Act*].

8.15 PROTECTION OF DONEES, PERSONS DEALING WITH DONEES AND OTHERS

8.15.1 The protection referred to in this section applies to donees, persons dealing with donees and others, when a document is registered as an LPA but an LPA was not created.

8.15.2 Donees.

A donee who exercises his powers under the registered instrument is protected from liability for acting without legal authority (because an LPA was not created) unless:

- a. he knows the LPA was not created (for example, the donee knows the donor lacked capacity when the donor signed the LPA or that the donor was induced to make the LPA by fraud or under undue pressure), or
- b. he is aware of circumstances which, if the LPA had been created, would have terminated his authority to act as a donee. For example, the donee must not make any decision for the donor in circumstances where the donee:
 - has formally refused the appointment;
 - knows the donor has died or become a bankrupt (for property & affairs decisions);
 - has become bankrupt or (if a company) is in liquidation or wound up or placed under judicial management or whose trust company licence has lapsed or been revoked;
 - was married to the donor and the marriage has been dissolved or annulled (unless the LPA provides that the dissolution or annulment of the marriage does not terminate the appointment); or
 - lacks capacity [section 16(2) *Mental Capacity Act*].

8.15.3 Persons dealing with donees.

A transaction concluded between another person and the donee would usually be invalid if the LPA had not been validly created. However, the Act protects the other person and treats the transaction as valid, as if the power had been in existence, unless the other person:

- a. knew the LPA was not created, or
- b. was aware of circumstances which, if the LPA was created, would have terminated the donee's authority to act as a donee [section 16 (3) *Mental Capacity Act*].

8.15.4 Purchasers.

- a. If a purchaser's interest depends on the validity of a transaction between the donee and the other person (mentioned in paragraph 8.15.3), the transaction is presumed to be valid in favour of the purchaser if:
- the transaction was completed within 12 months of the date of registration of the LPA with the OPG, or
 - the other person makes a statutory declaration within three months of completing the purchase stating that he had no reason at the time of the transaction to doubt that the donee had authority to dispose of the property which was the subject of the transaction.

8.15.5 Property matters.

- a. An individual or an organisation such as a bank, that deals with a donee of an LPA, on a matter relating to the property of the donor, may require the donee to produce a certificate from a registered doctor stating that the donor's lack of capacity relating to the matter is likely to be permanent [section 13(10) *Mental Capacity Act*].
- b. If the donee cannot provide such a certificate, the individual or organisation may refuse to accept the donee's authority to make decisions on behalf of the donor.

 ERICA'S STORY

Erica is a 70-year-old part-time music teacher. She lives alone since her husband passed away two years ago. Her adult children and grandchildren live nearby and visit her regularly. Erica recently made and registered an LPA naming her three children as joint donees who may make decisions regarding her property & affairs matters.

Yesterday, Erica was on her way to the market when a bus knocked her down. Erica is in a coma and her doctors are unsure about the extent of her injuries. Erica does not have health insurance. However, she told her children she has \$100,000 in her savings account for her future medical expenses. Her children would like to pay for her medical treatment from these savings. The money is held at a bank and is in Erica's name.

Erica's children, as donees of her LPA, want to withdraw some of the money to pay for Erica's medical treatment. The bank requires a certified copy of the registered LPA and a certificate from a registered medical practitioner to certify that Erica's lack of capacity is likely to be permanent before releasing the money to them.

The bank's request for the medical certificate is in accordance with section 13(10) of the *Mental Capacity Act*. The bank is entitled to require the documents to verify that Erica lacks capacity to operate her bank account and her donees may do so on her behalf.

9. THE ROLE OF THE COURT & DEPUTIES

9.1 KEY DETAILS

9.1.1 This chapter explains the court's role and powers as prescribed in the *Mental Capacity Act*.

Unless you fall into one of the categories of applicant described in 9.13.1, you must apply to the court to appoint deputies and to make the orders, decisions and declarations described below.

9.1.2 The court has a wide range of powers to:

- a. decide on matters relating to the Lasting Power of Attorney (LPA);
- b. make declarations;
- c. make specific decisions on behalf of persons who lack capacity to make the decision; and
- d. appoint and revoke deputies and vary their powers.

9.1.3 The court may appoint a deputy for a person who is below 21 years of age and lacks capacity to make decisions on certain matters if the court considers it likely that the person will still lack capacity when he reaches the age of 21 [section 21(1) *Mental Capacity Act*].

9.1.4 The responsibilities of deputies are similar to those of donees but their powers are defined by the court order under which they are appointed or such further orders as the court may make affecting their powers or their appointment.

ROLE OF THE COURT

9.2 THE COURT'S POWERS IN RELATION TO LPAS

9.2.1 Regarding the validity of an LPA, the court may determine whether:

- a. the requirements for creating an LPA were met [section 17(2)(a) *Mental Capacity Act*];
- b. fraud or undue pressure was used to induce the donor to make an LPA [section 17(3)(a) *Mental Capacity Act*];
- c. the LPA was revoked (cancelled) by the donor or by any event specified in paragraph 9.2.4 below [section 17(2)(b) *Mental Capacity Act*]; and
- d. the donee's appointment should be terminated because the donee has behaved or is behaving or proposes to behave in a way that violates the donee's authority or is not in the donor's best interests [section 17(3)(b) *Mental Capacity Act*].

- 9.2.2 The court can resolve any question about the meaning or effect of an LPA or any document that attempts to create an LPA [section 18(1) *Mental Capacity Act*].
- 9.2.3 The court may also do the following regarding the operation of an LPA, if the donor lacks capacity to make these specific decisions:
- give directions regarding decisions the donee has power to make [section 18(2)(a) *Mental Capacity Act*];
 - give directions regarding the remuneration or expenses of the donee [section 18(3)(c) *Mental Capacity Act*];
 - give consent or authorise the donee to act where the donee would have to obtain that consent or permission from the donor [section 18(2)(b) *Mental Capacity Act*];
 - authorise the making of gifts which are outside the powers of the donee under the LPA [section 18(4) *Mental Capacity Act*];
 - direct the donee to furnish reports, accounts, records and information to the court or the Public Guardian [section 18(3)(a) and (3)(b) *Mental Capacity Act*]; and
 - release the donee wholly or partly from any liability incurred on account of a breach of his duties as donee [section 18(3)(d) *Mental Capacity Act*].
- 9.2.4 For example, the court can make the decisions listed in the right-hand column in the table below if any of the circumstances in the left-hand column arise [sections 17(3)-(6) *Mental Capacity Act*].

Circumstances	Decisions the court can make
1. Fraud or undue pressure was applied to the donor to: <ul style="list-style-type: none"> execute a document for the purpose of creating an LPA, or create an LPA. 	(Applicable to both circumstances 1 and 2) <ol style="list-style-type: none"> Direct that the LPA is not to be registered (if it has not been registered). Revoke the LPA if the donor lacks capacity to do that. Notes: <ul style="list-style-type: none"> For circumstance 2, the court may revoke the portion of the LPA that relates to that donee only (if there are two or more donees appointed under the LPA), leaving the portion that relates to the other donee(s) unaffected.
2. A donee of an LPA: <ul style="list-style-type: none"> has behaved, is behaving, or is proposing to behave in a way that violates the donee's authority or is not in the donor's best interests. 	

DORIS'S STORY

Guo Po owns a successful hair salon. She earns a reasonable income but Guo Po does not believe it is enough. Guo Po has a wealthy aunt, Doris, who is 65 years old. Doris has one child, Daniel. Daniel has a mild disability and wants to be a hairstylist.

Guo Po offers him a trainee position at one of her salons. Daniel performs well and for the first time, seems able to hold down a job. Doris is very relieved.

Guo Po tells Doris that as she is getting on in years and Daniel cannot fend for himself, Doris should make an LPA for her property & affairs matters. Guo Po puts pressure on Doris to appoint her as the donee. She also tells Doris that unless she is made donee, she will fire Daniel. Doris does not want Daniel to lose his dream job and signs the LPA documents naming Guo Po as her donee for property & affairs matters.

Guo Po has pressured Doris into appointing her as donee. This behaviour is wrong. Doris (while she has capacity) or a family member (where she has lost capacity) may apply to court for the court to revoke the LPA and order that it is not to be registered, or if it has been registered, for the registration to be cancelled.

9.3 DECLARATIONS THE COURT CAN MAKE

The court can make the declarations as to:

- Whether a person has or lacks capacity to make a particular decision or decisions about a particular matter. For example, if a person challenges a decision made for him on the basis that he does not lack capacity or there is a dispute between family members whether the person lacks capacity.
- Whether an act or omission or course of conduct which was carried out, or yet to be carried out, is lawful in relation to the person. For example, the court may make a declaration about whether a particular treatment is in the person's best interests [section 19(1) and (2) *Mental Capacity Act*].

9.4 SPECIFIC DECISIONS THE COURT CAN MAKE

- 9.4.1 The court may make one or more personal welfare and/or property & affairs decisions on behalf of a person who lacks capacity if the person has not made an LPA governing those decisions [section 20(2)(a) *Mental Capacity Act*].

9.4.2 Personal welfare matters.

Some of the decisions the court can make about the personal welfare of the person who lacks capacity include:

- a. deciding where he should live [section 22(1)(a) *Mental Capacity Act*];
- b. deciding on whether he should or should not have contact with a specified person [section 22(1)(b) *Mental Capacity Act*];
- c. making an order prohibiting a certain person from having any contact with him [section 22(1)(c) *Mental Capacity Act*];
- d. giving or refusing consent to the carrying out or continuation of treatment (including a clinical trial) by anyone providing healthcare for the person (but not affecting the operation of the *Advance Medical Directive Act*) [section 22(1)(d) *Mental Capacity Act*]; and
- e. directing that anyone responsible for the person's healthcare allow someone else to take over the responsibility [section 22(1)(e) *Mental Capacity Act*].

 MR LEE'S STORY

Mr Lee is a 75-year-old widower. A year ago he suffered a stroke. As a result he is bedridden and unable to recognise his family members and respond to anyone. Prior to his stroke, he made and registered an LPA appointing his sons, John and Tim, to be his donees to decide jointly on various matters, including consenting or refusing medical treatment.

Mr Lee has been diagnosed with gall stones. The doctor has advised John and Tim that the gall stones can be surgically removed but surgery for a man in Mr Lee's condition has significant risks. John is against the surgery but Tim feels it is desirable to relieve their father of the pain. The doctor has assessed that Mr Lee's impairment of the brain is so severe that he is unable to decide about the surgery. The other members of the family are also divided over the issue.

Tim may apply to court for an order that the surgery be performed. This is a decision that the court may make for Mr Lee. It will decide whether having the surgery would be in his best interests.

9.4.3 Property & affairs matters.

Some of the decisions the court can make about the property & affairs matters of a person who lacks capacity include:

- a. control and management of his property [section 23(1)(a) *Mental Capacity Act*];
- b. selling, mortgaging, gifting or otherwise disposing of his property (subject to the principle that the person's property should be preserved for his benefit and maintenance during his life) [section 23(1)(b) and (2) *Mental Capacity Act*];
- c. purchasing property on the person's behalf [section 23(1)(c) *Mental Capacity Act*];
- d. carrying on any profession or business on his behalf [section 23(1)(d) *Mental Capacity Act*];
- e. deciding whether to dissolve a partnership of which he is a member [section 23(1)(e) *Mental Capacity Act*];
- f. carrying out any contract entered into by him [section 23(1)(f) *Mental Capacity Act*];
- g. discharging his debts or other obligations [section 23(1)(g) *Mental Capacity Act*];
- h. the creation of trusts over his property for his benefit or the benefit of others [section 23(1)(h) *Mental Capacity Act*];
- i. making a nomination for him under section 49L(2) or 49M(2) of the *Insurance Act* (Cap. 142) [section 23(1)(ha) *Mental Capacity Act*];
- j. revoking a nomination previously made by him or on his behalf under section 49L(2) or 49M(2) of the *Insurance Act* (Cap. 142) [section 23(1)(hb) *Mental Capacity Act*];
- k. executing a will for him (he must be at least 21 years old) [section 23(1)(i) and (3) *Mental Capacity Act*];
- l. executing under section 15(6A) or 25(1) of the *Central Provident Fund Act* (Cap. 36) any memorandum for him under section 25(1) of that Act [section 23(1)(ia) *Mental Capacity Act*];
- m. revoking any memorandum or nomination that had been made by him, or by the court on his behalf, under section 25(1) of the *Central Provident Fund Act* (Cap. 36) [section 23(1)(ib) *Mental Capacity Act*];
- n. maintaining, educating, benefiting or advancement of his spouse, parent, child below 21 years old or an intellectually disabled child of his [section 23(1)(j) *Mental Capacity Act*];
- o. exercising any power, including a power to consent, given to him whether beneficially or as a trustee under a trust [section 23(1)(k) *Mental Capacity Act*]; and
- p. conducting legal proceedings in his name or on his behalf [section 23(1)(l) *Mental Capacity Act*].

Additional provisions relating to the management of his property & affairs matters, including wills and trusts, are detailed in the second schedule *Mental Capacity Act*.

9.5 APPOINTING DEPUTIES

- 9.5.1 Sometimes, the court cannot make some decisions because they relate to future matters or are of an ongoing nature. If there is no relevant LPA, the court may appoint a deputy to make those decisions.
- 9.5.2 The Act requires the court to consider the following principles when deciding whether to appoint a deputy:
- A decision of the court is preferred to the appointment of a deputy [section 20(4)(a) *Mental Capacity Act*].
 - The deputy's powers should be limited in scope and duration as is reasonably practicable given the circumstances [section 20(4)(b) *Mental Capacity Act*].
- 9.5.3 The court will likely consider the following factors in determining whether to appoint a deputy:
- The circumstances of the person concerned.
 - The likelihood that future or ongoing decisions will be required.
 - Whether the appointment is for decisions with respect to property & affairs or personal welfare matters.

IDA'S STORY

Ida had a stroke three months ago. She is in a coma. Her condition is stable but unchanged. She owns an HDB flat and has \$50,000 in her bank account. Ida's daughter, Rohani, is a 22-year-old university student. Ida's husband died five years ago. Rohani does not have any income. The doctors have told Rohani that they do not know when Ida will regain consciousness. In the meantime, ongoing expenses for Ida's hospitalisation and household need to be paid. A decision also has to be made to move Ida into a nursing home. Ida has not made an LPA. Rohani cannot withdraw the money from Ida's account to meet those expenses nor decide about moving Ida to a nursing home.

In this situation, Rohani should apply to the court to make a decision about moving Ida to a nursing home and to appoint a deputy to manage Ida's property & affairs matters. The court is likely to appoint a suitable family member as deputy.

- 9.5.4 After appointing a deputy, the court may make further orders or directions as necessary or expedient to enable the deputy to carry out the role effectively [section 20(5) *Mental Capacity Act*].

- 9.5.5 The deputy must agree to the appointment and act in the best interests of the person [section 24(3) *Mental Capacity Act*].

- 9.5.6 Choice of deputy.

The court will normally choose a family member or close friend to be deputy. However, in certain circumstances, the court may choose an independent third party to become a deputy, for example, where there is a family dispute or if the person's circumstances are complicated. The court need not appoint a person by name as deputy. Instead, the current holder of a specified office or position may be appointed as the deputy [section 24(2) *Mental Capacity Act*].

- 9.5.7 Qualifications for deputies.

The deputy appointed by the court must agree to the appointment and:

- be an individual who is at least 21 years old [section 24(1)(a) *Mental Capacity Act*], or
- for decisions relating to property & affairs matters, the deputy may be an individual who is at least 21 years old or a non-individual within the class of persons prescribed by the regulations as qualified to act as donees [section 24(1)(b) *Mental Capacity Act*].

9.5.8 Personal welfare matters.

The appointment of a deputy for simple and routine personal welfare matters may not be required because caregivers and professionals who care for, or treat a person who lacks capacity may act on behalf of the person and have protection from liability under section 7 of the *Mental Capacity Act*, provided the requirements are satisfied. However, in some cases the court may appoint a deputy, for example, where the person's treatment or care is disputed or where the family has a history of disputes that could negatively impact the person's best interests.

9.5.9 Property & affairs matters.

A deputy is unlikely to be appointed for property & affairs matters unless the person who lacks capacity has property or assets or will become entitled to them (as with an inheritance or settlement).

 **GEORGE'S STORY**

George is 35 years old and single. He was injured in an industrial accident and suffered brain damage. Last week, he was awarded monetary compensation for his injuries but lacks the capacity to manage this large sum of money or to make decisions about his future care.

The court may appoint his parents as joint and several deputies for George's personal welfare and to manage his property & affairs matters.

9.5.10 Two or more deputies.

The court may appoint more than one deputy to act in any of the following ways:

- a. **Jointly** [section 24(4)(a) *Mental Capacity Act*]
This means that the deputies must act together and not alone.
- b. **Jointly and severally** [section 24(4)(b) *Mental Capacity Act*]
This means that the deputies can act together or separately. Both types of decisions are valid.
- c. **Jointly on some matters and jointly and severally on others** [section 24(4)(c) *Mental Capacity Act*]
This means that the deputies must act jointly on some matters, for example, sale of residential property, but may act separately on other matters, for example, paying household bills.

9.5.11 Appointment of successor deputies.

When the court appoints a deputy, it may also appoint one or more persons to succeed the deputy (successor deputies) if certain circumstances or events occur and for such period as the court may specify [section 24(5) *Mental Capacity Act*].

9.6 CANCELLING A DEPUTY'S APPOINTMENT OR VARYING THE DEPUTY'S POWERS

The court can cancel a deputy's appointment or vary the powers granted if the deputy:

- a. has behaved or is behaving in a way that violates the authority given by the court or is not in the best interests of the person for whom he is appointed as deputy, or
- b. may behave in a way that would violate the authority given by the court or would not be in the person's best interests [section 20(8)(a) and (b) *Mental Capacity Act*].

MINORS

9.7 APPOINTING A DEPUTY FOR A MINOR

- 9.7.1 The court can appoint a deputy for a person below the age of 21 (a minor) who lacks capacity to make decisions about certain matters if it is satisfied that the person will likely still lack capacity to make decisions concerning those matters after he turns 21 [section 21(1) *Mental Capacity Act*].
- 9.7.2 The parents or guardians of such a minor may apply to the court to appoint themselves as their child's deputies. They may also ask the court to appoint successor deputies to make provision for the future when they can no longer act as deputies for their child.
- 9.7.3 When selecting a deputy for a minor, the court must consider the:
 - a. factors detailed in paragraph 9.5.3 (factors the court will consider when appointing a deputy),
 - b. principle that appointment of the parents or guardian of the minor is to be preferred to the appointment of any other person as deputy [section 21(2) *Mental Capacity Act*], and
 - c. wishes of the parents or the guardian of the minor on the choice of the successor deputy (if a successor deputy is to be appointed) [section 24(6) *Mental Capacity Act*].

JEREMY'S STORY

Jeremy is 17 years old and has severe intellectual disability. The doctors and psychologists have advised his parents, Wendy and David, that Jeremy will not be able to make major decisions for himself because of his disabilities. Wendy and David are concerned about his future, especially when they are no longer around to care for him. He is their only child and will in future inherit most of their property and assets.

Wendy and David may apply to court on Jeremy's behalf to appoint themselves as Jeremy's deputies. They would like the court to appoint David's younger brother, Bob, as successor deputy when they die.

ROLE OF A DEPUTY

9.8 DUTIES OF A DEPUTY

Deputies must:

- 9.8.1 Follow the statutory principles in [section 3 *Mental Capacity Act*].
- 9.8.2 Act in the best interests of the person who lacks capacity according to [section 6 *Mental Capacity Act*].
- 9.8.3 Have regard for the guidance in the Code of Practice [section 41 *Mental Capacity Act*].
- 9.8.4 Follow the court's directions and not exceed the scope of authority as laid down by the court.

Deputies cannot make a decision outside the scope of their authority unless they ask the court to make the decision or change their powers.
- 9.8.5 Indemnify the person who lacks capacity against liability to third parties if the deputy is negligent.
 - a. This is necessary because deputies are treated as the person's agent regarding the decisions and actions taken on behalf of the person.
 - b. Deputies are not legally responsible to third parties for their decisions as long as they act within the scope of their authority.

- 9.8.6 Apply duty of care.
 - a. The level of care and skill deputies must apply depends on whether they are paid and hold relevant professional qualifications.
 - b. Unpaid deputies must carry out their duties with the same reasonable care, skill and diligence they would use with their own affairs.
 - c. Deputies who are paid for their services must meet a higher standard of care and skill.
 - d. Professionals who are engaged for their specific professional knowledge, for example, lawyers and accountants, must meet the high standards of their profession.
- 9.8.7 Not to take advantage of their position to benefit themselves but to benefit the person who lacks capacity (fiduciary duty).
 - a. Deputies are under a fiduciary duty not to take advantage of their position. They cannot put themselves in a position where their duties conflict with their personal interests, for example, they cannot accept a third party commission in any transaction involving the person who lacks capacity.
 - b. Deputies should not allow considerations other than the best interests of the person to influence the way they carry out their duties.
 - c. Decisions taken by deputies should benefit the person, not themselves.
- 9.8.8 Not to pass on their authority to someone else.

Deputies cannot pass on their authority to someone else but they may seek professional or expert advice, for example, from doctors, financial advisors, etc.
- 9.8.9 Act in good faith.

Deputies must act with honesty and integrity. For example, deputies should observe the wishes of the person who lacks capacity told to them insofar as those wishes are not contrary to the person's best interests.
- 9.8.10 Respect confidentiality.
 - a. Deputies must keep the person's personal and financial affairs confidential.
 - b. Two exceptions to this rule would be if disclosure of the information is required by law or in the person's best interests.
- 9.8.11 Follow any directions from the court.
 - a. Deputies must follow any directions made by the court.
 - b. Additionally, the court may also require deputies to provide reports, accounts, records and information, for example, financial or healthcare reports on the person who lacks capacity.

9.8.12 Keep accounts.

- a. Deputies appointed to manage the person's property & affairs matters must keep accounts of transactions carried out on behalf of the person who lacks capacity and submit them to the Public Guardian at times set by the court.
- b. If the person's financial affairs are simple, then records of income, expenses and bank statements may be adequate.
- c. If the person's financial affairs are complicated, then the records should be more detailed.

9.8.13 Keep the money and property of the person separate from their own.

- a. Deputies should keep the person's funds and property separate from their own and anyone else's.
- b. If a deputy is the person's spouse, they may have agreed in the past to keep all funds in a joint bank account. In these circumstances, it may be possible to continue this arrangement but it may not be advisable because it would be difficult to avoid mistakes or confusion.

9.8.14 Inform the Office of the Public Guardian (OPG) on changes in contact details. Deputies must inform the OPG of any changes in their or the person's contact details.

 **AI NEE'S STORY**

Ai Nee has been appointed by the court as a deputy to manage the property & affairs matters of her uncle, Eng Tian. She must sell one of her uncle's flats to pay for his liver transplant operation. The flat is valued at \$1.2 million. Ai Nee's daughter, Mei Fann, has recently graduated from polytechnic and has secured a job as a management trainee. She is looking to move into her own place. Ai Nee wants to buy Mei Fann a flat and thinks that Eng Tian's flat is ideal. Ai Nee plans to buy the flat for \$1.1 million and does not intend to put it on the market.

Ai Nee cannot do this. Her personal interests conflict with Eng Tian's. Her duty is to put the flat on the market and to secure the best possible price for it.

9.8.15 Please also see [sections 24 and 25 of the *Mental Capacity Act*].**9.9 REIMBURSING AND REMUNERATING DEPUTIES**

Deputies are entitled to be reimbursed for reasonable expenses incurred when performing their duties [section 24(8)(a) *Mental Capacity Act*]. The court may direct that deputies be paid out of the property of the person who lacks capacity for performing their duties [section 24(8)(b) *Mental Capacity Act*].

9.10 SUPERVISING DEPUTIES

9.10.1 Deputies are answerable to the court.

9.10.2 The OPG also helps the court to supervise deputies to carry out their duties. The court may require deputies to submit reports to the Public Guardian [section 24(10)(b) *Mental Capacity Act*].9.10.3 The court may require the deputy to provide security, for example, a security bond, to the Public Guardian [section 24(10)(a) *Mental Capacity Act*]. This may be a precautionary measure to protect the person lacking capacity in certain circumstances.**9.11 RESTRICTIONS ON DEPUTIES**

9.11.1 General restrictions.

Deputies cannot make a decision on behalf of the person for whom they have been appointed in relation to a matter if the deputies know or have reasonable grounds to believe that the person has the capacity to make that decision [section 25(1) *Mental Capacity Act*].

9.11.2 Specific restrictions.

a. Deputies cannot be given powers to:

- prohibit a specified person from having contact with the person who lacks capacity [section 25(2)(a) *Mental Capacity Act*];
- direct the individual responsible for the person's healthcare to allow another person to take over that responsibility [section 25(2)(b) *Mental Capacity Act*];
- make gifts of the person's property [section 25(3)(a) *Mental Capacity Act*];
- make nominations on the person's behalf under section 49L(2) or 49M(2) of the *Insurance Act* (Cap. 142) [section 25(3)(aa) *Mental Capacity Act*];
- revoke any nomination made by the person, or by the court on the person's behalf, under section 49L(2) or 49M(2) of the *Insurance Act* (Cap. 142) [section 25(3)(ab) *Mental Capacity Act*],
- execute a will for the person [section 25(3)(b) *Mental Capacity Act*];

- execute under section 15(6A) or 25(1) of the *Central Provident Fund Act* (Cap. 36) on the person's behalf, of any memorandum under section 25(1) of that Act [section 25(3)(ba) *Mental Capacity Act*];
 - revoke any memorandum or nomination that had been made by him, or by the court on his behalf, under section 25(1) of the *Central Provident Fund Act* (Cap. 36 [section 25(3)(bb) *Mental Capacity Act*];
 - carry out, continue or discontinue life sustaining treatment on the person (whether or not it amounts to extraordinary life sustaining treatment within the meaning of section 2 of the *Advanced Medical Directive Act*) [section 25(3)(c)(i) *Mental Capacity Act*]; or
 - carry out, continue or discontinue any treatment on the person which an individual providing healthcare reasonably believes is necessary to prevent a serious deterioration in the person's condition [section 25(3)(c)(ii) *Mental Capacity Act*]; or
 - make any decision on the person's behalf which is inconsistent with a decision of a donee of the person's LPA which is made within the scope of the donee's authority and in accordance with the Act [section 25(4) *Mental Capacity Act*].
- b. Acts of restraint.

Deputies cannot carry out an act that is intended to restrain the person unless all of the following four conditions are met [section 25(6) *Mental Capacity Act*]:

- they are acting within the scope of authority expressly granted by the court [section 25(7) *Mental Capacity Act*],
- the person lacks or they reasonably believe that he lacks capacity to decide the matter in question [section 25(8) *Mental Capacity Act*],
- the deputies reasonably believe that the act is necessary to prevent harm to the person [section 25(9) *Mental Capacity Act*], and
- the restraining act is a proportionate (balanced) response to the likelihood of the person suffering harm and the seriousness of that harm [section 25(10) *Mental Capacity Act*].

Restraint is the use, or threat to use, force by the deputy or someone authorised by the deputy to secure the doing of an act where the person resists, or restricting the person's freedom to move whether or not he resists [section 25(11) *Mental Capacity Act*]. An act may amount to restraint even though actual physical force or threat of physical force is not used.

9.12 MEMBERS OF COMMITTEE OF THE PERSON OR ESTATE APPOINTED UNDER THE MENTAL DISORDERS AND TREATMENT ACT DEEMED TO BE DEPUTIES

- 9.12.1 Under the *Mental Disorders and Treatment Act* (now repealed), a committee of the person or estate could be appointed by the court to make certain decisions on behalf of a person suffering from a mental disorder (third schedule, *Mental Capacity Act*).
- 9.12.2 Persons serving on existing committees when the *Mental Capacity Act* came into force on 1 March 2010 will be considered deputies appointed by the court to act jointly when making decisions on behalf of the person lacking capacity. They will have the same powers and functions they previously enjoyed on the committees (third schedule, *Mental Capacity Act*). Any pending application to court to appoint a committee of the person or estate will be treated as an application to appoint the members of the committee as deputies to act jointly when making decisions for the person who lacks capacity.

COURT APPLICATIONS

9.13 COURT'S PERMISSION TO MAKE APPLICATIONS

- 9.13.1 Generally, before an application can be made to the court under the Act, the court's permission must be obtained. However, the following individuals can make applications to the court without the court's permission:
- a. a person who lacks, or is alleged to lack capacity, and if that person is aged below 21 years, anyone with parental rights with respect to him [section 38(1)(a) *Mental Capacity Act*];
 - b. the donor or a donee of an LPA to which the application relates [section 38(1)(b) *Mental Capacity Act*];
 - c. a deputy appointed by the court for a person to whom the application relates [section 38(1)(c) *Mental Capacity Act*];
 - d. a person named in an existing court order, if the application relates to the order [section 38(1)(d) *Mental Capacity Act*];

- e. the Public Guardian where it appears to him that:
- a person lacks capacity [section 38(1)(e)(i) *Mental Capacity Act*];
 - no application has been made or is likely to be made for an order under the Act [section 38(1)(e)(ii) *Mental Capacity Act*]; and
 - an order under the Act is necessary for the protection of the personal welfare and property & affairs of the person [section 38(1)(e)(iii) *Mental Capacity Act*].
- f. anyone related to the person by blood or marriage (order 99 of the rules of court);
- 9.13.2 In addition, the court's permission is not required where the application is made for an interim order or directions in urgent cases under section 36 of the *Mental Capacity Act* (order 99 of the rules of court).
- 9.13.3 Anyone else who wishes to apply to the court for any order to be made under the Act must first obtain the court's permission to make the application.
- 9.13.4 The court will consider the following factors in deciding whether to grant its permission:
- a. the applicant's connection with the person to whom the application relates [section 38(3)(a) *Mental Capacity Act*];
 - b. the reasons for the application [section 38(3)(b) *Mental Capacity Act*];
 - c. the benefit to the person to whom the application relates of a proposed order or directions [section 38(3)(c) *Mental Capacity Act*]; and
 - d. whether the benefit can be achieved in any other way [section 38(3)(d) *Mental Capacity Act*].

SALLY'S STORY

Sally made and registered an LPA appointing her husband, Joe, to be her donee for all matters - personal welfare as well as property & affairs matters. She is injured in a traffic accident and is now in a coma. Joe has decided to place her in a nursing home because he has to work and he is not in favour of engaging full-time caregivers to take care of Sally at home. Sally's best friend, Amanda, disagrees with the decision. She does not want Sally to be looked after by strangers in a strange environment. She wants to move Sally to her home to live with her.

If Amanda wishes to apply to the court for an order that Sally should be moved to her home instead of a nursing home, she will have to first seek the court's permission to make the application for the order.

10. PROTECTING PEOPLE WHO ARE UNABLE TO MAKE DECISIONS FOR THEMSELVES

10.1 KEY DETAILS

- 10.1.1 People who are unable to make decisions for themselves because they lack mental capacity are a vulnerable group in society. They may not even be aware that they are being ill-treated. The *Mental Capacity Act* (the Act) has created a new criminal offence of ill-treatment that covers physical, sexual and emotional abuse.
- 10.1.2 Anyone who knows, suspects or believes that a person who lacks capacity and needs protection may report this to the Public Guardian and the appropriate bodies (see the table at the end of this chapter).
- 10.1.3 If there is good reason to suspect that a crime has been committed against the person, the report should be made to the police.
- 10.1.4 To encourage individuals to report suspected ill-treatment, no one can be forced to disclose the identity of whistle-blowers in court proceedings.
- 10.1.5 Healthcare workers who make such reports will not be in breach of their professional ethical codes when they report such cases.

10.2 ILL-TREATMENT - A CRIMINAL OFFENCE IN THE MENTAL CAPACITY ACT

- 10.2.1 Section 42 of the Act criminalises the ill-treatment of persons aged 16 and above who lack mental capacity or whom the offender reasonably believes lacks mental capacity. The *Children and Young Persons Act* criminalises ill-treatment of persons under 16 years old.
- 10.2.2 Under the Act, ill-treatment of a person is defined as:
 - a. Physical abuse of the person.
 - b. Sexual abuse of the person.
 - c. Any wilful or unreasonable act by the offender, or which the offender causes the person to do, that endangers or is likely to endanger the person's safety, or is likely to cause the person any:
 - unnecessary physical pain, suffering or injury;
 - emotional injury; or
 - injury to health or development.

- d. Wilful or unreasonable neglect, abandonment or exposure of the person with the intent to abandon the person, or in circumstances that are likely to endanger the person's safety, or to cause the person any:
- unnecessary physical pain, suffering or injury;
 - emotional injury; or
 - injury to health or development.
- e. Neglect occurs when the offender fails to provide adequate supplies of any of the following:
- food;
 - clothing;
 - medical aid;
 - lodging;
 - care; or
 - other necessities of life.

Types of Ill-treatment	Examples
Physical	<ul style="list-style-type: none"> • Slapping, hitting, pushing and other forms of violence • Inappropriate punishment, for example, denying the person a meal
Sexual	<ul style="list-style-type: none"> • Rape • Sexual touching • Procure sexual activities with a person who suffers from some mental disability whose consent is obtained through inducement, threat or deception
Psychological	<ul style="list-style-type: none"> • Emotional abuse • Threats of harm, restraint or abandonment • Refusing contact with other people • Intimidation
Neglect and omission	<ul style="list-style-type: none"> • Ignoring a person's health or physical care needs • Withholding food, water or medication

10.2.3 Section 42 applies where the offender is:

- anyone who cares for a person who either lacks capacity, or whom the offender reasonably believes to lack capacity;
- a donee appointed under a Lasting Power of Attorney (LPA) created by the person; or
- a deputy appointed by the court for the person.

10.2.4 The offender will be guilty of this offence if he ill-treats or causes, or brings about, or knowingly allows another individual to ill-treat the person.

10.2.5 The offender may still be convicted of the offence of ill-treatment even if the actual suffering or injury to the person is stopped by a third party, or the person is no longer alive.

SHERLIN'S STORY

Trina's only living relative is her aunt, Sherlin. Trina's parents passed away when she was 7 years old and Sherlin raised her. Sherlin suffered a stroke that left her with permanent brain damage and partial paralysis. Sherlin recently moved into Trina's home and Trina has employed Sara to care for Sherlin.

Before Sherlin moved into her home, Trina lived the high life, regularly holding parties at home. This is no longer possible. Trina's disposable income is substantially reduced because of the cost of Sherlin's medication, medical and hospitalisation bills and Sara's wages.

At first, Trina did not mind having Sherlin in her home but she soon feels bitter. Trina instructs Sara to stop Sherlin's medication to save costs. She eventually terminates Sara's employment to further reduce her expenses, leaving Sherlin to fend for herself in the daytime while she is at work.

Sherlin develops bedsores and dehydration. Trina admits Sherlin to hospital when Sherlin becomes critically ill. The doctor finds that Sherlin is malnourished and her condition has deteriorated as a result of the deprivation of medication.

Trina may be charged with ill-treatment of Sherlin under section 42 of the *Mental Capacity Act*.

10.3 PENALTIES FOR ILL-TREATMENT

- 10.3.1 If the person dies, a fine not exceeding \$20,000 or imprisonment of up to 7 years, or both.
- 10.3.2 In all other cases, a fine not exceeding \$4,000 or imprisonment of up to 4 years, or both.
- 10.3.3 The court may choose not to apply the punishments above. Instead the court may require the offender to execute a bond to ensure his good behaviour for a period of time, and may impose a condition that the offender undergoes counselling, psychotherapy or other programmes.
- 10.3.4 If the offender ordered to execute the bond fails to comply with any of its conditions, he or she will be subjected to:
- the penalty, if the bond was ordered instead of a penalty; or
 - a further fine not exceeding \$20,000 and/or a further term of imprisonment up to 7 years, if the bond is in addition to any penalty.

10.4 OTHER LEGISLATIONS THAT PROTECT PERSONS WHO LACK CAPACITY FROM ABUSE

There are other laws that also protect persons who lack capacity, such as the *Penal Code*, the *Maintenance of Parents Act* and the *Children and Young Persons Act*.

Examples of abuse	Criminal offences
Cheating a person out of any money by an offender who is bound by law to protect the person.	<ul style="list-style-type: none"> <i>Penal Code</i>, section 418. Penalty: up to 5 years imprisonment or a fine, or both.
Sexually touching a person who the offender knows, or could reasonably be expected to know, has a mental disability and the offender has obtained the person's consent by inducement, threat or deception.	<ul style="list-style-type: none"> <i>Penal Code</i>, section 376F. Penalty: up to 2 years imprisonment or a fine, or both but the punishment may be up to 10 years imprisonment or a fine, or both in more serious cases.
Refusing to financially maintain a parent who is either not capable of or finds it difficult to maintain himself.	<ul style="list-style-type: none"> <i>Maintenance of Parents Act</i> Order that the children maintain the parent.

10.5 THE OFFICE OF THE PUBLIC GUARDIAN (OPG)

- 10.5.1 General.
- The *Mental Capacity Act* (the Act) provides for the appointment of a Public Guardian [section 30], and the formation of a Public Guardian Board [section 33].
 - The Public Guardian Board has a duty to ensure that the Public Guardian is properly carrying out the functions listed below [section 33].
- 10.5.2 Functions of the Public Guardian.

The functions of the Public Guardian are:

- setting up and maintaining a register of LPAs;
- setting up and maintaining a register of court orders that appoint deputies;
- supervising deputies;
- receiving security the court requires from persons, for example, deputies, to carry out their functions;
- receiving reports from donees and deputies;
- reporting to the court on matters relating to proceedings under the Act;
- dealing with representations and complaints about the way in which donees and deputies are exercising their powers;
- dealing with representations and complaints regarding the way money is being spent on expenditure for necessary goods and services;
- investigating any alleged violation of any provision in the Act; and
- directing a member of the Board of Visitors to visit a person who lacks capacity or his donee or deputy.

10.5.3 Registering LPAs and investigating complaints against donees.

- a. The OPG oversees the registration of LPAs. An LPA will not be registered if it fails to meet the requirements of the Act. Before an LPA is registered, the OPG will check, among other things, that the necessary documentation is in order, the donee (for property & affairs) is not a bankrupt or in liquidation or under judicial management.
- b. The donee is the person chosen by the donor. The OPG will not supervise the donee. However, the court may order a donee to submit reports and accounts to the Public Guardian.
- c. The OPG will investigate complaints about the way donees are carrying out their duties. Where appropriate, the Public Guardian may initiate court proceedings (see paragraph 9.13.1e on when the Public Guardian may apply to court) to protect a donor.

10.5.4 Supervising deputies.

- a. A deputy is not chosen by the person who lacks capacity but is appointed by the court. The deputy is accountable to the court. The OPG supervises deputies' decisions and actions to ensure they do not abuse their position.
- b. The OPG may run checks on the deputy if requested to by the court. It will carry out risk assessment to determine what supervision a deputy will need.
- c. The OPG may call for records and documents from the deputy.
- d. The OPG will investigate complaints about the way a deputy is carrying out his duties. Where appropriate, the Public Guardian may initiate court proceedings (see paragraph 9.13.1e on when the Public Guardian may apply to court) to protect a person who lacks capacity.

10.5.5 Investigation and related offences.

- a. The Act confers considerable powers of investigation on the Public Guardian.
- b. These powers include requiring anyone with information about a person who lacks capacity to provide to the Public Guardian information and documents relating to that person.
- c. The Public Guardian may also require the individual with the information to attend at a specific time and place to provide the information orally, in writing or hand over relevant documents relating to the person who lacks capacity.

- d. Failure to comply with these requests for information and documentation is a criminal offence punishable with a fine not exceeding \$5,000 or imprisonment of up to 12 months, or both. Offenders that continue to refuse to comply will be fined up to \$50 per day [section 32(6) *Mental Capacity Act*].
- e. A person charged under section 32(6) *Mental Capacity Act* may raise the defence of reasonable excuse for failure to comply with the Public Guardian's requests [section 32(7) *Mental Capacity Act*].

f. A person commits a criminal offence if he:

- knowingly or recklessly provides the Public Guardian with information or documentation where a relevant detail is false or misleading, or
- wilfully changes, hides or destroys any document or part of any document that is required to be provided under the Act.

Such an offence is punishable with a fine not exceeding \$10,000 or imprisonment of up to 2 years, or both.

10.6 THE BOARD OF VISITORS

10.6.1 The roles of the Visitors on the Board of Visitors are to:

- a. visit persons who lack capacity, donees or deputies as may be directed by the Public Guardian, and report to the Public Guardian;
- b. provide independent advice to the court and the Public Guardian about how anyone given the power under the Act is and should be carrying out their duties and responsibilities; and
- c. check on the well-being of the person who lacks capacity.

10.6.2 The Minister will appoint individuals to be members of the Board of Visitors.

10.6.3 There are two types of visitors:

- a. Special Visitors – who are registered medical practitioners or persons who have the relevant expertise about impairment of, or disturbance in the functioning of the mind or brain, and
- b. General Visitors – who need not be medically qualified.

10.6.4 The court or the Public Guardian may send the appropriate type of Visitor to visit and interview the person who lacks capacity, his donee or deputy. The Visitor may inspect the premises where the person is cared for or treated and any records kept. Donees and deputies must co-operate with the Visitors and furnish all relevant information. If donees or deputies do not co-operate, the court can cancel their appointment if it finds they are not acting in the best interests of the person. The Visitor will submit a report to the Public Guardian.

10.6.5 The Visitor may be directed to not only investigate complaints but also to check on the general well-being of the person who lacks capacity.

MR FONG'S STORY

Mr Fong made and registered an LPA appointing his son, Danny, as his donee to make financial affairs decisions. Mr Fong loses capacity to make his own financial decisions when he falls ill and Danny has taken control of Mr Fong's bank accounts. Mr Fong's daughter, Jenny, suspects that Danny is using their father's money to pay off his gambling debts. She contacts the OPG and the OPG sends a General Visitor to visit Mr Fong and Danny. The Visitor will assess the facts and make a report. If appropriate, the Visitor may recommend that an application be made to the court to consider whether Danny has breached his duties as donee or not acted in Mr Fong's best interests.

The Public Guardian may refer the matter to the police for investigation if any criminal offence has been committed.

The Public Guardian will decide whether a court application should be made. If the matter goes to court and the court decides that Danny has been abusing his position, it may cancel the LPA and appoint someone else to be the deputy for Mr Fong's financial matters.

10.7 REPORTING SUSPECTED ABUSE AND PROTECTION FOR THOSE WHO REPORT SUSPECTED ABUSE

- 10.7.1 Some possible indications that a person who lacks capacity may be ill-treated or exploited are:
- physical signs like injuries and bruises;
 - relatives and friends are prevented from contacting or visiting the person;
 - social care or healthcare staff are prevented from seeing or treating the person;
 - the person is removed from hospital against medical advice;
 - there have been sudden changes in the person's living arrangements (for example, he is moved to a home without consultation with family members);
 - the person's unpaid bills (for example, medical bills or residential or day care charges);
 - the person's unusual expenses (for example, spending on services or things which the person obviously does not need); and
 - the person's funds or assets are transferred to others or out of the country.
- 10.7.2 Anyone who knows, suspects or believes that a person who lacks capacity and needs protection may report this to the Public Guardian and the appropriate bodies (see the table at the end of this chapter).
- 10.7.3 If there is good reason to suspect that a crime has been committed against the person, the report should be made to the police.
- 10.7.4 Healthcare workers who inform the OPG of their suspicions that a person who lacks capacity needs care or protection will not breach their professional code of ethics or standard of professional code [section 43(2) *Mental Capacity Act*].
- 10.7.5 For the purposes of section 43(2), healthcare workers are defined as doctors, nurses, dentists, psychologists, pharmacists, therapists, social workers, counsellors, attendants and any other persons providing healthcare services [section 43(3) *Mental Capacity Act*].
- 10.7.6 Witnesses in court proceedings do not have to identify the individual who reported the suspected ill-treatment to the OPG or to produce any report that is likely to identify that individual.
- 10.7.7 Individuals concerned about how a donee or deputy is carrying out his duties should contact the OPG.

NORAINI'S STORY

Noraini has been diagnosed with dementia. She is a widow and has no children. Her husband had looked after her until he became ill and he arranged for her to be moved to a private nursing home when he had to go into hospital for surgery. He passed away and left her a substantial inheritance. The registered medical practitioner who attends to the residents of the home conducts a formal assessment of capacity on Noraini and concludes that she lacks the capacity to make financial decisions and to handle money. Noraini's only relative, Maria, is her donee for property & affairs decisions under an LPA that Noraini made and registered before she became ill. Maria starts to act as donee under the LPA after the medical practitioner assessed Noraini's lack of capacity.

Initially, Maria visits Noraini regularly but later, she stops coming. Payment of the residential care charges, which were promptly paid previously, has begun to fall into arrears. The nursing home cannot contact Maria. Her telephone number is no longer in use and she has stopped working at the office shown on her business card.

The nursing home manager makes a report to the OPG and a General Visitor is appointed to investigate Noraini's finances. The investigations reveal that large amounts have been withdrawn from Noraini's account, substantially beyond Noraini's regular expenses. Maria has also put Noraini's house up for sale even though there are still sufficient funds in Noraini's bank account for her care. Noraini has no other known relatives or close friends who can act on her behalf.

A report is made to the police to investigate Maria for various criminal offences, including criminal misappropriation or criminal breach of trust. The Public Guardian may apply to the court to revoke Maria's appointment as Noraini's donee to prevent her from continuing to misuse Noraini's money or sell Noraini's house. The Public Guardian may also apply to court to appoint the Public Trustee to be Noraini's deputy for her property & affairs matters.

Types of abuse	Who to contact for help
Physical	<ul style="list-style-type: none"> • Police • Family Service Centre • OPG
Sexual	<ul style="list-style-type: none"> • Police • OPG
Financial	<ul style="list-style-type: none"> • Police • Family Service Centre • Office of the Commissioner for the Maintenance of Parents (failure to financially support parents) • OPG (where it involves a donee or deputy)
Psychological	<ul style="list-style-type: none"> • Police • Family Service Centre • OPG
Neglect and acts of omission	<ul style="list-style-type: none"> • Police • Family Service Centre • OPG

11. DISPUTE RESOLUTION

11.1 KEY DETAILS

Occasionally, the parties involved in caring for persons who lack capacity may disagree over matters such as their care, treatment, where they should live, and management of property. Although some disputes may be settled by the court, most should be settled amicably using other methods such as case conferences, formal complaint procedures and mediation. These alternatives to court are cost effective and may resolve the dispute fairly and quickly.

This section refers to various organisations to help you in resolving a dispute. The contact details of each organisation can be found at the end of this section (paragraph 11.7).

11.2 TYPES OF DISPUTES

Type of disputes	Examples
Financial	<ul style="list-style-type: none"> The family members of a person who lacks capacity objects to the deputy selling the person's assets. The family members of a person who lacks capacity objects to the expenditure claimed by the person's caregiver in connection with acts of care and treatment.
Health-related	<ul style="list-style-type: none"> The person assessed as lacking capacity to make a specific decision at a particular time challenges the capacity assessment. The donees of a Lasting Power of Attorney (LPA) disagree with the doctors about healthcare treatment.
Personal welfare	<ul style="list-style-type: none"> The donees of an LPA disagree with each other about whether to admit the donor to a nursing home. The family members of a person who lacks capacity disagree about whether to hire a nurse to care for the person.

11.3 PARTIES TO THE DISPUTE

There may be two or more parties to a dispute involving the care, treatment, personal welfare or finances of a person who lacks capacity. Disputes may be between:

- healthcare staff and family members regarding healthcare treatment;
- the person assessed as lacking capacity to make a specific decision at a particular time and the person who carried out the assessment; or
- family members regarding personal welfare and care issues for the person who lacks capacity.

It is advisable to settle disputes before it gets too serious. Some matters are so serious that only the court can settle them (see paragraph 11.6 below).

11.4 METHODS OF RESOLVING DISPUTES WITHOUT GOING TO COURT

11.4.1 Effective communication.

Sometimes, disputes are caused by a breakdown in communication or misunderstanding. It may be useful to hold a best interests conference where the different individuals can come together to discuss their various views and how these may affect the best interests of the person who lacks capacity. Everyone should make an effort to listen to one another, and to answer queries and concerns.

11.4.2 Mediation.

This method is good for resolving disputes that are developing or in the early stages. It is cost effective, speedy and less stressful than going to court. An independent third party (the mediator) determines if the dispute is suitable for mediation. The mediator helps the parties see each other's point of view through discussion and to focus on the best interests of the person who lacks capacity rather than imposing their views.

To find out more about mediation, contact:

- Singapore Mediation Centre
1 Supreme Court Lane
Level 4
Singapore 178879
Tel: 6332 4366
Website: www.mediation.com.sg
- Community Mediation Centre
100 High Street
#03-02, The Treasury
Singapore 179434
Tel: 6325 1600
Website: www.cmc.gov.sg

HALIMAH'S STORY

Halimah is a 72-year-old lady with advanced dementia. She lives with her son, Anwar, his wife, Nora, and their two young children in their semi-detached house. Halimah has two other adult children, Azlan and Adam. Anwar and his wife both work full-time. They hire a helper to care for Halimah when they are at work. Anwar and Nora are expecting their third child in six months' time. They want to move Halimah to a nursing home because they do not think they have enough room in their home to accommodate her once the new baby arrives. Azlan and Adam disagree with their brother. However, they are not prepared to let Halimah live with them. Instead, they want Anwar to continue with the current arrangement. Halimah made a valid LPA for her personal welfare when she had capacity. She appointed all three of her sons as her donees.

Anwar, Azlan and Adam should try to talk through their differences and discuss the various options available regarding where Halimah should live. If they cannot reach an agreement, they can try mediation. Any decision they make should always be in the best interests of their mother.

11.4.3 Disputes with professionals.

The methods of resolving disputes with healthcare staff, social workers and other professionals include:

- Getting a second opinion (for medical and legal matters).
 - Sometimes a family member may not agree with a decision made by a donee or deputy made for the person who lacks capacity based on medical advice given by the person's doctor. It may help them to resolve the disagreement by getting a second opinion from another doctor.
 - The same applies for legal matters. For example, a donee for property & affairs matters wants to act in a particular way on legal advice given by a lawyer. The other donee disagrees with this advice. The disagreement may be resolved by getting a second opinion from another lawyer.

- b. Case conferences.
- This conference enables all the parties in the dispute to meet and talk about the matter. Healthcare staff and other professionals should explain clearly the options available, give their opinion and reasons to support that opinion.
 - Meeting with senior medical staff members.
 - Senior medical staff members may be invited to provide a second opinion.
 - Giving the family members time to think through the situation.
 - This option is only available if it is not an emergency.
 - Making an official complaint.
 - When making a complaint about a health professional, you should contact the:
 - * health professional's employer, and
 - * professional board, council or association representing that profession.

Who is the complaint about?	Who to contact
Donee or deputy	• Office of the Public Guardian (OPG)
Healthcare professionals	• Organisation employing the healthcare professionals
• Doctors	• Singapore Medical Council • Singapore Medical Association
• Nurses and midwives	• Singapore Nursing Board
• Dentists	• Singapore Dental Council • Singapore Dental Association
Social worker	• Organisation employing the social worker • Singapore Association of Social Workers

The websites of some of these organisations provide more information.

11.5 TAKING LEGAL ACTION TO RESOLVE A DISPUTE

You may consult a lawyer if you wish. You can get a list of qualified lawyers from the Law Society of Singapore.

Legal aid is available to Singaporeans and Permanent Residents who satisfy the legal requirements, which include means testing. To find out more about what kind of help is available, whether you qualify and what you may have to contribute, go to the Legal Aid Bureau.

11.6 MATTERS THAT CAN ONLY BE SETTLED BY THE COURT

Some matters are so serious, that only the court can settle them. Examples include cases where it is uncertain whether the treatment decision is in the patient's best interests.

SAMUEL'S STORY

Sundaresh and his wife Sarah have two children - Samuel and Sangita, aged 22 and 24 years old respectively. Last month, Sangita was diagnosed with leukaemia. Her doctors have concluded that her best chance of survival lies in a bone marrow transplant. The only family member to match Sangita's bone marrow is Samuel. Samuel suffered head trauma during his birth that left him with a brain injury. A doctor assesses Samuel's ability to make a decision regarding donating his bone marrow to Sangita and concludes that he lacks the capacity to do so.

In this scenario, an application should be made to the court for guidance because it is uncertain whether the procedure is in Samuel's best interests.

11.7 CONTACT LIST

Organisation	Telephone	Address	Website
Office of the Public Guardian	1800 226 6222	20 Lengkok Bahru #04-02 Family@Enabling Village Singapore 159053	www.msf.gov.sg/opg
Singapore Association of Social Workers	6778 7922	Blk 324 Clementi Avenue 5 #01-209 Singapore 120324	www.sasw.org.sg
Singapore Dental Council	6355 2405	16 College Road #01-01, College of Medicine Building Singapore 169854	www.sdc.gov.sg
Singapore Dental Association	6220 2588	2 College Road Level 2, Alumni Association Singapore 169850	www.sda.org.sg
Community Mediation Centre	6325 1600	100 High Street #03-02, The Treasury Singapore 179434	www.cmc.gov.sg
Singapore Mediation Centre	6332 4366	1 Supreme Court Lane Level 4 Singapore 178879	www.mediation.com.sg
Singapore Medical Council	6372 3093	16 College Road #01-01, College of Medicine Building Singapore 169854	www.smc.gov.sg
Singapore Medical Association	6223 1264	2 College Road Level 2, Alumni Medical Centre Singapore 169850	www.sma.org.sg
Singapore Nursing Board	6478 5400	16 College Road #01-01, College of Medicine Building Singapore 169854	www.snb.gov.sg
Legal Aid Bureau	1800 325 1424	45 Maxwell Road #08-12, URA Centre East Wing Singapore 069118	www.lab.gov.sg
Law Society of Singapore	6538 2500	39 South Bridge Road Singapore 058673	www.lawsociety.org.sg

GLOSSARY

Acts in connection with care or treatment

These are tasks carried out by caregivers (paid or unpaid), healthcare staff and family members that involve personal care, healthcare or medical treatment for a person who lacks the capacity to consent to these acts.

Advance Medical Directive

The Advance Medical Directive is a legal document you sign under a separate law called the *Advance Medical Directive Act* that tells the doctor who is treating you for a terminal illness that you do not wish to have medical procedures that will only prolong the process of dying when death is imminent.

Agent

An agent is a person authorised to act on another person's behalf under the law of agency. Donees and deputies are agents and they have legal duties to follow.

Best interests

Decision makers have a duty to consider many factors that focus on what is best for the person lacking capacity before making a decision on his behalf. Refer to chapter 6 of the Code of Practice for more information.

Care facility

The term "care facility" used in paragraph 8.12.2c refers to day centres, homes for the disabled or the aged, and welfare, nursing, rehabilitation and convalescent homes.

Committee of the person or estate

The court appointed these committees, under the *Mental Disorders and Treatment Act* (now repealed), to make certain decisions on behalf of a person suffering from a mental disorder. Persons serving on existing committees when the *Mental Capacity Act* came into force on 1 March 2010 automatically became deputies as if they had been appointed by the court under the *Mental Capacity Act*, with the same powers and functions they were previously accorded under the committees.

Decision maker

The decision maker is the individual or person who makes decisions on behalf of persons who lack capacity. They include caregivers, nurses, doctors, donees of a Lasting Power of Attorney (LPA) and court appointed deputies.

Deputy

A deputy is appointed by the court to make certain decisions on behalf of a person who lacks mental capacity when the person has not made an LPA and has no donee to decide on his behalf in respect of those decisions. A deputy can be an individual, or a licensed trust company for property & affairs matters under the Trust Companies Act (Cap. 336) as prescribed by the Mental Capacity Regulations.

Donor

The person, at least 21 years of age, who makes an LPA, appointing donee(s) to take care of his personal welfare and/or property & affairs matters in the event he loses mental capacity one day.

Donee

Donees are appointed by donors to make decisions and act on their behalf on personal welfare and/or property & affairs matters in the event the donors lack mental capacity to manage their own affairs.

Fiduciary duty

This duty is a legal and ethical duty that the donee and deputy must discharge when acting on behalf of the person who lacks capacity. Donees and deputies must always act in the best interests of the person lacking capacity and to the benefit of that person and not themselves.

Fluctuating capacity

A person has fluctuating capacity when his mental capacity changes from time to time, for example, when his condition changes from good to bad and bad to good. It is variable. Persons in the early stages of dementia or suffering from schizophrenia may experience fluctuating capacity.

Formal assessment (of mental capacity)

A registered medical practitioner or specialists in mental health such as psychiatrists, conducts formal assessments of mental capacity. A professional such as an accountant or the donee of an LPA may seek a formal assessment when they have doubts about the person's capacity and the decision the person has to make is an important one or they anticipate a dispute over the decision.

Human Organ Transplant Act

This Act is a separate law that automatically allows doctors to remove certain organs when you are dead, for transplant to someone else, unless you opted out earlier in writing.

Ill-treatment

Ill-treatment under the Act is the abuse of persons who are at least 16 years old and who lack capacity or whom the offender reasonably believes to lack capacity. Ill-treatment includes physical abuse, sexual abuse, psychological abuse, neglect and omission.

Jointly (in the context of decision making by donees or deputies)

The donees or deputies must act together and not alone.

Jointly and severally (in the context of decision making by donees or deputies)

The donees or deputies can act together or separately. Both types of decision are valid.

Jointly on some matters and jointly and severally on others (in the context of decision making by donees or deputies)

This means that the deputies must act jointly on some matters, for example, sale of residential property, but may act separately on other matters, for example, paying household bills.

Lasting Power of Attorney (LPA)

A legal document that allows a donor to voluntarily appoint one or more donees to make decisions and act on his behalf should he lose the capacity to make his own decisions.

Life sustaining treatment

Life sustaining treatment is treatment that, in the view of an individual providing healthcare, is necessary to sustain the person's life.

Mediation

Mediation is a method of resolving disputes. An independent third party, called a mediator, helps the parties see each other's point of view through discussion.

Medical (Therapy, Education and Research) Act

This Act is a separate law that provides a scheme where people can pledge their organs or any body part for the purposes of transplant, education or research after they pass away.

Mental capacity

Mental capacity is the ability of a person to make a specific decision at a particular time. The Act introduces a two-stage test to ascertain mental capacity. Refer to chapter 4.

Office of the Public Guardian (OPG)

The OPG has a wide range of responsibilities within the framework of the *Mental Capacity Act*. These include keeping a register of LPAs, supervising deputies and investigating allegations of ill-treatment.

Permanent incapacity

A person suffers from permanent incapacity when the incapacity is long term. Examples include persons in a permanent vegetative state or locked-in syndrome. Refer to paragraph 4.4.1 for more information.

Personal welfare donee

A personal welfare donee is an individual appointed under an LPA by the donor to make personal welfare decisions on behalf of the donor when the donor lacks capacity to make these decisions on his own. Personal welfare decisions are lifestyle related decisions such as where the donor is to live and who may or may not have contact with the donor.

Property & affairs donee

A property & affairs donee is an individual or a licensed trust company under the *Trust Companies Act* (Cap. 336), as prescribed by the Mental Capacity Regulations, who is appointed under an LPA by the donor to make decisions relating to property & affairs matters when the donor lacks capacity to make these decisions on his own.

Restraint

Restraint is the use of, or threat to use, force by an individual to secure compliance to an act, which the person resists, or restricting the person's freedom to move, whether or not the person resists. A person can be restrained without physical force or threat of physical force being used.

Statutory principles

There are five statutory principles under the *Mental Capacity Act* that everyone must follow when dealing with persons who lack or may lack mental capacity.

Unwise decision

This refers to one of the statutory principles. A person who has mental capacity has the right to make a decision that is unwise in the view of others. Just because a decision is unwise does not mean that the person has lost mental capacity. Refer to paragraph 3.5 for more information.

Will

A will is a legal document that a person signs that directs the distribution of his property when he passes away. This definition includes codicils, which is an amendment to a will.

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