

THE DEPUTYSHIP REGIME UNDER SINGAPORE'S MENTAL CAPACITY ACT: AN INTRODUCTION

Mental incapacity is a pressing public issue in Singapore. It is thus surprising that there has been very little academic literature on the laws of mental capacity here. This article seeks to partially remedy this gap by examining the deputyship legal regime under the Mental Capacity Act (Cap 177A, 2010 Rev Ed). Apart from providing a map for those who wish to be acquainted with the deputyship regime, this article will examine the practical issues that litigants-in-person have faced under this legislative regime and consider some solutions to help them overcome such challenges.

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I. Introduction

1 Let us start with some statistics. In 2011, there were 28,000 individuals suffering from dementia in Singapore. This number is estimated to rise to 80,000 by 2030.² If one takes into account the other groups of persons who may lack mental capacity, such as those who are born with intellectual disabilities³ and accident victims,⁴ the absolute number is likely to be even higher. Mental incapacity is therefore a

1 The authors would like to thank Associate Professors Burton Ong and Ruby Lee of the National University of Singapore, and the anonymous reviewer for their kind comments and feedback. All errors remain their own.

2 Office of the Public Guardian, *Annual Report 2011* <https://www.publicguardian.gov.sg/opg/Lists/Media%20Centre/Attachments/27/OPG_AR_2011.pdf> (accessed 5 October 2017) (hereinafter "Office of the Public Guardian's Annual Report").

3 Currently, there are no statistics locally on the number of persons with disabilities and the type of disabilities they have. The 2020 census will gather specific data on these areas. See Theresa Tan, "Census to Help Target Disability Services" *The Straits Times* (24 April 2017).

4 Currently, accident victims account for about 10% of the deputyship cases annually. See Table 4: Causes of Loss of Mental Capacity in Deputyship Cases below.

pressing public issue in Singapore and will continue to be so in the near future.

2 Yet, there is a dearth in the local literature on the law relating to mental incapacity. Apart from a single book written in 1994,⁵ there have been no attempts to elucidate the law on mental incapacity. It is curious why so little academic attention has been given to this area of the law, given that the number of individuals to be stricken with illness and lose mental capacity is likely to only increase in the future.

3 Indeed, it is impossible to map the entire world of laws relating to mental incapacity within the breadth of one article.⁶ A more practical approach must be taken. This article focuses on the deputyship regime in Singapore, in the hope that it provides a convenient map for the uninitiated legal professional who may be asked to file a deputyship application on behalf of his or her client. Such a map would also be useful for any law student or academic to be acquainted with the deputyship regime, and be a basis for any further critique and improvement to the existing law.⁷ Part II⁸ of the article outlines the background in which the deputyship regime operates in Singapore. In Part III⁹ of this article, the law on deputyship and the application procedures will be summarised succinctly, keeping in mind recent local developments. References will be provided to direct the reader to where more information may be sought. Part IV¹⁰ of this article will discuss the practical challenges that applicants under the current regime face, and some proposals for reforming the deputyship regime.

II. The landscape

A. *Types of decisions*

4 Every person in his or her life must make decisions. These decisions may range from the mundane (what to eat for lunch) to the downright complex (such as whether to undergo a particularly risky form of medical treatment). To borrow the terminology of the Mental

5 Kok Lee Peng, Molly Cheang & Chee Kuan Tsee, *Mental Disorders and the Law* (Singapore: Singapore University Press, 1994).

6 This would include legislation such as the Mental Health (Care and Treatment) Act (Cap 178A, 2012 Rev Ed), which governs the admission, detention, care and treatment of mentally disordered persons in designated psychiatric institutions.

7 To the best of the authors' knowledge, the law is as stated as on 6 December 2019.

8 See paras 4–24 below.

9 See paras 25–78 below.

10 See paras 79–93 below.

Capacity Act¹¹ (“MCA”), one may conveniently categorise¹² the myriad of a person’s decisions into two groups: “personal welfare” decisions and “property and affairs” decisions. Personal welfare decisions refer to lifestyle decisions such as:¹³

- (a) deciding where one wishes to live;
- (b) deciding what contact one wishes to have with others; and
- (c) giving or refusing consent to any medical treatment.

5 Property and affairs decisions, as the name implies, refer to decisions relating to one’s financial affairs and property. These include:¹⁴

- (a) controlling one’s property;
- (b) acquiring property;
- (c) entering or carrying out of any contract; and
- (d) conducting legal proceedings.

6 The common law protects mentally incapacitated persons (“P”) by securing their legal positions, preventing them from being bound by the decisions they make while they are incapacitated. For example, if P can be shown to lack mental capacity at the point of executing a will, the will is void.¹⁵ However, this protection is a double-edged sword. As much as it protects P’s legal position, it poses problems when there is a need to make decisions regarding P or to alter the legal rights and obligations of P.¹⁶

11 Cap 177A, 2010 Rev Ed.

12 Historically, this categorisation allowed the court to grant limited powers to a deputy. Under the then Mental Disorders and Treatment Act (Cap 178, 1985 Rev Ed), the court could choose to appoint a “committee” (the equivalent of a deputy under the Mental Capacity Act (Cap 177A, 2010 Rev Ed)) for the person, or the property, or both. This approach may also have a signalling function, as the public can know generally the types of decisions the proxy decision-maker is allowed or not allowed to make, just from the categorisation.

13 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 22(1).

14 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 23(1).

15 See the oft-cited High Court decision of *George Abraham Vadakathu v Jacob George* [2009] 3 SLR(R) 631 at [1] and [29].

16 Such as making a claim or accepting compensation under the Work Injury Compensation Act (Cap 354, 2009 Rev Ed) on behalf of the mentally incapacitated victim. See, eg, *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598.

B. *Incapacity and types of proxy decision-making*

7 The general protection of P may have to be set aside in situations where there is a need to act on P's behalf and to alter P's rights. The law does so by allowing several proxy decision-makers to make decisions on P's behalf.

(1) *Proxy decision-making under MCA*

8 *The MCA is the prevailing legislation governing the conferment of authority on a third party to manage the matters of a mentally incapacitated person.*¹⁷ Under the MCA, these proxy decision-makers generally may make both personal welfare, and property and affairs decisions. There are four types of proxy decision-makers under the MCA, discussed in the order of their scope of powers.

(a) Court

9 Under the MCA, the court has the broadest powers in respect to proxy decision-making. Subject to certain excluded decisions, the court is granted wide powers to make decisions on matters regarding P's personal welfare or property and affairs.¹⁸ These include the power to execute wills for P, the power to make nominations under the Insurance Act,¹⁹ as well as to execute memorandums or nominations under the Central Provident Fund Act.²⁰ The court, however, cannot act *suo motu*. It can only exercise its powers under the MCA where an application has been commenced under the MCA and the applicable rules.²¹

(b) Donee of a lasting power of attorney

10 Prior to the MCA's enactment, it was impossible for a person to choose who would be his or her proxy decision-maker, in the event that said person loses his or her mental capacity. The MCA introduced a new regime known as the lasting powers of attorney ("LPA").²² Under this regime, a person may choose someone whom that person "could trust and rely on and ... who was willing to undertake that burden"²³ to

17 *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at [25].

18 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 20.

19 Cap 142, 2002 Rev Ed.

20 Cap 36, 2013 Rev Ed. Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 23(1).

21 See *Peter Edward Nathan v De Silva Petiyaga Arther Bernard* [2016] 3 SLR 361 at [36].

22 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 11.

23 *Singapore Parliamentary Debates, Official Report* (14 March 2016) vol 85 at col 108 (Dr Vivian Balakrishnan, Minister for Community Development, Youth and Sports).

be a donee of an LPA. A person could provide in the LPA what powers the donee would have.²⁴ The donee of an LPA has much more limited powers than the courts. For instance, he or she is not entitled to execute wills for P.²⁵ The donee of the LPA is able to exercise his or her decision-making powers automatically when P loses mental capacity, and there is no requirement to notify the Office of the Public Guardian (“OPG”) regarding P’s loss of capacity.²⁶

(c) Deputy

11 In cases where the decisions required to be made on behalf of P are of an ongoing nature, or relate to decisions which are to be made in the future, the court may choose to delegate its decision-making powers to a deputy. The court is empowered to do so under s 20(2)(b) of the MCA.²⁷ The scope of delegated powers depends on the terms of the court order. It is also subject to the various statutory restrictions imposed by the MCA. The deputy has much more limited powers as compared to an LPA. A deputy, unlike an LPA donee, cannot prohibit a named person from having contact with P, or to make gifts out of P’s assets.²⁸ A court application is required for a person to be appointed as a deputy.

(d) Caregivers and medical treatment providers acting under section 7 of MCA

12 Caregivers and medical treatment providers undertake various actions in looking after the day-to-day care of P, without P’s consent. These actions include basic caregiving such as feeding, changing clothes or providing necessary medical treatment such as surgery. Under common

24 Under the Office of the Public Guardian standard Lasting Power of Attorney Form 1, a person could grant blanket authority to the donee to make personal welfare or property and affairs decisions, or both. See Office of the Public Guardian, “Lasting Power of Attorney (LPA) Form 1 (2020)” <<https://www.msf.gov.sg/opg/Pages/Forms.aspx>> (accessed February 2020).

25 See ss 13(9) and 13(9A) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed).

26 The only safeguard against the abuse by a donee of a lasting power of attorney (hereinafter “LPA”) seems to be the person dealing with the donee regarding P’s property. In such situations, that person may demand that the donee produce a certificate from a medical practitioner stating P’s lack of capacity. See s 13(10) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed). This has been heavily criticised as a glaring weakness of the system, because “how can the OPG monitor what it does not know?” See Toh Yong Chuan, “How the Office of the Public Guardian Can Live Up to Its Name” *The Straits Times* (18 October 2014).

27 Mental Capacity Act (Cap 177A, 2010 Rev Ed).

28 Mental Capacity Act (Cap 177A, 2010 Rev Ed) ss 25(2)(a) and 25(3)(a).

law, these caregivers and treatment providers would be protected from claims of battery (on P), under the doctrine of necessity.²⁹

13 Nevertheless, the common law position on these informal decision-making situations was described to be “far from clear”.³⁰ As such, s 7 of the MCA was drafted with the purpose of “clarifying in statute the circumstances in which decisions can be taken for people who lack capacity, but without anyone having to apply for formal authorisation”. Hence, this section provides for a more certain ground to protect these caregivers and medical treatment providers.³¹ Section 7 of the MCA protects a person from any civil or criminal liability if:³²

- (a) that person does an act in connection with P’s care or treatment;³³
- (b) that person takes reasonable steps to establish if P lacks capacity in relation to the matter in question; and
- (c) when doing the act, that person reasonably believes P lacks capacity in relation to the matter, and that it will be in P’s best interest for the act to be done.

14 The caregiver or medical treatment provider may be reimbursed out of P’s assets, if he or she had borne expenditure for P for necessary goods or services.³⁴ However, the statutory protection does not extend to criminal or civil liability arising from that person’s negligence in doing the act.³⁵ *The combination of immunity from liability and a right of reimbursement in effect amounts to a statutory “authorisation” of these acts of care and treatment.*

29 *Re LP* [2006] 2 SLR(R) 13 at [6].

30 The Law Commission (Law Com No 231), *Mental Incapacity* (London: HMSO, 1995) at para 4.1.

31 The Law Commission (Law Com No 231), *Mental Incapacity* (London: HMSO, 1995) at para 4.2.

32 This is subject to certain limitations. See generally ss 7(2), 7(3) and 8 of the Mental Capacity Act (Cap 177A, 2010 Rev Ed).

33 It was noted in the Explanatory Statement to the Mental Capacity Bill (Bill 13 of 2008) that:

In welfare (including health care) matters, a deputy is never required in order for care or treatment to be given to a person because clause 7 provides sufficient scope for carers and professionals to act. Nevertheless, a deputy may be particularly helpful in cases of dispute.

Anecdotally, this did not seem to be the case, and caregivers have shared experiences where medical practitioners seemed risk adverse and were unwilling to provide treatment without a deputy’s consent (such as dental treatment). See para 24 below.

34 Mental Capacity Act (Cap 177A, 2010 Rev Ed) ss 9 and 10(1).

35 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 7(3)(a).

(2) *Alternative forms of proxy-decision making – Trusts*

15 Trusts may provide an alternative mechanism for indirectly managing P's property and affairs. For example, a parent of a mentally incapacitated child may wish to make financial arrangements for the child's care after the parent passes on. He or she could settle a trust and direct the trustee to apply the trust property for P's best interests.³⁶ However, services of a professional trustee are costly, and most professional trustees only cater to persons with assets of more than \$2m.³⁷

16 In Singapore, the non-profit Special Needs Trust Company ("SNTC") provides an affordable professional trustee service for these parents. The parents can settle a trust with SNTC, along with a letter of intent and a care plan which describes how the money is to be disbursed. As the letter of intent is non-binding, SNTC has the discretion to depart from the letter if it is in P's best interests (such as medical emergency situations).³⁸ SNTC provides caregivers with a low-risk financial planning solution. SNTC is a charity subject to the Commissioner of Charities' oversight, and the moneys are held by the Public Trustee. This alternative removes the risk of financial abuse from deputies. As of 2019, there are a total of 633 trust accounts.³⁹ However, setting up a trust with SNTC does not remove the need for a deputy as SNTC only manages cash assets. It does not deal with personal welfare and other specific decisions in relation to P's property and affairs.⁴⁰

(3) *Other legislation authorising proxy decision-making*

17 There may be other legislation that allows such proxy decision-making apart from the MCA. One example of such non-MCA legislation would be the Personal Data Protection Act 2012⁴¹ ("PDPA"). Under the PDPA, an organisation may collect, use or disclose an individual's personal data without his or her consent under certain circumstances. One such circumstance would include where the collection, use or

36 This is an alternative to the other solution where the parents bequeath property to P in a will. A deputy will be needed to receive the inheritance on P's behalf, and to apply the inheritance in P's best interests.

37 Tang Hang Wu, "Setting Up a Non-profit Trust Company: The Special Needs Trust Company in Singapore" (2014) Eld LJ 419.

38 Tang Hang Wu, "Setting Up a Non-profit Trust Company: The Special Needs Trust Company in Singapore" (2014) Eld LJ 419.

39 Special Needs Trust Company, "FY18/19 Annual Report" at pp 26–27 (Special Needs Trust Company, Singapore).

40 Such as entering into contracts on behalf of P. The Special Needs Trust Company does not deal with other forms of property, and a deputy is still required to manage these on behalf of P.

41 Act 26 of 2012.

disclosure is necessary for a purpose in the interest of the individual, and the consent cannot be obtained in a timely way. As such, if P lacks mental capacity to consent, the organisation is entitled to deal with P's personal data in limited circumstances under the PDPA.⁴²

18 However, it must be noted that the MCA remains the prevailing legislation that governs proxy decision-making for mentally incapacitated persons. The courts will therefore exercise much scrutiny in considering the effect that non-MCA legislation may have on P. This was evident in the Singapore Court of Appeal's decision of *SGB Starkstrom Pte Ltd v Commissioner of Labour*,⁴³ where Sundaresh Menon CJ considered the MCA as the "prevailing" legislation governing the conferment of powers on a third party in managing the affairs of mentally incapacitated persons. Hence, any derogation or deviation from the MCA's provisions by other legislation has to be clearly spelt out.⁴⁴ On the facts of the case, the court found that the Work Injury Compensation Act⁴⁵ did not establish a regime of proxy decision-making outside of the MCA since there was no such explicit language.⁴⁶

C. When is a deputyship required in Singapore?

19 At this point, a short summary on the various proxy decision-makers is appropriate. The following table provides a quick summary:

	Courts	LPA	Deputies	MCA s 7	Trusts	Other Legislation
Requires P's prior action before loss of capacity	No	Yes	No	No	No	No
Can manage P's personal welfare matters?	Yes	Yes	Yes	Only care and treatment	No	Depends

42 See para 1(a) of the Second Schedule, Third Schedule and Fourth Schedule to the Personal Data Protection Act 2012 (Act 26 of 2012).

43 [2016] 3 SLR 598.

44 *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at [25].

45 Cap 354, 2009 Rev Ed.

46 *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at [27] and [33].

Can manage P’s property and affairs matters?	Yes	Yes	Yes	No	Limited	Depends
Requires application to the court?	Yes	No	Only for appointment	No, unless seeking to be reimbursed	No	Depends
Costs involved?	High	Low	High	None, unless seeking to be reimbursed	High if professional trustee, low if SNTC	Depends

Table 1: Taxonomy of Proxy Decision-Makers for Mentally Incapacitated Persons

20 *Looking at the scope of proxy decision-making powers under the law, it would seem that theoretically a deputy is unnecessary in most cases. This is because:*

(a) First, if P has executed an LPA before he or she loses mental capacity, a proxy decision-maker would have been appointed already. The donee is able to make decisions immediately after P loses capacity, and there would be no need for a deputy.⁴⁷ With the greater increase in persons taking up LPAs, the role for deputyship is likely to decrease.⁴⁸

(b) Second, if there is no requirement to deal with P’s property and affairs, there will be no need for a deputy. In most cases where P lacks mental capacity and incurs expenses, P’s immediate family would foot P’s medical bill and P’s day-to-day expenses. They would do so by tapping on their own Medisave to pay for P’s medical expenses, or using their own money.⁴⁹ Similarly, if P does not have any property or assets, but the

47 As such, one should execute an LPA early, while one still has mental capacity. As observed by District Judge Foo Tuat Yien, “it may be wise to make a LPA in advance to save time, financial and emotional burden of applying for a court appointment of a deputy”. See the decision of *Re W* (OS No OSF251 of 2010) as reflected in the Office of the Public Guardian’s Annual Report 2011.

48 In the financial year 2015, the Office of the Public Guardian saw a total number of 8,478 LPA applications, up from 4,119 in the previous year. Office of the Public Guardian, “Application Fees for Lasting Power of Attorney Waived for Two More Years” (15 August 2016) <<https://www.msf.gov.sg/opg/Pages/Media-Centre-Press-Releases.aspx>> (accessed February 2020).

49 See, eg, *Re N* (OS No OSF119 of 2011), as seen in the Office of the Public Guardian’s Annual Report 2011.

caregiver wishes to provide for P after the caregiver's demise, a trust could be settled with SNTC.

(c) Third, in most cases of care and treatment, s 7 of the MCA would provide the statutory protection necessary for carers and medical treatment providers to proceed with acts of care and treatment. A deputy is not required to consent to these acts.

21 *Nevertheless, it is submitted that in practice the deputyship regime plays an important role for Ps and their caregivers.* There are three reasons for this. First, a deputy may be required as a matter of necessity. This includes situations where:

- (a) P has yet to execute an LPA, but has lost mental capacity;⁵⁰
- (b) the donee or deputy is unable to perform his or her functions, and a replacement deputy is required; and⁵¹
- (c) P is unable to execute an LPA, due to mental incapacity arising from a pre-existing medical condition.

22 Second, a deputy with powers to manage P's property and affairs may be needed to ease the financial burden on P's caregivers. There are cases where P's immediate caregivers had exhausted their own savings on P's care, and the use of P's assets was a last resort.⁵² In some cases, P may be the family's sole breadwinner, and his or her dependents require access to P's assets for P's upkeep and the family's maintenance.⁵³ It is submitted that if P has assets, these should be utilised first for P's expenses. There

50 Currently, not every person has executed an LPA. These persons may lose capacity subsequently due to an accident. See, *eg*, *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598. In this case, P was involved in a workplace accident, and became mentally incapacitated. Initially, his brother made a claim for statutory compensation on behalf of his brother, but subsequently changed his mind because he was not authorised at the material time to make the claim on behalf of his brother. The brother subsequently became P's deputy, and sought to set aside the claim, and to commence a common law action for damages. It was held in the Court of Appeal that the original claim and notice of assessment was void. The caregiver would need to be appointed as P's deputy in order to make claims for compensation, and to litigate on behalf of P.

51 This may be because the deputies or donees were disqualified, lost mental capacity, or may have predeceased P. See, *eg*, *Peter Edward Nathan v De Silva Petiyaga Arther Bernard* [2016] 3 SLR 361 at [34]–[39], which will be further discussed at para 24 below.

52 See, *eg*, *Re N* (OS No OSF119 of 2011) in the Office of the Public Guardian's Annual Report 2011. In some cases where P does not have enough cash, the applicant may have to dispose of P's assets; see, *eg*, *Re D* (OS No OSF620 of 2015) in the Office of the Public Guardian's Annual Report 2013 (Subordinate Courts Singapore).

53 See, *eg*, *Re R* (OS No OSF335 of 2010) in the Office of the Public Guardian's Annual Report 2011. In this case, a deputy was required to make claims, to receive
(*cont'd on the next page*)

is no good reason as to why this financial burden should be imposed on P's caregivers, thereby adding undue pressure on them on top of their caregiving stresses. While there seems to be a low number of deputyship applications,⁵⁴ it is unclear whether this was primarily due to the altruism of P's caregivers, or if these caregivers were deterred by the high legal costs and inconvenience from the deputyship application (which in the authors' view is a more likely reason). Furthermore, not all Ps have next-of-kin to pay for P's expenses, and P may be on welfare support.

23 Hence, the appointment of a deputy serves both public and private purposes. In terms of private purposes, the appointment allows P's family members to unlock P's assets such that they can provide a better quality of life for P. In terms of public purposes, the unlocking of such assets will reduce the demand for welfare support from the Government.⁵⁵

24 Third, caregivers do face the problem of medical practitioners being hesitant to rely on s 7 of the MCA to conduct non-emergency medical treatment for persons with mental incapacity. For example, a particular dentist may take the view that general anaesthesia is necessary to restrain P in order to treat a toothache. However, the dentist may not be willing to proceed with the treatment without consent from a deputy for fear of being sued.⁵⁶ If treatment is sought from a hospital, the process may take weeks of clearance from the hospital authorities before P finally receives treatment, thereby placing P under prolonged distress from a worsening toothache. This could lead to the perverse outcome of medical professionals waiting for a non-emergency to become an emergency, so that they could actually treat P. Hence, given the risk adverse nature of current medical practitioners, a deputy with powers to manage P's personal welfare will be needed, to ensure that medical treatment is provided to P in a timely manner.⁵⁷

compensation moneys, and to apply those moneys for P's medical treatment, future medical needs, and children's education expenses.

54 Between the coming into force of the Mental Capacity Act (Cap 177A, 2010 Rev Ed) and 31 March 2016, there were only a total of 1,354 court orders appointing deputies. The number of deputies as at 31 March 2011 was 2,992, as this included the committee of persons and/or estate under the previous Mental Disorders and Treatment Act (Cap 178, 1985 Rev Ed) who are deemed as deputies under the Mental Capacity Act. See Table 3: Number of Court Orders Appointing Deputies and Number of Deputies Appointed below.

55 Janice Tai, "Volunteers May Act for Mentally Incapacitated" *The Straits Times, Asiaone* (30 January 2015). See para 50 below on professional deputies.

56 A point noted by Choo Han Teck J in *Re LP* [2006] 2 SLR(R) 13 at [6].

57 This is a commonly cited example by social workers working with intellectually disabled persons. In some cases where P is an adult, consent from P's parent may not be sufficient. This is because P's parents no longer have parental rights to provide
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III. Deputyship law in Singapore

25 The Family Justice Courts have the jurisdiction to hear any civil proceedings under the MCA.⁵⁸ This would include decisions to approve deputyship applications under s 20 of the MCA.

26 For any deputyship application, the court must consider the following issues:

- (a) whether P lacks mental capacity;
- (b) whether it would be appropriate to appoint a deputy, and what powers he or she should be given; and
- (c) what the duties of a deputy are.

A. *Mental incapacity*

27 Before the court is seized of its powers to appoint a deputy,⁵⁹ the applicant must first establish on a balance of probabilities⁶⁰ that P lacks mental capacity.⁶¹ Under the test in the MCA, the applicant must show two components:⁶²

- (a) P is unable to make a decision for himself in relation to a matter at a material time (“Functional Component”);⁶³ and

such consent on behalf of P. See, eg, Janice Tai & Toh Yong Chuan, “Just \$250 to Seek Deputy Powers” *The Straits Times* (10 August 2015).

58 Section 2(1)(k) read together with ss 22(1)(b) and 26(2)(b) of the Family Justice Act 2014 (Act 27 of 2014).

59 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 20(1).

60 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 4(4).

61 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 3(1). See *TEB v TEC* [2015] SGFC 54 at [263]. There are cases where despite the applicant’s own expert evidence stating that P did not lack mental capacity, the applicant still sought to convince the court that P lacked mental capacity. See, for instance, the District Court decisions of *Re GAV* [2014] SGDC 125 and *JBO v JBP* [2014] SGDC 439.

62 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 4(1). See *A Local Authority v TZ* [2013] EWCOP 2322 where Baker J at [17] adopted a similar approach. For a practical perspective on how doctors should write their medical reports for Mental Capacity Act purposes, see Lim Hui Min, Goh Lee Gan & T Thirumoorthy, “Legal Medicine: Assessing Mental Capacity and Writing Medical Reports for Deputy Applications” (2017) 58(1) *Singapore Med J* 18. See also Gary Chan, “Assessing Mental Capacity: *BUV v BUU* [2019] SGHCF 15” *Singapore Academy of Law Journal* (published on e-First 12 February 2020).

63 *Re BKR* [2015] 4 SLR 81 at [134].

(b) the inability to make the decision is due to an impairment of, or a disturbance in the functioning of P’s mind or brain (“Clinical Component”).⁶⁴

28 *Notwithstanding the statutory order of the two limbs, it is submitted that the correct approach is to consider the Clinical Component first, followed by the Functional Component.*⁶⁵ Legislative history suggests that the Clinical Component was intended to be a diagnostic threshold, which serves to avoid catching “large numbers of people who make unusual or unwise decisions”.⁶⁶ As such, if there is “no indication of impairment or disturbance in the mind or brain, the individual should be presumed to have capacity, and his or her ability to make decisions should not be questioned”.⁶⁷ This is the approach as laid out in the Code of Practice,⁶⁸ and was the approach seemingly taken by the Court of Appeal in *Re BKR*⁶⁹ (“*Re BKR (CA)*”) as well.

(1) *Clinical Component*

29 Essentially, the Clinical Component requires the applicant to show that P is labouring under a medical condition, which affects P’s mental functioning in general. For the purposes of deputyship applications, expert evidence will be required. Medical professionals will be required to testify whether P has a mental impairment, based on the observable symptoms and the diagnostic tools available. The medical professional is required to state what the impairment is, as well as its effect on P’s cognitive abilities.⁷⁰

30 There is some overlap between the Clinical Component and the Functional Component. This is because medical conditions are defined

64 *Re BKR* [2015] 4 SLR 81 at [134].

65 *A Local Authority v TZ* [2013] EW COP 2322 at [17].

66 Section 4(1) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed) is derived from s 2(1) of the English Mental Capacity Act 2005 (c 9). As such, the English legislative history is relevant in interpreting our Mental Capacity Act. The diagnostic threshold view was taken by the English Law Commission; see The Law Commission, *Mental Incapacity* (Consultation Paper No 128, 1993) at para 3.8, and The Law Commission (Law Com No 231), *Mental Incapacity* (London: HMSO, 1995) at para 3.15.

67 See the discussion of English decisions on this point in *Mental Capacity Law and Practice* (Gordon Ashton OBE ed) (Bristol: Jordons Publishing, 3rd Ed, 2015) at para 2.59.

68 The Code of Practice is issued under the Mental Capacity Act (Cap 177A, 2010 Rev Ed), and provides guidelines for proxy decision-makers on matters including the assessment of capacity. The Code provides that the clinical component is to be considered first, before the functional component: see Office of the Public Guardian, *Code of Practice* (3rd Ed, 2016) at para 4.5.

69 [2015] 4 SLR 81.

70 *Re BKR* [2015] 4 SLR 81 at [134].

in terms of the severity of P's impaired functioning.⁷¹ *Given the fact that the Clinical Component is only a diagnostic threshold, any detailed analysis on the severity of P's impaired functioning should be done at the Functional Component stage. The specific type of medical condition is therefore not important.* This was the approach taken in *Re BKR (CA)*. In that case, P had symptoms of memory impairment and disturbance in her executive function, but could not be said to have suffered from dementia because there was no "significant impairment in social or occupational functioning". However, her symptoms such as her ability to recall "seemingly major recent events" and a "compromised orientation as to time" took her beyond the state of mere "mild cognitive impairment" ("MCI"). The Court of Appeal held that it was not necessary to state what P's mental impairment was, as long as it was situated between MCI and dementia, and went on to consider the degree of functional impairment at the Functional Component stage.⁷²

(2) *Functional Component*

31 *Although a person is labouring under a medical condition, it does not necessarily follow that he or she lacks mental capacity.*⁷³ *It must further be shown that P is unable to make a decision (or a class of decisions), due to the medical condition (ie, the Functional Component).*

32 Whether P is unable to make a decision is an opinion which the court will form from the evidence, and expert opinion may be given no weight. This is an evidentiary principle. In *Re BKR (CA)*, the Court of Appeal held that:⁷⁴

... it is ultimately the court which must decide whether P lacks the ability to make decisions within the meaning of s 5(1) of the MCA ... In the instant case, there were occasions on which the experts put forward their opinions on this issue but to the extent they did so, their views in that regard should not be given weight.

71 For example, low impairment may mean that a person only has "mild cognitive impairment". Higher levels of impairment may mean that a person suffers from dementia.

72 *Re BKR* [2015] 4 SLR 81 at [170]–[172].

73 See, for instance, the District Court's decision in *Re GAV* [2014] SGDC 125. In this case, P suffered from schizophrenia, and was on medication. The court observed that "the existence of a diagnosis of schizophrenia did not in itself mean that P must automatically be determined to lack capacity". On the facts, the expert evidence showed that P had mental capacity.

74 See *Re BKR* [2015] 4 SLR 81 at [134].

33 Under the Functional Component, P is unable to make a decision if P is unable:⁷⁵

- (a) to understand information relevant to the decision;⁷⁶
- (b) to retain that information;⁷⁷
- (c) to use or weigh that information as part of the process of making the decision; or⁷⁸
- (d) to communicate his decision.⁷⁹

34 P's inability is decision specific.⁸⁰ P may have the ability to decide on personal welfare matters (such as deciding where he or she wishes to live), but not property and affairs matters (such as commencing legal proceedings).⁸¹ P may be able to manage transactions involving small sums, but not transactions involving large sums.⁸² P's inability is time specific.⁸³ P may have a partial, temporary, permanent or fluctuating disability to make decisions.⁸⁴ A person is not to be treated as being unable to make a decision unless all practicable steps to help him do

75 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 5(1).

76 The ability of comprehension: see *TEB v TEC* [2015] SGFC 54 at [71].

77 The ability of memory: *TEB v TEC* [2015] SGFC 54 at [71].

78 The ability of logic and reason: *TEB v TEC* [2015] SGFC 54 at [71].

79 The ability to communicate in a way that others actually understand his decision: *TEB v TEC* [2015] SGFC 54 at [71].

80 See s 4(1) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed) where the person must lack capacity "in relation to a matter".

81 See, eg, *Re W* (OS No OSF322 of 2014) as seen in the Office of the Public Guardian's Annual Report 2014. P was of mild intellectual disability due to her suffering from Down Syndrome. P was involved in an accident, and was due to receive compensation for her injuries. P was found to only lack capacity in managing her property and affairs matters, and her mother was appointed to be a deputy to commence legal proceedings, and to receive the compensation money on P's behalf. See Office of the Public Guardian, *Annual Report, 2014* <https://www.publicguardian.gov.sg/opg/Lists/Media%20Centre/Attachments/24/AR_2014.pdf> (accessed 5 October 2017).

82 See, eg, *Re BKR* [2015] 4 SLR 81 at [208], where the Court of Appeal was of the view that P was able to act in respect of small sums of money, but not substantial sums.

83 Section 4(1) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed); the person must lack capacity "at the material time".

84 See the Family Court's decision of *TEB v TEC* [2015] SGFC 54 at [263]. In this case, the applicant sought to revoke an LPA which P had executed. P suffered from dementia, and had fluctuating capacity. The applicant in this case failed to discharge the burden of showing that P lacked mental capacity at the point of executing the LPA. On the facts, the defence did not succeed in positively proving that P had mental capacity as well.

so have been taken without success.⁸⁵ Mere unwise decisions made by a person do not reflect that person's inability to make the decision.⁸⁶

35 One pertinent issue is whether the ability to manage one's property and affairs is conceptually different from the ability to decide one's proxy decision-maker? In the High Court judgment in *Re BKR*⁸⁷ ("*Re BKR (HC)*"), there is *dictum* suggesting that these were two fundamentally different concepts. Lai Siu Chiu J (as she then was) observed that a decision on one's proxy decision-maker involves considerations of "who [BKR] trusts, how she places her trust in someone, and how she evaluates or responds to someone", but made no holding on the matter.⁸⁸

36 This approach has support from English authorities as well. Reference could be made to the English Court of Protection's ("COP's") decision in *Re K, Re F*.⁸⁹ In the context of an enduring power of attorney, Hoffmann J held that there was a lower threshold for executing a power. In his view, the rationale was that the power donated was fiduciary in nature, and not an outright disposition of assets like a gift. The power's exercise is hedged with statutory protection of the donor as well.⁹⁰ While the High Court's decision in *Re BKR (HC)* was overturned on appeal, this portion of the decision was not discussed. Hence, this remains an open matter in Singapore law.

37 *It is important to note that there must be a causal link between the medical condition and P's impaired functioning. However, the medical condition need not be the sole cause of the impaired functioning.* In deciding whether P lacks mental capacity to make a decision, it has been held in *Re BKR (CA)* that the court will take into account the actual circumstances of P's life. As such, if P's actual circumstances did not furnish P the help as would enhance P's ability to make decisions, but served as positive

85 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 3(3).

86 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 3(4). A person buying the lottery is clearly unwise, but that does not mean he is incapable of making that particular decision.

87 [2013] 4 SLR 1257.

88 *Re BKR* [2013] 4 SLR 1257 at [187]–[188].

89 [1988] 2 WLR 781 at 786.

90 See also *Mental Capacity Law and Practice* (Gordon Ashton OBE ed) (Bristol: Jordan Publishing, 3rd Ed, 2015) at para 3.113. The underlying logic is that a person may understand that something needs to be done, but may lack the understanding to do it for himself. It is perfectly normal that such a person would confer on another the power to do what needs to be done, see the English Court of Appeal's decision of *Masterman-Lister v Brutton & Co (No 1)* [2003] 1 WLR 1511 at [83].

hindrances to P's decision-making independence, P would still be treated as lacking mental capacity under the MCA.⁹¹

(3) *Declarations as to P's lack of capacity*

38 Section 19 of the MCA provides the court with the power to make declarations on whether a person has or lacks capacity to make a decision. Legislative history suggests that this provision serves two purposes. First, given that the court only has its decision-making jurisdiction if the person concerned lacked capacity, it follows that the court requires a power to make declarations about questions of capacity. Second, this declaratory power also protects persons who are being treated as if he or she lacked capacity,⁹² by allowing them to challenge the treatment through seeking a declaration as to his or her capacity.⁹³

(a) *Prior transactions*

39 *There is authority which suggests that the court may make declarations on P's capacity regarding prior transactions undertaken by P.* In *Re BKR (CA)*, the Court of Appeal considered in great detail two previous decisions taken by P, concluded that she did not have capacity to make those decisions,⁹⁴ and set aside those decisions. The court further held that P currently lacked mental capacity to manage property and affairs matters which involved substantial sums of money, and therefore a deputy should be appointed.⁹⁵ Similarly, in *BUV v BUU*,⁹⁶ the High Court considered in great detail the events showing P's prior mental capacity and held that P did not have capacity in relation to an earlier will, thereby granting the plaintiff's prayer for the will to be set aside.⁹⁷

40 However, it is submitted that s 19 of the MCA should not be applied in such a liberal manner. There are three reasons for this. First, a plain reading of s 19 suggests that the court can only make declarations

91 See *Re BKR* [2015] 4 SLR 81 at [207]. In that case, P was subject to undue influence from her immediate caregivers. The court held that her inability to make decisions was due to both her medical condition as well as her immediate circumstances. The combination of both factors was sufficient in meeting the incapacity threshold under the Mental Capacity Act (Cap 177A, 2010 Rev Ed).

92 Such as decisions being made on behalf of P under s 7 of the Mental Capacity Act (Cap 177A, 2010 Rev Ed). See para 12 above.

93 See Office of the Public Guardian, *Code of Practice* (3rd Ed, 2016) at para 9.3 and The Law Commission (Law Com No 231), *Mental Incapacity* (London: HMSO, 1995) at para 8.7.

94 *Re BKR* [2015] 4 SLR 81 at [174]–[206].

95 *Re BKR* [2015] 4 SLR 81 at [208].

96 [2019] SGHCF 15.

97 *BUV v BUU* [2019] SGHCF 15 at [116].

on P's present capacity. Section 19 is worded only in the present tense ("has or lacks capacity"), instead of the past tense ("had or lacked").⁹⁸ Second, the MCA is focused on proxy decision-making in the best interests of P moving forward, and not about decisions which P had purportedly made in the past. Third, the MCA does not purport to replace all common law rules on mental incapacity.⁹⁹ For example, in the High Court's decision in *Che Som bte Yip v Maha Pte Ltd*,¹⁰⁰ the first two plaintiffs were appointed under the then Mental Disorders and Treatment Act¹⁰¹ as the committee of the third plaintiff's estate. The first and second plaintiffs then commenced action on the third plaintiff's behalf to set aside the deed of mortgage on the grounds that the third plaintiff had lacked contractual capacity. Chao Hick Tin JC (as he then was) based his judgment on the law of contract and made no reference to the legislation.

41 It is unlikely that Parliament intended such wide-ranging ramifications from the enactment of the MCA. Such a restrained approach towards s 19 also borrows support from English authorities, which have held in the context of statutory will cases, that the COP has no jurisdiction to rule on the validity of any previously made will.¹⁰² The better solution would be for the court to decide that P lacked mental capacity to make these decisions going forward, appoint deputies to litigate on P's behalf and have the matter heard in a separate suit.

(b) Relevance of incapacity in other contexts

42 *The declaration made by a court on P's mental incapacity may be relevant to contexts beyond the deputyship application.* For example, P may have lost his or her mental capacity due to an accident arising from a tortfeasor's negligence. The severity of P's incapacity would be relevant in deciding whether a deputy should be appointed, and the scope of his or her powers. The severity of P's incapacity would also be relevant in determining the measure of damages with which the tortfeasor must

98 Contrast this with ss 17(3) and 17(4) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed), where the court has an express power to revoke an LPA if it was procured by fraud or undue pressure.

99 See Office of the Public Guardian, *Code of Practice* (3rd Ed, 2016) at para 4.11, which clarifies that the test for lack of capacity is for the purposes of the Mental Capacity Act (Cap 177A, 2010 Rev Ed) only, and does not replace the other legal tests in common law.

100 [1989] 2 SLR(R) 60.

101 Cap 178, 1985 Rev Ed.

102 See, for instance, the English Court of Protection decisions of *Re M* [2010] 3 All ER 682 at [50] and *Re D* [2011] 1 All ER 859 at [21]. This is because the Court of Protection is a separate court set up solely for the purposes of dealing with Mental Capacity Act matters, and does not deal with other civil matters.

compensate P.¹⁰³ As such, the tortfeasor may wish to be joined as a party to the deputyship application, in order to challenge P's incapacity.

43 Given that it is the responsibility of the court hearing the MCA application to determine if P lacks mental capacity, the court will consider all relevant evidence from the tortfeasor in assessing P's mental capacity. However, the court will also wish to ensure that the applicants' and P's confidentiality would be protected. *In such a situation, the court may direct that P is to be examined by an independent doctor, and all relevant information from the parties is to be furnished to him or her.*¹⁰⁴ In the event that the independent doctor disagreed with the applicant's doctor, there would be a triable issue regarding P's capacity, from which the court will then consider how the confidentiality and privileged information regarding the civil suit could be addressed when joining the tortfeasor.¹⁰⁵

44 However, aside from fraud and other forms of abuse, the court is unlikely to allow joinder applications for deputyship applications. This was borne out in the High Court's decision in *TWD v UQE*.¹⁰⁶ The court found that while there is an advantage of enabling alleged tortfeasors to place relevant evidence regarding P's capacity before the court as the applicants in a deputyship application may not have introduced this evidence to the court,¹⁰⁷ the disadvantages still outweigh the advantages of allowing a joinder application.¹⁰⁸ Such disadvantages would include (a) inevitably delaying the disposition of the deputyship application and increasing related costs;¹⁰⁹ (b) joinder would afford the tortfeasor private and confidential information about P and possibly P's family;¹¹⁰ and (c) joinder would make proceedings more adversarial which goes against the aims of having a just, expeditious and economical determination of deputyship applications.¹¹¹

45 In that case, Tan JC acknowledged that joinder enables alleged tortfeasors to place relevant evidence regarding X's capacity before the court, but he took the view that joinder is not the only means for such

103 Strictly speaking, the declaration made by the court for the deputyship application would be inadmissible as proof of the facts contained therein. See s 45 of the Evidence Act (Cap 97, 1997 Rev Ed). For practical purposes, however, the tortfeasor would not be satisfied with leaving the matter to be dealt with at the civil suit, and would still seek to intervene in the deputyship application.

104 *TWD v UQE* [2019] 3 SLR 662 at [55].

105 *TWD v UQE* [2019] 3 SLR 662 at [47], [48] and [55].

106 [2019] 3 SLR 662.

107 *TWD v UQE* [2019] 3 SLR 662 at [62].

108 *TWD v UQE* [2019] 3 SLR 662 at [80].

109 *TWD v UQE* [2019] 3 SLR 662 at [59].

110 *TWD v UQE* [2019] 3 SLR 662 at [60].

111 *TWD v UQE* [2019] 3 SLR 662 at [61].

relevant evidence to be placed, since rr 22(3)(b) and 22(3)(g) of the Family Justice Rules 2014¹¹² allow for evidence on P's capacity to be introduced before the court.

46 Tan JC then set out the procedure on how the alleged tortfeasor may place evidence regarding X's capacity before the court hearing the deputyship application:¹¹³

(a) The tortfeasor should write to inform the court of evidence in his possession, setting out the details of such evidence and explaining its relevance to the application.

(b) The applicant should then be able to respond to the tortfeasor's letter by letter to the court.

(c) The court would then consider its relevance to the issues to be determined in the deputyship application. If it is satisfied that the evidence is relevant, the court can then introduce such evidence of its own motion pursuant to rr 22(3)(b) and 22(3)(g) of the Family Justice Rules.

B. *Appointment of deputies*

47 The court is entitled under s 20 of the MCA to delegate its power to make decisions on behalf of P, by appointing a deputy.¹¹⁴ This is subject to certain restrictions under the MCA.

(1) Who may be appointed?

48 A deputy appointed by the court must be an individual who has attained the age of 21 years.¹¹⁵ For powers relating to property and affairs, a person other than an individual may be appointed if it falls within the class of persons prescribed as eligible to be appointed as donees of an LPA.¹¹⁶ Given that a deputyship order imposes onerous duties on the deputy, that person can only be appointed with his consent.¹¹⁷

112 S 813/2014.

113 *TWD v UQE* [2019] 3 SLR 662 at [81].

114 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 20(2).

115 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 24(1)(a).

116 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 24(1)(b). Regulation 5 of the Mental Capacity Regulations 2010 (S 105/2010) provides that only licensed trust companies under s 2 of the Trust Companies Act (Cap 336, 2006 Rev Ed) are such prescribed persons.

117 *Cf Mental Capacity Law and Practice* (Gordon Ashton OBE ed) (Bristol: Jordan Publishing, 3rd Ed, 2015) at para 4.29, where the learned authors seem to take the view that consent may not be necessary if the court appoints the holder of a specified
(cont'd on the next page)

49 Typically, it is P's next-of-kin who would apply to the courts to be appointed as P's deputies. However, there may be Ps who do not have any next-of-kin or persons who might be willing to act as their deputies. Yet, these Ps may have assets that could be used to fund their day-to-day expenses. This unfortunate situation arose in *Peter Edward Nathan v De Silva Petiyaga Arther Bernard*,¹¹⁸ where the committee of persons under the prior legislation (deemed to be deputies under the MCA) had predeceased P, who was the first defendant in the suit. None of P's living relatives were willing to take an application to act on P's behalf. This prompted Aedit Abdullah JC (as he then was) to observe that the then MCA was lacking since it did not allow any agency to act in place of deceased deputies, and there was no possibility of automatic succession to the deputy. This created the situation whereby no one was able to legally represent the first defendant.¹¹⁹

50 In 2016, amendments to the MCA introduced a new concept of professional deputies,¹²⁰ whereby professional deputies could be appointed to use these assets for P's benefit and be remunerated for their services.¹²¹ The MCA makes it mandatory for persons wishing to perform the services of a professional deputy to be registered with the Public Guardian.¹²² The Ministry of Social and Family Development ("MSF") has been fine-tuning the regulatory framework for professional deputies, which culminated in the Mental Capacity (Registration of Professional Deputies) Regulations 2018.¹²³ At present, there are a total of 40 professional deputies registered and published with the OPG.¹²⁴

51 Professional deputies must not be related by blood or marriage to the person for whom they are appointed to act.¹²⁵ They must fulfil the criteria for registering as a professional deputy, including:¹²⁶

office or position. This is likely because the consent of the previous holder would bind the subsequent office holders.

118 [2016] 3 SLR 361.

119 *Peter Edward Nathan v De Silva Petiyaga Arther Bernard* [2016] 3 SLR 361 at [34]–[39].

120 Mental Capacity (Amendment) Act 2016 (Act 10 of 2016) s 8.

121 *Singapore Parliamentary Debates, Official Report* (14 March 2016) vol 94 (Tan Chuan-Jin, Minister for Social and Family Development).

122 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 25A.

123 S 529/2018.

124 See the Office of Public Guardian's list of Registered Professional Deputies as at 3 December 2019 <<https://www.msf.gov.sg/opg/Pages/About-PDD.aspx>> (accessed February 2020).

125 Mental Capacity Act (Cap 177A, 2010 Rev Ed) ss 24(1)(a)(ii) and 24(1)(b)(ii).

126 Mental Capacity (Registration for Professional Deputies) Regulations 2018 (S 529/2018) reg 4.

- (a) attending and passing a training course conducted by a person appointed by the Public Guardian;¹²⁷
- (b) being a specified professional with at least five years of practice;¹²⁸
- (c) being credit worthy by having a credit rating of “BB” and above from the Credit Bureau (Singapore);¹²⁹ and
- (d) not being convicted of offences involving fraud or dishonesty.¹³⁰

52 The professional deputy is required to comply with the Code of Practice for Professional Deputies and Donees (“COP(PDD)”). Given that the professional deputy is entitled to remuneration, there is a risk that the professional deputy may overcharge for his or her services. As such, there is a need for the court and the OPG to supervise the professional fees to prevent issues of overcharging arising. To this end, the COP(PDD) prescribes factors to be considered in determining whether the fees charged by the professional deputy are reasonable.¹³¹ The Code of Practice further specifies that the professional deputy should clearly describe the work expected to be done (in the estimate submitted to the court) and post-court order, in the professional deputy’s annual reporting, and to give a breakdown with supporting documents for past work done.¹³²

127 Mental Capacity (Registration for Professional Deputies) Regulations 2018 (S 529/2018) reg 4(g). The course was most recently run by the Singapore University of Social Sciences, Faculty of Law.

128 Mental Capacity (Registration for Professional Deputies) Regulations 2018 (S 529/2018) reg 4(c)(i).

129 Mental Capacity (Registration for Professional Deputies) Regulations 2018 (S 529/2018) reg 4(e).

130 Mental Capacity (Registration for Professional Deputies) Regulations 2018 (S 529/2018) reg 4(i) read together with reg 2 which defines the scope of “specified offence” to include, *inter alia*, criminal dishonesty and misappropriation, and offences specified in chs VII–XVI of the Penal Code (Cap 224, 2008 Rev Ed).

131 Office of the Public Guardian, *Code of Practice Professional Deputies and Donees* (2018) Pt VI, “Professional Fees and Other Costs” at p 15. These factors include: the professional costs should be reasonable and proportionate to the value of P’s assets, the costs should be commensurate with the amount and complexity of the work done, the services are necessary and the professional deputy is acting in P’s best interests, whether there was any change in P’s circumstances which affects the fees charged for which the court may reassess, previous management costs billed, and industry benchmarks.

132 Office of the Public Guardian, *Code of Practice Professional Deputies and Donees* (2018) Pt VI, “Professional Fees and Other Costs” at p 15.

(2) *Court's scope of delegable power*

53 There are three hard limits on the court's ability to delegate its decision-making powers. First, the court is only able to exercise its powers under the MCA if P lacks capacity to do so. As such, the severity of P's mental incapacity directly correlates to the court's scope of delegable powers.¹³³

54 Second, even if P lacks capacity to make certain decisions, the court is excluded from making those decisions if they fall under s 26 of the MCA. These include consenting to marriage, consenting to sexual relations, sterilisation, adoption, renunciation of religion, and change of gender decisions. These are decisions which are so sensitive that proxy decision-makers should not be allowed to make them.¹³⁴

55 Third, the court cannot delegate the powers listed under s 25 of the MCA, and the court must exercise those powers itself. These powers would include prohibiting a named person from having contact with P, directing a person responsible for P's healthcare to allow a different person to take over that responsibility, and powers to make decisions on behalf of P which are inconsistent with a decision validly made by a donee of an LPA.

(3) *Is appointing a deputy in P's best interests?*

56 In considering whether a deputy should be appointed, the court is required to consider the principles under s 3 of the MCA, as well as to act in P's best interests under s 6 of the MCA. These considerations also determine the scope of power which the court should delegate to the deputy. In other words, the court has no greater power to oblige others to do what is best than what P would have done himself.¹³⁵

57 The MCA prescribes various best interest factors which can be conveniently grouped as *general considerations* (applying to all decisions),

133 See s 20(1) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed), which states that s 20 only applies if P lacks capacity "in relation to a matter or matters". Section 20(2) further provides that the court can only make orders in relation to "the matter or matters". The more severe P's incapacity, the greater the scope of delegable power. See also Baroness Hale DPSC's judgment (as she then was) in *N v A Clinical Commissioning Group* [2017] AC 549; [2017] UKSC 22 at [24].

134 See *Singapore Parliamentary Debates, Official Report* (14 March 2016) vol 85 at col 116 (Dr Vivian Balakrishnan, Minister for Community Development, Youth and Sports). While consenting to divorce was mentioned in the parliamentary debates, the Mental Capacity Act (Cap 177A, 2010 Rev Ed) is actually drafted narrowly to only exclude consenting to divorce on the ground of three years separation.

135 *N v A Clinical Commissioning Group* [2017] AC 549; [2017] UKSC 22 at [35].

as well as *special considerations* (for special classes of decisions). “Best interests” is not a test of “substituted judgment” (what P would have wanted), but an objective test as to what would be in P’s best interests. All relevant factors must be considered, but none would carry more weight or priority than another.¹³⁶

58 The general considerations can be summarised as follows:

- (a) Decisions by the court are preferred.¹³⁷
- (b) Powers delegated should be as limited as reasonably practicable.¹³⁸
- (c) Unjustified assumptions about P’s best interests should not be made based on P’s age, appearance, condition or behaviour.¹³⁹
- (d) The court must consider the likelihood of P regaining capacity, and if so, when.¹⁴⁰
- (e) The court must assist and encourage P to participate in the decision-making, where reasonably practicable.¹⁴¹
- (f) The court must consider P’s relevant wishes, feelings, beliefs and values as far as is reasonably ascertainable.¹⁴²
- (g) The court must, if practicable and appropriate to do so, consult those involved in P’s life to see if the decision is in P’s best interests.¹⁴³

59 Beyond the MCA, the Code of Practice provides additional factors which the court should consider:¹⁴⁴

136 See the Explanatory Statement to the Mental Capacity Bill (No 13 of 2008), and see also The Law Commission (Law Com No 231) *Mental Incapacity* (London: HMSO, 1995) at para 3.25. It bears mentioning that there is an ongoing debate in the UK as to whether it would be preferable to have a rebuttable presumption in favour of giving effect to P’s wishes, or if court practice had evolved to do so notwithstanding the English Mental Capacity Act 2005 (c 9). See the discussion in Alex Ruck Keene & Cressida Auckland, “More Presumptions Please? Wishes, Feelings and Best Interests Decision-making” (2015) Eld LJ 293.

137 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 20(4)(a).

138 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 20(4)(b).

139 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 6(1).

140 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 6(3).

141 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 6(4).

142 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 6(7).

143 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 6(8).

144 Office of the Public Guardian, *Code of Practice* (3rd Ed, 2016) at para 9.5.3. An interesting theoretical question arises as to whether the courts are obliged to follow the Code of Practice. Section 41(5) of the Mental Capacity Act (Cap 177A, *cont’d on the next page*)

- (a) the circumstances of the person concerned;
- (b) the likelihood that future or ongoing decisions will be required; and
- (c) whether the appointment is for decisions with respect to property and affairs or personal welfare matters.

60 The court may not be able to make certain decisions in the present if they relate to future matters, or the matters are of an ongoing nature. In such situations, it may be costly and inconvenient for the deputies to return to the court for multiple orders. As such, the court would be more inclined to appoint a deputy to make those decisions in these situations.¹⁴⁵

- (a) Special considerations: Property and affairs, investment powers

61 The courts adopt a very cautious attitude towards granting deputies powers relating to P's property and affairs. This is particularly so given the widely publicised cases of potential financial abuse.¹⁴⁶ Hence, the court must ensure that, as far as is reasonably practicable, P's property is preserved for application towards P's maintenance during his or her life.¹⁴⁷ For this reason, the court is more likely to require (if two or more deputies are appointed) the deputies to act jointly for all of P's property and affairs matters. This ensures that, at the very least, there are checks and balances on any decision made regarding P's assets, and lowers the risk of abuse of a deputy's power for his or her own benefit.

62 The current judicial attitude seems to be that where the possibility of receiving inheritance or insurance payouts is remote, the court will not

2010 Rev Ed) provides that only certain classes of persons are obliged to have regard to the Code, but the court is not listed as one of them. Section 41(7) of the Mental Capacity Act also provides that the Code is not subsidiary legislation. There is English authority to the effect that the court is not bound by the Code, but may consider the Code as guidance. However, if there is departure from the Code, the court should give careful explanation. See the English Court of Protection's decision of *The Mental Health Trust, The Acute Trust and the Council v DD* [2015] 1 FLR 1430 at [156].

145 Office of the Public Guardian, *Code of Practice* (3rd Ed, 2016) at para 9.5.1.

146 A particularly egregious case is the widely publicised debacle concerning a Chinese tour guide. See, for instance, the Family Court's decision of *TCZ v TDA, TDB and TDC* [2015] SGFC 63.

147 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 6(6). There is no equivalent of this in the English Mental Capacity Act 2005 (c 9). The purpose of this subsection is to "avoid some of the conflicts of interest which inevitably arise" in circumstances where P's property is disposed of, or settled, see *Singapore Parliamentary Debates, Official Report* (14 March 2016) vol 85 at cols 115 and 151 (Dr Vivian Balakrishnan, Minister for Community Development, Youth and Sports).

grant deputies the powers to receive these payouts or inheritance. This is because in such situations, the sum to be received is indeterminate, and the court may not be in a position to place adequate safeguards to ensure that the moneys are properly received and accounted for. The courts are inclined for deputies to apply for variation orders when the need to exercise these powers arises.¹⁴⁸ This allows the courts to have adequate oversight over P's property and affairs.¹⁴⁹

63 Where P has a sizable amount of assets, the court may grant investment powers to a deputy. In *Re TQR*,¹⁵⁰ the Family Court laid out certain factors which the court will consider in granting investment powers:¹⁵¹

- (a) whether P has enough assets to permit some of them to be used for investment;¹⁵²
- (b) the proposed deputy's relationship with P;¹⁵³
- (c) what safeguards would be put in place to protect P's assets from bad investment decisions;¹⁵⁴ and

148 The applicant would be required to specify the quantum received (or to be received) in his or her application to vary the order.

149 This was the experience of the volunteers from the Assisted Deputyship Application Programme pilot. In a large number of applications in which the students assisted, the court made no orders for insurance or inheritance.

150 [2016] SGFC 98.

151 *Re TQR* [2016] SGFC 98 at [24].

152 *Re TQR* [2016] SGFC 98 at [26]–[27]. If P has few assets, there will be little buffer if the investment decision goes wrong. The court will be slow to permit a deputy to invest P's assets due to the risk of loss. However, if P has significant assets, and P's maintenance is secured, the court will give more weight to what P would have decided to do (for example, P may wish to have the assets invested).

153 *Re TQR* [2016] SGFC 98 at [31]–[33]. If the proposed deputy is a close relative, the deputy is more likely to be concerned about P's interest. If the proposed deputy is a future beneficiary, while he or she might subconsciously consider his future inheritance, he or she is less likely to engage in risky investment behaviour due to an alignment of interests. However, the proposed deputy is not allowed to consciously consider his future inheritance in making the investment decision, due to his fiduciary relationship with P as a deputy, and must act in P's best interests.

154 *Re TQR* [2016] SGFC 98 at [37]–[42]. The purpose of the safeguards is to minimise risk of loss to P, to limit the extent of possible loss and to ensure that there is a reserve of funds for P regardless of what happens to the investments. The court may require the deputies to furnish the Public Guardian a list of P's assets and their current value on a periodic basis (eg, half-annual reports), on top of the annual reports. Applicants may consider giving commitments such as seeking advice from qualified persons for investments, to have decisions to be taken by deputies jointly, and to reimburse P for loss sustained if investments fall by a specified amount. The undertakings are similar to the duties of a trustee with investment powers under ss 5 and 6 of the Trustees Act (Cap 337, 2005 Rev Ed).

(d) if P's condition is temporary, the considerations to be considered may be different.

(b) Special considerations: Minors (persons under 21)

64 Section 21(1) of the MCA allows the court to exercise its powers to appoint deputies under the Act if the court considers it likely that the minor will continue to lack capacity to make decisions for that matter when he or she attains the age of 21.¹⁵⁵ In this regard, the MCA differs from its English counterpart, as the scope of eligible Ps is broader (the MCA applies to children). The English Mental Capacity Act 2005¹⁵⁶ ("English MCA") generally only applies to Ps above 16, although property and affairs deputies may be appointed for Ps under 16.¹⁵⁷ The court should prefer the appointment of the parents or guardian of P as deputy over any other person.¹⁵⁸ Where the applicants are older than P, the applicants may wish to seek appointment of successor deputies, to ensure that P is cared for even if the original deputies are unable to act.

C. Duties of a deputy

65 Under the MCA, a deputy is to be treated as P's agent for anything done by the deputy within the scope of the deputy's authority.¹⁵⁹ The deputy's primary duty is to act in P's best interests while exercising his or her delegated powers under s 6 of the MCA. There would be sufficient compliance with s 6 if the deputy "reasonably believes that what he does or decides is in the best interests of the person concerned".¹⁶⁰ The deputy is required to comply with the court's order, which may specify additional duties.¹⁶¹ The deputy is also required to have regard to the

155 This provision was described as being "particularly useful for parents of children with intellectual disabilities", and may "[assuage] some of their fears", see *Singapore Parliamentary Debates, Official Report* (14 March 2016) vol 85 at col 115 (Dr Vivian Balakrishnan, Minister for Community Development, Youth and Sports). See, eg, *Re T* (OS No OSF137 of 2011) as seen in the Office of the Public Guardian's Annual Report 2011, where P was 18, and the parents sought to make care arrangements.

156 c 9.

157 Mental Capacity Act 2005 (c 9) (UK) ss 2(5), 2(6) and 18(3).

158 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 21(2)

159 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 24(7).

160 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 6(10).

161 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 20(5). It is standard practice for deputies to be required to keep a record of decisions, as well as to file annual reports with the Public Guardian.

Code of Practice,¹⁶² and failure to comply with the Code may be a factor considered within any civil or criminal proceedings.¹⁶³

66 A question arises as to whether the deputy owes additional duties beyond those that have just been mentioned. It should be noted that following the MCA's Code of Practice, deputies do owe fiduciary duties to the persons whom they act on behalf of.¹⁶⁴ On the other hand, legislative history suggests that deputies owe fiduciary duties to the persons whom they act on behalf of under the law of agency.¹⁶⁵ It was suggested that the deputy must act with due care and skill, and is bound by fiduciary duties.¹⁶⁶

67 There are also sufficient authorities that suggest that the deputy's duties are of a fiduciary nature. For instance, in *ATL v The Public Guardian*,¹⁶⁷ where the court held that if the deputy were to remunerate himself without obtaining authorisation from the courts, that would be a conflict with his fiduciary duty that was described in the English MCA Code of Practice. In the Singapore High Court's decision of *Wong Meng Cheong v Ling Ai Wah*,¹⁶⁸ Lai Siu Chiu J (as she then was) stated that the "fiduciary relationship between a deputy and [P] is akin to that of trustee and beneficiary". Regardless of which basis the fiduciary duty has arisen on, the fact remains that it does pose some difficulties for the legally uninitiated applicants, as they may not fully appreciate the spectrum of legal responsibilities that they are shouldering.

D. Application procedure

68 *The following summary of the application procedure only applies to ex parte cases where there are no persons challenging the deputyship application.* This procedure is undertaken for the bulk of Singapore's

162 Which provides guidance to deputies on how to discharge their duties; see Office of the Public Guardian, *Code of Practice* (3rd Ed, 2016).

163 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 41(5).

164 See Office of the Public Guardian, *Code of Practice* (3rd Ed, 2016) at para 9.8.7.

165 See generally Tan Cheng Han SC, *The Law of Agency* (Singapore: Academy Publishing, 2nd Ed, 2017).

166 See the Explanatory Statement to the Mental Capacity Bill (Bill 13 of 2008): "The law of agency imposes a range of duties on those who act as agents for someone else. For example, an agent must act with due care and skill and is bound by fiduciary duties amongst other duties."

167 [2015] EWCOP 77 at [44]–[45]. The decision relates to the payment of gratuitous care allowances paid by deputies to other family members.

168 [2012] 1 SLR 549 at [192]–[198]. In this case, the deputies were held to have not acted *bona fide* in carrying out the litigation. Lai J (as she then was) thus held that they were not entitled to be indemnified from P's estate for the litigation costs.

deputyship applications, which are by and large uncontentious.¹⁶⁹ Where the case is likely to be disputed, the procedure below would have to be modified, and one should refer to the Family Justice Rules and the Practice Directions for guidance.¹⁷⁰

(1) *Court documents*

69 Proceedings under the MCA are commenced by way of originating summons (“OS”). An applicant is required to complete and file a number of prescribed forms, namely:

- (a) originating summons – Form 217;
- (b) supporting affidavit – Form 218;
- (c) successor deputy affidavit (if applicable) – Form 220;
- (d) consent of relevant persons – Form 221; and
- (e) doctor’s medical report – Form 224.

70 If the applicant is acting as a litigant in person, the applicant is required to file the court documents with the CrimsonLogic Service Bureau.¹⁷¹ As Forms 218, 220, 221 and 224 are affidavits, they are to be attested.¹⁷²

71 After the filing, the applicant would be notified by the court of the outcome of the application, as well as the hearing date. This would normally take about a week.

(2) *Notification of P*

72 There is a general requirement to notify P of the information regarding the application.¹⁷³ In most cases, P’s mental incapacity is likely to be so severe that P is unable to understand the application. As such, the

169 See discussion at para 83 below. The application procedure is stated as of 2 March 2019.

170 See also generally Chen Siyuan, Eunice Chua & Lionel Leo, *Family Procedure in Singapore* (Singapore: LexisNexis, 2018).

171 Family Justice Courts Practice Directions para 147(1).

172 By a solicitor, a Commissioner for Oaths, a notary public or any person for the time being authorised by law in the place where the document is executed to administer oaths. See para 51(1) of the Family Justice Courts Practice Directions.

173 Family Justice Rules 2014 (S 813/2014) r 181.

applicant may seek to dispense with notification,¹⁷⁴ and must explain why dispensation is sought.¹⁷⁵

(3) *Service on relevant persons*

73 The applicant is required to serve the OS on relevant persons,¹⁷⁶ but the applicant may request that the court dispense with service,¹⁷⁷ on the ground that the relevant persons consented to the application.¹⁷⁸

74 Relevant persons are defined as individuals who have an involvement in P's life and/or who are likely to have an interest in the application. These persons include: P's immediate family members;¹⁷⁹ persons who have a close relationship with P; persons who have a legal duty to support P; persons who will benefit from P's estate, or persons who are responsible for P's care.¹⁸⁰ If consent for the application is not obtained from these relevant persons, the applicant must explain why this is so.¹⁸¹

(4) *Permission to apply*

75 The applicant is required to seek the court's permission to make the deputyship application. However, permission is not required if the applicant is P's parent,¹⁸² relative or spouse.¹⁸³ In these situations, documents proving these relationships must be included in the applicant's supporting affidavit (Form 218).¹⁸⁴ In deciding whether to grant permission, the court will consider the applicant's relationship with P, the reasons for the application, how the application would benefit P, and whether the benefit could be achieved in other ways.¹⁸⁵

174 Family Justice Rules 2014 (S 813/2014) r 181(6). The prayer is to be included in Form 217.

175 As prescribed by para 52(3) of the Family Justice Courts Practice Directions, the explanation is to be included in the applicant's supporting affidavit (Form 218).

176 For the specific requirements in service, including the time limits, see r 179 of the Family Justice Rules 2014 (S 813/2014).

177 The prayer is to be included in Form 217.

178 As stated in para 51(1) of the Family Justice Courts Practice Directions, the consent is to be provided for in Form 221.

179 See para 50(2) of the Family Justice Courts Practice Directions.

180 See para 50(6) of the Family Justice Courts Practice Directions. These include organisations providing residential accommodation to P. However, there is no need to obtain consent from these organisations for the application, see para 50(9) of the Family Justice Courts Practice Directions.

181 The explanation is to be included in Form 218.

182 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 38(1)(a).

183 Family Justice Rules 2014 (S 813/2014) r 176(3)(a).

184 Family Justice Rules 2014 (S 813/2014) r 47.

185 Family Justice Courts Practice Directions para 48(2).

(5) *Hearing*

76 Currently, deputyship cases are generally heard *in camera*, and members of the public are not entitled to attend such hearings. However the court may, in its discretion, permit interested persons to attend the hearings.¹⁸⁶

77 The court will consider the affidavit evidence in assessing whether P lacks capacity, whether deputies should be appointed as well as what powers should be granted to the deputies. The judge may clarify with the applicants on the need for certain orders, and may grant different orders from what was sought.

(6) *Extracting the order of court*

78 After the hearing and the judge has made the orders, the applicants are required to prepare a draft order and to file it with the court registry.¹⁸⁷ Where the applicants are not legally represented, the draft would be filed with the CrimsonLogic Service Bureau, and the applicants will collect the approved order from the service bureau as well.¹⁸⁸ If a certified true copy is sought, a separate application must be made, and the certified true copy would be collected from the court registry.

IV. Challenges under current MCA regime in Singapore

79 The English MCA was meant to, *inter alia*, promote “awareness and good practice in dealing with persons lacking capacity”, as well as fulfil the Government’s human rights obligations towards persons lacking mental capacity.¹⁸⁹ While the English MCA was hailed as a “visionary piece of legislation”, “its implementation has not met the expectations that it rightly raised”.¹⁹⁰

80 Singapore too has her fair share of implementation problems. The biggest challenge to the current deputyship regime is one of high legal representation costs, which places it out of most applicants’ reach. In

186 Family Justice Act 2014 (Act 27 of 2014) s 10(1). See also para 87(1) of the Family Justice Courts Practice Directions.

187 Family Justice Rules 2014 (S 813/2014) r 178(3).

188 Family Justice Courts Practice Directions para 142.

189 Senior Judge Denzil Lush, “Mental Capacity Act – A New Framework”, a paper delivered at a seminar organised by the Singapore Academy of Law in conjunction with the Office of the Public Guardian (11 March 2010).

190 See Summary of the House of Lords Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: Post-legislative Scrutiny* (London: The Stationary Office Limited, 2014).

this part of the article, the authors make the case that if Singapore wishes to encourage more in-person deputyship applications as a solution to the problem of costly legal representation fees, more needs to be done to simplify the existing application processes.

A. *High legal representation costs*

81 Justice is open to both the rich and the poor, “like the Ritz Hotel”¹⁹¹ Suppose you wish to stay at the MCA’s Ritz Hotel, you decide that you would like the safety and representation that only a lawyer could provide; the costs of your stay in this “hotel” will range from \$3,000¹⁹² to more than \$10,000.¹⁹³ Given that the majority of the MCA cases are uncontentious,¹⁹⁴ the cost for contentious cases may well exceed the upper \$10,000 limit. In one particular case which went up to the Court of Appeal, the legal costs charged amounted to millions.¹⁹⁵ The high threshold in the Legal Aid Bureau’s means testing criteria further exacerbates the problem for middle to lower-income families.¹⁹⁶ The huge legal costs will deter such families from seeking a deputyship appointment, and for these families, the sad truth is that the “hotel” is effectively out of bounds for those who cannot afford it.¹⁹⁷

191 A quote oft associated with the Irish judge Sir James Mathew. See Robert E Megarry, *Miscellany-at-law* (Stevens, 1955) at p 254.

192 Kok Xing Hui, “Easier for Parents to Be Deputies to Their Special-needs Child” *The Straits Times* (18 May 2017).

193 Chew Yat Peng, “Deputy Powers: Extend Legal Help to Seniors with Dementia” *The Straits Times* (25 August 2015).

194 See para 83 below.

195 See *Law Society of Singapore v Yeo Khirn Hai Alvin* [2019] SGDT 3. The lawyer in question, a Senior Counsel, had been referred to the Law Society of Singapore’s Disciplinary Tribunal for alleged overcharging of fees over a long-running dispute concerning a deputyship application under the Mental Capacity Act (Cap 177A, 2010 Rev Ed). The tribunal acquitted him of all charges, though since then, both the Law Society and the Attorney-General’s Chambers have applied to the High Court for that decision to be reviewed. See Faris Mokhtar, “Law Society, AGC Seek Review of Case Where Senior Lawyer Was Cleared of Alleged Overcharging” *Today* (29 June 2019).

196 Under the criteria, if the applicant has either more than \$10,000 disposable capital or disposable income, the applicant would not be eligible for legal aid. See Legal Aid Bureau, “What Is the Means Test?” (16 October 2019) <<https://lab.mlaw.gov.sg/legal-services/taking-the-means-test/>> (accessed 29 November 2019).

197 As of 31 March 2016, there are 8,478 LPA applications. The LPA fees are much lower or waived, the LPA form much simpler, as well as greater outreach by the Office of the Public Guardian. In contrast, there are only 1,183 court orders within the same period. Office of the Public Guardian, *Annual Report* (2015) <[https://www.publicguardian.gov.sg/opg/Lists/Media%20Centre/Attachments/30/Office%20of%20the%20Public%20Guardian%20Electronic%20Annual%20Report%20Final%20\(EDITED\)%20.pdf](https://www.publicguardian.gov.sg/opg/Lists/Media%20Centre/Attachments/30/Office%20of%20the%20Public%20Guardian%20Electronic%20Annual%20Report%20Final%20(EDITED)%20.pdf)> (accessed 5 October 2017).

82 A stay in the MCA Ritz Hotel could lead to a catch-22 situation. This happens when the applicant seeks to be reimbursed for legal fees from P's assets,¹⁹⁸ and it turns out that P's assets may be insufficient to meet these costs.¹⁹⁹ This is because prior to his or her deputyship appointment, the applicant has no authority to access information on P's assets. This may lead to a strange situation where "at the end of litigation which is meant to help P, P ends up virtually destitute due to the depletion of his or her assets because of legal costs".²⁰⁰ Such situations may be extremely pressing where P is the family's sole breadwinner, and the family requires access to P's assets for their maintenance.

B. Policy solution: In-person applications

83 MSF's policy solution towards the high legal costs seems to be to encourage in-person deputyship applications. In other words, caregivers will apply to the courts as litigants-in-person without legal representation. The likely justification for this approach is that most cases before the courts are uncontentious. From the OPG Annual Reports, as of 31 March 2016, there have been 1,183 deputyship orders made by the court. A search on Lawnet for the now-repealed Mental Disorders and Treatment Act only revealed 36 decisions, of which only a few involved the appointment of proxy decision-makers.²⁰¹ A similar search for the MCA only revealed 38 decisions, again with few cases disputing the appointment of proxy decision-makers. The OPG Annual Reports contain 46 case reports, of which none were contentious either. Parliament has also noted the non-contentious nature of such applications. In 2013, the then Minister of Social and Family Development, Chan Chun Sing, stated that "only 9 cases were fully contested. 16 other cases, which were initially contested, were resolved in various ways, including via Court mediation. Of the uncontested cases, none were denied".²⁰² The uncontentious nature of applications suggests that there are no substantial disputes of facts

198 See r 190 of the Family Justice Rules 2014 (S 813/2014).

199 See the then Subordinate Court's decision of *Re O* (OS No OSF256 of 2012) as seen in the Office of the Public Guardian's Annual Report's 2012. These observations were repeated in *Re U* (OS No OSF478 of 2013) as seen in the Office of the Public Guardian's Annual Report 2013 (Subordinate Courts).

200 See the Singapore Family Court's decision of *TRD v TRE* [2016] SGFC 55 at [13]. While the comments made by District Judge Colin Tan were in the context of a contentious case, the observation is equally valid for non-contentious cases.

201 Originally enacted as Ordinance 38 of 1952, the Act was in operation until its subsequent repeal.

202 "Applications for Court Order under the Mental Capacity Act", *Singapore Parliamentary Debates, Official Report* (11 November 2013) vol 90 (Chan Chun Sing, Minister for Social and Family Development).

or application of law in practice, and the assumption is that a lawyer's services are unnecessary for most deputyship applications.

84 As part of the move to encourage in-person deputyship applications, MSF piloted the Assisted Deputyship Application Programme ("ADAP") in 2015 to simplify the deputyship application process for parents of children with intellectual disability.²⁰³ In these cases, P's parents would seek for themselves to be appointed as deputies, in order to make care arrangements and decisions on behalf of P. The parents would normally be older than P and would seek to have relatives (such as P's siblings or cousins) appointed as successor deputies.²⁰⁴ Under the ADAP, MSF works "actively with the Family Justice Courts to simplify the process of deputy applications", including "changing forms and rules, providing standard templates for key documents, such as medical reports, and enabling individuals to apply on their own without a lawyer".²⁰⁵ Student volunteers assist these parents to fill up and file the court documents, accompany the parents during the hearing, and assist the parents in extracting the court order. As students cannot give legal advice, volunteer lawyers with the ADAP would answer legal questions from the parents.

85 The ADAP was highly successful in lowering the costs involved in an application. In a survey conducted with 20 deputies under the ADAP pilot scheme, about 80% of the deputies surveyed considered that the application costs were affordable,²⁰⁶ and the costs mostly ranged between \$300 to \$500 (excluding fees for medical reports). The ADAP seemed to also be successful in terms of its outreach.²⁰⁷ More than 80% of those surveyed perceived that there was sufficient information on the legal requirements for the application.²⁰⁸ Of those surveyed, 70% agreed that there was sufficient information on their duties as a deputy.

203 See Janice Tai & Toh Yong Chuan, "Just \$250 to Seek Deputy Powers" *The Straits Times* (10 August 2015).

204 See, eg, *Re T* (OS No OSF137 of 2011) in the Office of the Public Guardian's Annual Report 2011 (Subordinate Courts). This ensures that P's care would continue even if the primary deputies were unable to act any longer.

205 "Cost for Family Members to be Appointed Deputies under the Mental Capacity Act", *Singapore Parliamentary Debates, Official Report* (14 July 2015) vol 93 (Tan Chuan-Jin, Minister for Social and Family Development).

206 The cost of applications ranged between \$300 and \$600, and was mainly incurred in filing the court documents and having the documents affirmed before a Commissioner of Oaths.

207 For most of the deputies, information on the deputyship application primarily came from the Special Education Schools and Voluntary Welfare Organisations. Notably, none of them learnt about the regime from the Office of the Public Guardian or the Family Justice Courts' website.

208 Such as the type of orders and forms to be submitted.

86 Nevertheless, the surveyed deputies also suggested that there was much room for improvement. The application process was perceived to be complex. More than 70% of the deputies said that without the students and lawyers' assistance, they would not be able to navigate the application process on their own.²⁰⁹ There were mixed perceptions on whether there was sufficient information on court procedure,²¹⁰ and whether that information was easily accessible to the public.²¹¹ Short-answer feedback from the survey suggests that deputies are most concerned about the legalese within the court forms, the inconvenience from making multiple trips to CrimsonLogic, as well as the lack of publicly available information on court procedures. Given the current complexity of the process, it may be incorrect to assume that just because there are no substantial factual or legal disputes, a lawyer's services or expertise is not required.

C. *Moving forward: Suggestions to simplify application process*

87 It is perhaps for the following reasons that despite the Government's current policy position, in-person deputyship applications remain the exception rather than the rule. As of 2013, only a mere three out of 843 deputyship applications were made in person.²¹² The number may have increased with the Government's new initiative for the ADAP, but that number is far from substantial. *Given that the appointment of deputies will continue to play an important role in the care of Ps, and the policy desire to push for in-person applications, what more can be done in this area?* There are three suggestions which could be adopted.

88 First, it is proposed that the court documents could be simplified further for the general public. Currently, applicants must use the prescribed forms within the Practice Directions. The prescribed forms are full of legalese, and no layperson would be able to navigate the current system unguided.²¹³ In this regard, Singapore could learn from

209 It is hard to see how the legally uninitiated can navigate through the various procedural requirements, or to draft the court orders on their own. For a detailed commentary on the procedural concerns, see generally Chen Siyuan, Eunice Chua & Lionel Leo, *Family Procedure in Singapore* (Singapore: LexisNexis, 2018). See also Ruby Lee *et al*, *A Step-by-step Guide to Deputyship Applications* (Singapore: Centre for Pro Bono and Clinical Legal Education, Faculty of Law, NUS, 2019). However, it should be noted that the forms have been amended pursuant to the Family Justice Courts Practice Directions Amendment No 5 of 2019.

210 Of those surveyed, 50% agreed that information regarding court procedure was easily accessible, 25% remained neutral and the remaining disagreed.

211 Of those surveyed, 45% disagreed that the information was accessible to the public, 30% remained neutral and only 25% agreed.

212 *Singapore Parliamentary Debates, Official Report* (11 November 2013) vol 90 (Chan Chun Sing, Minister for Social and Family Development).

213 See para 86 above.

the application forms currently being used in England and Wales.²¹⁴ The forms there are written in simple English, thereby making it easier for an applicant-in-person to navigate the regime. MSF may also make the standard orders used for ADAP applications available to the wider public. Below is a table comparing some of the terms used between the Singapore and English forms:

MCA Form 217	English MCA COP Application Form
In the Matter of [name of person alleged to lack capacity] (ID No.:), a person alleged to lack capacity ('P').	Full name of the person to whom the application relates (this is the name of the person who lacks, or is alleged to lack, capacity).
The Applicant prays for the following orders [please select the relevant prayer(s) or add prayers as required].	What order are you asking the Court to make?
The Applicant be permitted to make this application to the Court.	Do you require permission to make the application? (Applicant to tick checkboxes for yes or no).

Table 2: Comparison between Form 217 and COP Application Form

89 Furthermore, the English COP does not require the forms to be attested, and it is sufficient for the forms to be verified by a “statement of truth”. If a statement is made falsely, the maker may be in contempt of court.²¹⁵ Such an approach has been adopted recently in Singapore, albeit in a limited manner, in relation to uncontested applications for specified

214 See Her Majesty’s Courts and Tribunal Services, “Court of Protection Forms and Guidance” <<https://www.gov.uk/government/collections/court-of-protection-forms>> (accessed 9 September 2019). The English Court of Protection’s forms are considered because Singapore’s Mental Capacity Act (Cap 177A, 2010 Rev Ed) is modelled after the English legislation. Hence, these forms can be adapted with relative ease for Singapore’s use.

215 See, for instance, Her Majesty’s Courts and Tribunal Services, “Form COP1: Application Form” at p 7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/687898/cop1-eng.pdf> (accessed 9 September 2019). See also *Mental Capacity Law and Practice* (Gordon Ashton OBE ed) (Bristol: Jordon Publishing, 3rd Ed, 2015) at para 8.46.

matters.²¹⁶ If this approach is taken for all applications, significant costs can be saved *vis-à-vis* the court documents as well.²¹⁷

90 Second, the process could be made more convenient by the use of infocomm technology. Currently, the Integrated Family Application Management System (“iFams”) is used to allow applicants to apply for personal protection orders and maintenance orders remotely.²¹⁸ As the iFams system is accessed by way of Singpass, Singpass can serve as a security feature as well, and can be used to verify the maker of the statement of truth. This can serve as a replacement to the current attestation procedure.²¹⁹ At the time of writing, the iFams system allows for online applications for limited short-term urgent orders relating to P’s medical and dental treatment, as well as access to P’s bank funds.²²⁰ The iFams system also provides an option for applications relating to long-term orders, in relation to certain low risk specified matters such as:²²¹

- (a) where and with whom P is to live;
- (b) opening a bank account for P;
- (c) to place P’s moneys in a trust for P; and
- (d) to obtain information relating to P.

91 The system could be further extended for deputyship applications for the ADAP group as well, where the applicants may require orders

216 This will require amending the Family Justice Rules to allow evidence to be received in this form, rather than an affidavit (which needs to be attested). This can be done under s 39(2) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed), which has the potential to even exclude the application of the Evidence Act. Under s 39(2) of the Mental Capacity Act, the Family Justice Rules Committee is able to make provision to receive evidence even if it is “not admissible apart from the Family Justice Rules”. To this end, a limited version of this is provided for under r 176A(6) of the Family Justice Rules 2014 (S 813/2014). For a list of the specified matters, see para 61A of the Family Justice Courts Practice Directions.

217 The commissioning fee is currently \$25 per affidavit, with an additional fee of \$5 per exhibit to the affidavit. Medical experts may charge an additional fee to the applicants for the time taken to affirm his or her affidavit, which may cost up to \$600.

218 Kok Xing Hui, “More Venues to Apply for Personal Protection Orders” *The Straits Times* (15 July 2017).

219 As such, the medical doctor can remotely complete Form 224, and file it electronically. SingPass then serves as the security function which ensures that the maker of the statement is the SingPass account holder. This may well help these families save on costs.

220 <<https://ifams.gov.sg/sop/process/IFAMS/McaHome#iFAMS>> (accessed 4 September 2019).

221 See para 61A of the Family Justice Courts Practice Directions for the full list of specified matters.

relating to matters outside of the list above. Such an approach would make it more convenient for applicants.²²²

92 Third, there continues to be room for developing more assistance programmes that are similar to the ADAP. It is worth noting that law schools here in Singapore have also started their own programmes where students assist applicants referred by voluntary welfare organisations to file deputyship applications, under the close supervision of faculty and volunteer legal practitioners.²²³ With the simplification of the application process, it is likely that most educated applicants would be able to navigate the application process on their own. As such, assistance programmes such as the ADAP could then turn to specifically focus on the low-income and low-educated families, who may need additional assistance to navigate the new process.²²⁴

93 While there are some concerns that simplifying the process may lead to an increased risk of appointing an unsuitable person who might misuse his or her powers and take advantage of P, it is submitted that this may not necessarily occur.²²⁵ This is because simplifying the application process does not entail a reduction in the information supplied to the court, and the information presented to the court will be unchanged. The aforementioned proposals deal with the language as well as application process, and not the information to be supplied.²²⁶ Even if there may

222 Currently, in-person applicants must make at least three trips to CrimsonLogic Service Bureau (located near Chinatown MRT): to file the court documents, to collect the court's reply and hearing date, and to file the draft order of court. The applicants would then make an additional trip to the Family Justice Courts at the MND Building to obtain a certified true copy of the court order.

223 For instance, the National University of Singapore's Centre of Pro Bono and Clinical Legal Education has been running projects such as the In-Person Deputyship Programme which has assisted various beneficiaries from MINDS, Down's Syndrome Association Singapore and Bishan Home for the Intellectually Disabled. The authors declare their interest in so far as they were volunteer co-ordinators for these projects in the National University of Singapore. As of the date of writing, both the National University of Singapore and Singapore Management University are planning on collaborating for a similar project to assist students in filing deputyship applications. The second author of this article declares his interest as a co-ordinator for this proposed project.

224 A particular cause for concern is families where the caregivers of P do not speak English, much more assistance would be required for these families.

225 Timothy Pak (Deputy Director, MSF) & Chia Wee Kiat (Registrar, Family Justice Courts), "Forum Letter – Making Deputyship Applications Simpler" *The Straits Times* (27 April 2017).

226 In the short-answer feedback from the survey conducted, the majority did not seem to find the amount of information required for application a problem (they were more concerned about the number of trips to CrimsonLogic Service Bureau and the legalese used in the forms). Only three deputies (out of 20) suggested reducing the number of forms.

be increased risks of abuse for these proposals, such risks can still be mitigated through the safeguards imposed by the court and the Public Guardian. The court is always free to make different orders from what is requested by the applicants, and can also require the appointed deputies to give security for performance to the Public Guardian as well.²²⁷

V. Conclusion

94 It is hoped that this article has captured the landscape in which the deputyship regime operates in Singapore, the developments in the law till date, and how the regime could be improved further. The deputyship regime plays an important role in ensuring the provision of care for those who are less fortunate. As the then Chief Justice Chan Sek Keong remarked: “What kind of society do we have if we do not care for those among us who, through no fault of their own, cannot fend for themselves? *We aspire to be a caring and gracious society.*” [emphasis added]²²⁸ While we may never be able to fully appreciate or shoulder the burdens of caregivers, the law should better reflect the aspirations of a caring society, by producing an efficient and streamlined deputyship process that eases the anxieties and frustrations of these families.

VI. Annex – Court statistics

Information from OPG Annual Reports from Years 2010 to 2015

	Financial Year					
	2010	2011	2012	2013	2014	2015
<i>Number of Court Orders</i>	171	225	204	248	243	263
<i>Number of Deputies Appointed</i>	2992	344	317	N/A	N/A	N/A

Table 3: Number of Court Orders Appointing Deputies and Number of Deputies Appointed

227 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 24(10)(a).

228 Chief Justice Chan Sek Keong, keynote address at the Mental Capacity Act: Code of Practice Seminar (7 October 2011).

Causes of Loss of Mental Capacity	Financial Year						
	2010*	2011	2012	2013	2014	2015	
Accidents	17%	9%	6.4%	7.7%	9.9%	5.33%	
Neurological Disorders	-	30%	33.3%	26.2%	31.3%	31.18%	
Psychiatric Disorders: Dementia etc	-	37%	39.2%	39.9%	33.7%	41.06%	
Psychiatric Disorders: Developmental	-	11%	8.8%	12.9%	13.6%	15.21%	
Psychiatric Disorders: Psychotic	-	13%	11.8%	13.3%	11.1%	7.22%	
Psychiatric Disorders: Substance Related	-	N/A	0.5%	N/A	0.4%	N/A	

*A different classification was used.

Table 4: Causes of Loss of Mental Capacity in Deputyship Cases

Persons Lacking Mental Capacity by Age Group	Financial Year						
	2010	2011	2012	2013	2014	2015	
< 21	N/A	1%	N/A	N/A	N/A	1.15%	
21 - 34	7%	6%	6.9%	5.2%	8.2%	6.46%	
35 - 55	24%	21%	23.5%	25.8%	21.4%	23.57%	
56 - 70	25%	32%	30.9%	33.1%	38.7%	31.18%	
> 70	44%	40%	38.7%	35.9%	31.7%	37.64%	

Table 5: P by Age Group

Deputies by Age Group	Financial Year						
	2010	2011	2012	2013	2014	2015	
21 - 34	12%	12%	11.4%	12.6%	7.5%	8.95%	
35 - 55	52%	44%	48%	46.2%	42.3%	42.63%	
56 - 70	28%	38%	35.6%	34.7%	40.8%	40.00%	
> 70	8%	6%	5%	6.5%	9.3%	8.42%	

Table 6: Deputies Appointed by Age Group