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Case Comment

ASSESSING MENTAL CAPACITY

BUV V BUU
[2019] SGHCF 15

The assessment of the mental capacity of an elderly person ("P") is central to the framework under the Mental Capacity Act (Cap 177A, 2010 Rev Ed). This case note discusses the clinical diagnosis and functional aspects of mental capacity and evidence needed to assess P's mental capacity; the importance of examining the functional abilities for particular decisions to be made and how they are applied to P's decision to execute legal documents; the extent to which assistance may be provided to P to make decisions; and the impact of undue influence on mental capacity.

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I. Introduction

1 Litigation under the Mental Capacity Act[2] ("MCA") has oftentimes arisen from a potent amalgam of factors: (a) an elderly person ("P") suffering from dementia or other mental illness; (b) who had decided to create a lasting power of attorney ("LPA") and/or dispose of substantial property or assets; and (c) family members who were unhappy about P's decisions and/or personal well-being. At the centre of the legal maelstrom may lie a question as to P's mental capacity at the time of decision-making. Is there a clear approach to ascertain the effect of mental incapacity on such decision-making? To what extent is P's mental capacity to be determined by medical or legal experts or both? How does the alleged mental incapacity affect the decisions made or legal documents that may have been executed by P?

1 The author would like to thank Ms Athelia Ong Kai Qi, law student in the Singapore Management University, for her research assistance as well as the anonymous referee for the perceptive comments.
2 Cap 177A, 2010 Rev Ed. The statute came into effect in 2010.

2 In *BUV v BUU*,[3] UWP ("the second defendant") was already 89 years old at the time the legal actions were initiated. She was assessed by doctors to be suffering from dementia, had no formal education and was illiterate. However, she was able to understand and speak in the Teochew dialect. UWP apparently favoured her second son ("the first defendant") at the expense of the third son (plaintiff) and his wife. In 2016, she had executed an LPA authorising the first defendant as her donee to make decisions in relation to her personal welfare, property and financial matters. In the same year, UWP executed a will which bequeathed moneys to the first defendant amongst others but nothing to the plaintiff.

3 The litigation involved a previous court order relating to some moneys held in a bank account as well as an application under the MCA for a declaration that UWP was unable to make decisions as to her personal welfare, property and financial affairs and for the appointment of court deputies to act on her behalf. There is also a related application for a court order that UWP was not mentally capable of conducting litigation.

4 The Singapore High Court was faced with two main issues: (a) whether the second defendant was mentally incapable of making decisions as to her personal welfare and property and to conduct litigation; and (b) whether the LPA and will respectively ought to be revoked. Upon considering a wide range of medical and non-medical evidence adduced by the parties, Aedit Abdullah J answered both questions affirmatively. His Honour also appointed two joint deputies, namely, UWP's youngest daughter and daughter-in-law, to make decisions as to UWP's property and financial matters including the moneys in the bank account.

5 The decision raises the following challenging issues on the assessment of mental capacity:

(a) the clinical diagnosis and functional aspects of mental capacity and evidence needed to assess P's mental capacity;

(b) the importance of examining the functional abilities for particular decisions to be made and how they are applied to P's decision to execute the legal documents;

(c) the extent to which assistance may be provided to P to make decisions; and

(d) the impact of undue influence on mental capacity.

3 [2019] SGHCF 15.

II. Clinical and functional assessment of mental capacity

6 The statute makes an assumption that P possesses mental capacity and it is for the party arguing otherwise to show that P is mentally incapable.[4] The test for mental capacity under the MCA requires the ascertainment of the clinical (*ie,* the impairment or disturbance in the functioning of the mind or brain) as well as the functional component (*ie,* the inability to make a decision). With respect to the functional component, the individual is not mentally capable of making a decision if he is unable to (a) understand the information relevant to the decision; (b) retain that information; (c) use or weigh that information; or (d) communicate her decision.[5] If P lacks any one of these competencies, she will be adjudged to be mentally incapable of making a decision.[6] Further, it must be shown that P's functional inability to make the decision was due to her mental impairment (causal nexus).[7]

7 In the present case, the medical experts in *BUV v BUU* agreed that UWP suffered from dementia. One medical expert assessed the dementia to be of mild-moderate severity whilst another expert described the dementia as mild and of the Alzheimer's type.[8] The learned judge stated that UWP had an impairment or disturbance in the functioning of her mind.[9] His Honour also referred to UWP's memory retention impairment and her inability to make judgments or solve problems.[10]

8 As for the functional component, Abdullah J noted UWP's lack of memory and inability to follow proceedings and understand questions from counsel[11] notwithstanding allowances due to the "stresses of a court environment".[12] UWP's "lapses in memory and deficiencies in comprehension" were "serious"[13] according to the learned judge. UWP could not recall the nature and contents of the legal documents she had

4 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 3.
5 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 4.
6 *Re BKR* [2013] 4 SLR 1257 at [71]; *Re F* [2009] EWHC B30 (Fam) at [21].
7 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 4. The impairment must have a causal nexus to the functional inability and not merely be present or related to it: see *York City Council v C* [2014] 2 WLR 1; [2013] EWCA Civ 478.
8 *BUV v BUU* [2019] SGHCF 15 at [62].
9 *BUV v BUU* [2019] SGHCF 15 at [75].
10 *BUV v BUU* [2019] SGHCF 15 at [70].
11 *BUV v BUU* [2019] SGHCF 15 at [40].
12 *BUV v BUU* [2019] SGHCF 15 at [41]. In this regard, the Court of Appeal in *Re BKR* [2015] 4 SLR 84 had suggested a more inquisitorial and less adversarial mode of proceedings with the court directing the inquiry with inputs from independent experts; see also *Cheshire West and Chester Council v P* [2011] EWHC 1330 (Fam) at [52], *per* Baker J.
13 *BUV v BUU* [2019] SGHCF 15 at [48].

executed, the events central to the court proceedings or relationships with her own children.[14]

9 Abdullah J stated that based on the cross-examination and medical evidence, the second defendant had an "impairment or disturbance in the functioning of the mind".[15] His Honour proceeded to add in the same paragraph that the mental impairment "manifested" in UWP's "inability to recall short-term information, and an impairment in her ability to use and understand information".[16] Here it seems the analysis of the functional component overlaps with the clinical.

10 It is inevitable that certain mental abilities and sources of evidence may overlap for both components. In *Re BKR*,[17] the Singapore Court of Appeal opined that the clinical aspect is an inquiry which requires evidence from medical experts as to the nature of mental impairment and its effect on P's cognitive abilities, whilst the functional inability to make a decision is to be primarily assessed by the court based on the functional components in the MCA rather than by medical experts.[18] Reference was made to the clinical interviews and cross-examination of witnesses including P for the purpose of assessing the clinical and functional components.[19]

11 From a conceptual angle, however, the different objects of inquiry with respect to the clinical and functional components should, as far as possible, be separated at least in so far as clinical and professional assessments of mental incapacity are concerned.[20] First, the mental impairment requirement was included to pre-empt the problem of over-inclusiveness if it were to be based on the functional component alone.[21] Second, persons who suffer from mental impairment may nevertheless be able to make decisions with respect to their personal welfare or financial affairs[22] or other decisions. Conversely, a person who is unable to understand or weigh information for a particular decision may not be suffering from any mental impairment. Third, as the assessment

14 *BUV v BUU* [2019] SGHCF 15 at [45] and [48].
15 *BUV v BUU* [2019] SGHCF 15 at [75].
16 *BUV v BUU* [2019] SGHCF 15 at [75].
17 [2015] 4 SLR 81.
18 *Re BKR* [2015] 4 SLR 81 at [134]; see also the English position in *King's College Hospital NHS Foundation Trust v C* [2015] EWCOP 80 at [39], *per* McDonald J; and *CC v KK* [2012] EWCOP 2136.
19 *Re BKR* [2015] 4 SLR 81 at [135].
20 *York City Council v C* [2014] 2 WLR 1; [2013] EWCA Civ 478 at [58].
21 See United Kingdom, Law Commission No 231, "Mental Incapacity" (1995) at para 3.8 ("ensuring that the test [for mental incapacity] is stringent enough not to catch large numbers of people who make unusual or unwise decisions").
22 *Eg*, *Re GAV* [2014] SGDC 215.

of mental capacity in the MCA requires a causal nexus between the clinical and functional components, there should be a clear method to differentiate the objects of inquiry for each component. The effect of mental impairment on functional ability may differ depending on the nature and severity of the specific mental impairment.

12 Mental impairment includes recognised mental illnesses such as depression and schizophrenia, brain injury, or mental impairment arising from alcohol or drug abuse.[23] The impairment may be temporary or permanent in nature. The relevant evidence for establishing mental impairment may include brain scans, symptoms suggesting mental impairment and P's responses to clinical interviews. In clinical diagnosis, reference is often made to the *Diagnostic and Statistical Manual of Mental Disorders*[24] ("DSM-IV") and "International Classification of Diseases"[25] ("ICD-10") on the requisite symptoms which may include delusions, deterioration of memory and so on. With respect to dementia, the DSM-IV provides specific diagnostic criteria based on symptoms, significance of impairment or decline in functioning which may or may not overlap with the functional component set out in the MCA.[26] The MCA does not provide guidelines for determining mental impairment unlike for functional ability. The assessment of functional ability must be made with reference to the legal provisions in ss 3(3), 3(4) and 5 of the MCA.

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23 World Health Organization, "International Statistical Classification of Diseases and Related Health Problems" (10th Revision, 5th Ed, 2016) ch 5 on mental and behavioural disorders: ICD codes F00 to F99.

24 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Washington DC, American Medical Association, 1994).

25 World Health Organization, "International Statistical Classification of Diseases and Related Health Problems (10th Revision, 5th Ed, 2016).

26 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Washington DC, American Medical Association, 1994). The section on "Diagnostic Criteria for Dementia of the Alzheimer's Type" states as follows:

> A. The development of multiple cognitive deficits manifested by both:
>
> (1) memory impairment (impaired ability to learn new information or to recall previously learned information)
>
> (2) one (or more) of the following cognitive disturbances:
>
> (a) aphasia (language disturbance)
>
> (b) apraxia (impaired ability to carry out motor activities despite intact motor function)
>
> (c) agnosia (failure to recognize or identify objects despite intact sensory function)
>
> (d) disturbance in executive function (i.e. planning, organizing, sequencing, abstracting)
>
> B. The cognitive deficits in Criteria A1 and A2 each cause significant impairment in social or occupational functioning and represent a significant decline from a previous level of functioning.

13 As for clinical interviews and cognitive tests, it is suggested that they may be used for determining both functional and clinical components. One material difference is that the clinical aspect is primarily based on medical expert evidence whilst the functional aspects are to be decided by judges. The interviews and tests allow medical experts to ascertain the nature of the impairment and its effect on cognitive abilities based on diagnostic criteria for the specific impairment. Similarly, judges can draw from the interviews and cognitive tests to assess whether they correspond with the functional components of understanding, retention, use and weighing of information and communication of decision.

14 The closer the clinical interviews and cognitive tests are conducted to the time of execution of the legal documents, the greater their evidential weight for assessing P's mental capacity. Whether such evidence would be useful in a particular case would also depend on the nature of the questions asked during the interviews and the types of cognitive tests conducted and their connection to the particular decision made by P. In the present case, Abdullah J considered a few cognitive tests, namely, Mini Mental State Exam ("MMSE"), Frontal Assessment Battery ("FAB") test, the CLOX clock-drawing test, and finally, the Abbreviated Mental Test ("AMT"). In *Re BKR*,[27] the Court of Appeal had raised questions as to whether the cognitive tests, in particular the clock-drawing test, related to a person's ability to make decisions in actual life situations.

15 In order to aid the court in assessing mental capacity, one proposal is for the cognitive tests to be more geared towards the four elements of functional (in)ability to make a decision, provided the assessments are also linked to the type of decision made by P. In this regard, the MacArthur Competence Assessment Tool for Treatment,[28] for example, uses the four aspects of mental capacity in s 5 of the MCA (though, as the name suggests, it is primarily meant for assessing the patient's consent to treatment) and the FACE Mental Capacity Assessment was devised for clinicians applying the MCA test.[29]

27 [2015] 4 SLR 81 at [146].

28 Thomas Grisso, Paul S Appelbaum & Carolyn Hill-Fotouhi, "The MacCAT-T: A Clinical Tool to Assess Patients' Capacities to Make Treatment Decisions" (1997) 48(11) *Psychiatric Services* 1415.

29 Sumytra Menon, "The Mental Capacity Act: Implications for Patients and Doctors Faced with Difficult Choices" *Annals Academy of Medicine* (April 2013).

III. Mental incapacity to execute legal documents

16 The assessment of mental capacity is issue-specific. Depending on the situation and evidence, P may be adjudged to have the mental capacity to make certain decisions but not others.[30] With respect to the revocation issue, both medical experts were of the view that she had the mental capacity to create the LPA.[31] One of them gave evidence that UWP did not have the mental capacity to make the will as UWP could neither remember the assets that she wanted to include in the will nor the executor and beneficiaries of the will.[32]

17 The learned judge found, however, that UWP lacked mental capacity to execute both legal documents. As mentioned above, his Honour found there was impairment or disturbance in the functioning of her mind and UWP was unable to recall short-term information or to use and understand information. In particular, she could not recall the circumstances surrounding the execution of the will during cross-examination[33] and there was no further evidence apart from the fact that she had been independently advised as to the will.[34] Moreover, the lawyer's evidence as to UWP's mental capacity to execute the LPA was not conclusive as he was not aware of UWP's diagnosis of dementia and was not medically trained to assess mental capacity.[35]

18 Ultimately, a judge must be prepared in appropriate cases to depart from the clinical view of medical experts which may not be based on the precise functional components in assessing mental capacity under the MCA. This supports the "social model" of mental impairment (which understands the experience of disability from the perspective of social context, structures and institutions) as opposed to the strictly "medicalised" view (that the impairment is a purely medical disorder associated with a particular individual).[36] Important as the mental impairment requirement is to prevent over-inclusiveness of the category

30 *Eg*, *A NHS Trust v X* [2014] EWCOP 35.
31 *BUV v BUU* [2019] SGHCF 15 at [63]–[64].
32 *BUV v BUU* [2019] SGHCF 15 at [84].
33 *BUV v BUU* [2019] SGHCF 15 at [81].
34 *BUV v BUU* [2019] SGHCF 15 at [83].
35 *BUV v BUU* [2019] SGHCF 15 at [79].
36 B Clough, "'People Like That': Realising the Social Model in Mental Capacity Jurisprudence" (2015) 23(1) *Medical Law Review* 53–80; see also reference to *DH NHS Foundation Trust v PS* [2010] EWHC 1217 (Fam) at [3] in n 22 of B Clough above (suggesting that adopting the "medicalised" perspective may lead a judge to accept the clinical diagnosis of mental illness without scrutinising the functional elements).

of persons with mental incapacity as mentioned above,[37] the concept of mental incapacity is broader than mental impairment *per se*. Overall, as the clinical diagnosis is primarily based on medical expert opinion, the MCA framework may be seen as accommodating both (clinical and functional) perspectives in the assessment of mental capacity.

19 Let us now examine the four elements of functional ability to make a decision.[38] With respect to understanding the relevant information, it is suggested that this should involve an appreciation of the purpose(s) or reason(s), nature, consequence(s) of the decision to be taken and the option(s) available.[39] The nature of the decision may, such as in the present case, involve an understanding of the contents of the legal document (such as a will or the LPA). For retention of information, one important aspect would be the duration. The ability to retain information for only a short duration does not necessarily mean P does not have functional ability to make a decision.[40] The Code of Practice under the MCA[41] ("Code of Practice") states that "it is sufficient if the person remembers the information for a short period of time as long as he can remember it long enough to understand it, weigh it up and communicate his decision".[42] With regard to assessing P's use and weighing of information, it is focused on the process not outcomes.[43] In the Code of Practice,[44] the example used to illustrate the use and weighing up of information for treatment appears to indicate that the person's beliefs (based on subjective perceptions) may be taken into account in assessing mental capacity:

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

37 See United Kingdom, Law Commission No 231, "Mental Incapacity" (1995) at para 3.8 ("ensuring that the test [for mental incapacity] is stringent enough not to catch large numbers of people who make unusual or unwise decisions").

38 See Alex Ruck Keene *et al*, "Taking Capacity Seriously? Ten Years of Mental Capacity Disputes Before England's Court of Protection" (2019) 62 *International Journal of Law and Psychiatry* 56 especially at 66–70.

39 This is consistent with the Code of Practice at <https://www.msf.gov.sg/opg/Pages/Home.aspx> (accessed 26 July 2019) (hereinafter "Code of Practice") at para 4.6.1.

40 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 5(3).

41 See Code of Practice.

42 Code of Practice at para 4.6.2.

43 M J Gunn, *et al*, "Decision-making Capacity" (1997) 7(3) *Medical Law Review* 269 at 297. This emphasis on process rather than outcomes is also supported by s 3(4) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed) which states that "[a] person is not to be treated as unable to make a decision merely because he makes an unwise decision".

44 The Code of Practice is not meant to represent the law but provide guidance to people when dealing with persons lacking mental capacity.

> are plotting to harm her. She is unable to accept anything they say to her about the nature of her wound and the treatment they wish to administer.
>
> An informal assessment of Li Ling's capacity shows that she is unable to use or weigh the information to make a decision about whether to accept or reject the treatment.

20 Citing *Re BKR*, the judgment also briefly mentioned "executive function" which includes activities such as planning, organising and even the ability to think abstractly when examining the relevance of the cognitive tests.[45] Indeed, one of the aspects of the clinical diagnosis for dementia in DSM-IV is the "disturbance in executive function (i.e. planning, organizing, sequencing, abstracting)". As for the functional aspects, one would probably require a sufficient threshold of understanding and retention of the information before one can exercise executive function. It is likely that the need to show "executive function" as part of the functional component would depend on the context (*eg*, where it involves a decision requiring wide-ranging ability to manage significant financial wealth and assets). In the case of a decision that is less complex (*eg*, to execute a LPA in favour of a donee whom the donor trusts), however, it is not intuitive that the ability to weigh information in the MCA would necessarily encompass the capacity to "plan" (which typically requires the ability to consider timelines and possible future effects of one's actions) or to think "abstractedly" (about general categories of things and hypothetical situations).

21 The more complex the decision, the more capacity is required. Expert evidence in the present case differed on the mental capacity required to execute the LPA and will. As mentioned, the assessment of mental capacity is issue-specific (or more precisely, document-specific). Assessing the content of the "relevant information" for a particular decision is crucial.[46] Thus, the functional ability should be analysed by reference to the nature, purpose and consequences of making the decision whether with respect to the will or LPA (and this will be further discussed below).

22 As a brief aside to the issue-specific assessment of mental capacity, Abdullah J's assessment of UWP's lack of mental capacity led to his Honour concluding that she was not capable of conducting litigation.[47] It would be useful to assess UWP's mental capacity by reference to the functional components for a specific decision to be made by P. The test

45 *BUV v BUU* [2019] SGHCF 15 at [52].

46 *LBL v RYJ* [2011] 1 FLR 1279; *In re A (Court of Protection)* [2019] 3 WLR 59 (in relation to social media and Internet usage).

47 *BUV v BUU* [2019] SGHCF 15 at [25].

in *Masterman-Lister v Brutton & Co and Jewell & Home Counties Dairie*[48] is whether the party to legal proceedings was capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case might require, the issues on which his consent or decision was likely to be necessary in the course of those proceedings. This common law test is consistent with and also helps to contextualise the first functional element (namely P's "understanding" of the information relevant to the decision) in relation to the specific mental capacity to conduct litigation. If this test were to be accepted by the court, the conclusion that UWP was not mentally capable of conducting litigation may be determined by reference to UWP's absence of knowledge with respect to the substantive issues in the court proceedings, namely, the moneys in the bank account (which the learned judge had alluded to),[49] the significance of appointing court deputies and the status of the legal documents she executed.[50] These factors should also be interpreted as far as possible in accordance with the scope of "information relevant to a decision" in s 5(4) of the MCA.[51]

IV. Facilitative assistance to P to make decisions

23 Section 3 of the MCA lays out a few basic principles relating to the presumption of mental capacity. For example, s 3(3) of the MCA states that "a person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success". Abdullah J aptly referred to s 3(3) as importing "facilitative assistance" that enables a person to make a decision.[52] Read with s 5(2) which states that the relevant information may have to be "explained in a way that is appropriate to the person's circumstances (using simple language, visual aids or any other means)", his Honour stated that s 3(3) is "aimed at helping a person retain her existing decision-making ability" – a clearly important objective. The learned judge also highlighted that the assistance does not obviate the need for a base level of decision-making capacity.[53] Apart from these judicial observations, another objective of s 3(3) could be to help P *demonstrate* her decision-making ability in circumstances

48 [2003] 1 WLR 1511.

49 In *BUV v BUU* [2019] SGHCF 15, Aedit Abdullah J indicated at [49], with reference to one set of court proceedings in OS 1096/2016, that UWP's "decision-making in respect of her funds was compromised".

50 In *BUV v BUU* [2019] SGHCF 15, Aedit Abdullah J at [86]–[87] did not find the testimony of the lawyers useful to assess P's mental capacity for execution of the lasting power of attorney and will.

51 This refers to "information about the reasonably foreseeable consequences of – (a) deciding one way of another; or (b) failing to make the decision".

52 *BUV v BUU* [2019] SGHCF 15 at [110].

53 *BUV v BUU* [2019] SGHCF 15 at [88].

where a third party alleges that P lacks the ability to understand, use or weigh the information based on the available evidence (for example, that P failed to respond to a specific question posed to test her decision-making ability). In such circumstances, the question put to P to assess his ability to make a rather complex decision may have to be re-crafted in simple language so that P can respond accordingly to *demonstrate* that he does possess the requisite decision-making ability for the purpose of rebutting the allegations. Beyond "decision-making ability", it is also clear that the principle in s 3(3) should extend to the functional component of P's *(in)ability to communicate her decision* in s 5(1)(*d*) (though this was not directly relevant to the case facts).

24 One of the medical professionals administering the cognitive tests had allowed UWP the use of paper when she was doing simple subtraction during the AMTs as she was "struggling".[54] The plaintiff argued that such assistance by the medical professional would bias the results. Abdullah J disagreed, noting perceptively that the medical professional did not coach or guide UWP in the answers.[55] On the facts, the learned judge noted that UWP's inability to understand and retain information was such that facilitative assistance would not have helped UWP in any event to make decisions.

25 According to the Code of Practice, a "person-centred approach" that focuses on P's best interests, should be adopted to help him or her make decisions.[56] When communicating with persons who may have mental capacity issues, the approach should be tailored to their needs (*eg,* their educational level and specific intellectual disabilities). Factors to consider include the speed and manner in which the information is presented, use of supplementary materials (*eg,* picture boards, DVDs and leaflets) as appropriate, cultural and religious sensitivities and the need for an interpreter. The Code of Practice gives an example of a person with learning disabilities in absorbing verbal information. In such a situation, the suggestion was to present the information in other ways such as in drawings or actions to help him understand the information.[57]

26 There was no specific mention of the language or alternative methods (such as the use of pictures and drawings) to communicate with UWP during the clinical interviews since she was illiterate and could only speak the Teochew dialect though one of the cognitive tests administered

54 *BUV v BUU* [2019] SGHCF 15 at [73].
55 *Re BKR* [2013] 4 SLR 1257 at [73].
56 Code of Practice at para 5.2. This includes listening carefully to them, truly seeking to understand what the person wants, and finding appropriate ways to support the person's decision-making.
57 Code of Practice at para 4.6.1.

by the medical professionals did take into consideration UWP's age and low education in the scoring.[58]

V. Impact of undue influence on mental capacity and the lasting power of attorney

27 Though s 4 of the MCA refers to the causal nexus between a person's inability to make decisions (functional component) and mental impairment (clinical), it is not the sole nexus. The concept of "effective" cause which applies to s 4 does not mean that mental impairment must be the only cause for the inability to make decisions.[59] The functional inability to make decisions may be caused by the individual's mental impairment as well as actual circumstances such as undue influence exerted on the individual.

28 Recently, the Singapore Court of Appeal decision in *BOM v BOK*[60] focused on classes of actual (class 1) and presumed (class 2) undue influence with respect to the execution of a deed of trust. It accepted that a lack of mental capacity flowing from acute grief from bereavement over the death of a loved one[61] as well as bullying, pressure and threats by another can result in a person being subject to actual undue influence. It should be noted, however, that the case did not directly examine the MCA requirements or the clinical and functional components of mental capacity.

29 The central question is whether and how undue influence impacts on the issue of mental capacity under the MCA. Abdullah J had referred to the Court of Appeal's statement in *Re BKR*[62] that undue influence may be relevant in three ways: (a) whether the person is capable of understanding that a third party is opposed to his interests or if that inability is caused by mental impairment; (b) whether the person's susceptibility to undue influence is caused by mental impairment; and (c) whether the person is unable to obtain assistance in making decisions due to undue influence. This reinforces the contextual nature of the inquiry on mental capacity. The learned judge observed that UWP's mental impairment affected her ability to discern whether undue influence was exerted on her, made

58 *BUV v BUU* [2019] SGHCF 15 at [55].
59 *Re BKR* [2015] 4 SLR 81 at [115].
60 [2019] 1 SLR 349.
61 The husband who executed the deed of trust was suffering from acute grief from his mother's death which impaired his judgment at the material time. But there was no discussion of the Mental Capacity Act (Cap 177A, 2010 Rev Ed) requirements or the clinical and functional components of mental capacity.
62 *Re BKR* [2015] 4 SLR 81 at [125]–[126].

her more susceptible to undue influence and resulted in her inability to receive assistance.[63]

30 With regard to point (a) above, one question to be raised is the significance of P's understanding that a third party is opposed to his interests for the purpose of assessing mental capacity. As discussed, understanding information relevant to a decision involves an appreciation of the purpose(s), nature, option(s) and consequence(s) of making the decision. In this regard, undue influence would not typically affect P's understanding of the purpose or nature of the decision but may mislead P into thinking that he or she does not have a viable alternative. Point (b) above is relevant to the causal nexus between mental impairment and functional inability to make a decision. Point (c) would be relevant to the interpretation and application of s 3(3) of the MCA as discussed above. The court has to strike a balance between the practical steps needed to facilitate the rendering of assistance to P and consider how undue influence might prevent P from obtaining such assistance.

31 The Singapore High Court in the present case decided that there was a rebuttable presumption of undue influence under class 2B where there is a "relationship of trust and confidence" between the parties that falls outside certain established legal categories,[64] *and* the transaction is not readily explicable by their relationship as stated in *Oversea-Chinese Banking Corp Ltd v Tan Teck Khong*.[65] In similar vein, UWP reposed "a great of deal of trust and confidence" in the first defendant, and she was "dependent and vulnerable beyond a normal degree" due to her age and mental condition.[66] The circumstances under which UWP signed the legal documents, her lack of knowledge of the contents, and the first defendant's instructions and presence during these events gave rise to the presumption of undue influence. The evidence adduced that UWP may have favoured and approved of the first defendant's actions was not sufficient to rebut the presumption.

32 The High Court felt empowered to revoke the LPA under s 17 of the MCA[67] on the basis that "undue pressure" from the first defendant

63 *BUV v BUU* [2019] SGHCF 15 at [108].

64 This is class 2A presumed undue influence. The categories of wrongdoer and complainant respectively are parent and child, solicitor and client, medical adviser and patient.

65 [2005] 2 SLR(R) 694 at [34]. This case involved a class 2B presumption of undue influence. One material difference is that the person executing the mortgage was not mentally incapable of making the decision.

66 *BUV v BUU* [2019] SGHCF 15 at [93].

67 Mental Capacity Act (Cap 177A, 2010 Rev Ed) s 17(4)(*b*) ("[t]he court may … if P lacks capacity to do so, revoke the instrument or the lasting power of attorney") read

(cont'd on the next page)

had induced the donor (UWP) to create the LPA. In the English case of *The Public Guardian v GB, SG, London Borough of Bromley*,[68] the presumption of undue influence by the donees of an LPA appeared to be a factor underlying the court's conclusion that the LPA made by P should be revoked on the ground that the donees had behaved in a way that contravened their authority and which was not in P's best interest.[69] In a different context, the presence of undue influence exerted on a person is a factor to consider when granting a statutory will under the MCA.[70] In a statutory will, the court steps into the shoes of the person and attempts to walk in it by executing a will that protects the person's best interests. In a previous case, the exercise of undue influence (*ie,* actual undue influence) exerted on P who suffered from dementia went towards showing that the testator's will was not freely executed and did not serve her best interests; as such, the court was prepared to grant a statutory will.[71]

33 Abdullah J's decision implied that, with respect to the LPA, "undue pressure" in s 17 of the MCA can encompass presumed undue influence.[72] One problem is the literal phrasing of the section that "undue pressure was used to induce P to create a lasting power of attorney". This may suggest that steps must be taken by the third party to put pressure on or coerce P to create the LPA. If this interpretation is accepted, it would imply that the revocation of an LPA requires *actual* rather than merely presumed undue influence. If so, evidence of a relationship of trust and confidence between P and the third party and that the execution of the legal document is one that calls for an explanation would not suffice.

34 It must, however, be highlighted that actual and presumed undue influence are not different types of undue influence but different ways of proving undue influence.[73] The legal burden lies with the party claiming undue influence, and presumed undue influence involves a shift of merely the evidential, and not the legal, burden. In fact, it can be argued

with s 17(3)(*a*)(ii) (where undue pressure was used to induce P to create a lasting power of attorney).

68 [2015] EWCOP 6.

69 Mental Capacity Act 2005 (c 9) (UK) s 22(3)(b).

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

71 *TCZ v TDA; TDB v TDC* [2015] SGFC 63. See also *BHR v BHS* [2013] SGDC 149 at [63] (P who suffered from dementia lacked testamentary capacity; the statutory will was granted on the basis of, amongst others, undue influence of P).

72 The terms "undue influence" and "undue pressure" appear to be used interchangeably: see *Singapore Parliamentary Debates, Official Report* (14 March 2016), vol 94 on the Mental Capacity (Amendment) Bill. Note, however, that the Advance Medical Directive Act (Cap 4A, 1997 Rev Ed) uses the term "undue influence" in s 14(1)(*a*).

73 Andrew Phang Boon Leong & Goh Yihan, "Duress, Undue Influence and Unconscionability" in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 12.114.

that the distinction between actual (class 1) and presumed (class 2B) undue influence is blurred as "the proof of facts that raise an evidential presumption would simultaneously constitute the proof of actual undue influence".[74] Further, the discussion in *Re BKR* above on the three ways that undue influence may be relevant to mental capacity does not make any distinction between actual or presumed undue influence. Based on the aforementioned observation, presumed undue influence (in addition to actual undue influence) may be regarded as a method to show that undue pressure "was used" to induce P. After all, the undue pressure may either be explicit or implicit under the statutory provision.

35 Moreover, the MCA seeks to protect the donor of an LPA who may be particularly vulnerable *vis-à-vis* the donee as a matter of policy and this is consistent with the objective of the equitable doctrine of undue influence (actual and presumed) to prevent victimisation.[75] For example, the 2016 amendments to the MCA added to the court's powers to revoke the LPA if there is a risk of abuse of the vulnerable donor by the donee who has been convicted of an offence involving dishonesty or fraud.[76] Allowing greater leeway for the use of undue influence to be proven (whether through actual or presumed undue influence) would better protect the autonomy of the donor.

VI. Undue influence and testamentary capacity at common law

36 In deciding to revoke the will, Abdullah J referred to the case of *Chee Mu Lin Muriel v Chee Ka Lin Caroline*[77] ("*Chee Mu Lin Muriel*") in which it was held that mental capacity under ss 4 and 5 of the MCA is consistent with the common principles relating to testamentary capacity. As stated in *Chee Mu Lin Muriel*,[78] the legal requirements of testamentary capacity are as follows: (a) the testator understands the nature of the act

74 Andrew Phang & Hans Tjio, "The Uncertain Boundaries of Undue Influence" [2002] LMCLQ 231 at 232–233.

75 *Allcard v Skinner* (1887) 36 Ch D 145 at 182–183; *National Westminster Bank plc v Morgan* [1985] AC 686 at 705.

76 See *Singapore Parliamentary Debates, Official Report* (14 March 2016), vol 94 on the Mental Capacity (Amendment) Bill, where the Minister for Social and Family Development stated that the:

> … amendments will allow the Court to revoke a donee's or deputy's powers if there is *significant risk of the donee or deputy abusing the person* whom they have been appointed for. For instance, the risk of abuse would be significant, if the donee or deputy is convicted of an offence involving dishonesty or fraud. This *offence could have been committed against some other person, and not simply just the donor*. However, the donor has no capacity. He is *vulnerable*. [emphasis added]

77 [2010] 4 SLR 373.

78 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [37].

and its consequences;[79] (b) he knows the extent of the property of which he is disposing; (c) he knows who his beneficiaries are and can appreciate their claims to the property; and (d) he is free from an abnormal state of mind that might distort feelings or judgments relevant to making the will.[80]

37 The finding of a mental illness *per se* does not mean that the testator did not possess testamentary capacity.[81] If the testator was suffering from mental illness prior to the execution of the will that results in loss of testamentary capacity, there is a presumption of continued lack of testamentary capacity at the time of execution. But such a presumption can be rebutted if it is shown that there were moments of lucidity demonstrating testamentary capacity at the time of execution despite the testator suffering from dementia.[82] The assessment of testamentary capacity is a decision for the judges based on both medical and non-medical evidence rather than the medical experts. Similarly, as mentioned above, under ss 4 and 5 of the MCA, both clinical and functional components together determine the issue of mental capacity.[83]

38 The similarities between testamentary capacity and mental capacity under the MCA are that they are both time-specific and issue-specific.[84] However, there is arguably a material difference relating to undue influence. The learned judge had made a connection between testamentary capacity and the validity of a will by drawing from *Chee Mu Lin Muriel*.[85] To establish the validity of a will, the testator must (a) have the mental capacity to make a will; (b) have the knowledge and approval of the contents of the will; and (c) be free of undue influence or the effects of fraud. In this regard, His Honour noted that the testator (UWP) was not mentally capable at the time of the signing of the will and was also under undue influence from the first defendant. This means that undue influence was clearly a factor underlying the judge's decision to revoke the will. From the discussion in the preceding section, this is a class 2B *presumed* undue influence.

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79 *Sheffield City Council v E & S* [2004] EWHC 2808 (Fam), *per* Munby J (that the test of capacity is the ability (whether or not one chooses to exercise it) to understand the nature and quality of the transaction).

80 *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 (cited in *George Abraham Vadakathu v Jacob George* [2009] 3 SLR(R) 631 at [29]).

81 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [42].

82 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [41].

83 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [45].

84 *George Abraham Vadakathu v Jacob George* [2009] 3 SLR(R) 631 (capacity to make a will at a certain time though testator may not have had capacity to make a will at another time; and the capacity needed to make a complex will is not the same as that needed to make a simple will.)

85 *Chee Mu Lin Muriel v Chee Ka Lin Caroline* [2010] 4 SLR 373 at [37].

39 Based on recent case law, however, the common law position on wills appears to be that the undue influence required to invalidate a will has to be *actual*; presumed undue influence does not suffice.[86] This position is also supported by legal commentaries on wills.[87] The focus is arguably on the element of "coercion" in undue influence with respect to wills; mere persuasion and influence is not sufficient.[88] As such, whilst presumed undue influence can adversely affect one's mental capacity to make a decision generally, it seems that the same concept cannot apply to invalidate a will.

40 This in turn raises the question whether the statutory position with regard to LPAs under the MCA as discussed in the preceding section should be consistent with the common law position on revocation of wills. As a starting point, a broader treatment of undue influence (actual and presumed) as argued in the preceding section would better protect the autonomy of both donors of LPAs and testators in the making of a will at common law. However, it is understandable that the two positions need not be perfectly aligned. The principles relating to the invalidation of wills based on coercion are part of a regime that has developed separately from the equitable doctrine of undue influence as applied to contracts (and for that matter, LPAs under the statute). There is special protection given to donors of LPAs who are vulnerable under the MCA whilst the policy of preventing victimisation is not so strong in respect of testators and wills. In this regard, the Wills Act[89] focuses on the formalities of execution and does not specifically protect the testator from undue pressure or influence from third parties, and the local case precedents on testamentary capacity have yet to engage on the relevance of this policy issue at common law. As it stands, this may signal a difference in statutory objectives for LPAs and wills respectively. Also, there is arguably greater impact on the donor flowing from the creation of an LPA as it gives the donee continuing decision-making powers with respect to the donor's personal matters and financial affairs when the donor has become mentally incapable of making such decisions, unlike in the case of wills. That being said, the MCA framework allows for a measure of control

86 *ULV v ULW* [2019] 3 SLR 1270 at [69]–[71]. See also *Rajaratnam Kumar v Estate of Rajaratnam Saravana Muthu (deceased)* [2010] 4 SLR 93 at [65]; *Lian Kok Hong v Lian Bee Leng* [2015] SGHC 205 at [45] and the Court of Appeal decision in *Lian Kok Hong v Lian Bee Leng* [2016] 3 SLR 405 at [38]. *Cf* the more dated *Tan Teck Khong v Tan Pian Meng* [2002] 2 SLR(R) 490 which accepted in general the presumption of undue influence in respect of wills and transactions.

87 *Theobald on Wills* (John G Ross Martyn *et al* eds) (Sweet & Maxwell, 18th Ed, 2016) at para 3.032; Roger Kerridge, *Parry & Kerridge: The Law of Succession* (Sweet & Maxwell, 13th Ed, 2016) at para 5.54; *Halsbury's Law of Singapore* vol 15 (LexisNexis, 2016 Reissue) at para 190.199 (all cited in *ULV v ULW* [2010] 3 SLR 1270 at [69]).

88 *ULV v ULW* [2010] 3 SLR 1270 at [71].

89 Cap 352, 1996 Rev Ed.

over the donees of LPAs by prescribing the substantive requirements of determining P's "best interests"[90] when she becomes mentally incapable and by instituting further safeguards by the Office of Public Guardian constituted and exercising its powers under the statute against errant donees.[91]

VII. Conclusion

41 The assessment of P's mental capacity or otherwise is central to the MCA framework. It is proposed that the clinical and functional analyses of mental capacity ought to be delineated more clearly so as to be consistent with their treatment under the MCA framework. The components of the functional inability to make a decision (especially the scope of understanding, using and weighing of relevant information) should be separately analysed as far as possible with respect to each specific decision to be made by P. The judicial reference to "facilitative assistance" provided to P and the objective to allow P to "retain" his decision-making ability under s 3(3) are useful though its scope could be widened. Clarifications regarding the impact of actual (or presumed) undue influence on mental capacity and its effect on the issue of whether the LPA or will ought to be revoked will also be important.

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

91 See ss 30–32 of the Mental Capacity Act (Cap 177A, 2010 Rev Ed). The Office of Public Guardian receives reports from the donees and has the power to investigate any statutory contravention.