

# DRAFT VERSION OF CODE OF PRACTICE

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## 1. What is the Mental Capacity Act?

### 1.1 Key Details

The Mental Capacity Act is a law which:

- 1.1.1 Addresses the need to make decisions for persons who are 21 years or older when they lack mental capacity to make those decisions for themselves.
- 1.1.2 Allows persons who have mental capacity to voluntarily make a *Lasting Power of Attorney (LPA)* to appoint one or more persons (donees) to act and make decisions on their behalf if and when they lack mental capacity in the future.
- 1.1.3 Allows the court to appoint a deputy to act and make decisions on behalf of a person who lacks mental capacity where the person has not made an LPA.
- 1.1.4 Allows parents of children with intellectual disabilities who are below the age of 21 years of age to apply to the court to appoint a deputy to ensure that their child's future care is arranged if the parents pass away or lose their mental capacity.
- 1.1.5 Gives legal protection for acts done by anyone in connection with the care and treatment of a person who lacks mental capacity if certain conditions are met, including the requirement that the act is done in the best interests of that person.
- 1.1.6 Creates a new office called the Public Guardian whose functions include maintaining a register of LPAs and a register of court orders appointing deputies, supervising deputies and dealing with allegations of abuse by donees and deputies. The Public Guardian is supported by the Office of the Public Guardian (OPG), a department under the Ministry of Community Development, Youth and Sports (MCYS).
- 1.1.7 Provides safeguards to protect persons lacking capacity. The Act gives the Public Guardian supervisory and investigative powers and makes ill-treatment of persons who lack capacity by caregivers and decision-makers a criminal offence. It also prohibits certain decisions from being made on behalf of a person who lacks capacity. For example:
  - Consenting to marriage and
  - Adopting or renouncing a religion.
 The list of excluded decisions is in paragraph 1.4.

### 1.2 Application of the Act

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

### 1.3 Actions and Decisions Covered by the Act

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

### 1.4 Actions or Decisions Excluded under the Act

#### 1.4.1 Section 26 *Mental Capacity Act*

The Act does not allow certain decisions to be made on behalf of a person lacking mental capacity. These decisions are:

- (a) Consenting to marriage.
- (b) Consenting to touching of a sexual nature.
- (c) Consenting to a decree of divorce on the basis of 3 years' separation.
- (d) Consenting to a making of an adoption order under the *Adoption of Children Act*.
- (e) Adopting or renouncing a religion.
- (f) Receiving treatment for change of gender.
- (g) Consenting or revoking consent to treatment for sexual sterilization.
- (h) Consenting or revoking consent to treatment to terminate pregnancy.
- (i) Registering or withdrawing an objection under section 9 of the *Human Organ Transplant Act* regarding the removal of an organ from any person upon death.
- (j) Making or revoking an advance medical directive under section 7 of the *Advance Medical Directive Act*.
- (k) Making or revoking a gift of a body or any part of a body under section 3 or 9 of the *Medical (Therapy, Education and Research) Act*.
- (l) Such other matter as may be prescribed by Minister of Community Development, Youth & Sports.

#### 1.4.2 *Mental Health (Care and Treatment) Act* Matters [Section 27 *Mental Capacity Act*]

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

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

#### 1.4.3 Voting Rights [section 28 *Mental Capacity Act*]

The Act does not permit anyone to make a decision on voting at an election for any public office, or at a national referendum on behalf of a person who lacks mental capacity.

### 1.5 Scope of the Act

- 1.5.1 Nothing in the Act affects the law on murder, culpable homicide not amounting to murder or abetment of suicide. [Section 29 *Mental Capacity Act*]

## 1.6 Life-sustaining treatment or treatment to prevent serious deterioration

1.6.1 A donee of a lasting power of attorney for personal welfare matters does not have, and a court-appointed deputy may not be given, the power to refuse life-sustaining treatment or treatment required to prevent a serious deterioration in the condition of the person lacking capacity. The doctor will usually make these decisions based on the best interests of the patient. Sometimes the court may have to make these decisions. This may occur if there is an unresolved conflict over what the best interests of the patient are.

### DEFINITIONS

#### *Lasting Power of Attorney (LPA)*

A legal document that a person (donor) signs which allows him to choose one or more persons called donees to make decisions about his personal welfare and/or property and affairs on his behalf when he lacks mental capacity. Anyone above 21 years old can be a donee except an undischarged bankrupt. To find out more, read Chapter 8.

#### *Deputy*

A deputy is a person appointed by the court to make certain decisions on behalf of a person who lacks mental capacity when the person has not made an LPA or has no donee to decide on his behalf in respect of those decisions. To find out more, read Chapter 9.

#### *Best Interests*

Decision-makers have a duty to consider many factors which focuses on what is best for the person lacking capacity. To find out more, read Chapter 3.

#### *Human Organ Transplant Act*

A separate law that automatically allows doctors to remove your organs when you are brain dead for transplant to someone else unless you have opted out earlier in writing.

#### *Advance Medical Directive*

A legal document you sign under a separate law known as the Advance Medical Directive Act that tells the doctor who is treating you for a terminal illness that you do not wish to have your life artificially prolonged.

#### *Medical (Therapy, Education and Research) Act*

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

## 2. What is the Code of Practice?

### 2.1 Key Details

The Code of Practice provides guidance and information about how the Act works in practice.

### 2.2 Purpose of the Code of Practice

The Code of Practice provides guidance for people to:

2.2.1 Understand their responsibilities and rights under the Act.

2.2.2 Be aware of what steps they can take to prepare for a time in their future when they may lack capacity.

### 2.2.3 Be aware of best practices in caring for persons lacking mental capacity and follow those practices.

The scenarios and examples in this Code are for illustration only and use fictitious characters and situations. They are not in any way to be taken as precedents for decisions that need to be made in similar situations.

## 2.3 Who does the Code of Practice apply to?

2.3.1 The Code of Practice applies to everyone who deals with a person lacking mental capacity. This includes those who are under a formal duty such as professionals and paid caregivers as well as informal caregivers, family and friends of the person who lacks capacity.

2.3.2 The Act states that the following categories of individuals have a particular duty to consider the Code when acting in relation to a person lacking mental capacity:

- donee of a Lasting Power of Attorney,
- deputy appointed by the Court,
- people who act in a professional capacity; e.g. a lawyer, health care professional, accountant, ambulance crew, and
- people who act for remuneration; e.g. a paid caregiver, therapist.

## 2.4 What happens if people do not comply with the Code?

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

### Scenario I

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

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

### 3. What Are The Statutory Principles?

#### 3.1 Key Details

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

3.1.2 It sets out 5 statutory principles that anyone making any decision or taking any action for a person who appears to lack capacity must apply:

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

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

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

Principle 4: An act done, or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

Principle 5: Before an act is done or decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

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

#### 3.2 Who must apply the statutory principles?

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

#### 3.3 Presumption of Capacity

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

The assumption is that a person has capacity to make a decision for himself unless there is proof that it is more likely than not that he lacks capacity to make the decision at the time it needs

to be made. This assumption applies to persons 21 years of age or older. The assessment of a lack of capacity cannot be based simply on the person's appearance, age, condition or behaviour. [See paragraph 4.3.2.]

People should be allowed to make their own decisions where they can: it cannot be assumed that they cannot make decisions unless the incapacity is established. However, it does not mean that people who deal with a person that they suspect lack capacity can act on that person's decision without checking that the person actually has capacity to act. They must act reasonably to ascertain that the person has capacity to carry out the transaction.

#### Scenario 2

Shanti Sandhu is a 66-year-old divorcee who lives alone in a walk-up apartment. Her children were tragically killed in a road traffic accident six months ago. Shanti used to be active in the community, taking part in local activities and volunteering at Resident Committee activities. Since the accident, she does not speak to anyone. The apartment block committee is organizing a health talk and free screening activity. The committee is considering to exclude Shanti as they feel that she no longer has the capacity to contribute to organising the activities.

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

#### Scenario 3

Tay Keng Song has made and registered an LPA. He appointed his daughter, Chin Lee, to manage his property and financial affairs in the event he lacks mental capacity to manage them himself. Keng Song has now been diagnosed with dementia. Chin Lee is worried that he is becoming forgetful about money matters. She must assume that her father has the capacity to manage his property and affairs unless she has good reasons to believe otherwise. She must help him to make the decisions himself.

At the market, she notices that her father is able to choose what to buy and successfully handles money to make payment. However, she notices that he gets confused about his bank accounts and investments even though he previously handled these on his own. Chin Lee carefully explains to her father about his bank accounts and investments and his options in managing them. However, Keng Song does not understand the information.

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

#### 3.4 Giving All Practicable Help

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



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

#### Scenario 4

Several police officers found a middle-aged man living underneath a bridge on the Pan Island Expressway. He is very dirty and has a big cut on his leg, which looked infected. They take him to hospital. The hospital staff asks for his personal details and relatives they could contact. To help the man to communicate, these enquiries are made in several languages. The man remains silent and does not want to cooperate with the doctor who wants to examine his injury. The doctor tells him that if the injury is not treated he may lose his leg and makes a sawing motion over his leg in an attempt to explain the situation to him. The man appears to pay more attention after that and starts pointing at his mouth and ears while shaking his head. A nurse realises that he may be a deaf mute, so she gives him a paper and pen and calls in a person who knows sign-language. The man calms down and starts communicating to the hospital staff in writing.

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

### 3.5 Unwise decision

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

- 3.5.1 A person is free to make his own decisions even if those decisions are unwise in the view of others, e.g. relatives, care staff and doctors. This is a very important principle

in autonomy (freedom) which recognises the right of a person to make his own choices. Just because a decision is unwise does not mean that the person has lost mental capacity.

- 3.5.2 However, there is a difference between a person making an unwise decision (which the person who decides may make) and his making a decision when he lacks the ability to understand, remember or use the information necessary to make the decision. [See paragraph 4.6]
- 3.5.3 If a person makes several decisions which are unusual bearing in mind his usual behavior or makes decisions which make it easy for him to be exploited or harmed, then further investigation into that person's capacity should be conducted.

#### Scenario 5

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

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

#### Scenario 6

Ah Huat is 73 years old. He is a widower and lives alone. Last week, a window installer named Paul visited Ah Huat at his home. Paul convinces Ah Huat to change the window in his bathroom because it is rusty. The next day, Paul returns and advises Ah Huat to change the windows in his bedroom. Paul charges Ah Huat \$500. Ah Huat's son, Ah Seng, is concerned about his father. Ah Huat is normally careful with his finances because he is retired. Paul returns for a third time and Ah Huat agrees to change the remaining windows in his flat for \$1500. Ah Seng, who examined the windows earlier, noticed they are still in good condition and do not need to be changed. He believes that Paul has taken advantage of his father and wonders whether Ah Huat is capable of making similar purchasing decisions. Ah Huat explains that he prefers to get the windows replaced all at once because he gets a better bargain. He believes that all the windows will need to be replaced in one or two years' time.

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

### 3.6 Best Interests

**Principle 4:** *“An act done, or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made in his best interests.” [Section 3(5) Mental Capacity Act]*

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

#### Scenario 7

Kevin Khoo and his wife Rishima Rajah have three children. Their eldest, Ron, who is 23 years old, has an intellectual disability and has been working at a sheltered workshop operated by a charity. The charity also has a programme which offers temporary residence to persons like Ron to acquire basic life skills for more independent living. With some support, they are also taught how to take public transport. These life skills help them to be better suited for open employment. A place in the residential programme becomes available and the social workers at the charity recommend that Ron take up the offer. Kevin and Rishima know that Ron will like to become more independent. However, they are worried that if Ron takes up the offer, they won't be able to look out for him and he will spend less time with them.

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

### 3.7 Less Restrictive

**Principle 5:** “Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be effectively achieved in a way that is less restrictive of the person's rights and freedom of action.” [Section 3(6) Mental Capacity Act]

3.7.1 When acting or making a decision on behalf of a person who lacks capacity, the action or decision taken should be one which is less restrictive on that person's right and freedom to act. The less restrictive option is usually also the option that is in the best interests of the person. Sometimes, that includes not taking any action or decision at all. All actions taken or decisions made, or decisions not to take any actions, must be taken in the person's best interests.

3.7.2 If there is more than one option available, then the options must be weighed up and the decision taken must be determined by both the best interests and less restrictive option principles.

#### Scenario 8

Ah Mei lives with her 80-year-old mother, Madam Kwong Siew Moi, who has dementia. When Ah Mei goes to work, she locks her mother in her room to prevent her from injuring herself or wandering off. She leaves food and water in the room. Madam Kwong wears adult diapers. When Ah Mei returns home in the evening, she bathes and feeds her mother. Even though Ah Mei is acting out of concern for the safety of her mother and is a filial daughter, this form of care is not the less restrictive option. She must make some other more suitable care arrangement such as placing Madam Kwong in a dementia day-care centre.

## 4. Lack of Mental Capacity And How Is It Assessed

### 4.1 Key Details

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

### 4.2 Conditions that can cause a lack of Mental Capacity

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

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

These conditions may cause the person to lose capacity. However, it must not be assumed that a person who suffers from any of these conditions necessarily lacks mental capacity.

### 4.3 Mental Capacity

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

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

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

- age,
- appearance – this covers all aspects of the way a

person looks. It includes the physical characteristics of certain conditions (for example, features linked to Down's syndrome or muscle spasms caused by cerebral palsy) as well as aspects of appearance like dress or state of cleanliness,

- condition – this includes physical disabilities, intellectual disabilities, age-related illnesses or temporary conditions such as drunkenness,

OR

- aspect of behaviour - this may include behaviour that appears unusual to others, for example, rocking back and forth, talking to oneself or inappropriate laughing. It also includes extroverted behaviour, for example, shouting and gesticulating, and withdrawn behaviour, for example, refusing to speak or avoiding eye contact.

[Section 4(3) *Mental Capacity Act*]

#### Scenario 9

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

*The paramedics should not assume that the man does not have mental capacity merely because of this aspect of his behaviour.*

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

## 4.4 Types of Mental Incapacity

### 4.4.1 Permanent Incapacity

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

Type	Examples
Permanent Incapacity	A person suffering from: <ul style="list-style-type: none"> <li>• A persistent vegetative state</li> <li>• Locked-in syndrome</li> <li>• End stages of Dementia</li> </ul>

#### Scenario 10

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

#### Scenario 11

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

### 4.4.2 Temporary Incapacity

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

Type	Examples
Temporary Incapacity	A person who is: <ul style="list-style-type: none"> <li>• Drunk or on drug abuse</li> <li>• Affected by prescribed medication drugs</li> <li>• Having delirium from toxic and metabolic effects of acute infections e.g. septicaemia, pneumonia, cholecystitis, orcholangitis, or urinary tract infection</li> <li>• Having cerebral infection without irreversible damage to the brain</li> <li>• Having cerebral vascular accidents which are able to recover</li> <li>• Having head injury without irreversible damage to the brain</li> </ul>

#### Scenario 12

Matthew Lim, a 40-year-old bond trader, has become a drug addict. He has been using cocaine for the past year. He owns a unit at a condominium with his wife, Irene. Matthew has lost his job and must sell the condominium. He has to sign the legal documents but he overdoses on cocaine and has been admitted to hospital. The overdose has caused him to lose consciousness. The doctors believe he will recover consciousness in a few days. Irene informs the lawyers of the situation and the process of signing of the legal documents is put off for a few days until Matthew recovers.



#### 4.4.3 Fluctuating Capacity

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

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

#### Scenario 13

Danielle de Souza aged 72 suffers from early Alzheimer's disease. Her mental capacity fluctuates. When she has mental capacity, she speaks clearly about herself and chats happily with her family members. At other times, she becomes quiet and ignores everyone around her. She also has diabetes mellitus for 15 years and this is now complicated by cellulitis of the left foot requiring a below-knee amputation. The family members and the nursing staff note that Danielle's mental capacity tends to be better in the morning compared to the rest of the day. Morning will be the better time to talk to her, get her understanding of the need for the surgery, and get her consent.

### 4.5 Assessing Mental Capacity

The definition of "lack of capacity" provides a 2-stage test for mental capacity [Section 4(1) *Mental Capacity Act*]:

STEP 1 : Is the person suffering from an impairment of, or disturbance in the functioning of the mind or brain?

STEP 2 : If yes, does the impairment or disturbance cause the person to be unable to make a decision when he needs to?

### 4.6 What is the meaning of "unable to make a decision"?

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

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

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

#### 4.6.1 Understand the Information

The person must be able to understand the information that is relevant to the decision. To help him to understand the information, it may be necessary to explain it in a

way that is appropriate to his circumstances, such as using simple language, visual aids or some other means [Section 5(2) *Mental Capacity Act*]. The person should not be rushed or pressured to make a decision but given time to understand the information.

He needs to understand the:

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

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

#### Scenario 14

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

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

She then gives Susie several leaflets that provide similar information on diabetes in plain English with simple drawings. Dr Said tells Susie to think about what she has said and return in 7 days. Linda helps Susie to read through and understand the leaflets supplied by Dr Said. When Susie sees Dr Said a week later, she is feeling more confident about the tests. She nods in agreement when Dr Said asks her whether she wants to have the tests. Susie points to the syringe and beaker when Dr Said asks her which equipment she will need to conduct the tests. Dr Said concludes that Susie has the mental capacity to make the decision to have the tests and she proceeds to carry out the tests.

#### 4.6.2 Remember the Information

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

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

**Scenario 15**

Harry Pereira was recently diagnosed as an early sufferer of dementia. Occasionally, he forgets the names of his family members, favourite restaurants and how to get home when he goes out unaccompanied. However, he has clear moments and remembers the names of his family members when he sees them. Harry has a \$10,000 insurance policy that is about to mature. Harry's wife, Jean, asks him what he would like to do with the money. She is careful to ask him when he has a clear moment. Harry wants to leave the money to his two grandchildren for their education. He says that a good education is the most valuable thing a person can have. *In these circumstances, it is clear that Harry has made the decision when he has capacity, and can explain his reasons for making the decision. Therefore, despite his short-term memory problems, Harry has the mental capacity to make the decision.*

**4.6.3 Use or weigh up the Information**

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

**Scenario 16**

Li Ling has been diagnosed with schizophrenia. She cuts her hand but refuses to allow her family to attend to the wound because she is experiencing hallucinations and paranoia that causes her to believe that her family members are plotting to harm her. She is unable to accept anything they say to her about the nature of her wound and the treatment they wish to administer. *An informal assessment of Li Ling's capacity shows that she is unable to use or weigh the information to make a decision about whether to accept or reject the treatment.*

**4.6.4 Communicate the Decision**

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

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

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

**Scenario 17**

Johan Mohammed is a salesman who suffered a brain injury due to an accident. He has been recovering in hospital for the past three months. Johan is conscious but he cannot speak or move. His wife, Miriam, is considering mortgaging their flat to get a loan to pay for his medical expenses. She is his donee under an LPA with authority to decide on property matters. When she tells him of this option, Johan starts blinking furiously, something he has not done in the past. Miriam suspects that Johan is trying to communicate with her. She works out a system with Johan that enables him to communicate with her, so that Johan blinks one time for 'yes' and two times for 'no'. When Miriam asks Johan whether he agrees to mortgage the flat, he blinks twice. As she explores his reasons, she realizes that he wants her to sell some of the shares in their joint investment account (that either person may operate independently) to raise the money for the medical expenses instead of mortgaging their flat. *Johan has mental capacity because he is able to understand, remember and weigh up the information, and communicate his decision. So, Miriam cannot act under the LPA.*

**4.7 When should capacity be assessed?**

4.7.1 An assessment should be carried out when a person's capacity is in doubt and he has to make a particular decision. This doubt may arise for various reasons, for example, because of the person's behaviour or circumstances or because the person was previously diagnosed with an impairment of or disturbance in his mind or brain and lacked capacity to make some other decision.

4.7.2 Sometimes people can improve their decision-making capabilities. For example, persons with learning disabilities may be taught new skills to improve their capacity to make certain decisions. So, their capacity should be reviewed from time to time.

**4.8 Who should assess capacity?**

4.8.1 Different individuals may be involved in assessing a person's capacity for different decisions. The assessor is usually the individual directly concerned with the person at the time the decision needs to be made.

**4.8.2 Informal Assessment**

- a. An individual who has not been specially trained to conduct mental capacity assessments carries out an informal assessment. These assessments are appropriate for most day-to-day decisions, for example, whether the person can go out alone. The assessor is likely to be the person's caregiver.
- b. The assessor must apply the statutory principles (see paragraphs 3.2 to 3.7) and give all practicable help

to the person to make his own decision. If the person is still unable to make a decision, the assessor must conduct an informal assessment to determine if the person can make the specific decision. If the person lacks capacity to make the decision, the caregiver will make the decision on behalf of the person.

- c. For acts of care or treatment, the individual must do the following to obtain protection under section 7 of the *Mental Capacity Act*:

- take reasonable steps to determine whether the person lacks capacity about the matter in question before doing the act, and
- reasonably believe that the person lacks capacity and the act to be done is in the person's best interests when doing the act.

(See Chapter 6).

- d. If the decision concerns medical treatment, the healthcare professional will assess the patient's capacity to consent to or refuse treatment. If the healthcare professional is uncertain whether the patient has the capacity to make the decision, he may request a formal assessment of capacity (see 4.8.3 below). In complex cases, a multi-disciplinary team may be involved in making the assessment.

#### 4.8.3 Formal Assessments

Accredited GPs who have been specially trained to conduct mental capacity assessments and specialists in mental health, such as psychiatrists, can conduct formal assessments. (The names of accredited GPs who have been trained can be found at [OPG website].)

- 4.8.4 The accredited GP or specialist may charge a fee for conducting the assessment. To avoid any conflict of interest, the assessor should not be related to the person being assessed or the individual seeking the formal assessment of the person.

- 4.8.5 The person to be assessed or the individual who is seeking the formal assessment for the person must complete Part A of the Mental Capacity Assessment form by providing personal, medical and other information about the person to be assessed. The accredited GP [or specialist] will complete Part B of the form. (The form can be found at [OPG website].)

- 4.8.6 A professional, such as a lawyer, or the donee of an LPA may seek a formal assessment where they have doubts about the person's capacity and the decision the person has to make is an important one. Examples of such decisions are:

- moving house;
- emigrating to another country;
- selling assets; or

- transferring assets to another individual or organization.

For a legal transaction (for example, making a will), a lawyer must assess the client's capacity to instruct them. They must assess whether the client has the capacity to satisfy any relevant legal test. In cases of doubt, they should get an opinion from a doctor or other professional expert.

#### Scenario 18

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

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

#### Scenario 19

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

### 4.9 Refusing Formal Assessments of Mental Capacity

- 4.9.1 A person cannot be forced to undergo a formal assessment of mental capacity. It may help to explain to him why it is necessary and what the consequences of refusal would be.

4.9.2 If the person lacks the capacity to decide whether to have the assessment or not, he can be taken for the assessment. This is acceptable as long as the decision to have the assessment is made in his best interests.

4.9.3 If the person is a danger to himself or others because of mental disorder, then the Mental Health (Care and Treatment) Act allows for admission and detention of the person into psychiatric care.

#### 4.10 Proof required to show a Person lacks Mental Capacity

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

#### 4.11 Other Legal Tests of Mental Capacity

There are other legal tests of mental capacity from our common law (cases decided by judges in the Courts). Note that the test for lack of capacity and the 2-stage test for capacity are for the purposes of this Act only [Section 4(1) *Mental Capacity Act*].

The other tests include the capacity to:

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

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

### 5. Practicable Steps to Help People Make their Own Decisions

#### 5.1 Key Details

5.1.1 Under Principle 2 of the Statutory Principles (see paragraph 3.4), people should be helped to make their own decisions. Therefore, before deciding that a person lacks capacity to make a specific decision at a particular time, all practical and appropriate steps must be taken to help the person make his own decision.

5.1.2 In an emergency situation, there may not be time to go through as many steps as in a non-emergency. It will depend on the nature of the emergency. In urgent situations, such as in a medical emergency, decisions may have to be made in the person's best interests without consulting him, his caregivers, donees or deputies.

#### 5.2 Steps to Help a Person Make His Own Decisions

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

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

#### Provide Relevant Information

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

#### 5.2.1 Communicate in a Way Appropriate to the Person

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

- speed and manner in which the information is presented,
- use of supplementary material, e.g. picture boards, DVDs, leaflets etc, as appropriate,
- cultural and religious sensitivities, and
- need for an interpreter.

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



5.2.2 Make the Person Feel Relaxed Enough to Make a Decision

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

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

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

6. Best Interests

6.1 Key Details

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

**Scenario 20**

Wong Hah Nee is 75 years old and suffers from dementia. She did not make an LPA. Her husband died recently and she lives on her own. Her son Jonah lives in a 3-room flat with his wife, Ann, and four children. Jonah is worried about his mother living on her own. Jonah is unable to take Hah Nee to live with him. There is not enough room in his flat and Ann is unable to care for Hah Nee because she is already taking care of the children. Jonah wants his mother to move to a nursing home.

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

6.2 Who is the Decision-Maker?

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

6.3 Best Interests Checklist

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

Scenario	Effect of Lasting Power of Attorney	Decision-Maker
<ul style="list-style-type: none"> <li>Road traffic accident</li> <li>Paramedics arrive</li> <li>Zainal bin Hamid is unconscious and bleeding</li> </ul>	<ul style="list-style-type: none"> <li>This is an emergency situation. If the paramedics wait to consult family members or the donees, it may be too late to save Zainal's life.</li> <li>Therefore, the donee of an LPA who is authorized to make decisions on personal welfare matters does not need to be consulted in this scenario.</li> </ul>	Paramedics
<ul style="list-style-type: none"> <li>Care home setting</li> <li>Sheila Goh has dementia</li> <li>Decision concerning whether to go for walk or play mahjong</li> </ul>	<ul style="list-style-type: none"> <li>Sheila's day-to-day care will primarily be managed by the care staff and nurses at the care home; i.e. the decision-makers on day-to-day matters where the person lacks capacity are the care staff and nurses.</li> <li>The donee of an LPA who is authorised to make decisions on personal welfare matters does not need to be consulted over every minor decision concerning the person. However, the donee should have been involved in the decision to select a care home and devising a care plan together with the care home professionals. For these major decisions, the decision-maker is the donee.</li> </ul>	Caregiver and/or donee of an LPA with power to decide personal welfare matters
<ul style="list-style-type: none"> <li>Lim Wei Min has moderate brain injury sustained in a car accident.</li> <li>Decision to be made if he should undergo knee surgery.</li> </ul>	<ul style="list-style-type: none"> <li>Wei Min's capacity to decide whether to have the knee surgery or not should be formally assessed.</li> <li>If the assessor concludes that Wei Min has capacity to make this decision, Wei Min should be supported to make his own decision.</li> <li>If the assessor concludes that Wei Min lacks capacity to make this decision, the ultimate decision-maker is the personal welfare donee (see paragraph 8.2.2) if the donee has been specifically given the authority to consent or refuse consent to carrying out of medical treatment.</li> <li>The donee must consider the doctor's opinion.</li> </ul>	Donee of an LPA with power to decide personal welfare matters and authority to decide on medical treatment.
	<ul style="list-style-type: none"> <li>If the donee and doctor disagree on the decision, the court may have to make the decision.</li> </ul>	

Stage 1 – Not to base determination of best interests merely on certain factors	Apply
<p>The decision-maker must not decide what is in a person's best interests OR assess capacity merely based on his:</p> <ul style="list-style-type: none"> <li>Age</li> <li>Appearance</li> <li>Condition</li> <li>Aspect of behaviour</li> </ul> <p>(See paragraph 6.4 for more details)</p>	✓

Stage 2 – Things to consider or do:	Extent of Application	Apply
1. Whether it is likely the person will regain capacity at some time in the future to make the decision in question and when that is likely to happen. See paragraph 6.5.1.	Must Consider	✓
2. Permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him or any decision affecting him. [Section 6(4) <i>Mental Capacity Act</i> ] See paragraph 5.2.	So far as reasonably practicable.	✓
3. If the decision relates to the disposition of or settlement of property, e.g. sale of property or placing assets in trust, the decision-maker must be motivated by a desire to ensure that the person's property is preserved for the person's maintenance during his life. [Section 6(6) <i>Mental Capacity Act</i> ]	So far as reasonably practicable.	✓
4. The person's past and present wishes and feelings, especially if they were written down when the person had capacity. See paragraph 6.5.2.	So far as reasonably ascertainable.	✓
5. The beliefs and values likely to affect that person's decision if he had capacity; e.g. cultural background, religious beliefs and past behaviour or habits. See paragraph 6.5.3.	So far as reasonably ascertainable.	✓
6. Any other factors the person would likely to have considered, if he had capacity to do so. See paragraph 6.5.4.	So far as reasonably ascertainable.	✓

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

#### 6.4 Factors That Should Not Be Relied On Exclusively To Determine Best Interests

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

- age,
- appearance – this covers all aspects of the way a person looks. It includes the physical characteristics of certain conditions (for example, features linked to Down's syndrome or muscle spasms caused by cerebral palsy) as well as aspects of appearance like dress or state of cleanliness,
- condition – this includes physical disabilities, intellectual disabilities, age-related illnesses or temporary conditions such as drunkenness,

OR

- aspect of behaviour – this may include behaviour that appears unusual to others, for example, rocking

back and forth, talking to oneself or inappropriate laughing,. It also includes extroverted behaviour, for example, shouting and gesticulating, and withdrawn behaviour, for example, refusing to speak or avoiding eye contact)

[Section 6(1) *Mental Capacity Act*]

#### 6.5 Factors that must be considered by the Decision-Maker in determining Best Interests

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

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

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

- The cause of the lack of capacity is treatable; e.g. with medication or therapy.
- The lack of capacity will decrease over time; e.g. the person loses capacity temporarily because of a sudden shock.
- The person learns new skills or undergoes new experiences to cope with an intellectual disability so as to increase understanding and ability to make certain decisions.
- The person has fluctuating capacity, so it may be possible to get the person to make the decision at a time when he has capacity to make that specific decision.
- The person who previously could not communicate learns a new form of communication.

#### Scenario 21

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

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

### 6.5.2 The person's past and present wishes and feelings, especially if they were written down when the person had capacity

- This is a factor which must be considered in working out the person's best interests. It cannot be ignored. There are many ways people may reveal their wishes and feelings, e.g. by speaking, drawing, or using sign language.
- It is important that other individuals, such as relatives and friends, do not try to influence or apply pressure

on the person to express views which are not the person's own.

- The decision-maker must consider the person's past and present wishes and feelings so far as they are reasonably ascertainable.
- The decision-maker should consider written statements carefully. If their decision does not follow something a person has put in writing, they must record the reasons why. They should be able to justify their reasons if someone challenges their decision.
- A doctor is not obliged to follow the person's wish if it is against the person's best interests. Doctors should exercise their professional clinical judgment of what is in the best interests of the person as a patient to determine what treatment to provide.

#### Scenario 22

Rohan Ramlan is a wealthy 80-year-old man with dementia. He shares a home with his unmarried sister, Siti. Rohan is very fond of his two nephews, Rahim and Rashid. Rohan has told his relatives and friends that he would like to be looked after by either Rahim or Rashid in their homes, if they agree to have him. Rahim has invited Rohan to move in with him. Siti does not like her nephews much and would prefer to care for Rohan instead.

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

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

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

#### Scenario 23

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

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



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

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

##### Scenario 24

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

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

##### Scenario 25

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

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

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

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

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

##### Scenario 26

Deidre Fernandez has dementia. Her husband passed away recently. She now lives alone and lacks the capacity to decide whether to move in with her daughter, Celia, or son, Henry. Deidre made a Lasting Power of Attorney before she developed dementia. She appointed her best friend, Tara, as her donee to make decisions about her personal welfare. Both Celia and Henry want their mother to move in with them. Celia thinks it is in her mother's best interests to move in with her because she has a large garden and her mother likes gardening and she can be close to her two grandchildren. Henry thinks it is in his mother's best interests to move in with him because he is a registered nurse who can care for her when he is not working. Deidre was also close to her pastor and confided in him. Tara does not share the same faith as Deidre and prefers to only consult Henry and Celia.

*Tara must base her decision on Deidre's best interests after weighing up the benefits and disadvantages of Deidre living with Celia and Henry. She must apply the best interests checklist and consult all relevant persons*

*before making her decision. Tara cannot refuse to consult a relevant person just because she does not like that person or does not agree with his or her views. She must be objective and fair in determining Deidre's best interests. Here, those persons will include Celia's children, her caregivers, other relatives, close friends and the pastor.*

#### 6.5.6 Life Sustaining Treatment or Treatment to Prevent a Serious Deterioration in a Person's Condition

- A personal welfare donee (see paragraph 8.2.2) does not have the power to refuse life-sustaining treatment or treatment required to prevent a serious deterioration in the condition of the donor who lacks capacity. [Section 13(6) *Mental Capacity Act*]. The doctor will usually make these decisions based on the best interests of the patient.
- The position is the same for deputies appointed by the court [Section 25(3)(c) *Mental Capacity Act*].
- The decision-maker must not be motivated by a desire to bring about the death of the person when deciding that person's best interests in relation to life-sustaining treatment [Section 6(5) *Mental Capacity Act*]. This provision reflects our other laws that prohibit euthanasia, suicide and murder.

##### Scenario 27

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

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

#### 6.6 Keeping Records – Good Practice

6.6.1 The following parties should keep clear and detailed records of all decisions and the steps leading up to decisions made in relation to persons who lack capacity:

- medical professionals (nurses, doctors, specialists etc.),
- professional caregivers (care staff in nursing homes, hospitals, hospices etc.),
- therapists (physiotherapists, occupational therapists etc.),
- donees of a Lasting Power of Attorney,
- deputies appointed by the Court,
- professionals (lawyers, accountants etc.),
- individuals acting or caring for the person for a fee,
- other professionals acting for a fee.

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

#### Scenario 28

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

*Dr Alkaff decides it is in Vikram's best interests to have the surgery. He is worried that a long delay will cause the leg to become infected or deformed. Dr Alkaff records the process by which he arrives at the decision and the attempts made to contact Pooja. He follows the best interests checklist and includes notes on the discussions he has with related professionals at the nursing home in coming to this decision.*

## 7. Acts in Connection with Care or Treatment

### 7.1 Key Details

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

## 7.2 Individuals who may be protected under section 7

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

## 7.3 Definition of Acts in Connection with Care or Treatment

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

### Examples – Acts in Connection with Care

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

### Examples – Healthcare & Treatment

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

**Scenario 29**

Ronald Teo is a young adult with autism and severe intellectual disabilities. He does not communicate verbally but can usually explain what he wants using gestures. Ronald's parents have taken him to see a dentist, Dr Gopal, for his annual check-up. Dr Gopal, tries to make Ronald comfortable and explains to him in simple language that he needs to open his mouth so he can check his teeth. Ronald refuses to co-operate. Dr Gopal tries to persuade Ronald to open his mouth and Ronald's parents also try to convince him to do so. Ronald still refuses to cooperate. Dr Gopal makes an informal assessment of capacity and determines that Ronald does not have the capacity to decide whether his teeth should be examined. Dr Gopal asks Ronald's parents to hold him down for a few minutes while he opens Ronald's mouth to check his teeth. He thinks the check-up is in Ronald's best interests.

*Dr Gopal is protected under section 7 Mental Capacity Act because he:*

1. has taken reasonable steps to determine whether Ronald has capacity to consent to the treatment before starting the treatment;
2. reasonably believes that Ronald lacked capacity to consent to the treatment and that the treatment is in Ronald's best interests.

*If the procedure was more serious, for example, a root canal procedure, Ronald's capacity to consent to dental treatment should be formally assessed by an accredited GP or a specialist.*

**7.4 What Section 7 does not cover**

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

7.4.2 Section 7 does not apply to:

- a. clinical trials but a donee of a Lasting Power of Attorney (LPA) who has been specifically given the authority under the LPA to give or refuse consent to

the carrying out or continuation of treatment by a health care provider may decide on the conduct of clinical trials [Section 13(7) *Mental Capacity Act*],

- b. acts where inappropriate restraint has been used [see paragraph 7.8], and
- c. acts not within the scope of the individual's professional skills or experience; e.g. a caregiver should not carry out acts relating to care or treatment that should only be performed by a trained healthcare specialist such as a physiotherapist or nurse.

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

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

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

**7.5 Checklist for Individuals Carrying Out Acts of Care or Treatment**

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

**Stage 1 – Have regard to the Statutory Principles****Apply**

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

**Stage 2 – Not to base determination of best interests merely on certain factors****Apply**

The decision-maker must not decide what is in a person's best interests OR assess capacity merely based on his: ✓

- Age.
- Appearance.
- Condition.
- Aspect of behaviour.

(See paragraph 6.4 for more details)

<b>Stage 3 – Assess Capacity</b>		<b>Apply</b>
The decision-maker must assess the person's capacity, applying the 2-stage test. Informal assessments are appropriate for everyday matters. Formal assessments are conducted when the decision is an important or life-changing one. See paragraphs 4.8.2 and 4.8.3 for more details.		✓
<b>Stage 4 – Involve &amp; Encourage Participation</b>		<b>Apply</b>
The decision-maker must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him or any decision affecting him. [Section 6(4) <i>Mental Capacity Act</i> ] See paragraph 5.2 for more details.		✓
<b>Stage 5 – Apply Best Interests Checklist</b>	<b>Extent of Application</b>	<b>Apply</b>
1. Whether it is likely the person will regain capacity at some time in the future to make the decision in question and when that is likely to happen. See paragraph 6.5.1.	Must Consider	✓
2. The person's past and present wishes and feelings, especially if they were written down when the person had capacity. See paragraph 6.5.2.	Consider so far as reasonably ascertainable.	✓
3. The beliefs and values likely to affect that person's decision if he had capacity; e.g. cultural background, religious beliefs and past behaviour or habits. See paragraph 6.5.3.	Consider so far as reasonably ascertainable.	✓
4. Any other factors the person would likely to have considered, if he had capacity to do so. See paragraph 6.5.4.	Consider so far as reasonably ascertainable.	✓
5. The views of anyone named by the person as someone to be consulted on the matter in question or on matters of that kind. See paragraph 6.5.5	Consult if practicable and appropriate.	✓
6. The views of anyone engaged in caring for the person or interested in his welfare. See paragraph 6.5.5	Consult if practicable and appropriate.	✓
7. The views of any donee of any Lasting Power of Attorney granted by that person. See paragraph 6.5.5	Consult if practicable and appropriate.	✓
8. The views of any court-appointed deputy. See paragraph 6.5.5	Consult if practicable and appropriate.	✓
<b>Stage 6 – Special Consideration – Life-Sustaining Treatment</b>		<b>Apply</b>
Decisions regarding life-sustaining treatment should not be made by anybody other than a doctor and the doctor must not be motivated by a desire to end the life of the person. See paragraph 6.5.6.		✓
<b>Stage 7 – Special Consideration – Acts of Care or Treatment</b>		<b>Apply</b>
For acts of care or treatment, the individual must satisfy the following conditions to obtain protection under section 7 of the Act: • Take reasonable steps to determine whether the person lacks capacity about the matter in question before doing the act, and • reasonably believe that the person lacks capacity and the act being done is in the person's best interests when doing the act. See paragraph 7.6 for more details.		✓
<b>Stage 8 – Special Consideration – Restraint (Acts of Care or Treatment)</b>		<b>Apply</b>
For acts of care or treatment, where restraint is considered, the individual must, in addition to the matters mentioned in Stage 7: • Reasonably believe that the act of restraint is necessary to prevent the person from suffering harm, and • Ensure the restraining act is a proportionate (balanced) response to the likelihood of the person suffering harm and the seriousness of that harm. See paragraph 7.7 and 7.8 for more details.		✓



## 7.6 Meaning of Reasonable Belief that a Person Lacks Capacity

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

## 7.7 Definition of Restraint

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

### Examples – Restraining Actions and Threats

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

## 7.8 Using Restraint

- 7.8.1 The individual must satisfy the following conditions to obtain protection under section 7 *Mental Capacity Act*:
- take reasonable steps to determine whether the person lacks capacity about the matter in question before doing the act,
  - reasonably believe that the person lacks capacity,
  - reasonably believe that the act of restraint is necessary to prevent the person from suffering harm, and
  - ensure the restraining act is a proportionate response to the likelihood of the person suffering harm and the seriousness of that harm.
- The terms in italics above are explained in detail at paragraphs 7.6, 7.8.5 and 7.8.6 respectively.
- 7.8.2 It is not appropriate to use restraint merely to make it easier for the individual providing care or treatment to "manage" the person. Individuals who are considering the use of restraint must give objective reasons why the restraint was necessary. These reasons should be detailed in the person's records.
- 7.8.3 If a person who does not have capacity to consent demonstrates challenging behaviour or behaves in a way that may cause harm to others, healthcare and social service staff may restrain or remove the person to prevent harm befalling the person or anyone else. This duty is imposed by the common law on healthcare and social service staff regarding the persons they serve.
- 7.8.4 Statutory Principle 5 (see paragraph 3.7) requires the action or decision taken to be one that has the less restrictive effect on the person's rights and freedom of action [section 3(6) *Mental Capacity Act*].
- 7.8.5 **Meaning of Harm**  
Harm is not defined in the Act. What is harm depends on the circumstances.

### Examples – Harm

- A person with severe dementia may not understand that drinking liquid detergent is dangerous.
- A person suffering from moderate dementia may get lost and forget where they live if they wander from home.
- A person with schizophrenia undergoing an attack may suffer hallucinations and believe that the doctors are trying to poison him.

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

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

**Scenario 30**

Ismail Saat is a 75-year-old man with dementia. He is a resident at a dementia care home. The doctor in charge of the home has recommended influenza vaccination for all inmates as a yearly preventive measure. The daughter of Ismail Saat who is his LPA has agreed to this for the father.

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

This is restraint that is acceptable in the circumstances, but it nevertheless is restraint. As good practice, the sister in charge will also talk to Mr Ismail Saat that the injection is good for him and that she will try to give it as best as she could.

**7.8.6 Meaning of Proportionate Response**

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

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

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

**Scenario 31**

Ren Zhen is a 22-year-old woman who suffered brain damage at birth. She lives with her father, Zhong Ming Tat, in a terrace house. She has the capacity to make day-to-day decisions like what to eat and can select items she wants to buy at the market although she cannot handle money at all. Whenever she goes out, her father or caregiver accompanies her. At home, Ren Zhen likes to spend time sitting on the swing in the garden. She can play in the garden unsupervised as long as the gate is locked. Her father, Mr Zhong made some bad investments and lost a lot of money. To avoid going bankrupt, he sells the house and rents an HDB flat instead. Ren Zhen has never lived in a flat before. On the day they move into the flat, Mr Zhong notices Ren Zhen leaning over the window and nearly falling over. Mr Zhong is horrified and rushes to pull her to safety. He makes enquiries about and then purchases metal grilles for installation on all windows in the flat. The contractor will install the grilles in 3 days. In the meantime, Mr Zhong concludes that it is not safe to leave Ren Zhen unattended in the flat. He has two options:

1. Tie Ren Zhen to a chair to ensure her safety while he is out at work during the 3 days; or
2. Move her to his sister's house temporarily.

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

*Option 2 will be a more appropriate solution. This is what is meant by less restrictive option.*

**7.9 Care Plans**

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

- a multi-disciplinary team of professionals (individuals with different skills, e.g. psychiatrists, physiotherapists and geriatricians),
- the donee of a lasting power of attorney for personal affairs (if the person has appointed one), and
- the person's relatives.

7.9.2 All care plans should contain an assessment of the person's mental capacity to consent to the acts of care and treatment proposed in the plan. It should also contain risk assessments and state the appropriate measures that need to be taken to minimize or prevent these possible risks (see examples at paragraph 7.8.1).

7.9.3 The care arrangements drawn up in the plan must be in the best interests of the person concerned. Health and social care staff who work to the care plan can assume that their actions are protected under section 7 *Mental Capacity Act*. However, they should still make every effort to communicate with the person to determine if he still lacks capacity and to see if the action is still in his best interests. Regular checks on a person's capacity to make a specific decision should be made because the circumstances of the person lacking capacity may change thereby impacting the capacity and best interests assessments. This is particularly true for persons with fluctuating capacity. Therefore, care plans should be regularly reviewed.

**Scenario 32**

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

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

## 8. Lasting Power of Attorney

### 8.1 Key Details

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

### 8.2 Decisions Donees may be authorised to make

- 8.2.1 The donor of an LPA may give the donee authority to make decisions about the donor's:
- personal welfare and/or
  - property and affairs.
- 8.2.2 A donee appointed to make decisions about personal welfare ("Personal Welfare Donee") cannot make decisions about the donor's finances unless the same donee is also authorised to make decisions about the donor's property and affairs.
- 8.2.3 A donee appointed to make decisions about property and affairs ("Property and Affairs Donee") cannot make decisions about the donor's welfare unless the same donee is also authorised to make decisions about personal welfare.
- 8.2.4 The donor may restrict the scope or exclude the types of decisions that a donee may make; e.g. the donor appointing a donee for property and affairs matters may state in the LPA that the donee cannot make any decisions on investments.
- 8.2.5 If the donor does not restrict the decisions a donee may make, a general LPA, whether for personal welfare and/or property and affairs, gives the donee authority to make wide-ranging decisions on behalf of the donor but not the excluded decisions mentioned in paragraph 1.4.

### 8.3 Powers of a Personal Welfare Donee

- 8.3.1 The types of decisions and actions a Personal Welfare Donee may be authorised to make include:
- where the donor should live,
  - who the donor should live with,
  - day to day care decisions (e.g. what to wear and eat),

- what social activities to take part in,
- handling the donor's personal correspondence, and
- who the donor may have contact with.

- 8.3.2 The list above contains some examples of the types of decisions and actions a Personal Welfare Donee may make but it is not a complete list. Donors may restrict the powers of the donee through conditions and exclusions; e.g. a donor may state that the donee cannot disallow the donor's brother from visiting him.

### 8.3.3 Health Care Treatment

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

#### Scenario 33

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

### 8.4 Powers of a Property and Affairs Donee

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

**Scenario 34**

Martin Mok is a 60-year old bachelor who lives alone. His doctor tells him that his blood pressure is very high. Martin is worried that if he suffers a stroke and becomes incapacitated, no one will have access to his savings account with YZA Bank to pay for his expenses. He thinks of placing his savings in a joint account with his niece, Jessica, so that she will be able to use the money for his expenses if he becomes too ill to do so himself. He is uncertain about this idea because he would have to authorise her to access the account independently even when he is well and can manage his own affairs. He hears about the Mental Capacity Act and decides to make a Lasting Power of Attorney appointing Jessica as his donee for personal welfare as well as property and affairs. This allows Martin to have sole control over his savings account for so long as he has capacity to manage his financial affairs. He also specifies in his Lasting Power of Attorney that Jessica should consult his friend, Jeremy, on matters relating to health care and residential care because Jeremy is an old friend who is familiar with Martin's preferences on these matters.

**8.5 Duties of Donees**

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

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

- 8.5.7 Not to pass on their authority to someone else.
  - a. Donees cannot pass on their authority to someone else.
  - b. They may seek professional or expert advice, e.g. from doctors, financial advisors, etc.
- 8.5.8 Act in good faith
 

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



## 8.6 Restrictions on Donee's Power to Make Decisions

A donee may only make decisions on behalf of the donor if the donor lacks capacity, or the donee reasonably believes that the donor lacks capacity to make those decisions [section 13(1) *Mental Capacity Act*]. To protect the donor, in addition to the excluded decisions mentioned in paragraph 1.4, the law does not allow a donee to make any of the following decisions on behalf of the donor:

### 8.6.1 Restrictions on Personal Welfare Donee

#### a. Medical Issues

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

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

#### b. Use of Restraint

- The Personal Welfare Donee may not use restraint unless:
  - ◆ the donee reasonably believes that the act of restraint is necessary to prevent the donor from suffering harm, and
  - ◆ the restraining act is a proportionate (balanced) response to the likelihood of the donor suffering harm and the seriousness of that harm.

[Section 13 *Mental Capacity Act*]
- Restraint is the use or threat to use force by the donee or someone authorised by the donee to secure the doing of an act which the donor resists, or restricting the donor's freedom to move, whether or not he resists.
- An act may amount to restraint even though actual physical force or threat of physical force is not used.

- Refer to paragraphs 7.6, 7.8.5 and 7.8.6 for the definitions of reasonable belief that a person lacks capacity, harm and proportionate response respectively.

### 8.6.2 Restrictions on Property and Affairs Donee:

#### a. Wills

- The Property and Affairs Donee may not execute a will on behalf of the donor [section 13(9) *Mental Capacity Act*].

#### b. Gifts

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

### 8.6.3 Restrictions on both Donees:

#### Appointing Substitute or Successor Donees

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

## 8.7 Selecting a Donee

8.7.1 The donee should be someone trustworthy, reliable and competent to make decisions that the donor has authorised.

8.7.2 A donee cannot be appointed without being told of the appointment. The donee must sign a statement in the LPA consenting to the appointment.

### 8.7.3 Personal Welfare Donee

- a. A Personal Welfare Donee must be an individual who is at least 21 years old at the signing of the LPA.
- b. A company or business cannot be appointed as a Personal Welfare Donee.
- c. The donee must be a named person; e.g. "Fiona Fernandez", and not a job title; e.g. "my lawyer".

### 8.7.4 Property and Affairs Donee

- a. A Property and Affairs Donee must be an individual who is at least 21 years old at the signing of the LPA OR a non-individual classified within the regulations as qualified to act as a donee.
- b. A Property and Affairs Donee cannot be an undischarged bankrupt.

## 8.8 Number of Donees

8.8.1 A donor may appoint one or more donees. There is no maximum number of donees that can be appointed.

8.8.2 However, the donor should not appoint too many donees if donees are to make decisions jointly because it may be difficult to get them to agree on decisions.

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

#### a. Jointly

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

#### b. Jointly and severally

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

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

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

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

## 8.9 Decisions That Require Both the Personal Welfare Donee and the Property and Affairs Donee To Work Together

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

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

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

## 8.10 How To Make & Register a Lasting Power of Attorney

8.10.1 To make a valid LPA, you must:

- a. complete and sign the LPA form that consists of the:
  - portion to be completed by the donor,
  - consent forms to be signed by each donee, and
  - certificate which must be signed by a certificate issuer [see paragraph 8.12.2];
- b. complete and sign the Application to register an LPA form
- c. Submit the signed original LPA form and the Application to register an LPA form at the Office of the Public Guardian and pay the registration fee. Both the LPA form and the Application form are available from the Office of the Public Guardian and from the [the OPG Website].

8.10.2 An LPA can be registered by the:

- a. Donor,
- b. Donee or donees (if the LPA appoints them to act jointly), or
- c. Any of the donees if the LPA appoints the donees jointly and severally.

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

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

## 8.11 Notification Requirements When Registering a LPA

8.11.1 The Donor

The donor must notify any named person [see paragraph 8.12.3] of his application to register the LPA.

8.11.2 The Donee

The donee or donees must notify any named person of his or their application to register the LPA.

## 8.11.3 The Public Guardian

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

## 8.12 Safeguards for Making & Registering an Lasting Power of Attorney

## 8.12.1 The Donor

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

## 8.12.2 The Certificate Issuer

- a. The certificate issuer must certify that when the LPA was made:
  - the donor understood the LPA and its scope
  - the donor was not induced by fraud or undue pressure to create the LPA and
  - there is nothing else that would prevent the LPA from being created.
- b. A certificate issuer is defined in the Mental Capacity Regulations. He cannot be a donee appointed under the LPA.
- c. To avoid any conflict of interest, the certificate issuer should not be related to the donee.
- d. Two certificate issuers are required where the donor has not specified any named persons.

## 8.12.3 The Named Person

- a. The donor may name one or more persons who are to be notified of an application to register the LPA (referred to as the “named person” or “named persons”). If the donor selects to have no named persons for the LPA, the Mental Capacity Regulations require two certificate issuers (instead of one) to complete the certificate mentioned in the preceding paragraph 8.12.2.
- b. The donee cannot be a named person.

## 8.12.4 The Donee

To ensure that the donee understands his obligations, he must state in the LPA that he -

- a. has read or someone has read to him key information, and
- b. understands his role and responsibilities under the LPA, in particular –
  - he has a duty to act according to the principles of the *Mental Capacity Act* [section 3] (see Chapter 3),
  - he can only act as donee after the LPA is registered with the Office of the Public Guardian and when the donor lacks mental capacity or if the donee reasonably believes the donor lacks capacity,
  - he can only make decisions that are within the scope authorised by the LPA, and
  - he must always make decisions and act in the best interests of the donor.

## 8.12.5 The Witness

- a. The certificate issuer shall be the witness for the donor.
- b. The witness for the donee shall not be the donor.

## 8.13 When can a Donee act?

8.13.1 The LPA must be properly made and registered. The donee may make decisions on behalf of the donor when the donor lacks capacity to make those decisions [Section 11(1) *Mental Capacity Act*].

8.13.2 The donee may only make decisions that he is authorised to make under the LPA.

8.13.3 The donee may not make any decision for the donor if he knows

- a. the donor does not lack capacity or he does not reasonably believe the donor lacks capacity,
- b. the LPA was not created (for example, he knew the donor lacked capacity when the donor signed the LPA), or
- c. of circumstances that would have terminated his authority to act as donee. (See paragraph 8.14)

### Scenario 35

Latiff Osman has made and registered a Lasting Power of Attorney appointing his wife, Zaleha, as donee for personal welfare matters. Latiff suffered a stroke which caused some brain damage. He is unconscious and cannot communicate with anyone. Currently, Zaleha can act as donee and make all decisions relating to Latiff's personal welfare because he does not have the capacity to make any of them. However, Zaleha cannot make any decision relating to property or affairs for Latiff because she is not authorized to under the LPA. If Latiff regains consciousness and can understand, retain and use information to communicate his own personal welfare decisions, Zaleha's authority to make those decisions for him will cease.

## 8.14 Cancelling a Lasting Power of Attorney & The Donee's Appointment

8.14.1 The donor may cancel an LPA if he has the mental capacity to do so whether the LPA has been registered or not [Section 15(2) *Mental Capacity Act*].

8.14.2 The donor must notify the Public Guardian of the cancellation of the LPA [if the LPA was registered,]. The Public Guardian will then cancel the registration of the LPA. The original LPA and any office copies of it must be delivered up to the Public Guardian to be cancelled. The donor should notify the donee and anyone else who the donor may have informed about the LPA that it has been cancelled.

8.14.3 The LPA is cancelled when the donor dies.

8.14.4 In addition to the above situations, the donee's appointment will be terminated in the certain events. However, the termination of his appointment does not necessarily mean that the LPA is cancelled.

### 8.14.5 Personal Welfare

- a. The donee's appointment is cancelled if the:
  - donee dies,
  - marriage between the donor and donee is dissolved or annulled unless the LPA itself specifically provides that it will not,
  - donee formally refuses the appointment of donee, or
  - donee lacks mental capacity.
- b. However, the LPA is not cancelled and remains valid if there is a replacement donee appointed under it or there is one or more surviving donees appointed to act jointly and severally on any matter.

### 8.14.6 Property and Affairs

- a. If the donor becomes a bankrupt, the power conferred by the LPA is cancelled so far as it relates to property and affairs.
- b. The appointment of the donee for property and affairs is cancelled in the following events:
  - the donee dies or becomes a bankrupt,
  - the donee, not being an individual (e.g. a company) is liquidated, wound-up, dissolved or under judicial management,
  - the marriage between the donor and donee is dissolved or annulled unless the LPA itself specifically provides that it will not,
  - the donee formally refuses the appointment,
  - the donee lacks mental capacity.
- c. However, the power conferred by the LPA is not cancelled and remains valid if there is a replacement donee appointed under the LPA or there is one or more surviving donees appointed to act jointly and severally on any matter.

### 8.14.7 Court's Power to revoke LPA

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

## 8.15 Protection of Donees, Persons dealing with donees and Others

8.15.1 The protection referred to in this section applies to donees, persons dealing with donees and others when a registered LPA turns out to be invalid.

### 8.15.2 Donees

A donee who exercises his powers under the LPA is protected from liability unless

- a. he knows the LPA was not created (for example, the donee knows the donor lacked capacity when the donor signed the LPA) or that the donor was induced to make the LPA by fraud or under undue pressure), or
- b. he is aware of circumstances which terminate his authority to act as a donee. For example, the donee must not make any decision for the donor in circumstances where the donee:
  - has formally refused the appointment
  - knows the donor has died or become a bankrupt (for property and affairs decisions)
  - has become bankrupt or (if a company) is in liquidation or wound up or placed under judicial management
  - was married to the donor and the marriage has been dissolved or annulled (unless the LPA provides that the dissolution or annulment of the marriage does not terminate the appointment), or
  - lacks capacity.

[Section 16(2) *Mental Capacity Act*]

### 8.15.3 Persons dealing with donees

A transaction concluded between another person and the donee would usually be invalid if the donee did not have the authority to act on behalf of the donor. However, the Act protects the other person in these circumstances and treats the transaction as valid unless the other person:

- a. knew the LPA was not created, or
- b. was aware of circumstances which, if the LPA was created, would have terminated the donee's authority to act as a donee.

[Section 16 (3) *Mental Capacity Act*]



## 8.15.4 Purchasers

- a. If a purchaser's interest depends on the validity of a transaction between the donee and the other person (mentioned in paragraph 8.15.3), the transaction is presumed to be valid in favour of the purchaser if the:
  - transaction was completed within 12 months of the date of registration of the LPA with the Office of the Public Guardian, or
  - other person makes a statutory declaration within 3 months of completing the purchase stating that he had no reason at the time of the transaction to doubt that the donee had authority to dispose of the property which was the subject of the transaction.

## 8.15.5 Property Matters

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

**Scenario 36**

Erica Eng is a 70-year-old part-time music teacher. She lives alone since her husband passed away two years ago. Her adult children and grandchildren live nearby and visit her regularly. Erica recently made and registered a Lasting Power of Attorney naming her three children as joint donees who may make decisions regarding her property and affairs. Yesterday, Erica was on her way to the market when a bus knocked her down. Erica is in a coma and her doctors are unsure about the extent of her injuries. Erica does not have health insurance. However, she told her children she has \$100,000 in her savings account for her future medical expenses. Her children would like to pay for her medical treatment from these savings. The money is held at a bank and is in Erica's name. Erica's children, as donees of her LPA, want to withdraw some of the money to pay for Erica's medical treatment. The bank requires a certified copy of the registered LPA and a certificate from a registered medical practitioner to certify that Erica's lack of capacity is likely to be permanent before releasing the money to them.

**9. The Role of the Court & Deputies****9.1 Key Details**

- 9.1.1 The Court has a wide range of powers to:
  - a. decide on matters relating to lasting powers of attorney (LPA),
  - b. make declarations,
  - c. make specific decisions on behalf of persons who lack capacity to make the decision, and
  - d. appoint and revoke deputies and vary their powers.
- 9.1.2 The court may appoint a deputy for a person who is below 21 years of age and lacks capacity to make decisions on certain matters if the court considers it likely that the person will still lack capacity when he reaches the age of 21.
- 9.1.3 The responsibilities of deputies are similar to those of donees but their powers are defined by the court order under which they are appointed or such further orders as the court may make affecting their powers or their appointment.

**ROLE OF COURT****9.2 The Court's Powers in relation to LPAs**

- 9.2.1 Regarding the validity of an LPA, the court may determine whether:
  - a. the requirements for creating an LPA were met,
  - b. fraud or undue pressure was used to induce the donor to make an LPA,
  - c. the LPA was revoked (cancelled) by the donor or by any event specified in paragraph 9.6 below,
  - d. the donee's appointment should be terminated because the donee has behaved or is behaving or proposes to behave in a way that violates the donee's authority or is not in the donor's best interests.
- 9.2.2 The court can resolve any question about the meaning or effect of an LPA or any document that attempts to create an LPA [Section 18(1) *Mental Capacity Act*].
- 9.2.3 The court may also do the following regarding the operation of an LPA, if the donor lacks capacity to make these specific decisions:
  - a. give directions regarding decisions the donee has power to make and as to the remuneration or expenses of the donee,
  - b. give consent or authorise the donee to act where the donee would have to obtain that consent or permission from the donor,
  - c. authorise the making of gifts which are outside the powers of the donee under the LPA,
  - d. direct the donee to furnish reports, accounts, records and information to the court or the Public Guardian, and



- e. release the donee wholly or partly from any liability incurred on account of a breach of his duties as donee.

9.2.4 For example, the court can make the decisions listed in the right-hand column in the table below if any of the circumstances in the left-hand column arise [Sections 17(3)-(6) *Mental Capacity Act*].

Circumstances	Decisions Court Can Make
1. Fraud or undue pressure was applied to the donor to:	(Applicable to both circumstances 1 and 2)
• execute a document for the purpose of creating a LPA or	a. Direct that the LPA is not to be registered (if it has not been registered) or
• create a LPA	b. Revoke the LPA if the donor lacks capacity to do that.
2. A donee of a LPA:	Notes:
• has behaved	• For Circumstance 2, the court may revoke the portion of the LPA that relates to that donee only (if there are two or more donees appointed under the LPA), leaving the portion that relates to the other donee(s) unaffected.
• is behaving or	
• is proposing to behave in a way that violates the donee's authority or is not in the donor's best interests.	

#### Scenario 37

Guo Po owns a successful hair salon. She earns a reasonable income but Guo Po does not believe it is enough. Guo Po has a wealthy aunt, Doris Deng, who is 65 years old. Doris has one child, Daniel. Daniel has a mild disability and wants to be a hairstylist. Guo Po offers him a trainee position at one of her salons. Daniel performs well and for the first time, seems able to hold down a job. Doris is very relieved. Guo Po tells Doris that as she is getting on in years and Daniel cannot fend for himself, Doris should make an LPA for her property and affairs. Guo Po puts pressure on Doris to appoint her as the donee. She also tells Doris that unless she is made donee, she will fire Daniel. Guo Po does not want Daniel to lose his dream job and signs the LPA documents naming Guo Po as her donee for property and affairs.

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

### 9.3 Declarations the Court Can Make

- 9.3.1 The court can make the declarations as to:
- Whether a person has or lacks capacity to make a particular decision or decisions about a particular matter. For example, if a person challenges a decision made for him on the basis that he does not lack capacity or there is a dispute between family members whether the person lacks capacity.

- Whether an act or omission or course of conduct which was carried out, or yet to be carried out, is lawful in relation to the person. For example, the court may make a declaration about whether a particular treatment is in the person's best interests. [Sections 19(1) & (2) *Mental Capacity Act*]

### 9.4 Specific Decisions the Court can Make

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

#### 9.4.2 Personal Welfare

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

- deciding where he should live,
- ordering that he should have no contact with a named person,
- deciding what contact, if any, he should have with a named person,
- giving or refusing consent to the carrying out or continuation of treatment (including a clinical trial) by anyone providing health care for the person (but not affecting the operation of the Advance Medical Directive Act),
- directing that anyone responsible for the person's health care allow someone else to take over the responsibility.

#### Scenario 38

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

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

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

### 9.4.3 Property and Affairs

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

- a. control and management of his property,
- b. selling, mortgaging or gifting his property (subject to the principle that the person's property should be preserved for his benefit and maintenance during his life),
- c. purchasing property on the person's behalf,
- d. carrying on any profession or business on his behalf,
- e. carrying out any contract entered into by him,
- f. discharging his debts or other obligations,
- g. settling his property by trust,
- h. executing a will for him (he must be at least 21 years old),
- i. maintaining, educating, benefiting or advancement of his spouse, parent, child below 21 years old or an intellectually disabled child of his,
- j. exercising any power, including a power to consent, given to him whether beneficially or as a trustee under a trust,
- k. conducting legal proceedings in his name or on his behalf.

Additional provisions relating to the management of his property and affairs, including wills and trusts, are detailed in the Second Schedule *Mental Capacity Act*.

## 9.5 Appointing Deputies

9.5.1 Sometimes, the court cannot make some decisions because they relate to future matters or are of an ongoing nature. If there is no relevant LPA, the court may appoint a deputy to make those decisions.

9.5.2 The court must bear in mind the following principles when deciding whether to appoint a deputy:

- a. A decision of the court is preferred to the appointment of a deputy.
- b. The deputy's powers should be limited in scope and duration as is reasonably practicable given the circumstances.

9.5.3 The court will consider the following factors in determining whether to appoint a deputy:

- a. The circumstances of the person concerned.
- b. The likelihood that future or ongoing decisions will be required.
- c. Whether the appointment is for property and affairs or personal welfare.

### Scenario 39

Ida Hussein had a stroke three months ago. She is in a coma. Her condition is stable but unchanged. She owns a HDB flat and has \$50,000 in her bank account. Ida's daughter, Rohani, is a 22-year-old university student. Ida's husband died 5 years ago. Rohani does not have any income. The doctors have told Rohani that they do not know when Ida will regain consciousness. In the meantime, ongoing expenses for Ida's hospitalisation and household need to be paid. A decision also has to be made to move Ida into a nursing home. Ida has not made an LPA. Rohani cannot withdraw the money from Ida's account to meet those expenses nor decide about moving Ida to a nursing home.

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

9.5.4 After appointing a deputy, the court may make further orders or directions as necessary or expedient to enable the deputy to carry out the role effectively.

9.5.5 The deputy must agree to the appointment and act in the best interests of the person.

### 9.5.6 Choice of deputy

The court will normally choose a family member or close friend to be deputy. However, in certain circumstances, the court may choose an independent third party to become a deputy; e.g. where there is a family dispute or if the person's circumstances are complicated. The court need not appoint a named person as deputy. Instead, the current holder of a specified office or position may be appointed as the deputy.

### 9.5.7 Qualifications for Deputies

The deputy appointed by the court must be:

- a. An individual who is at least 21 years old, or
- b. For decisions relating to property and affairs, the deputy may be an individual who is at least 21 years old or a non-individual classified within the regulations as qualified to act as deputy.

### 9.5.8 Personal welfare matters

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

### 9.5.9 Property and affairs matters

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

#### Scenario 40

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

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

### 9.5.10 Two or more deputies

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

#### a. Jointly

This means that the deputies must act together and not alone.

#### b. Jointly and severally

This means that the deputies can act together or separately. Both types of decision are valid.

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

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

### 9.5.11 Appointment of successor deputies

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

## 9.6 Cancelling a Deputy's Appointment or Varying the Deputy's Powers

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

- Behaved or is behaving in a way that violates the authority given by the court or is not in the best interests of the person for whom he is appointed as deputy, or
- Proposes to behave in a way that would violate the authority given by the court or would not be in the person's best interests.

## MINORS

### 9.7 Appointing a Deputy for a Minor

9.7.1 The court can appoint a deputy for a person below the age of 21 (a minor) who lacks capacity to make decisions about certain matters if it is satisfied that the person will likely still lack capacity to make decisions concerning those matters after he turns 21.

9.7.2 The parents or guardians of such a minor may apply to the court to appoint themselves as their child's deputies. They may also ask the court to appoint successor deputies to make provision for the future when they can no longer act as deputies for their child.

9.7.3 When selecting a deputy for a minor, the court must consider the:

- factors detailed in paragraph 9.5.3 (factors the court will consider when appointing a deputy),
- principle that appointment of the parents or guardian of the minor is to be preferred to the appointment of any other person as deputy, and
- wishes of the parents or the guardian of the minor on the choice of the successor deputy (if a successor deputy is to be appointed) [section 24(6) *Mental Capacity Act*].

#### Scenario 41

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

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

## ROLE OF DEPUTY

### 9.8 Duties of a Deputy

Deputies must:

9.8.1 Follow the statutory principles [section 3 *Mental Capacity Act*].

9.8.2 Act in the best interests of the person who lacks capacity [section 6 *Mental Capacity Act*].

9.8.3 Have regard to the guidance in the Code of Practice.

- 9.8.4 Follow the court's directions and not exceed the scope of authority as laid down by the court.  
Deputies cannot make a decision outside the scope of their authority unless they ask the court to make the decision or change their powers.
- 9.8.5 Indemnify the person who lacks capacity against liability to third parties if the deputy is negligent.
- This is necessary because deputies are treated as the person's agent regarding the decisions and actions taken on behalf of the person.
  - Deputies are not legally responsible to third parties for their decision as long as they acted within the scope of their authority.
- 9.8.6 Apply duty of care.
- The level of care and skill deputies must apply depends on whether they are paid and hold relevant professional qualifications.
  - Unpaid deputies must carry out their duties with the same reasonable care, skill and diligence they would use with their own affairs.
  - Deputies who are paid for their services must meet a higher standard of care and skill.
  - Professionals who are engaged for their specific professional knowledge, eg. lawyers and accountants, must meet the high standards of their profession.
- 9.8.7 Not to take advantage of their position to benefit themselves but to benefit the person who lacks capacity (fiduciary duty).
- Deputies are under a fiduciary duty not to take advantage of their position. They cannot put themselves in a position where their duties conflict with their personal interests; e.g. they cannot accept a third party commission in any transaction involving the person who lacks capacity.
  - Deputies should not allow considerations other than the best interests of the person to influence the way that they carry out their duties.
  - Decisions taken by deputies should benefit the person, not themselves.
- 9.8.8 Not to pass on their authority to someone else.
- Deputies cannot pass on their authority to someone else but they may seek professional or expert advice, e.g. from doctors, financial advisors etc.
- 9.8.9 Act in good faith.  
Deputies must act with honesty and integrity. For example, deputies should observe the wishes of the person who lacks capacity told to them insofar as those wishes are not contrary to the person's best interests.
- 9.8.10 Respect confidentiality.
- Deputies must keep the person's personal and financial affairs confidential.
  - Two exceptions to this rule would be if disclosure of the information is required by law or in the person's best interests.
- 9.8.11 Follow any directions from the Court.
- Deputies must follow any directions made by the court.
  - Additionally, the court may also require deputies to provide reports, accounts, records and information; e.g. financial or healthcare reports on the person who lacks capacity.
- 9.8.12 Keep accounts.
- Deputies appointed to manage the person's property and affairs must keep accounts of transactions carried out on behalf of the person who lacks capacity and submit them to the Public Guardian at times set by the court.
  - If the person's financial affairs are simple, then records of income, expenses and bank statements may be adequate.
  - If the person's financial affairs are complicated, then the records should be more detailed.
- 9.8.13 Keep the money and property of the person separate from the deputies'.
- Deputies should keep the person's funds and property separate from their own and anyone else's.
  - If a deputy is the person's spouse, they may have agreed in the past to keep all funds in a joint bank account. In these circumstances, it may be possible to continue this arrangement but it may not be advisable because it would be difficult to avoid mistakes or confusion.
- 9.8.14 Inform the Office of the Public Guardian on changes in contact details.  
Deputies must inform the Office of the Public Guardian of any changes in their or the person's contact details.

**Scenario 42**

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

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

## 9.9 Reimbursing Deputies

Deputies are entitled to be reimbursed for reasonable expenses incurred when performing their duties.

## 9.10 Supervising Deputies

9.10.1 Deputies are answerable to the court.

9.10.2 The Office of the Public Guardian also helps the court to supervise deputies to carry out their duties. The court may require deputies to submit reports to the Public Guardian.

9.10.3 The court may require the deputy to provide security; e.g. a security bond, to the Public Guardian. This may be required to protect the person lacking capacity in certain circumstances; e.g. where deputies are responsible for managing assets and losses are incurred because of their behaviour.

## 9.11 Restrictions on Deputies

### 9.11.1 General Restrictions

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

### 9.11.2 Specific Restrictions

a. Deputies cannot be given powers to:

- prohibit a named person from having contact with the person who lacks capacity, or
- direct the individual responsible for the person's health care to allow another person to take over that responsibility,

b. Deputies cannot be given powers to:

- Make gifts of the person's property,
- Execute a will for the person,
- Carry out or continue life-sustaining treatment on the person (whether or not it amounts to extraordinary life-sustaining treatment within the meaning of section 2 Advanced Medical Directive Act), or
- Carry out or continue any other treatment on the person which an individual providing health care reasonably believes is necessary to prevent a serious deterioration in the person's condition, and

- Make any decision on the person's behalf which is inconsistent with a decision of a donee of the person's LPA which is made within the scope of the donee's authority and in accordance with the Act.

### c. Acts of Restraint

Deputies cannot do an act that is intended to restrain the person unless all of the following four conditions are met:

- they are acting within the scope of authority expressly granted by the court,
- the person lacks or they reasonably believe that he lacks capacity to decide the matter in question,
- the deputies reasonably believe that the act is necessary to prevent harm to the person and
- the restraining act is a proportionate (balanced) response to the likelihood of the person suffering harm and the seriousness of that harm.

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

## 9.12 Members of Committee of Person or Committee of Estate appointed under the Mental Disorders and Treatment Act Deemed to be Deputies

9.12.1 Under the Mental Disorders and Treatment Act (now repealed), a Committee of Person or a Committee of Estate could be appointed by the court to make certain decisions on behalf of a person suffering from a mental disorder.

9.12.2 Persons serving on existing committees when the Mental Capacity Act came into force on [DDMMYYYY] will be considered deputies appointed by the court to act jointly when making decisions on behalf of the person lacking capacity. They will have the same powers and functions they previously enjoyed on the Committees.

Any pending application to court to appoint a Committee of Person or a Committee of Estate will be treated as an application to appoint the members of the Committee as deputies to act jointly when making decisions for the person who lacks capacity.



## COURT APPLICATIONS

### 9.13 Court's Permission to Make Applications

9.13.1 Generally, before an application can be made to the court under the Act, the court's permission must be obtained. However, the following individuals can make applications to the court without the court's permission:

- a. a person who lacks, or is alleged to lack, capacity, and if that person is aged below 21 years, anyone with parental rights with respect to him,
- b. the donor or a donee of an LPA to which the application relates,
- c. a deputy appointed by the court for a person to whom the application relates,
- d. a person named in an existing court order, if the application relates to the order,
- e. the Public Guardian where it appears to him that
  - a person lacks capacity,
  - no application has been made or is likely to be made for an order under the Act, and
  - an order under the Act is necessary for the protection of the personal welfare, property or affairs of the person.
- f. [others to be inserted, if any under Rules of Court to be made].

9.13.2 Anyone else who wishes to apply to the court for any order to be made under the Act must first obtain the court's permission to make the application.

9.13.3 The court will consider the following factors in deciding whether to grant its permission:

- a. the applicant's connection with the person to whom the application relates,
- b. the reasons for the application,
- c. the benefit to the person to whom the application relates of a proposed order or directions, and
- d. whether the benefit can be achieved in any other way

[section 38(3) *Mental Capacity Act*].

#### Scenario 43

Sally Teo made and registered an LPA appointing her husband, Joe Krishnan, to be her donee for all matters, personal welfare as well as property and affairs. She is injured in a traffic accident and is now in a coma. Joe has decided to place her in a nursing home because he has to work and he is not in favour of engaging full-time caregivers to take care of Sally at home. Sally's parents, Mr and Mrs Teo Chee Meng, disagree with the decision. They do not want Sally to be looked after by strangers in a strange environment. They want to move her to their home to live with them.

*If Mr and Mrs Teo wish to apply to the court for an order that Sally should be moved to their home instead of a nursing home, they will have to first seek the court's permission to make the application for the order.*

## 10. Protecting People Who Are Unable to Make Decisions for Themselves

### 10.1 Key Details

10.1.1 People who are unable to make decisions for themselves because they lack mental capacity are a vulnerable group in society. They may not even be aware that they are being ill-treated. The *Mental Capacity Act* has created a new criminal offence of ill-treatment that covers physical, sexual and emotional abuse.

10.1.2 Anyone who knows, suspects or believes that a person who lacks capacity is not properly looked after or needs care or protection may report this to the Public Guardian (where a deputy and/or donee has been appointed) and the appropriate bodies (see the table at the end of this chapter).

10.1.3 If there is good reason to suspect that a crime has been committed against the person, the report should be made to the police.

10.1.4 To encourage individuals to report suspected ill-treatment, the identity of whistle-blowers will not be disclosed in court proceedings.

10.1.5 Healthcare workers who make such reports will not be in breach of their professional ethical codes when they report such cases.

### 10.2 Ill-Treatment – A Criminal Offence in the Mental Capacity Act

10.2.1 Section 42 of the *Mental Capacity Act* criminalises the ill-treatment of persons over the age of 16 who lack mental capacity or whom the offender reasonably believes lacks mental capacity. The Children and Young Persons Act criminalises ill-treatment of persons under 16 years old.

10.2.2 Under the *Mental Capacity Act*, ill-treatment of a person is defined as:

- a. physical abuse of the person,
- b. sexual abuse of the person,
- c. any wilful or unreasonable act by the offender, or which the offender causes the person to do, that endangers or is likely to endanger the person's safety, or is likely to cause the person any:
  - unnecessary physical pain, suffering or injury,
  - emotional injury, or
  - injury to health or development,
- d. wilful or unreasonable neglect, abandonment or exposure of the person with the intent to abandon the person, or in circumstances that are likely to endanger the person's safety, or to cause the person any:
  - unnecessary physical pain, suffering or injury,
  - emotional injury, or
  - injury to health or development.

- e. Neglect occurs when the offender fails to provide adequate supplies of any of the following:
- food,
  - clothing,
  - medical aid,
  - lodging,
  - care, or
  - other necessities of life.

#### Types of Ill-treatment Examples

1. Physical	<ul style="list-style-type: none"> <li>• Slapping, hitting, pushing and other forms of violence.</li> <li>• Inappropriate punishment; e.g. denying the person a meal.</li> </ul>
2. Sexual	<ul style="list-style-type: none"> <li>• Rape.</li> <li>• Sexual touching.</li> <li>• Procure sexual activities with a person who suffers from some mental disability whose consent is obtained through inducement, threat or deception.</li> </ul>
3. Financial	<ul style="list-style-type: none"> <li>• Theft.</li> <li>• Cheating.</li> <li>• Neglect; e.g. refusal to financially support where there is a duty to.</li> </ul>
4. Psychological	<ul style="list-style-type: none"> <li>• Emotional abuse.</li> <li>• Threats of harm, restraint or abandonment.</li> <li>• Refusing contact with other people.</li> <li>• Intimidation.</li> </ul>
5. Neglect and omission	<ul style="list-style-type: none"> <li>• Ignoring a person's health or physical care needs.</li> <li>• Withholding food, water or medication</li> </ul>

#### 10.2.3 Section 42 applies where the offender is:

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

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

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

#### Scenario 44

Trina Gan's only living relative is her aunt, Sherlin Quek. Trina's parents passed away when she was 7 years old and Sherlin raised her. Sherlin suffered a stroke that left her with permanent brain damage and partial paralysis. Sherlin recently moved into Trina's home and Trina has employed Sara to care for Sherlin. Before Sherlin moved into her home, Trina lived the high life, regularly holding parties at home. This is no longer possible. Trina's disposable income is substantially reduced because of the cost of Sherlin's medication, medical and hospitalisation bills and Sara's wages. At

first, Trina did not mind having Sherlin in her home but she soon feels bitter. Trina instructs Sara to stop Sherlin's medication to save costs.

She eventually terminates Sara's employment to further reduce her expenses, leaving Sherlin to fend for herself in the daytime while she is at work. Sherlin develops bedsores and dehydration. Trina admits Sherlin to hospital when Sherlin becomes critically ill. The doctor finds that Sherlin is malnourished and her condition has deteriorated as a result of the deprivation of medication.

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

### 10.3 Penalties for Ill-Treatment

10.3.1 If the person dies, a fine not exceeding \$20,000 or imprisonment of up to 7 years, or both.

10.3.2 In all other cases, a fine not exceeding \$4,000 or imprisonment of up to 4 years, or both.

10.3.3 The court may choose not to apply the punishments above. Instead the court may require the offender to execute a bond to ensure his good behaviour for a period of time, and may impose a condition that the offender undergoes counselling, psychotherapy or other programme.

10.3.4 If the offender ordered to execute the bond fails to comply with any of its conditions, he or she will be subject to:

- a. the penalty, if the bond was ordered instead of a penalty, or
- b. a further fine not exceeding \$20,000 and/or a further term of imprisonment up to 7 years, if the bond is in addition to any penalty.

### 10.4 Other Legislation That Protects Persons Who Lack Capacity From Abuse

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

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

## 10.5 The Office of the Public Guardian (OPG)

### 10.5.1 General

- a. The *Mental Capacity Act* creates the new officer, the Public Guardian [section 30], and the Public Guardian Board [section 33].
- b. The Public Guardian Board has a duty to ensure that the Public Guardian is properly carrying out the functions listed below [section 33].

### 10.5.2 Functions of the Public Guardian

The functions of the Public Guardian are:

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

### 10.5.3 Registering LPAs and Investigating Complaints Against Donees

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

### 10.5.4 Supervising Deputies

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

### 10.5.5 Investigation & Related Offences

- a. The *Mental Capacity Act* confers considerable powers of investigation on the Public Guardian.
- b. These powers include requiring anyone with information about a person who lacks capacity to provide to the Public Guardian information and documents relating to that person.
- c. The Public Guardian may also require the individual with the information to attend at a specific time and place to provide the information orally, in writing or hand over relevant documents relating to the person who lacks capacity.
- d. Failure to comply with these requests for information and documentation is a criminal offence punishable with a fine not exceeding \$5,000 or imprisonment of up to 12 months, or both. Offenders that continue to refuse to comply will be fined up to \$50 per day [Section 32(6) *Mental Capacity Act*].
- e. A person charged under section 32(6) *Mental Capacity Act* may raise the defence of reasonable excuse for failure to comply with the Public Guardian's requests.
- f. A person commits a criminal offence if he:
  - knowingly or recklessly provides the Public Guardian with information or documentation where a relevant detail is false or misleading, or
  - wilfully changes, hides or destroys any document or part of any document that is required to be provided under the *Mental Capacity Act*.

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

## 10.6 The Board of Visitors

### 10.6.1 The role of the Visitors on the Board of Visitors are to:

- a. visit persons who lack capacity, donees or deputies as

may be directed by the Public Guardian, and report to the Public Guardian,

- b. provide independent advice to the court and the Public Guardian about how anyone given the power under the Act is and should be carrying out their duties and responsibilities, and
- c. check on the well-being of the person who lacks capacity.

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

10.6.3 There are 2 types of visitors:

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

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

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

#### Scenario 45

Mr Freddie Fong made and registered an LPA appointing his son, Danny, as his donee to make financial affairs decisions. Mr Fong loses capacity to make his own financial decisions when he falls ill and Danny has taken control of Mr Fong's bank accounts.

Mr Fong's daughter, Jenny, suspects that Danny is using their father's money to pay off his gambling debts. She contacts the Office of the Public Guardian (OPG) and the OPG sends a General Visitor to visit Mr Fong and Danny. The Visitor will assess the facts and make a report. If appropriate, the Visitor may recommend that an application be made to the court to consider whether Danny has breached his duties as donee or not acted in Mr Fong's best interests.

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

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

## 10.7 Reporting Suspected Abuse & Protection for Those Who Report Suspected Abuse

10.7.1 Some possible indications that a person who lacks capacity may be ill-treated or exploited are:

- a. physical signs like injuries and bruises
- b. relatives and friends are prevented from contacting or visiting the person
- c. social care or healthcare staff are prevented from seeing or treating the person
- d. the person is removed from hospital against medical advice
- e. there have been sudden changes in the person's living arrangements (e.g. he is moved to a home without consultation with family members)
- f. the person's unpaid bills (e.g. medical bills or residential or daycare charges)
- g. the person's unusual expenses (e.g. spending on services or things which the person obviously does not need)
- h. the person's funds or assets are transferred to others or out of the country.

10.7.2 Anyone who knows, suspects or believes that a person who lacks capacity is not properly looked after, needs care or protection may report this to the Public Guardian (where a deputy and/or donee has been appointed) and the appropriate bodies (see the table at the end of this chapter).

10.7.3 If there is good reason to suspect that a crime has been committed against the person, the report should be made to the police.

10.7.4 Health care workers who inform the OPG of their suspicions that a person who lacks capacity needs care or protection will not breach their professional code of ethics or standard of professional code [section 43(2) *Mental Capacity Act*].

10.7.5 For the purposes of section 43(2), health care workers are defined as doctors, nurses, dentists, psychologists, pharmacists, therapists, social workers, counsellors, attendants and any other persons providing health care services.

10.7.6 Witnesses in court proceedings do not have to identify the individual who reported the suspected ill-treatment to the OPG or to produce any report that is likely to identify that individual.

10.7.7 Individuals concerned about how a donee or deputy is carrying out his duties should contact to the OPG.



**Scenario 46**

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

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

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

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

**Types of Abuse Who to Contact for Help**

1. Physical	<ul style="list-style-type: none"> <li>Police</li> <li>Family Service Centre</li> <li>OPG (where there is a donee or deputy appointed)</li> </ul>
2. Sexual	<ul style="list-style-type: none"> <li>Police</li> <li>OPG (where there is a donee or deputy appointed)</li> </ul>
3. Financial	<ul style="list-style-type: none"> <li>Police</li> <li>Family Service Centre</li> <li>Tribunal for the Maintenance of Parents (failure to financially support parents)</li> <li>OPG (where there is a donee or deputy appointed)</li> </ul>
4. Psychological	<ul style="list-style-type: none"> <li>Police</li> <li>Family Service Centre</li> <li>OPG (where there is a donee or deputy appointed)</li> </ul>
5. Neglect and acts of omission	<ul style="list-style-type: none"> <li>Police</li> <li>OPG df</li> </ul>

**11. Dispute Resolution****11.1 Key Details**

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

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

**11.2 Types of Disputes**

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

**11.3 Parties to the Dispute**

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

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

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



## 11.4 Methods of Resolving Disputes Without Going to Court

### 11.4.1 Effective Communication

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

### 11.4.2 Mediation

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

To find out more about mediation, contact:

- [the Singapore Mediation Centre at I Supreme Court Lane Level 4 Singapore 178879 (Tel 6332 4366). Their website is: <http://www.mediation.com.sg>. Or,
- the Community Mediation Centre at URA Centre, East Wing, 45 Maxwell Road #01-13 Singapore 069118 (Tel: 6325 1600). Their website is: <http://notesapp.internet.gov.sg/48256E09003B1AF3.nsf/>.]

#### Scenario 47

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

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

### 11.4.3 Disputes with Professionals

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

- a. Getting a second opinion (for medical and legal matters)
  - Sometimes a family member may not agree with a decision made by a donee or deputy made for the person who lacks capacity based on medical advice given by the person's doctor. It may help them to resolve the disagreement by getting a second opinion from another doctor.
  - The same applies for legal matters. For example, a donee for property and affairs wants to act in a particular way on legal advice given by a lawyer. The other donee disagrees with this advice. The disagreement may be resolved by getting a second opinion from another lawyer.
- b. Case conferences
  - This conference enables all the parties in the dispute to meet and talk about the matter. Healthcare staff and other professionals should explain clearly the options available; give their opinion and reasons to support that opinion.
  - Meeting with senior medical staff members
    - o Senior medical staff members may be invited to provide a second opinion.
  - Giving the family members time to think through the situation
    - o This option is only available if it is not an emergency.
  - Making an official complaint
    - o When making a complaint about a health professional, you should contact the:
      - Health professional's employer, and
      - Professional board, council or association representing that profession.

#### Who is the complaint about? Who to contact

1. Donee or deputy	• Office of the Public Guardian (OPG)
2. Health professionals	• Ministry of Health • Organisation employing the health professional
• Doctors	• Singapore Medical Council or the Singapore Medical Association
• Nurses and midwives	• Singapore Nursing Board
• Dentists	• Singapore Dental Council • Singapore Dental Association
3. Social worker	• Organisation employing the social worker • Singapore Association of Social Workers

The websites of some of these organisations provide more information.

### 11.5 Taking Legal Action to Resolve a Dispute

- You may consult a lawyer if you wish. You can get a list of qualified lawyers from The Law Society.
- Legal aid is available to Singaporeans and Permanent Residents who satisfy the means test applied by the Legal Aid Bureau. To find out more about what kind of help is available, whether you qualify and what you may have to contribute, go to The Legal Aid Bureau.

### 11.6 Matters that can only be Settled by the Court

Some matters are so serious, that only the court can settle them. Examples include the following types of decision:

- cases where it is uncertain whether the treatment decision is in the patient's best interests, and

- cases where there is conflict between healthcare staff or between healthcare staff and family members that cannot be resolved.

#### Scenario 48

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

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

### 11.7 Contact List

Organisation	Telephone	Address	Website
Office of the Public Guardian	6226 6222	**	<a href="http://www.opg.gov.sg">www.opg.gov.sg</a>
Singapore Association of Social Workers	6778 7922	Block 324, Clementi Avenue 5, #01-209, Singapore 120324.	<a href="http://www.sasw.org.sg">www.sasw.org.sg</a>
Singapore Dental Council	6372 3087	16 College Road, #01-01 College of Medicine Building, Singapore 169854.	<a href="http://www.sdc.gov.sg">www.sdc.gov.sg</a>
Singapore Dental Association	6220 2588	2 College Road, Level 2 Alumni Medical Centre, Singapore 169850.	<a href="http://www.sda.org.sg">www.sda.org.sg</a>
Community Mediation Centre	6325 1600	URA Centre, East Wing, 45 Maxwell Road #01-13, Singapore 069118	<a href="http://www.notesapp.internet.gov.sg/_48256E09003B1AF3.nsf/">www.notesapp.internet.gov.sg/_48256E09003B1AF3.nsf/</a>
Singapore Mediation Centre	6332 4366	1 Supreme Court Lane, Level 4, Singapore 178879	<a href="http://www.mediation.com.sg">www.mediation.com.sg</a>
Singapore Medical Council	6372 3065	16 College Road, #01-01 College of Medicine Building, Singapore 169854.	<a href="http://www.smc.gov.sg">www.smc.gov.sg</a>
Singapore Medical Association	6223 1264	2 College Road, Level 2, Alumni Medical Centre, Singapore 169850.	<a href="http://www.sma.org.sg">www.sma.org.sg</a>
Singapore Nursing Board	6372 3082	16 College Road, #01-01 College of Medicine Building, Singapore 169854.	<a href="http://www.snb.gov.sg">www.snb.gov.sg</a>
The Legal Aid Bureau	1800 325 1424	45 Maxwell Rd, #08-12 URA Centre, East Wing, Singapore 069118.	<a href="http://www.app.minlaw.gov.sg/lab">www.app.minlaw.gov.sg/lab</a>
The Law Society	6538 2500	39 South Bridge Road, Singapore 058673.	<a href="http://www.lawsociety.org.sg">www.lawsociety.org.sg</a>