

Everything you need to know about a Lasting Power of Attorney

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I. Introduction

1 In 2018, approximately 82,000 seniors suffered from dementia,¹ which impairs one's capacity to make decisions independently.² With Singapore's growing ageing population, this number is only expected to increase. Hence, it is incumbent on us to be well-equipped to care for our elderly when they lack the capacity to do so. The Lasting Power of Attorney ("LPA") has become a popular tool used under such circumstances, as reflected by the increasing number of LPA applications in Singapore from 8,000 registered in 2015 to almost 24,500 in 2019.³

2 Though a useful tool that safeguards one's autonomy in the event of loss of mental capacity, the power entrusted to the donee could be wielded for their own personal gains. Hence, loved ones of seniors with registered LPAs should be aware of how LPAs work to prevent vulnerable seniors from being taken advantage of.

3 This article will first explain what an LPA is, before discussing the assessment of mental capacity which is governed by the Mental Capacity Act ("MCA"). Lastly, the risks involved in the administration of LPAs will be considered. Loved ones of those with LPAs should be aware of this to better protect donors under an LPA.

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¹ Pratika Satghare, Siow Ann Chong, Janhavi Vaingankar, Louisa Picco, Edimansyah Abdin, Boon Yiang Chua, and Mythily Subramaniam, "Prevalence and Correlates of Pain in People Aged 60 Years and above in Singapore: Results from the WiSE" (2016) Pain Research and Management.

² Soumya Hegde & Ratnavalli Ellajosyula, "Capacity issues and decision-making in dementia" (2016) Annals of Indian Academy of Neurology; 19, p34-S39.

³ Singapore's Public Data website <https://data.gov.sg/dataset/number-of-lpas-registered?resource_id=10a99555-981d-4cfd-9118-ad233613f2b9> (Accessed 15 October).

II. Understanding the LPA

A. *What is an LPA*

4 Under the MCA, an LPA is where the applicant (“the donor”) confers upon another person (“the donee”) the authority to make decisions regarding their personal welfare and/or property and affairs when they do not have the capacity to do so.⁴

5 Wills are more well-known as tools for estate planning. However, LPAs can be said to be of equivalent importance. Though both tools safeguard a person’s autonomy in case of unforeseen circumstances, they serve different functions and are not substitutes for each other. A will only takes effect upon death. More importantly, it does not deal with the management of one’s affairs upon loss of mental capacity. As such, LPAs work in tandem with wills to create a more comprehensive estate plan and are thus an important aspect in protecting one’s interests.

B. *Invoking an LPA: Mental Capacity*

6 In assessing mental capacity, the starting point is that a person is assumed to have capacity unless otherwise established.⁵ As such, the LPA only takes effect when the donor lacks capacity, or the donee reasonably believes that the donor lacks capacity.⁶

7 There are two components for the assessment of mental capacity under section 4(1) of the MCA: the clinical component of whether an individual has an impairment or disturbance in the functioning of their mind, and the functional component of whether this impairment causes the donor to be unable to make a decision.⁷ The clinical component entails a medical examination and will not be the focus of this article.

8 Section 5(1) of the MCA discusses the functional component. A person who lacks mental capacity is one who is unable to (a) understand the information relevant to the decision, (b) retain that information, (c) use or weigh that information in the process of making the

⁴ Section 11 of the Mental Capacity Act (Cap 177A, 2010 Rev Ed).

⁵ Section 3(2) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed).

⁶ Section 13(1) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed).

⁷ *Re BKR* [2015] SGCA 26 at [134].

decision, or (d) to communicate their decision (“the four requirements”).⁸ A deficiency in any of the four requirements would indicate lack of mental capacity.⁹

9 Thus, in *BUV v BUU*, it was held that the donor lacked mental capacity in relation to her personal welfare, property and affairs, as she failed three of the four requirements.¹⁰ During cross-examination, the donor was unable to recall answers she had just given moments before,¹¹ and could not give consistent answers about basic information like her family members upon questioning.¹² This indicated a failure of requirement (b). Further, the donor was unable to follow simple questions given to her and would often digress from them.¹³ These were taken to indicate deficiencies in requirements (a) and (c), as the donor was unable to comprehend the nature of the situation she was in, and the questions given to her.¹⁴

10 With regard to requirement (b), it should be noted that it would be sufficient if the donor “remembers the information for a short period of time, as long as they remember it long enough to understand it, weigh it up and communicate their decision”.¹⁵ Even if the donor has occasional lapses in memory, it would be sufficient if they are able to communicate their reasons for making a decision at the time the decision is made.¹⁶

11 It is also stipulated by the MCA that a person is not to be treated as lacking capacity to make a decision unless “all practicable steps to help him to do so have been taken without success”.¹⁷ What this means is that facilitative assistance which enables the donor to make a decision must be given before making a judgement on a donor’s lack of mental capacity.¹⁸ This could entail simplifying the information in ways that are easier for the donor to understand,

⁸ Section 5(1) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed).

⁹ *Re BKR* [2013] SGHC 201, at [71].

¹⁰ *BUV v BUU and another and another matter* [2020] 3 SLR 1041 (“*BUV v BUU*”), at [109].

¹¹ *Id.*, at [42].

¹² *Id.*, at [45].

¹³ *Id.*, at [46].

¹⁴ *Id.*, at [47].

¹⁵ *Supra* n 15, at para 4.6.2.

¹⁶ *Id.*, at para 4.6.2.

¹⁷ Section 3(3) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed).

¹⁸ *Id.*, at [110].

using tools like diagrams or photographs to help retain information, or even providing alternative forms of communication to ensure that the donor is able to communicate.¹⁹

C. Risks involved in administering an LPA

12 A donee under an LPA can only make decisions on the donor's behalf if he reasonably believes that the donor lacks capacity.²⁰ Hence, close attention should be paid to seniors who possess an LPA to make sure that they are not being taken advantage of and that decisions made on their behalf by the appointed donee are in their best interests. For example, the appointed donee must take into consideration the donor's beliefs and values when making any decisions for the donor. If the donor was a devout Buddhist who did not eat meat and had previously expressed her preference for a Buddhist nursing home, the donee must respect that when making arrangements for the donor who has been found to lack capacity.²¹

13 Where the donor is found to lack mental capacity in making a decision, any acts done or decisions made on their behalf must also be done or made in their best interests.²² In determining the donor's best interests, the donee must not make their decisions purely based off the donor's age or appearance, or any condition or aspect of behaviour which might lead others to make unjustified assumptions of their capacity.²³ Behaviour that may seem unusual to others, like talking to oneself, inappropriate laughing, or shouting, could lead others to make assumptions of a donor's capacity. However, this must not be the basis on which a donee acts or makes a decision on behalf of the donor.²⁴

14 Should one suspect that decisions have not been made in a donor's best interests, or that the donor is being taken advantage of, the MCA's Code of Practice should be referred to. It is a comprehensive guide that lists out various scenarios where a donee's actions would be considered a violation of the MCA. Though the Code of Practice is not the law, the guidelines laid out should be followed, and contravention of the guidelines may be used in court as evidence of the donee's violation of the MCA.

¹⁹ *Supra* n 15, at p 20-23.

²⁰ Section 13(1) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed).

²¹ *Supra* n 15, at para 6.5.3.

²² Section 3(5) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed).

²³ Section 6(1) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed).

²⁴ *Supra* n 15, at para 6.4.

15 If the donee is found to have ill-treated the donor in violation of the MCA, he could be subject to fines of up to \$40,000 or imprisonment for a term of up to 14 years.²⁵

III. Conclusion

16 All in all, the value of an LPA lies in the autonomy it imparts on our loved ones before their mental capacity has been compromised. Though it is a powerful tool that can be used to respect a donor's wishes, it could also be taken advantage of if wielded by the wrong person in a wrongful manner. Hence, loved ones of the elderly should consider the option of LPAs early to enable the elderly to make the best decisions for themselves while they are able to do so.

²⁵ Section 42(6) of the Mental Capacity Act (Cap 177A, 2010 Rev Ed).