

The Remembrance and the Forgetting: Singapore's Mental Capacity Act, Nine Years On¹

I. Introduction

1. Like most developed nations, Singapore has a gradually aging population.² The proliferation of this new demographic profile raises a host of pressing issues, particularly that of rising incidences of dementia among the aged.³ Given that many of those who might suffer from dementia will have accumulated considerable assets and are therefore at risk of being the victims of fraud, there is thus a need for legislation that adequately protects this vulnerable group of persons.
2. The main legislative instrument that deals with assessing mental capacity and its consequences is the Mental Capacity Act (“MCA”),⁴ which was passed in 2008 and subsequently revised in 2010. The introduction of the MCA is indeed timely, as there have been incidences of fraud committed against persons with mental incapacity even after the MCA was introduced. A poignant example would be the protracted Yang Yin saga where the titular tour guide was convicted for nine years for cheating the wealthy elderly widow Chung Khin Chun of S\$1.1 million.⁵
3. This article discusses the inception and purpose of the MCA, and reviews the state of the law as it presently stands.

II. Shortcomings of the MCA's predecessor

4. The predecessor of the MCA is the Mental Disorders and Treatment Act (“MDTA”),⁶ whose origin may be traced back to the Straits Settlements Mental Ordinance 1935.⁷

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² Kelly Ng, “Singapore feeling impact of rapidly ageing population” *Today* (1 July 2015) <<http://www.todayonline.com/singapore/singapore-feeling-impact-rapidly-ageing-population>> (accessed 1 September 2017).

³ Janice Tai, “One in 10 people over 60 have dementia, new Singapore study claims” *Straits Times* (25 March 2015) <<http://www.straitstimes.com/singapore/health/one-in-10-people-over-60-have-dementia-new-singapore-study-claims>> (accessed 1 September 2017).

⁴ Mental Capacity Act (Cap 177A, 2010 Rev Ed) (“MCA”).

⁵ Lee Min Kok, ‘Yang Yin saga: A recap of the case’ *The Straits Times* (29 September 2016) <<http://www.straitstimes.com/singapore/courts-crime/yang-yin-saga-a-full-recap-of-the-case>> (accessed 1 September 2017).

⁶ Mental Disorders and Treatment Act (Cap 178, 1987 Rev Ed) (“MDTA”).

⁷ Ordinance 33 of 1935 of the Straits Settlements (Cap 44, Rev Ed 1935 of the Laws of the Straits Settlements).

The statutory procedure provided for in the MDTA had an even older lineage, being patterned largely on the 19th century English Lunacy Acts.⁸ Given the antiquated origin of the old MDTA, it had become outdated and inadequate⁹ in dealing with the two fundamental questions underlying any legislation on mentally incapacitated individuals:

- a. How is a person's mental capacity to be assessed?
- b. If a person is found to be mentally incapacitated, how is he/she going to be looked after?¹⁰

5. First, the MDTA equated mental illnesses with mental incapacity.¹¹ This approach failed to reflect the reality that most persons today are mentally incapacitated not because of a clinical illness but due to old age.¹² Moreover, the old MDTA requirement for a mentally incapacitated person to be of “unsound mind *and* incapable of managing himself and his affairs” was seen as overly strict since *both* conditions must be satisfied before the Court can make a finding of mental incapacity, restricting the scope of curial intervention.¹³ It was also criticised as being inflexible since a court can only make a general determination of mental capacity, while the reality is that a person may only be incapable of making rational decisions in some specific areas of his life but not others. For instance, the English Court of Appeal held that a patient suffering from chronic paranoid schizophrenia was still sufficiently competent to make decisions regarding his medical treatment.¹⁴
6. Secondly, even where a Committee of the Persons or Estate could be appointed by the Court to manage the welfare and finances of an individual of “unsound mind”, there were inadequate safeguards against abuse since the duties of the guardians and trustees were insufficiently defined.¹⁵ The actions of such a committee were also not subject to judicial or other governmental scrutiny.¹⁶ More importantly, there was no mechanism

⁸ Law Reform Committee, Singapore Academy of Law, *The Report of the Sub-Committee of the Law Reform Committee of the Singapore Academy of Law for the Review of Proceedings under the Mental Disorders & Treatment Act (Cap. 178)* (November 1999) (“LRC Report”), at [8].

⁹ *Id.*, at [16].

¹⁰ LRC Report, *supra* n 8.

¹¹ LRC Report, *supra* n 8, at [16]; MDTA, *supra* n 6, s 2.

¹² LRC Report, *supra* n 8.

¹³ LRC Report, *supra* n 8, at [17].

¹⁴ *In re C (Adult: Refusal of Treatment)* [1994] WLR 290 (Fam.).

¹⁵ LRC Report, *supra* n 8, at [17] and [19].

¹⁶ LRC Report, *supra* n 8, at [17] and [19].

for individuals to appoint in advance another person to tend to their affairs, should they lose capacity later on.¹⁷

III. Key provisions of the MCA

7. Given the abovementioned shortcomings of the pre-existing regime, the MCA was passed in 2010 to replace the MDTA and address the existing lacunae in the legal system.
8. The MCA was inspired by its English counterpart, the UK Mental Capacity Act 2005.¹⁸ Section 3 of the MCA sets out a list of overarching principles relating to the assessment of capacity and the protection of persons who lack capacity. These principles emphasise individual autonomy where possible,¹⁹ but ultimately fall back on a paternalistic approach that requires decisions to be made in the “best interests” of a person who lacks capacity.²⁰
9. Section 4(1) envisages a two-stage enquiry to assessing mental capacity: first, whether a person is suffering from an impairment of, or disturbance in the functioning of the mind or brain (“the diagnostic threshold”); and secondly, whether the impairment or disturbance causes the person to be unable to make a decision when he needs to (“the functional test”).²¹ The first stage, involving an objective clinical impairment, was included so that the test for incapacity would be stringent enough not to catch persons who simply make unwise or unusual decisions.²² The relevant factors for consideration under the second stage include whether a person is unable to understand or retain information relevant to a decision, and are laid out in s 5 of the MCA. The approach taken by the MCA in assessing capacity is therefore superior to that in the MDTA because it acknowledges the reality that mental incapacity is contextual – a patient may only be irrational with regards to certain areas of his life and not others. Thus, the

¹⁷ *LRC Report*, *supra* n 8, at [17] and [19].

¹⁸ Denzil Lush, “Mental Capacity Act – A New Framework”, *Law Gazette* (2010) <<http://www.lawgazette.com.sg/2010-05/feature2.htm>> (accessed 1 September 2017); Mental Capacity Act 2005 (c 9) (UK).

¹⁹ Denzil Lush, *supra* n 18 s 3.

²⁰ MCA, *supra* n 4, s 3(5).

²¹ Denzil Lush, *supra* n 18; MCA, *supra* n 4, s 5(1).

²² Denzil Lush, *supra* n 18.

functional test balances the need for curial intervention with the need to respect the patient's autonomy.

10. If an individual is found to lack capacity, s 6 of the MCA then provides further guidance on determining what course of action is in his or her "best interests".²³ This includes considering, for example, whether he or she will at some time in future have capacity in relation to the matter in question.²⁴ Given the MCA's aforementioned focus on individual autonomy, a person lacking capacity must also be permitted or encouraged to participate as far as possible in any decisions affecting him.²⁵
11. More importantly, Part IV of the MCA also establishes a new statutory mechanism called a Lasting Power of Attorney ("**LPA**").²⁶ This is a power of attorney that allows individuals to confer authority in advance on a donee, who will make decisions on their behalf when they no longer have the requisite mental capacity.²⁷ There is therefore no need for judicial intervention in such cases.²⁸

IV. Subsequent developments

12. The MCA, now nine years in force, has indeed proven capable of responding to the needs that arose with Singapore's new demographic landscape. This is seen, most recently, in the Court of Appeal's decision of *Re BKR*.
13. In *Re BKR*, the Court affirmed the test of incapacity under s 4 of the MCA as being a two-stage enquiry.²⁹ The case concerned an application for a declaration that the third respondent ("BKR") was mentally incapable of making decisions as to her property and affairs and deputies should be appointed to make all decisions relating to her property and affairs on her behalf. The application was made by BKR's sisters, and was opposed by BKR herself and her youngest daughter and son-in-law. The Court clarified that the "diagnostic threshold" (referred to in *Re BKR* as the "clinical" component) is the

²³ MCA, *supra* n 4, s 6.

²⁴ MCA, *supra* n 4, s 6(3).

²⁵ MCA, *supra* n 4, s 6(4).

²⁶ MCA, *supra* n 4, Part IV.

²⁷ MCA, *supra* n 4, s 11.

²⁸ In the absence of the LPA statutory mechanism, a person would not be able to plan ahead and curial intervention might be resorted to in the event that an individual is found to lack mental capacity.

²⁹ *Re BKR* [2015] 4 SLR 81 ("**Re BKR**") at [55].

purview of medical experts, while the “functional test” remains a question for the court to decide.³⁰ It also stressed a causal connection between the first and second stages of the test – hence, the mental impairment must have been a cause of the inability to make decision.³¹

14. Laudably, in *Re BKR* the Court has also eschewed a theoretical approach to assessing mental capacity in favour of a practical one. Instead of assessing a person’s decision-making skills in a vacuum, the Court must take into account a person’s actual circumstances in assessing his mental capacity.³² This approach is significant, given that a considerable number of cases concerning the MCA involve situations where the person with the mental incapacity also faces undue influence from the party seeking to exploit him/her.³³
15. Last but not least, the Court also expressed in *Re BKR* its distaste for an adversarial approach when it comes to the assessment of mental capacity, instead favouring a more inquisitorial system where independent experts assess the mental capacity of the relevant persons.³⁴ This approach is to be welcomed. It not only gives greater weight to the best interests of persons lacking capacity, but would also save on the time and costs associated with an adversarial approach.³⁵
16. In addition to case law that elucidates on the workings of the MCA, Parliament has also actively sought to augment the MCA. Recent amendments to the MCA in 2016 have introduced “professional donees” and “professional deputies”, who provide deputyship services for remuneration.³⁶ These new statutory mechanisms target the growing group of elderly singles or childless couples who may not have family members or close friends to rely on as proxy decision-makers.³⁷ In addition, these new statutory

³⁰ *Id.*, at [134].

³¹ *Id.*, at [55].

³² See Kwang Guan and Ng Bin Hong, “Clarifications on the Mental Capacity Act”, Singapore Law Blog (8 June 2015) (<http://www.singaporelawblog.sg/blog/article/115>) (accessed 1 September 2017).

³³ See, for instance, *Public Prosecutor v Yang Yin* [2016] SGDC 264.

³⁴ *Re BKR*, *supra* n 28, at [212].

³⁵ See *supra* n 31.

³⁶ Mental Capacity (Amendment) Act 2016 (No 10 of 2016) (“**MCA Amendment**”) s 2. The MCA Amendment would also come into operation on a date that the Minister appoints by notification in the Gazette: MCA Amendment s 1. As of the date of the publication of this article, there has been no notification issued for these provisions.

³⁷ Ministry of Social and Family Development, “Fact Sheet on Mental Capacity (Amendment) Bill 2016”, <<https://www.msf.gov.sg/media-room/Pages/Fact-Sheet-on-Mental-Capacity-Amendment-Bill-2016.aspx>> (accessed 1 September 2017).

mechanisms also cater to the increasing number of high net-worth individuals who have chosen Singapore as their investment base, or even their home.³⁸ Given the complexity of these individuals' assets, it would be in their interests that their assets be managed by other competent professionals during their infirmity.

17. Another noteworthy revision to the MCA is the extension of the Court's powers in relation to revoking a valid LPA. The pre-existing s 17 of the MCA only allowed for the LPA to be revoked under two scenarios: first, if the LPA was created because of fraud or undue influence,³⁹ or secondly, if the donee acts in a way that would contravene his authority or is not in the donor's best interests.⁴⁰ Most recently in 2016, that provision has been modified so that the LPA can be revoked if the donee is convicted of an offence "of criminal misappropriation, criminal breach of trust, cheating, theft or extortion or any other offence involving fraud or dishonesty, whether as against P or another person", either upon an application to the Court⁴¹ or on the Court's own accord.⁴² Under a new section 36A to the MCA, the Court now also has the power to suspend a donee's powers immediately if it "has reason to believe" that the donee is charged with a crime involving dishonesty, or has acted in an unsuitable way.⁴³
18. As mentioned in the Minister's Opening Speech at the second reading of the MCA amendment bill, these new powers were a parliamentary response to concerns of elderly persons being duped into trusting fraudsters with their assets, as reflected in the infamous Yang Yin case.⁴⁴ There, the tour guide Yang Yin had met the wealthy and elderly Madam Chung, and was invited to stay with her in Singapore. Inexplicably, he was named as the main beneficiary in her will in 2010, and was further appointed as Madam Chung's donee under an LPA she had allegedly made in 2012.⁴⁵ Upon a number of police reports made by Madam Chung's niece, Yang was arrested in 2014 for

³⁸ "Fall in number of Singapore's ultra-high net worth individuals: Survey" *Channel News Asia* (2 March 2016) <<http://www.channelnewsasia.com/news/singapore/fall-in-number-of-singapore-s-ultra-high-net-worth-individuals-s-8112286>> (accessed 1 September 2017).

³⁹ MCA, *supra* n 4, s 17(3)(a).

⁴⁰ MCA, *supra* n 4, s 17(3)(b).

⁴¹ MCA Amendment, *supra* n 34, s 5(b). As of the date of the publication of this article, there has been no notification issued for these provisions.

⁴² MCA Amendment, *supra* n 34, s 5. As of the date of the publication of this article, there has been no notification issued for these provisions.

⁴³ MCA Amendment, *supra* n 34, s 13. As of the date of the publication of this article, there has been no notification issued for these provisions.

⁴⁴ *Opening Speech by Mr Tan Chuan-Jin, Minister for Social and Family Development, at the Second Reading of the Mental Capacity (Amendment) Bill 2016* (14 Mar 2016) at paras 37–40.

⁴⁵ Lee Min Kok, *supra* n 5.

suspected criminal breach of trust. At the same time, Madam Chung's family finally succeeded in revoking the LPA, and making a new will for Madam Chung that left most of her assets to charity. Yang ultimately pleaded guilty to misappropriating S\$1.1 million, and was sentenced to 6 years' imprisonment.⁴⁶ With the Court's new powers of temporary suspension and revocation of the LPA on the ground of being charged with offences of dishonesty, there is now a more legally expedient procedure for persons in similar situations to combat the hold that fraudsters have over the finances of a vulnerable individual.

V. Conclusion

19. By-and-large, the MCA has proven to be a robust piece of legislation that has successfully addressed the lacunae left by the MDTA, and tackled issues that come with Singapore's changing demographic landscape. While there remains a dearth of case law on the interpretation of the MCA, it is expected that as reliance on the MCA increases, there will eventually come more decisions that can further shed light on this relatively young piece of legislation.

⁴⁶ *PP v Yang Yin* [2016] SGDC 264.