



Caring for Persons with Diminished Capacity – CERTIFYING AN LPA

Text by Dr T Thirumoorthy and Dr Giles Tan

The SMA Centre for Medical Ethics and Professionalism (CMEP) Webinar on “Certifying Lasting Power of Attorney under the Mental Capacity Act – Understanding the Issues and Avoiding the Pitfalls” was held on 30 April 2022, Saturday (12.30 pm to 4.30 pm). This was a joint collaboration between SMA, the College of Psychiatrists of the Academy of Medicine, Singapore (AMS) and the Law Society of Singapore (LSS). The start of the webinar was marked by opening addresses by the presidents of the SMA and LSS. The webinar featured four speakers (two lawyers and two doctors) and was followed by a panel discussion. We were honoured by the presence of the Public Guardian during the panel discussion.

The learning scope of the webinar included (i) the legal basis of the Lasting Power of Attorney (LPA) in the Mental Capacity Act; (ii) the various steps in certifying an LPA; (iii) appreciation of the various medical issues in mental capacity assessment of the Donor; and (iv) medical and legal red flags and pitfalls.

The poll and its analysis

There was a total of 142 participants, of which 89% were doctors. 33% of participants had completed the SMA LPA Certificate Issuers course. 40% of participants had ever issued an LPA and 20% had issued more than five in

the last year. Approximately 37% and 44% of participants were confident in doing a mental capacity assessment in general and for the LPA issuing, respectively. Another 30% were confident of completing the steps of correctly filling the LPA application. What we can conclude from the above poll results is that, although the majority of participants have not issued an LPA before, and have little confidence in mental capacity assessment and the steps in filling the LPA application, there is a strong interest to learn and improve their professional skills.

What we learnt from the lawyers

Mr Chong Yue-En covered the topic of legal nuts and bolts of the LPA Certifier. Mr Goh Kok Yeow covered the duty of care and potential liabilities of LPA Certificate Issuers (CIs).

Duties and responsibilities of LPA CIs

The first duty of the CI is to ensure that the donor has read the essential information and understands that the LPA will give authority for the donee to make decisions on the donor's behalf when he/she loses capacity, and the significance of the LPA. This means that the CI must personally interview the donor.

Next, the CI is to be aware of the duties and responsibilities, which include (i) enabling the donor to understand the

purpose of the instrument and the scope of the authority conferred; (ii) ensuring that there is no fraud or undue pressure being used to induce the donor to create the LPA; and (iii) covering all other issues that would prevent the LPA from being created. The CI should be aware of and avoid conflicts of interest in assuming the role of CI in this case.

It is important to use open-ended questions when asking the potential donor what they understand about the LPA, and to have a good understanding of the donor's family tree and their reasons for the choice of the donee(s). Adequate time ought to be spent on the donor's understanding of the scope of the authority given to the donee under Personal Welfare and Property and Affairs.

Red flags to be aware of

The common red flags to be aware of are:

1. The donor is unable to express his/her understanding when it comes to the technical legal nature of the LPA. The donor appears to be confused.
2. The donor or a relevant person informs you that the donor has a mental or cognitive impairment.
3. The relevant person who contacts you is “gatekeeping” the donor for much of the process of creating the LPA.

4. The relevant person who contacts you tries to pressure you to certify the donor quickly or hurriedly, and is uncomfortable when details and clarification are sought.
5. The relevant person who contacts you has a history of "CI-shopping" for a CI who will issue an LPA certificate when the donor's capacity is in doubt or if there is suspicion of fraud or coercion.

Apply due diligence and no shortcuts

CIs are reminded that the LPA is a legal document and that serious professional conduct issues or even tortious liabilities exist for the CI where the LPA issued cannot be registered or is revoked due to negligence. Due diligence, working within one's competence, and exercising

judgement in good faith are important steps in avoiding negative professional accountability matters. This means that the CI must be actively engaged throughout the entire process and personally witness the execution of the LPA.

There is no excuse for shortcuts or expediency, regardless of how little the fee charged for issuing the LPA Certificate. The CI must at all times fulfil his/her duty of care and meet the standard of care.

Contemporaneous and comprehensive documentation of the LPA process is an important defence in professional accountability. An LPA CI is strongly advised to make and retain notes of the donor's responses to the questions posed.

What we learnt from the doctors

Dr Aaron Ang covered the topic of "Understanding the Medical Issues in Certifying an LPA" and Dr Chen Shiling discussed "Medical Red Flags and Pitfalls in Certifying an LPA".

General principles

The first principle to appreciate when caring for persons with diminished capacity is to find the right balance between respecting their wishes and concerns for their safety and welfare – this is the principle of Respect for Persons.

Having "Mental Capacity" is defined as the **ability** of a person to make a **specific decision** at a **particular time** that the decision needs to be made – a person's capacity is *decision- and time-specific*.

In complex cases, there is a need for a higher cognitive capacity and capability in the decision makers. In other words, a person would be required to demonstrate a greater ability to process and reason about the complex information involved than is needed for less demanding or lower-stakes decisions. The concept of capacity is as a sliding scale and a spectrum rather than as an "either present or absent" dichotomy.

Mental capacity assessment

In addressing the question of "Is the person suffering from an impairment of, or disturbance in the functioning of the mind or brain?", this can be viewed under two categories; namely, medical causes commonly represented in delirium, dementia, head injury and stroke; and psychiatric causes such as schizophrenia, bipolar disorder and major depressive disorder.

Next, one has to assess whether the condition is temporary and reversible or permanent and irreversible. In persons with intellectual disabilities, one needs to consider whether the condition started in early life (birth), and whether their symptoms are persistent or even progressive. To serve the best interests of the person where the lack of mental capacity is temporary, where appropriate, is to do the needful to reverse or remove the blocking factors and delay the decision until the patient regains their capacity.

Table 1: Recommended comprehensive questionnaire for donors when red flags appear or in potentially risky cases

1. What is your understanding of what an LPA is?
2. What are your reasons for making an LPA at this time?
3. Have you discussed with your family members that you are making an LPA?
 - (a) Ask about the donor's family composition.
 - (b) If not, why not?
4. Why have you chosen me to be your certificate issuer?
5. Who have you chosen to be your donee?
 - (a) Why him/her?
6. Have you discussed with other members of your family your choice?
7. What powers are you giving to your donee under the LPA?
8. What types of decision would you like your donee to make?
 - (a) What (if any) should they not take?
9. If there are any restrictions in the LPA (eg, home not to be sold), what do you believe the restrictions achieve?
10. Has your chosen donee provided you with answers to any of these questions?
11. Do you have any reason to think your donee could be untrustworthy?
12. Do you know when you could cancel the LPA?
13. Are there any other reasons why the LPA should not be created?

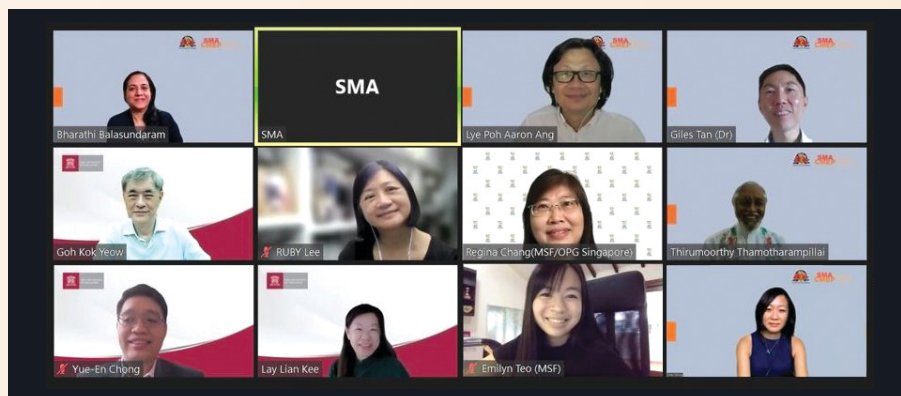
Questions provided by Mr Goh Kok Yeow, Co-Chair, Probate Practice Committee, LSS

Communicating the decision

As to the question of ability to communicate the decision, whether by talking, using sign language or any other means, one must consider other sensory and motor disabilities such as hearing impairments, visual impairments, language issues or even the donor's educational level. Here, we are reminded that the principle of Respect for Persons is for him/her not to be treated as being unable to make a decision, unless all practicable steps taken to help the person to do so have been taken without success.

Comprehensive information collection and verification

In collaborating with persons and patients who request for an LPA, the collected history needs to be extended beyond just medical conditions, cognition and mental capacity. As the LPA is part of the journey that can lead to critical issues such as end-of-life care and relocation to a nursing home, the assessment needs exploration of the psychosocial, cultural and financial aspects, including an exploration of their wishes, values and beliefs. It is important to explore and clarify answers like "It does not matter", "Not important for me", or "I don't care or don't know".



The faculty and facilitators of the webinar

Decision-making in an LPA application can be difficult and complex; professional support and guidance is required in an empathic and active communication in order to build a strong professional relationship.

Concluding thoughts

In the feedback on the webinar provided by the participants, more than 96% agreed that the concepts presented were useful and relevant to their work and helped in their learning process.

In Singapore today, the prevalence of dementia among those aged 60 years

and above is estimated to be five to ten percent. More than 556,000 persons were admitted to hospitals in Singapore in 2020, of which 34% (about 190,000 persons) were above 65 years old. This gives a conservative figure of around 19,000 persons admitted to hospitals who would have diminished capacity to conduct medical decision-making. It is logical to conclude that persons with dementia are often over-represented in outpatient clinics and hospital admissions. As such, doctors in clinical practice will be managing an increasing number of patients with reduced mental capacity in coming years. ♦

The Mental Capacity Act (2008) enables individual Singaporeans 21 years and older to appoint trusted persons to make decisions on their behalf if they lose their mental capacity in the future. The Act also allows parents of those with intellectual disabilities to apply to court for appointment of a trusted person as deputy to make decisions for their children when they pass on. Under the Act, persons who wish to make advance plans for themselves can do so through executing a LPA.

The core purpose of SMA CMEP is to educate and enable doctors to fulfil their professional, ethical and legal responsibilities. In January 2013, SMA CMEP commissioned a Free and Online Training Module for LPA CIs. So far, at least 1,519 doctors have registered and 956 doctors have completed the training. In July 2015, SMA CMEP launched the Free Online Training Module on Assessment of Mental Capacity and Skills in Medical Report Writing. In August 2017, SMA CMEP also established a Free Online Training Module on Assessment of Mental Capacity and Skills in Medical Report Writing with a Focus on Persons with Intellectual Disabilities.

SMA CMEP has fostered collaborations with the College of Psychiatrists, AMS, the LSS and the Office of the Public Guardian in developing educational modules to enable doctors to fulfil their ethical and legal obligations in the caring of persons with diminished capacity.

Dr Thirumoorthy has been with the SMA Centre for Medical Ethics and Professionalism (SMA CMEP) since its founding in 2000 and has most recently been given the responsibility of being the SMA CMEP Academic Director.



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