Who will decide on his behalf?

Laws needed to let officials act for mentally incapacitated elders with no one to help manage their affairs

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A 56-YEAR-OLD person living along falls down and badly injures himself. Two days later, he is discovered by his neigh-
borhood watch team. He has lost mental capacity and wishes to place him in a nursing home. The family members do not step forward. No nursing home will take this elderly person as the family has no means of caring for him, and no means of ensuring that his fees will be paid.

Meanwhile, the Housing Board (HDB) flat owned by the elderly person is left empty. The story above is not a hypothetical one. As an effect of a semi-profit company, I have heard of such cases. Similar incidents will only increase with the shrinking of nuclear families, the rise in the number of individuals remaining single, and the fact that many elderly people are single.

The obvious solution to this unfortunate situation is to sell the HDB flat and settle the proceeds of the sale in trust to meet the costs of the elderly person’s care. After all, once an elderly person loses mental capacity, it is not possible for him or her to stay in the HDB flat alone. Selling the flat would pay for the cost of the nursing home.

However, this gives rise to a whole host of tricky questions. Who has the authority to initiate the sale?

Who will safeguard the elderly person’s interest in the sale and the settlement of the trust?

Who will initiate legal proceedings to sell the property?

Who will pay for the legal costs?

In the past few years, there have been many land-
mark legislative changes and government-based ini-
tiatives dealing with the special needs community. Among these are the enactment of the Mental Ca-
pacity Act, the setting up of the Office of Public Guardians, the incorporation of the Special Needs Trust Company, and the launch of the Central Pres-
ident’s Fund’s Special Needs Saving Scheme.

The Mental Capacity Act is the key legislation which regulates the issue of persons who have lost mental capacity. Under the Mental Capacity Act, a person is entitled to appoint a donee through a lasting power of attorney before he loses mental capacity.

Once mental capacity is lost, the donee would be able to act in matters of personal welfare or property, and affairs on behalf of the donee. If a person has not appointed a donee, a relative or a local authority may apply to court to be appointed as a deputy to act on behalf of the person.

The problem is that many people will not have appointed a donee or they simply have no one willing to act as a donee or a deputy. While we may anticipate that people should plan ahead for such contingencies, the reality today is that many people are faced with this predicament not always for want of planning, but a lack of willing persons to act as donees.

The Mental Capacity Act currently does not make any provision for such cases, but assumes that there are willing and able family members or friends to step forward to make the requisite court applications.

In this regard, the policy makers and non-profit sector should think of refining the legislation and developing initiatives to cater to this group of people. Consistent with Singapore’s “more helping hands approach” to social needs and drawing on the experience of England, after which Singapore’s Mental Capacity Act was modelled, the following matters need urgent consideration.

First, the Mental Capacity Act should designate hospices, care homes where the person currently res-
ides, and relevant grassroots organisations where the person has substantial links as “managing author-
ities” with the power to apply to the court on behalf of the mentally incapacitated person.

In appropriate cases, the managing authorities could apply to court for the flat to be sold and the proceeds held by the Special Needs Trust Company for the mentally incapacitated person.

Second, the court should consider forming a panel of professional deputies, consisting of lawyers and other professionals who have the requisite experience and qualifications for working with elderly people.

In England, panel deputies comprise a list of court-approved deputies who act where no one can, or is willing to act as a deputy.

For those unable to afford the fees of a profes-
sional deputy, the court can persuade law firms to accept a number of cases each on a pro bono basis.

Third, legislative provisions and regulations mir-
ing the law in England on Independent Mental Capacity Advocates (IMCA) ought to be enacted in Singapore.

The IMCA may be appointed to safeguard the elderly person’s interest when there is no one willing to act. In this regard, apart from appointing experienced advocates, the court may tap into the Supreme Court’s successful Young Allen Clarke Scheme to act as IMCA.

Fourth, a non-profit company providing services as a donee or deputy ought to be set up. Such an organ-
isation could be modelled after the Special Needs Trust Company. Unlike the Special Needs Trust Company, which holds and manages the money of the special needs persons, this new non-profit entity could act as a donee or deputy for the special needs person.

This role may include a decision to sell the prop-
erty of the elderly person and to settle the proceeds on trust for this person. It is legally impossible to collapse the role of such a decision maker with the provisions of a trust without getting into tricky conflict-of-interest problems.

Finally, the Disability and Public Officers’ Of-
fice should provide the services of a deputy of last resort when all of the above fails.

The issues facing the aging population are compl-
plex and require a multi-faceted approach to working them. Among the many options is the use of the special needs persons’ legal guardianship to pack and solve these difficulties. However, we must confront these concerns sooner rather than later. Otherwise, such problems will become more pron-
ced.

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