

Creating A User-Friendly Environment for The Elderly in The Context of Power of Attorney in Malaysia

Nurazlina Abdul Raof^{1,2}, Nuraisyah Chua Abdullah²

¹Faculty of Law, Universiti Teknologi MARA, Shah Alam, ²PhD Candidate, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Gombak
Email: nurazlina@uitm.edu.my, nuraisyah@uitm.edu.my

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Abstract

Entrusting others to perform chores is practised by the elderly to ensure matters are attended to when they cannot perform those functions. Sometimes, they resort to executing a power of attorney by giving the power to the donees to act on their behalf. Under the Powers of Attorney Act 1949, the elderly can choose the types of powers they would like to delegate, which can be either revocable or irrevocable. One pertinent issue concerning the elderly is whether the donees would be able to continue performing the powers given by the elderly as the donors when the elderly could not make decisions on their behalf. This paper uses the doctrinal approach. It seeks to examine the concept of the powers of attorney in an elderly user-friendly environment. It analyses the extent of the application of the power of attorney in Malaysia compared with England and Wales, and Singapore. This paper suggests that it might be time for laws to be changed so that older people can make plans for who will make decisions for them about their health, welfare, or finances when they no longer have the ability to do so.

Keywords: Capacity, Decision, Elderly, Power of Attorney, User-Friendly Environment

Introduction

In Malaysia, the population above 60 is increasing, from 10.3% in 2019 to 10.7 % in 2020 (Department of Statistics Malaysia Official Portal, 2020). By 2035, 15% (5.6 million) of Malaysia's population will be categorised as senior citizens, making Malaysia an ageing nation (Abdul Hamid et al., 2018). In five years, namely by 2040, the proportion of elders is anticipated to reach 16.3% of the overall population (Abdul Rashid et al., 2016), an increase of 1.3%. In recognition of this fact, in the 12th Malaysia Plan (2021-2025), e-Warga Emas will be implemented as an integrated national database for the elderly to improve policymaking and programme implementation (12th Malaysian Plan, 2021). The Malaysian National Policy for the Elderly, established in 1996 and updated in 2011, is already in place. It is to ensure the

social status, dignity and well-being of the elderly as members of the family, society and nation by enabling them to optimise their self-potential, have access to all opportunities and have provision for their care and protection (Hamid & Yahaya, 2008).

Unquestionably, one way to care for the elderly is to make sure they have support if they cannot take care of things like finances and health on their own. The inability to make one's own decisions is known as "incapacity" (Éducaloi, n.d.). As the population ages, dementia prevalence increases. The number of people with dementia in Malaysia is expected to rise from 123,000 in 2015 to 261,000 in 2030 and 590,000 in 2050 (Arif, 2022). The National Health and Morbidity Survey 2018: Elderly Health research revealed a high incidence of 8.5% of dementia among older individuals in Malaysia (Lai et al., 2022). In addition to dementia, the elderly may also be incapable due to a serious brain injury or a severe mental illness (GOV.UK, 2020). When they have legal capacity, they may enter into a formal document, namely a power of attorney, by granting powers to the donee to act on their behalf and in their name. Under the Powers of Attorney Act 1949, the elderly will be at liberty to choose the types of powers they would like to delegate, which can be ordinary, revocable or irrevocable. However, an ordinary power of attorney is not adequate for the elderly because it is automatically revoked when the elderly do not possess the decision-making capacity anymore, just when it is most needed. In order to give an irrevocable power of attorney, the elderly must enter into a transaction with a donee with valuable consideration given, meaning it relates primarily to a commercial transaction. This paper is based on a doctrinal analysis. It adopts a comparative study approach by looking at laws and practices in England and Wales, and Singapore concerning the validity of the decisions made by the elderly concerning their welfare and financial interest when they lack mental capacity.

Research Objective

- To examine whether the donees would be able to continue performing the powers given by the elderly as stated in the powers of attorney document when the elderly cannot make future decisions for their benefit.

Results and Discussion

Definition

The Malaysian Powers of Attorney Act 1949 and the Interpretation Acts 1948 and 1967 are silent on the definition of the 'power of attorney'. In *Rafeah Binti Ahmad (The Representative of Hassan Arshad Deceased) v Bank Bumiputra Malaysia Berhad* [1995] 2 CLJ 993, High Court, the learned judge stated that a power of attorney is an instrument 'where one person (the donor of the power) formally authorises another (the donee of the power) to act as his agent; the donor effects an instrument (a power of attorney) to appoint the donee his attorney under power, and the result of appointing the donee as the attorney is to enable the donee to act for the donor generally or in a specified transaction or series of transactions.' A power of attorney is thus a formal instrument by which the donor confers the donee the power to act on his behalf in performing either general or specific acts. As principal, the donor shall be liable to a third party for the donees' acts, who is his agent, if the donee has acted within the bounds of his authority or the acts of the donee are subsequently rectified by the donor. Executing a power of attorney creates a relationship between the principal and the agent. There is a fiduciary relationship between the donor and the donee.

Laws in Malaysia

There are a few types of powers of attorney. Firstly, a general or ordinary power of attorney is only valid when the donor has decision-making capacity. Once the donor loses the capacity to make decisions, the general or ordinary powers of attorney will no longer have any effect. According to Section 5 of the Powers of Attorney Act 1949, a power of attorney will continue in force indefinitely until the donor revokes it or the donee renounces it by way of a notice in writing deposited in every office in which the appointment is required to be deposited or extinguished by the death of donor or donee, bankruptcy of donor, donee becoming inflicted with unsoundness of mind or donor adjudged to be of unsound mind (*Jamaliah bte Hj Masudi v Sivam a/l Munusamy* [1999]5 MLJ 250). Secondly, an irrevocable power of attorney which must be given for valuable consideration and relates primarily to a commercial transaction (Section 6 of the Powers of Attorney Act 1949). It cannot be revoked by the death, bankruptcy, or unsoundness of mind of the donor and without the consent of the donee (*Masteron Sdn Bhd v Abdul Aziz bin Abdul Halim* [2000]5 MLJ at p 63). It is intended that the donee uses the irrevocable powers not for the benefit of the donor but for his benefit to achieve the objectives of the arrangement (*Bowstead & Reynolds On Agency*, 2006). Thirdly, it is mentioned in Section 7 of the Powers of Attorney Act 1949 that a power of attorney can be expressed to be irrevocable for a fixed time. Here, the donee must have a proprietary interest, or some obligation must be owed to him by the donor (Cheng et al., 2009). Thus, it appears that in Malaysia, a power of attorney operates primarily in the donor's interest, an example being business and financial interest, while the donor has the capacity and not during the period of incapacity. If the donor wants to grant an irrevocable power of attorney, the donee must have an interest or benefit in the arrangement.

Legal Framework of Other Jurisdictions

(i) *The Mental Capacity Act 2005: United Kingdom*

A power of attorney is an agency created by deed at common law. The creation of an agency will be terminated by the donor's subsequent loss of mental capacity. As the consequence of loss of mental capacity was widely perceived as a defect in the law as at a moment when the donee's help has become not just desirable but vital for the donor, the donee lacks the power to act, the United Kingdom Law Commission proposed changing it. Following the publication of both a working paper and a report (The Law Commission (Law Com. No. 122), 1983), the United Kingdom Enduring Powers of Attorney Act 1985 (EPA) was enacted. The principal objective was to abolish the common law rule that a power of attorney was revoked by the subsequent mental incapacity of the donor. The EPA addresses property and financial matters (Taggart, 2020). Subsequently, the Mental Capacity Act 2005 (MCA 2005) came into force on 1 October 2007. It was no longer possible to create EPA. The MCA is an Act of Parliament which applies in England and Wales. The primary purpose of the MCA 2005 is to provide a legal framework for acting and making decisions on behalf of adults who cannot make particular decisions for themselves (Abdul Raof & Abdullah, 2017). One compelling consideration was to enable people to plan for any incapacities by selecting trusted individuals to act on their behalf (Griffith, 2018). The MCA 2005 introduced Lasting Powers of Attorney, which allow the person making the Lasting Powers of Attorney (the donor) to give power to someone else (the donee) to make decisions on the donor's behalf (*Bowstead & Reynolds On Agency*, 2006) if, in the future, they lose capacity (Taggart, 2020). The donor decides who the donee should be and how broad the powers should be. There are two types of Lasting Powers of Attorney as opposed to one in the EPA, namely the Property and Financial

Affairs Lasting Powers of Attorney and Health and Personal Welfare Lasting Powers of Attorney (Taggart, 2020). The Property and Financial Affairs Lasting Powers of Attorney refers to a person's property (such as a house or apartment, jewellery, and other valuables), their income, savings, and investments, as well as any expenditures (GOV.UK, 2020). The donor can specify that the donee should only have the power to manage financial affairs after the donor loses capacity sometime in the future. Otherwise, the donee can use the Lasting Powers of Attorney once registered with the Office of the Public Guardian, even if the donor still has capacity. As regards Health and Personal Welfare Lasting Powers of Attorney, it includes daily decisions such as food and drink, dress, and activities, as well as larger choices such as where to reside and whether to obtain medical care (SCIE UK social care institute for excellence, n.d.). It can only be used when the donor does not have the capacity.

The donor of a Lasting Powers of Attorney must be 18 or over and have the mental capacity to make it. The Lasting Powers of Attorney is made using a form containing a certificate that an independent person must sign. The signature confirms that the donor fully understands what is involved in making the Lasting Powers of Attorney and the importance of the Lasting Powers of Attorney. The person signing the certificate also confirms that no fraud or undue pressure has been used to make the donor create Lasting Powers of Attorney. At the time the power is given, the donor must be capable of understanding its nature and effect for it to be valid. A person who lacks capacity is defined under section 2(1) MCA 2005 "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 the brain."

Section 44 of the MCA made 'ill treatment or neglect of a person lacking capacity' a criminal offence (Taggart, 2020). The maximum penalty is five years in jail, a fine, or both. The three principles related to 'capacity' stated in the MCA 2005 are as follows (Ruck Keene et al., 2019): (1) a person must be assumed to have capacity unless it is established that he lacks capacity; (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; and (3) a person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(ii) The Mental Capacity Act 2008: Singapore

The Mental Capacity Act 2008 (MCA 2008) came into operation on 1 March 2010 in response to the ageing population and similar trends in other jurisdictions (Ho et al., 2015). Hence, the MCA 2008 protects society's most vulnerable people (Ho et al., 2015). It was estimated in 2015 that one in ten Singaporean residents aged 60 and older is affected by dementia (Thirumoorthy, 2016). 5.2% of Singaporeans over 60 have dementia (HealthXchange.sg, n.d.). In connection to it, the MCA 2008 empowers a person who is 21 years of age or older (Section 4(5)) to make a Lasting Power of Attorney. They can plan for a time when they may lack the capacity to make decisions for themselves concerning the areas of personal welfare and financial matters. Even if the individual does not choose to elect a proxy decision maker in advance, applications can be made to the Court to appoint a deputy to make decisions on an individual's behalf when he loses his capacity. However, this may be time-consuming and expensive. The MCA 2008 makes it a crime to 'ill-treat' a person who lacks capacity, whether that person is under his or her care, the donee of a Lasting Power of Attorney, or the deputy appointed by the Court (Chan, 2011). Any caregiver, donee or deputy found guilty of such an

offence can be imprisoned, fined or both. Section 4(1) of the MCA 2008 defines a person who is considered to lack mental capacity in relation to a matter; namely 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. A person lacks mental capacity if impaired in one of the following areas (Ho et al., 2015)

- (1) communicate his or her decision by any means;
 - (2) remember specific information required for decision-making;
 - (3) understand the information relevant to the decision-making; and
 - (4) use or weigh relevant information as part of the decision-making process.
- (Section 5(1) of the MCA, 2008).

It does not matter whether the impairment or disturbance is permanent or temporary. The MCA 2008 was developed based on the United Kingdom's MCA 2005 (Chua, 2022). It requires establishing the Office of Public Guardian (Ho et al., 2015). There are five principles concerning capacity, as stated in Section 3 MCA 2008:

- (1) A person must be assumed to have capacity unless it is established that the person lacks capacity;
- (2) A person is not to be treated as unable to make a decision unless all practicable steps to help the person to do so have been taken without success;
- (3) A person is not to be treated as unable to make a decision merely because the person makes an unwise decision;
- (4) An act done, or a decision made, under the MCA 2008 for or on behalf of a person who lacks capacity must be done, or made, in the person's best interests; and
- (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 as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Malaysia vs Other Jurisdictions

(i) Malaysia v England and Wales

In England and Wales, a general or ordinary power of attorney can be granted under the Powers of Attorney Act 1971. Under the EPA, a power of attorney will continue even though the donor lacks capacity. The MCA 2005 repealed the EPA. However, the enduring powers of attorney created prior to the MCA 2005 will remain valid. Under the MCA 2005, the donee for the elderly would be able to continue performing the powers as stated in the powers of attorney document given by the elderly as the donor when the elderly lack the capacity in the future to make decisions on his behalf.

In comparison, Malaysia does not have a Mental Capacity Act or a lasting power of attorney, which would be effective when the donor is mentally incapacitated. Thus, the only resort is for the elderly to draft a power of attorney under the Powers of Attorney Act 1949. It lays down the powers to be given to the donee specifically, bearing in mind that a power of attorney will only be valid when the elderly have the capacity. If an irrevocable power of attorney is executed for a specified fixed time, it can survive the incapacity of the elderly as the donor. However, according to the Powers of Attorney Act 1949, the validity of the powers of attorney is only in favour of the purchaser. Furthermore, based on the literature review, the validity only concerns the context of conveyancing (Cheng et al., 2009). It does not enable

the donee to deal with the powers granted by the elderly donor under a lasting power of attorney on behalf of the donor.

(ii) Malaysia v Singapore

A Power of Attorney is an instrument created by a person who entrusts someone to act on his behalf, usually in a legal transaction, for example, buying or selling property. The person creating such an instrument is the donor, and the person receiving authority to act is the donee. A Power of Attorney, which is created under Section 48 of the Conveyancing and Law of Property Act (Cap 61 1994 Rev Ed) ("CLPA") related to property matters may be deposited at the General Division of the High Court (Singapore Courts & The Judiciary, 2022). A power of attorney does not cover enduring or lasting powers of attorney. Under the Singapore MCA 2008, Lasting Power of Attorney, though made while the donor has the capacity, operates only when the donor no longer has capacity. Prior to the enforcement of the Singapore MCA 2008, there was no pre-planning instrument available. Families of those without mental capacity need to go through the process of the Court to make decisions to transact on their behalf, for example, to collect rental of properties or to pay for the nursing home charges. Safeguards are in place to ensure that the individual's best interests are protected if he or she loses mental capacity. For example, suppose a donee does not act in the donor's best interests. In that case, the statute provides whistle-blowing so that the authority can investigate and apply to the Court to remove the donee. The MCA 2008 facilitates arrangement to help family members to avoid all these legal complications. They can quickly act in the best interest of the person who has lost his mental capacity (Safeguards for Persons who Execute Lasting Power of Attorney, Singapore Parliament No. 12, Session 2, Volume 92, Sitting Date, 2014).

In comparison, the Powers of Attorney Act 1949 in Malaysia is silent on the lasting power of attorney, which would be effective when the donor is mentally incapacitated. Malaysia has enacted Mental Health Act 2001 (MHA 2001), but the capacity issue is not addressed. The MHA 2001 varies significantly from the MCA in that it addresses admission, detention, housing, care, treatment, rehabilitation, control, and protection of mentally disordered individuals (Thomas, 2020). Although mental incapacity includes people with some mental health conditions, it should not be mistaken for a mental disorder (Thomas, 2020). Mental capacity refers to the ability to make own decisions (GOV.UK, 2020). According to the World Health Organization (World Health Organization, 2022), a mental disorder is characterised by a clinically significant disturbance in an individual's cognition, emotional regulation, or behaviour. It is usually associated with distress or impairment in critical areas of functioning. There are many types of mental disorders, such as anxiety disorders, depression, and bipolar disorder. Mental disorders may also be referred to as mental health conditions. Thus, in Malaysia, the elderly can utilise the power of attorney only when they have the capacity.

Recommendation and Conclusion

Bearing in mind our ageing society with increasing rates of dementia and other mental illnesses, perhaps it is time that relevant provisions of the law concerning power of attorney be amended. The amendment may allow the creation of a user-friendly environment power of attorney for the elderly to make plans to appoint someone to make decisions on their behalf when they no longer have the capacity. It can be a decision relating to health, welfare or finance. The example can be seen in the jurisdictions highlighted above.

Contribution

The authors hope this paper will contribute to academic discussion on the possible adaption of the lasting power of attorney. It will benefit the elderly as the donors since the donees would be able to continue performing the powers as stated in the powers of attorney document given by the elderly when the elderly lack the capacity in the future to make decisions on their behalf, as practised in modern jurisdictions. The study is significant to enhance the efficacy of the legal framework on power of attorney as a formal instrument of delegation of powers.

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