

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHCF 15

Originating Summons (Family) No 1 of 2017

In the matter of Section 17, 18 and 20 Mental Capacity Act (Cap 177A)

And

In the matter of [UWP], a person alleged to lack capacity (“P”)

Between

[BUV]

... Plaintiff

And

(1) [BUU]

(2) [UWP]

... Defendants

Originating Summons No 1096 of 2016

In the matter of Section 18(2) of the Supreme Court of Judicature Act
(Cap 322)

And

In the matter of Supreme Court Judicature Act (Cap 322), Section 18(2), First
Schedule, Paragraph 14

And

In the matter of the Time Fixed Deposit Account No. [xxx] held in the names
of [UWP] and [BUU] and [BUV] with [BXD] Bank

Between

[UWP]

... Plaintiff

And

(1) [BUV]

(2) [BXD] Bank

... Defendants

GROUPS OF DECISION

[Mental Disorders and Treatment] — [Legal capacity] — [Mental Capacity
Act]

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BUV
v
BUU and another and another matter

[2019] SGHCF 15

High Court (Family Division) — Originating Summons (Family) No 1 of 2017

High Court — Originating Summons No 1096 of 2016

Aedit Abdullah J

21 August; 4 September 2017; 30, 31 January; 1, 2 February; 25 April 2018;
1 November 2018

20 June 2019

Aedit Abdullah J:

Introduction

1 The present case concerns interrelated applications, which I brought together for their more efficient determination.

2 First commenced was a civil suit by [UWP] in Originating Summons No 1096 of 2016 (“OS 1096/2016” or “the civil application”). [UWP] was 89 years old at the time of the application and brought the action against [BUV], her youngest son, and [BXD] Bank (“the Bank”) for orders relating to moneys held in an account at the Bank.

3 The second application in Originating Summons (Family) No 1 of 2017 (“OSM 1/2017” or “the MCA application”) was by [BUV] pursuant to the

Mental Capacity Act (Cap 177A, 2010 Rev Ed) (“the MCA”) against [UWP] and [BUU], her eldest son, for a declaration that [UWP] is unable to make decisions as to her personal welfare and her property and affairs because of an impairment of or a disturbance in the functioning of her mind or brain, and for a consequential order that deputies be appointed to make all decisions relating to her property and affairs on her behalf.

4 While MCA proceedings are generally heard in the first instance in the Family Justice Courts, the two matters were clearly connected. Indeed, the MCA application grew out of a failed application by the plaintiff for an order that the second defendant be found incapable of conducting the civil suit in OS 1096/2016.

5 I determined that [UWP] is not mentally capable within the meaning of ss 4 and 5 of the MCA. Subsequent hearings were necessary to determine the consequential appointment of the deputies. Time for appeal was extended in the meantime. [BUU] has since appealed against my decision.

Facts

The parties

6 In the present grounds of decision, I take the MCA application as the primary application, and use the terms plaintiff and defendants accordingly.

7 [UWP] (“the second defendant”) is the mother of [BUU] (“the first defendant”) and [BUV] (“the plaintiff”). The first defendant and plaintiff are retirees. The second defendant did not receive a formal education and is

illiterate, but is able to understand and speak in the Teochew dialect.¹ She has six children in total: four sons and two daughters.

8 At the time of the proceedings, the second defendant’s family was split along two lines. The second defendant favoured the first defendant and her second son (“Second Son”), and expressed unhappiness with the plaintiff, her third son (“Third Son”) and her Third Son’s wife (“Daughter-in-Law”). Of her children, only her Third Son and the first defendant gave evidence.

Background facts and procedural history

9 The dispute between the parties arose in the middle of 2016, when a bank account (“the Bank Account”) at the Bank was jointly opened in the names of the second defendant, the first defendant and the plaintiff.²

10 Shortly after, the second defendant executed two wills; a declaration of intention dated 21 June 2016 (“the 2016 Declaration of Intention”);³ and a lasting power of attorney signed on 21 June 2016 and registered on 29 November 2016 (“the 2016 LPA”).⁴ The first of these wills, dated 25 August 2005 (“the 2005 Will”),⁵ was ineffective as it did not fulfil the formalities required. The second defendant’s testamentary capacity in relation to the second will, dated 20 July 2016 (“the 2016 Will”), was disputed in OSM 1/2017.⁶

¹ Defendants’ bundle of affidavits (“DBA”), second defendant’s affidavit at para 2.

² Plaintiff’s bundle of affidavits (“PBA”), plaintiff’s affidavit at para 73; DBA, first defendant’s affidavit at para 91.

³ DBA, second defendant’s affidavit in at p 108.

⁴ DBA, second defendant’s affidavit at pp 99–106.

⁵ DBA, second defendant’s affidavit at pp 135–136.

⁶ DBA, second defendant’s affidavit at pp 110–114.

11 Letters of demand were sent to the plaintiff thereafter, culminating in the commencement of the action in OS 1096/2016 against the plaintiff and the Bank. OS 1096/2016 was filed on 25 October 2016. The second defendant sought a declaration that she is the legal and beneficial owner of the moneys held in the Bank Account, and an order that the Bank Account be closed by the Bank and all moneys in the Account be returned to her.⁷

12 On 10 November 2016, the plaintiff applied by way of Summons No 5468 of 2016 (“SUM 5468/2016”) for an order that the second defendant be medically examined as to her mental capacity to commence proceedings in OS 1096/2016. The plaintiff invoked the court’s powers under s 18 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) (“the SCJA”) read with para 19 of the First Schedule of the SCJA. On 22 December 2016, I denied this application as insufficient evidence had been adduced to justify infringing upon the second defendant’s autonomy in the manner prayed for. The second defendant’s medical reports at the time indicated sufficiently that she was able to conduct and give instructions concerning the proceedings in OS 1096/2016.

13 The plaintiff filed the present MCA application on 19 January 2017, seeking, *inter alia*, a declaration of the second defendant’s mental incapacity and a consequent appointment of deputies.

14 In the meantime, in order to safeguard the funds in the Bank Account, I ordered on 20 April 2017 that the first defendant and the plaintiff remove their names as joint account holders for the Bank Account. The moneys in the Bank

⁷ PBA, plaintiff’s affidavit at pp 63–64.

Account were not to be withdrawn or dealt with without any further order or directions made by the court, pending the disposal of the present proceedings.⁸

The legal documents executed in 2016

15 The plaintiff applied for the 2016 LPA and Will to be respectively revoked and set aside as part of the MCA application. I thus briefly set out the contents of these documents.

16 The 2016 LPA assigned the first defendant as the second defendant’s only donee and authorised him to make decisions about her personal welfare and her property and affairs. He was also given unrestricted authority to dispose of her property by making cash gifts.

17 The 2016 Will disposed of the second defendant’s assets in the following proportions: the jewelleries, as marked; \$20,000 to her youngest daughter (“Youngest Daughter”); \$1,250 each to nine of her grandchildren; and the remaining moneys to the first defendant after all debts were paid out of her estate.

The procedure adopted and the evidence adduced

18 The MCA application was conducted as a judge-led process and involved the taking of evidence from the following persons:

- (a) two court-appointed medical experts who gave evidence on the second defendant’s mental capacity and her ability to manage her own

⁸ Bundle of documents provided to experts (“DBE”), Tab 1 at pp 43–44.

affairs, namely, Professor Kua Ee Heok (“Prof Kua”), a psychiatrist, and Dr Tang Kok Foo (“Dr Tang”), a neurologist;

(b) a neuropsychologist, Dr Yeo Hong Huang Donald (“Dr Yeo”), who adduced a report and gave testimony on what transpired during his psychological testing of the second defendant; and

(c) the second defendant, the first defendant, the plaintiff and a number of other family members; the evidence of the family members largely concerned their interactions with the second defendant, as well as various events relating to the second defendant’s disposal of property and assets.

The parties’ cases in OSM 1/2017

The plaintiff’s case

19 The plaintiff argued that the evidence of the medical experts showed that the second defendant suffered from mental impairment. This was supported by her performance on the stand, which showed that she could not retain, understand, use and weigh information or communicate decisions as to her own personal welfare and her property and affairs. She also lacked the capacity to litigate. Undue influence, which is relevant to a determination of mental capacity following *Re BKR* [2015] 4 SLR 81 (“*Re BKR*”), was presumed and was not rebutted on the evidence. These factors together evidenced her lack of mental capacity.

20 The plaintiff also prayed for the 2016 LPA and Will to be revoked or found ineffectual, and for deputies to be appointed to act for the second defendant in respect of her property and affairs.

The defendants' case

21 The defendants argued that the second defendant did not lack capacity despite her dementia, as supported by the earlier medical evidence from 2016. Even the medical experts appointed by the court concluded that she did not lack capacity. The second defendant through her own testimony showed that she was able to make decisions for herself.

22 The 2016 LPA and Will were properly executed by the second defendant, who was aware of her actions. This was supported by evidence from the other family witnesses and the medical evidence. The second defendant chose to have the first defendant be her caregiver. A conspiracy existed against the first defendant, involving the plaintiff, the second defendant's Third Son and her Daughter-in-Law, in respect of the closing of bank accounts which the second defendant had prior to June 2016, and the allegations made against the first defendant.

23 Finally, there was no evidence of any undue influence, such allegations being only speculative. The second defendant was still able to make independent decisions despite her dementia, and she was not subject to any undue influence in the making of the 2016 Declaration of Intention, LPA and Will, which were simple documents. If anything, it was the plaintiff and the second defendant's Third Son who had exerted undue influence on her.

My decision

24 Bearing in mind the evidence and submissions, I was satisfied that the second defendant lacked mental capacity in respect of decisions pertaining to her personal welfare and her property and affairs because of a disturbance in the functioning of her mind. There was sufficient medical evidence, particularly

from Prof Kua, that indicated that she did not have sufficient capacity. I generally preferred Prof Kua's evidence to Dr Tang's. In addition, I also considered the witnesses' testimony in court, particularly that of the second defendant herself, which caused me considerable concern as to her capacity.

25 To my mind, that lack of capacity affected the execution of her 2016 Will. Furthermore, despite Prof Kua's testimony that the 2016 LPA could have been properly made by her, I found that the second defendant did not have the capacity to do so. My finding of incapacity also affected the second defendant's ability to give instructions with regard to OS 1096/2016 and to litigate it.

26 As for the question of the appropriate deputy for the second defendant, the appointments prayed for by the plaintiff – being the plaintiff and the second defendant's Daughter-in-Law – were difficult. I adjourned the determination of the appointment of deputies to arrive at a solution, extending the time for appeal in the meantime.

27 As it was, on 1 November 2018, I appointed the second defendant's Youngest Daughter and Daughter-in-Law as joint deputies to make decisions on her behalf. I have granted the deputies liberty to write in to the court for directions in the event issues arise in the course of their duties.

The legal approach towards assessing mental capacity

The framework under the MCA

28 The plaintiff invoked the following provisions under the MCA: s 17, which grants the court powers to rule in respect of the validity of LPAs; s 19, which permits the court to make declarations as to (a) whether a person has or lacks capacity to make specific decisions and (b) the lawfulness of acts done by

that person; and s 20, which grants the court powers to make decisions in relation to persons lacking capacity and to appoint deputies.

29 Section 4(1) defines a lack of capacity:

... [A] person lacks capacity in relation to a matter 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.

This is further explained by s 5(1), which defines the inability to make a decision:

For the purposes of section 4, a person is unable to make a decision for himself if he is unable —

- (a) to understand the information relevant to the decision;
- (b) to retain that information;
- (c) to use or weigh that information as part of the process of making the decision; or
- (d) to communicate his decision (whether by talking, using sign language or any other means).

Section 5(2) provides that a person is not to be found unable to understand the information relevant to a decision if he is able to understand an explanation of it using simpler language or by other means. Section 5(3) specifies that the fact that a person is able to retain information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

30 As decided in *Re BKR*, the test for capacity in s 4(1) of the MCA has a functional and clinical component, the functional aspect being that the subject must be unable to make a decision, and the clinical aspect being that this inability must be caused by a mental impairment: at [134]. While expert evidence may address the clinical component of the test, it is not determinative.

The expert evidence tells the court what view of the subject's mental impairment emerges from her symptoms, but the functional component is a judgment for the court to make based on the evidence as to the degree her mental functioning is compromised: at [134]. To this end, answers in cross-examination should be considered in assessing the functional component, to shed light on (a) whether the subject is able to retain, understand, use and weigh information relevant to decisions and (b) her symptoms as might shed light on the nature of her mental impairment: at [154]. As noted at [134] and [135]:

... [The court is] able to form our own assessment from the evidence ... [T]hat competence derives essentially from the knowledge and experience that we as rational human beings have of the process of thinking and reasoning. It does not require the specialised expertise of a medical professional to see whether P has, for instance, poor memory or difficulty in understanding sophisticated concepts. ...

... [Clinical interviews and cross-examination] afford us an insight into the extent to which she is able to retain, understand, use and weigh information, and hence furnish us with evidence upon which we determine whether she is able to make decisions; but at the same time, they also reveal symptoms, such as a decline in memory or executive function, which a medical expert might use in a clinical diagnosis as to the nature and degree of her mental impairment. We rely on experts to tell us what view of her mental impairment emerges from her symptoms, but questions such as whether she is able to retain, understand, use and weigh information relevant to the decisions she makes are matters that are within our capability to assess and do not call for expert assistance.

31 Additionally, I would note that the High Court in *Re BKR* [2013] 4 SLR 1257 ("*Re BKR (HC)*") held at [71] that the requirements under ss 5(1)(a) to 5(1)(d) are to be read conjunctively, following the English approach articulated in *Re F* [2009] EWHC B30 (Fam) (at [21]). A person must be able to understand, retain, and weigh the relevant information, and then communicate his decision if he is found able to make a decision. A deficiency in any one of these requirements would mean he lacks mental capacity. I understood from this

guidance that the court's assessment as to mental capacity should be made holistically.

32 The principles as laid down in ss 3(2) to 3(6) of the MCA were also material to my assessment. These provisions specify as follows:

- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) 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.
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- (5) An act done, or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (6) 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.

33 Of these, s 3(3) was raised specifically in the present case. Dr Tang, in particular, was concerned that it should not be too readily inferred that the second defendant could not make decisions in respect of the 2016 LPA as she could have been given assistance when executing it. But as will be discussed below, I was concerned that this principle could not be taken too far; the possibility of assistance rendered will not be able to correct for any deficit in capacity if a subject is found to be mentally incapable.

The relevance of undue influence

34 I accepted the plaintiff's argument that it was relevant to consider if there was some interaction between the second defendant's mental impairment and the exertion of undue influence on her by her family members. The proven

or potential presence of undue influence is relevant to the issue of mental capacity in three ways (*Re BKR* at [125] and [126]):

... [First, it is] material whether P is able to retain, understand or use the information that relates to whether there might be undue influence being applied, for instance whether P can understand that a third person may have interests opposed to his; and if not, whether that inability is caused by mental impairment. [Second,] it must be considered whether P's susceptibility to undue influence is caused by mental impairment; if so, and if the result of such undue influence is that P's will is so overborne that he is unable to use and weigh information relevant to the decision in question, P would be unable to make decisions "because of" mental impairment.

The third way in which undue influence is relevant is that it might mean that P cannot realistically hope to obtain assistance in making decisions. In such a situation, P may be found to lack capacity because of a mental impairment operating together with that lack of assistance. ...

35 To this end, the plaintiff referenced *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773, which distinguished between classes of actual and presumed undue influence. This categorisation has recently been affirmed in the Court of Appeal's decision in *BOM v BOK and another appeal* [2019] 1 SLR 349 ("*BOM*"). Although *BOM* was published after my decision in this case was rendered, it does not change the approach that is to be taken. Presumed undue influence, or "Class 2" undue influence, which was relied upon here, arises where the following conditions are met (*BOM* at [101]):

... It suffices for the plaintiff to demonstrate (i) that there was a relationship of trust and confidence between him and the defendant; (ii) that the relationship was such that it could be presumed that the defendant abused the plaintiff's trust and confidence in influencing the plaintiff to enter into the impugned transaction; and (iii) that the transaction was one that calls for an explanation. This class of undue influence is further divided into "Class 2A" and "Class 2B" undue influence, as follows:

...

(ii) Under “Class 2B” undue influence, the plaintiff must prove that there is a relationship of trust and confidence. If it is shown that there was such a relationship and that the transaction calls for an explanation, then there is a *rebuttable* presumption of undue influence.

Whether the second defendant lacked capacity in relation to her personal welfare, property and affairs

36 I first considered whether the second defendant was able to make decisions in relation to her personal welfare and her property and affairs because of a mental impairment. The declaration of incapacity that the plaintiff urged me to make was broad: see the Court of Appeal’s comments in *Re BKR* at [129]. This necessitated a wide-ranging assessment of the evidence in the round.

37 Accordingly, I took the second defendant’s cross-examination and the expert evidence into account. I also considered the circumstances in which the second defendant’s decisions were made, focusing in particular on the legal documents which she executed in 2016, and the possibility that she had been subject to the undue influence of her children at the time.

38 In my weighing of the evidence, I gave little weight to the evidence relating to the second defendant’s relationship with her family members, Dr Yeo’s psychological assessment of her capacity, her previous medical assessments and the testimony given by her other family members.

39 I now consider each factor in turn.

The second defendant’s cross-examination

40 The plaintiff argued that the second defendant’s testimony showed that she was incapable of retaining, understanding and using information that she

had.⁹ The defendants maintained that the second defendant’s performance on the stand did not demonstrate any mental impairment.¹⁰ I did not accept the defendants’ contentions. The second defendant’s own performance on the stand raised considerable doubt about the state of her memory and her ability to follow proceedings and to understand questions posed to her by counsel.

41 I accept that some leeway has to be given to witnesses and their ability to recall facts and incidents in view of the stresses of a court environment. Even so, grave doubts were raised. What was displayed by the second defendant went beyond any nervousness displayed by a witness unfamiliar with court proceedings. Nor was her age an excuse; any impact caused by her age on her performance would have been relevant to her mental capacity in any event.

42 As it transpired, it was clear from the second defendant’s testimony in court that she could not remember information and events. Indeed, she could not even remember what she had just testified. When asked during cross-examination how she kept track of the money she had in the Bank Account, she first explained that she read her bank statements:¹¹

Witness:	When I am done reading, I tear them up, so no one else can read them.
Court:	You can read the statements?
Witness:	Yes, I can read them. If I don’t understand, I will write it somewhere else and ask someone what this means. And then I can remember.
...	
Q:	Now, ... who is that somebody you would ask?

⁹ Plaintiff’s written closing submissions (“PCS”) at paras 127–148.

¹⁰ Defendants’ written submissions (“DCS”) at paras 12, 23(iii) and 23(v).

¹¹ Notes of Evidence (“NEs”) (1 February 2018) at p 34 ln 3–8, ln 15–25.

Witness: I cannot remember who I asked. There are too many matters. If there's more money, there's more money, it's all in the passbook.

Low: Sorry, can you repeat that, Mr Translator?

...

Interpreter: 'If there's more money, there's more money; if there's less money, there's less money. It's all in the passbook.'

The second defendant was unable to recall her previous answers as the questioning continued. The next page in the transcript disclosed the following:¹²

Q: Now you said if there's more money, there's more money; there's less money, there's less money. That's what you said just now. Do you remember that, just 2, 3 minutes ago?

A: Why would I say that?

Court: You just said it.

A: I don't remember.

43 As highlighted by the plaintiff,¹³ a similar problem arose in respect of the second defendant's testimony about her 2005 Will. At around 12pm, she testified:¹⁴

Q: ... [D]o you recall making a will dated ... 25th August 2005.

A: I think I did. I can't quite remember the date.

...

Q: Now [the will] has two pages [*ie*, pages 135 and 136 of the second defendant's affidavit]. And if you flip to the second page, 136, it's dated 25th August 2005.

¹² NEs (1 February 2018) at p 35 ln 6–11.

¹³ PCS at para 129.

¹⁴ NEs (1 February 2018) at p 17 ln 25 – p 18 ln 5.

Low: First, does she see that?
 A: Yes, I see it.
 Low: Does she recognise the thumbprint that is there
 in the middle of the page?
 A: That's my thumbprint.

However, the second defendant was not able to recall this exchange at around 2.40pm:¹⁵

Q: Now in relation to your will that was dated
 August 2005, do you remember us discussing
 that earlier this morning?
 A: I can't quite remember.
 ...
 Q: ... Do you recall, looking at page 135 and 136
 this morning?
 A: I can't remember.

44 Applying *Re BKR* at [154] (see above at [30]) and assessing the second defendant's performance in court, I could not find based on the above and other similar exchanges that she was able to follow the proceedings, understand what was asked of her and absorb the information provided to her. The quality of her memory also demonstrated that she was unable to recall important details. It was apparent that, at the very least, she had to be reminded several times of the quality of the information that was before her or that came from her before she was able to give relevant evidence, if at all.

45 Specifically, the second defendant was unable to recall the nature and contents of the legal documents that she had apparently executed.¹⁶ She was also

¹⁵ NEs (1 February 2018) at p 42 ln 16–18 and ln 28–30.

¹⁶ *Eg*, NEs (1 February 2018) at p 22 ln 20–30.

unable to remember if she had signed certain affidavits¹⁷ or had given specific instructions to her lawyers.¹⁸ She could not give consistent information relating to the moneys she kept in her bank accounts: for instance, even though she answered at 11.45am that her bank accounts included sums of \$100,000 and \$700,000, she could not remember giving this answer at 3.15pm on the same day.¹⁹ This inability to recall information extended to details about her own family. At one point in the proceedings, she voiced that she could not recall if she had two or four daughters, even though she stated about ten minutes earlier that she had two daughters.²⁰

46 Moreover, the second defendant demonstrated that she was unable to follow the questions asked of her in court and would occasionally digress from the line of questioning that was being pursued:²¹

Q:	... Do you remember going to another lawyer's office to make another will in June or July 2016?
Court:	What did she want to say, Mr Interpreter?
Interpreter:	She's saying are they asking about taking her on a holiday.
Court:	... Alright. So the question is do you remember going to another lawyer's office?
Witness:	When they tell me to go, I would go, I'm illiterate.
Court:	No, the question is do you remember going to a lawyer's office?
Witness:	They said they will do something for me. So that's all. When they asked me to go, I just go.

¹⁷ NEs (1 February 2018) at p 59 ln 32 – p 60 ln 3.

¹⁸ *Eg*, NEs (1 February 2018) at p 47 ln 22–24; p 48 ln 32 – p 49 ln 1; p 58 ln 3–11.

¹⁹ NEs (1 February 2018) at p 52 ln 13–22, *cf* p 16 ln 4–11.

²⁰ NEs (1 February 2018) at p 41 ln 10; *cf* p 44 ln 3.

²¹ NEs (1 February 2018) p 20 ln 26 – p 21 ln 3.

Later on, she was unable to cogently answer questions that I posed to her regarding the making of her affidavits:²²

Court:	... [W]hat did you tell [your lawyers] to write [in your affidavit]?
Witness:	I told them to write that we should help others in need. That's all I said, I didn't say anything else.
...	
Witness:	We are poor, so we have to work hard.
Court:	... [D]o you know what documents you signed ... in relation to your property or your jewellery or your bank account?
Witness:	No, I said that when I take out in future, it's not a lot. Some I will give to my daughters, some I will give to my daughters-in-law, and that's it. I told them if you want take it, or leave it. I put it in a red packet.
Court:	... [T]hat's not my question. My question is, do you know what was the purpose of all the documents you signed?
Witness:	To help others.
Court:	What do these documents have to do with helping others?
Witness:	I have been through difficult times.
Court:	... Repeat back to me what was my question?
Witness:	I don't remember.
Court:	My question is what was the purpose of the legal documents you signed?
Witness:	It's to help others, feed others.
Court:	The purpose of the legal documents was to help feed others, is that what you are saying?
Witness:	Yes.

²² NEs (1 February 2018) at p 62 ln 1–29.

...

Witness: Cook some porridge and feed them and then I would starve.

47 Even allowing some leeway for the stresses of testifying in court and being in an unfamiliar environment, it was apparent from the second defendant's answers that she was unable to fully comprehend the nature of the present proceedings and the questions asked of her. There was nothing in the evidence to show that any inability on her part was limited to the courtroom setting. I did not see, for instance, anything that showed that significant nervousness on her part affected her ability to recall key facts and information. Nothing was said by her to this effect, nor did I observe anything of that nature.

48 In the circumstances, I found that her lapses in memory and deficiencies in comprehension were not merely trivial; they were serious and concerned documents and events central to the present proceedings. They pertained also to her relationships with her own children. To my mind, this raised serious doubts about her ability to retain information relevant to the kinds of decisions relating to her property and affairs.

49 Given that the proceedings in OS 1096/2016 concerned the moneys in the second defendant's Bank Account, I considered in particular that her decision-making in respect of her funds was compromised. While she was aware that she did have property and expressed concern that the plaintiff had taken her money and "locked" it up, she could not state with any definitive accuracy the amount which she owned or what bank accounts she had.²³

²³ NEs (1 February 2018) at p 7 ln 7–26; p 38 ln 26 – p 39 ln 5; p 40 ln 10–16.

The testimony of the medical experts

50 It was against the second defendant’s performance on the stand that I weighed the evidence from the two medical experts, Prof Kua and Dr Tang. Both experts agreed that the second defendant’s capacity was impaired and that she had dementia to some degree. They took the common position that she had the capacity to make the 2016 LPA. There was, however, disagreement as to whether she had capacity to make the 2016 Will.

The medical experts’ evidence

(1) The cognitive tests administered

51 Prof Kua administered the following tests: (a) the “Mini Mental State Exam” (“MMSE”), (b) the Frontal Assessment Battery (“FAB”) test; and (c) the CLOX clock-drawing test. These three tests had been performed on the second defendant in 2015 at Khoo Teck Puat Hospital (“KTPH”), and Prof Kua repeated them in June 2017 with a view to using the 2015 results as a baseline.²⁴

52 Prof Kua explained that the FAB and CLOX clock-drawing tests assessed the second defendant’s “executive control” and “executive function”.²⁵ I adopted the Court of Appeal’s explanation of these concepts in *Re BKR* at [139] and [140]:

... Executive function refers to a relatively diverse constellation of skills and behaviours “all of which are involved, to some extent, in the maintenance of goal-directed behaviours”. A non-exhaustive list of the skills and behaviours considered to be part of executive function includes: (a) volition, which is the

²⁴ NEs (21 August 2017) at p 14 ln 4–7; p 15 ln 1–6.

²⁵ Prof Kua’s Medical Report and Opinion exhibited at KEH-1 to his affidavit (“Prof Kua’s Report”) at p 8.

“process of ascertaining one’s needs or wants and forming a plan to achieve those goals”, (b) inhibition and impulse control, (c) planning and organising, which is the ability to “think prospectively, to conceive of the various available options, and to make decisions based on those options”, and (d) abstraction, which is “the ability to think in terms of concepts or generalizations as well as the ability to think about people, events, or situations of the past, future, or imagined”.

Executive function has also been defined as “a set of mental processes that helps connect past experience with present action”, which people use to perform activities such as “planning, organising, strategising, paying attention to details and remembering them and managing time and space”. It “involves the ability to think abstractly and to plan, initiate, sequence, monitor and stop complex behaviour”. It can be seen that executive function is a rather all-encompassing concept that collects within it various cognitive skills and abilities which might be quite dissimilar to one another. ...

53 As in *Re BKR*, the experts here did not refer to the component parts of executive function in their evidence.

54 Moving to the tests, the MMSE test was as described in *Re BKR* at [141]:

This test consists of a number of questions and tasks, including the following: (a) P is asked to give the year, month, date and day of the week, with one point awarded for each correct answer; (b) three objects are mentioned for P to remember, *eg*, [ball, flag and tree] and P is asked to recall them a few minutes later, with one point awarded for each object correctly recalled; (c) starting from 100, P is asked to count backwards by subtracting 7 five times to get 93, 86, 79, 72 and 65, in what is called the “serial 7s” part of the test, with one point awarded for each correct subtraction; (d) P is asked to repeat the phrase [“An apple a day keeps the doctor away”], with one point awarded if successful; and (e) P is referred to a drawing of a pair of interlocking pentagons and asked to reproduce it, with one point awarded if done correctly. The maximum possible score is 30, ...

55 Prof Kua scored the second defendant as obtaining 14 out of 30 points.²⁶ She had obtained scores of 27 and 15 in 2013 and 2015 respectively. Prof Kua noted that the 12-point drop from 2013 to 2015 was significant. For an elderly Chinese patient with low education, an MMSE score lower than 22 points indicates “cognitive impairment at an abnormal level”.²⁷

56 The FAB test assessed the second defendant’s brain function in cognitive and behavioural domains. This test involves asking the subject a series of test questions that cover: (a) the subject’s ability to identify similarities between pairs of objects; (b) the subject’s lexical fluency, where she must name as many animals as she can in a minute; and (c) the subject’s ability to follow the tester’s instructions, *eg*, instructions to imitate a series of hand movements after being shown the series three times, and instructions not to perform a certain action. The second defendant’s score of 7 out of 18 points was in the “abnormal” range.²⁸ She had scored 8 points in her 2015 assessment, which was “abnormal, signifying difficulty in [conceptualisation], reasoning, motor programming and executive control of action”.²⁹

57 The CLOX clock-drawing test was as described in *Re BKR* at [144]:

... [This test] is said to test a fairly wide range of cognitive functions: executive function, comprehension, planning, visual memory, visuospatial abilities, motor programming and execution, numerical knowledge, abstract thinking, inhibition, concentration, and frustration tolerance. There are two components to the test ... [In] CLOX 1, ... P is given a blank sheet of paper and told to draw a clock with the hands pointing at a certain time stipulated by the tester. The clock is then

²⁶ Prof Kua’s Report at p 9 and Annex 3 at pp 35–38.

²⁷ Prof Kua’s Report at p 7.

²⁸ Prof Kua’s Report at p 9 and Annex 5 at pp 44–46.

²⁹ Prof Kua’s Report at p 8 and Annex 5 at p 43.

scored according to a detailed and structured set of criteria, the maximum attainable score being 15.

58 The second defendant obtained a score of 11 out of 15 points.³⁰ She had previously scored 9 in 2015, indicating abnormality in her visuo-spatial and executive functions.³¹

59 Dr Tang conducted a version of the “Abbreviated Mental Test” (“AMT”). The Ministry of Health (“MOH”) guidelines for the AMT³² involve the subject being asked ten questions pertaining to, *inter alia*, her personal details (age, date of birth, address); the time; the identity of the Prime Minister; counting backwards from 20 to one; and recalling an address and a phrase.

60 At the hearing, Dr Tang acknowledged that he asked questions beyond the scope of the MOH guidelines. However, he explained that he had limited his scoring of the second defendant’s AMT on the basis of the ten MOH-prescribed questions.³³ The second defendant received scores of 6 on the two separate occasions when the AMT was administered to her. Dr Tang concluded that while these scores were not high, there were “no normal values” that applied to the second defendant’s particular age and educational background.³⁴

³⁰ Prof Kua’s Report at p 9 and Annex 6 at p 49.

³¹ Prof Kua’s Report at p 8 and Annex 6 at p 48.

³² Exhibit P3.

³³ NEs (4 September 2017) at p 59 – p 62 ln 10.

³⁴ Dr Tang’s Medical Report exhibited at TKF-1 to his affidavit (“Dr Tang’s Report”) at pp 7–10.

(2) The second defendant’s dementia

61 The tenth revision of the “International Classification of Diseases” grades dementia on a scale from mild, moderate to severe.³⁵ This is reflected in the Clinical Dementia Rating (“CDR”) scale, which assesses the severity of a patient’s dementia from mild, moderate to severe, with reference to several components: memory, orientation, judgment and problem-solving, *etc.*³⁶

62 At KTPH in 2015, the second defendant was assessed to have moderate dementia on the CDR scale. Prof Kua assessed her dementia to be of mild-moderate severity instead.³⁷ He applied a more granular analysis of the CDR components in his testimony, grading the second defendant as possessing mild memory impairment; moderate impairment in terms of orientation in time and to relationships and place; and severe impairment in terms of judgment and problem-solving.³⁸ Dr Tang characterised the second defendant’s dementia to be mild and of the Alzheimer’s type,³⁹ without referencing the CDR scale.

(3) The experts’ conclusions

63 Prof Kua concluded that the second defendant’s financial capacity is impaired, that she had no capacity to make her 2016 Will, but that she had the capacity to make the 2016 LPA.⁴⁰

³⁵ Prof Kua’s Report at Annex 2 at pp 19–21.

³⁶ Prof Kua’s Report at Annex 4 at p 41.

³⁷ Prof Kua’s Report at pp 7 and 9.

³⁸ NEs (21 August 2017) at p 48 ln 16 – p 49 ln 13.

³⁹ Dr Tang’s Report at p 10.

⁴⁰ Prof Kua’s Report at paras 6(VIII) and 6(IX).

64 Dr Tang assessed the second defendant as having mild mental incapacity due to her impaired short-term memory. However, she retained a good working memory with full testamentary capacity. She was mentally competent to manage her own affairs. She had testamentary capacity in June 2016 when she executed her 2016 LPA and Will, and had been mentally competent to do so provided that their contents had been slowly and carefully explained to her in simple Teochew.⁴¹

The parties' characterisation of the experts' conclusions

65 The plaintiff submitted that the cognitive tests carried out by Prof Kua were to be preferred to those by Dr Tang. Prof Kua had conducted his tests with a view to compare the results with those derived from the 2015 KTPH tests. Conversely, Dr Tang was much less rigorous and leaned in favour of leniency. The plaintiff emphasised that: (a) the MMSE scores showed that the second defendant continued to suffer difficulties in her ability to remember and retain information; (b) she had severe impairment of judgment and problem-solving on the CDR scale; (c) she obtained low scores in terms of executive functioning through the FAB assessment; and (d) while her CLOX clock-drawing test scores showed an improvement from 2015, the test did not relate specifically to her decision-making ability in everyday affairs: *Re BKR* at [146].⁴²

66 The defendants pointed to the assessments as indicating that the second defendant suffered no lack of capacity, even though she suffered from mild dementia. Reliance was also placed on medical reports from medical experts she had engaged: Dr Tan Chai Beng (“Dr Tan”), a neurologist who assessed her

⁴¹ Dr Tang’s Report at pp 9–10.

⁴² PCS at paras 109–118.

in September 2016, and Dr Calvin Fones Soon Leng (“Dr Fones”), a psychiatrist who assessed her in November 2016 and February 2017. Both Dr Tan and Dr Fones opined that the second defendant was not suffering from any psychiatric disorder. The defendants also relied on Dr Tang’s conclusions as to the second defendant’s mental competence. They emphasised that Prof Kua’s conclusions were that persons with mild dementia would still be able to remember and weigh information and communicate decisions, and that the second defendant wanted the first defendant to continue taking care of her.⁴³

The previous medical assessments

67 Two of the medical reports (by Dr Tan and Dr Fones) which the defendants relied upon had been prepared in 2016 (“the 2016 medical reports”) for SUM 5468/2016, for the purpose of establishing the second defendant’s ability to give instructions in OS 1096/2016. The defendants also relied on Dr Fones’s 2017 report, which had been prepared for the second defendant’s application in Summons No 449 of 2017 in the Family Court to strike out the present MCA application.

68 In the present proceedings, I did not attach weight to these medical assessments to assess the second defendant’s current capacity. As recounted above, I dismissed the application in SUM 5468/2016 on the basis that the plaintiff had not met the threshold required to justify an order that the second defendant undergo a medical examination against her wishes. The 2016 medical reports had not been specifically addressed to the issue of whether she had mental capacity in respect of an application under s 19 of the MCA specifically. The same could be said of Dr Fones’s 2017 report. Furthermore, the reports

⁴³ DCS at paras 11 and 23(ii).

were made earlier in time. There was not much to be gained from weighing their conclusions in light of the more recent reports, which were specifically commissioned for the purposes of the present proceedings.

Evaluation of the medical evidence

69 In summary:

(a) As noted by the plaintiff, both experts agreed that the second defendant suffered from dementia, but differed as to the severity of her dementia.⁴⁴ This difference was not large: Prof Kua's finding that the second defendant had mild-moderate dementia was just a shade beyond Dr Tang's assessment that she had mild dementia.

(b) Both experts found that the second defendant had capacity to make the 2016 LPA, but Prof Kua differed from Dr Tang in determining that she did not have capacity to make her 2016 Will.

(c) Finally, although Prof Tang found that the second defendant's financial capacity is impaired, Dr Tang concluded that she had the capacity to decide on her personal welfare and her property and affairs.

70 I ultimately concluded that the medical evidence showed that the second defendant was at the very least impaired in her judgment and mental abilities. In reaching this view, I did not rely on the second defendant's performance on the stand, so as to avoid begging the question. I generally preferred Prof Kua's evidence and accepted his conclusion that the second defendant's memory retention was mildly impaired and that she was unable to make judgments or

⁴⁴ PCS at para 104.

solve problems, given his more detailed and granular assessment through the tests conducted. I also observe the following.

71 First, I took guidance from the Court of Appeal’s comments about the utility of cognitive test results in *Re BKR* at [149]. The results of the tests administered in *Re BKR* showed that there were deficiencies in [BKR]’s memory and executive functioning; however, the Court of Appeal cautioned that her performance on the tests did not disclose much as to whether she had capacity for the purposes of ss 4 and 5 of the MCA. For instance, the clock-drawing tests indicated only that [BKR]’s executive function was far from good; they assisted the Court little in its task of determining whether she was able to make decisions. Imperfect clock-drawing skills did not relate specifically to her ability to make decisions as she would encounter in the circumstances of her life (at [146]). To that end, cross-examination and clinical interviews were also relevant to the Court’s analysis.

72 Second, the concerns raised by the plaintiff about Dr Tang’s conclusions militated against my acceptance of his conclusions. I had to accept that the strength of his evidence was affected by his departure from the MOH guidelines on the administering and scoring of the AMT. Dr Tang’s primary conclusion appeared also to be influenced by his view that some of the second defendant’s difficulties with the AMT stemmed from her lack of education and age.⁴⁵ But, as identified by the Court of Appeal in *Re BKR* at [148], whether a subject is to be regarded as “normal” is not useful; the real focus is whether her executive function is impaired. In this regard, I did not find it helpful to postulate whether the cognitive tests were tailored to the second defendant’s specific demographic

⁴⁵ NEs (4 September 2017) at p 30 ln 20 – p 34 ln 24.

or educational profile. Instead, it was critical to observe that on both occasions when Dr Tang administered his version of the AMT, the second defendant was only able to recall one of three objects she was instructed to remember after 10 minutes had elapsed.⁴⁶ In any case, I noted that Dr Tang did conclude that the second defendant did not score highly on the tests he administered.⁴⁷

73 Third, the plaintiff took issue with Dr Tang allowing the second defendant the use of paper to assist in simple subtraction during her AMTs when he saw her “struggling”.⁴⁸ The plaintiff cast this as an instance where Dr Tang had taken the principle in s 3(3) of the MCA too far, such that he rendered assistance in such a way as to bias the results of the AMT.⁴⁹ On the whole, I did not think that this particular act of assistance was inappropriate; Dr Tang’s provision of some assistance when the second defendant was working out mathematical problems would not have affected his conclusion on her mental capacity and judgment to a significant degree. He had not coached her on the answers she should give nor prompted and guided her answers: see *Re BKR* at [152]. I emphasise only that the medial expert’s role is not to construe the requirements of the MCA, but to provide the assessment called for.

74 Fourth, although Prof Kua was of the view that the second defendant could have executed the 2016 LPA properly as it was a simple document, I could not in the circumstances allow the LPA to stand. I did not endorse Dr Tang’s conclusions as to the 2016 Will for similar reasons. I elaborate upon this below.

⁴⁶ Dr Tang’s report at pp 8 (Q12) and 9 (Q17).

⁴⁷ Dr Tang’s Report at p 10.

⁴⁸ NEs (4 September 2017) at p 68 ln 9–29.

⁴⁹ PCS at paras 116 and 117.

The legal documents executed in 2016

75 I found, based on the second defendant’s cross-examination and the medical evidence, that the second defendant had an impairment or disturbance in the functioning of her mind. This manifested in her inability to recall short-term information and an impairment in her ability to use and understand information. In this section, I consider whether her mental impairment rendered her unable to make decisions in her daily life, scrutinising her execution of the 2016 Declaration of Intention, LPA and Will and highlighting the circumstances which did not appear consistent with her stated intentions.

76 I qualify that the conclusions I drew from the second defendant’s performance under cross-examination and the 2017 medical reports were not directly relevant to the question of whether she had capacity at the time she executed the relevant legal documents in 2016. Her dementia would have developed over time, and these *post facto* observations would not necessarily reflect her earlier condition.

The 2016 Declaration of Intention

77 The 2016 Declaration of Intention was not an operative instrument which the plaintiff sought to set aside directly; it was rather sought to be used by the plaintiff as an indication of undue influence exerted upon the second defendant by the first defendant. The document stated that the second defendant intended to “appoint and entrust [the first defendant] alone” to manage her money and other assets, and that it was her wish that her other three sons did not become involved with or make decisions or manage her assets. This document appeared to have been intended to address misunderstandings and to

resolve tensions between the second defendant's sons.⁵⁰ However, as was argued by the plaintiff, this document was not shown to him or the second defendant's Third Son,⁵¹ which would seem to undermine its very objective.

The 2016 LPA

78 The 2016 LPA was prepared by Mr Peh Chong Yeow ("Mr Peh") of M/s Advent Law Corporation. Mr Peh gave evidence that, from his observations with the second defendant, he concluded that she had the mental capacity to execute the 2016 Declaration of Intention and the LPA.⁵²

79 The defendants argued that the second defendant had executed the LPA under Mr Peh's advice and that the evidence from Prof Kua, Dr Tang, Dr Yeo and Dr Fones was unanimous in finding that she had capacity to execute it.⁵³ The plaintiff contended that Mr Peh's evidence was inconclusive as he had not been told of the second defendant's diagnosis of dementia. His affidavit evidence also only disclosed an opinion that she appeared to understand his explanation of the contents and effects of an LPA.⁵⁴ There was force in the plaintiff's arguments in this regard; Mr Peh did not have complete information and would not have been medically trained to assess the second defendant's mental capacity at the time.

⁵⁰ DBA, Mr Peh Chong Yeow's ("Mr Peh's") affidavit at para 4.

⁵¹ NEs (2 February 2018) at p 27 ln 5–28; PCS at paras 62–63.

⁵² DBA, Mr Peh's affidavit at para 12.

⁵³ DCS at paras 16 and 17.

⁵⁴ PCS at para 195; NEs (2 February 2018) at p 26 ln 1–9.

The 2016 Will

80 The plaintiff argued that the second defendant lacked the requisite capacity to execute the 2016 Will.⁵⁵ The defendants argued that the evidence showed that the Will was properly executed, with independent advice being given by Mr Koh Mong Poo Sam (“Mr Koh”), counsel for the defendants in OSM 1/2017. Dr Tang had also assessed the second defendant as having the capacity to execute the 2016 Will, and his evidence was to be preferred to Prof Kua’s assessment, as he had testified that he had experience evaluating more complex wills. There was no evidence of any undue influence in relation to the 2016 Will. The second defendant’s difficulties in court in explaining the circumstances in which the 2016 Will was executed were explained by her mild dementia, age, low education and illiteracy in English.⁵⁶

81 I found, however, that the evidence the defendants relied upon pointed against a finding that the second defendant executed the 2016 Will with full knowledge and capacity. She did not appear to recall the circumstances surrounding the execution of the Will when she was on the stand. Notably, she departed from her affidavit evidence as to why her 2005 Will had to be corrected:⁵⁷

Q: ... [In your affidavit,] you say why the will had to be corrected is because it needs two witnesses. Do you remember that?

A: Yes.

...

⁵⁵ PCS at paras 179–185.

⁵⁶ Defendants’ reply submission (“DRS”) at paras 18–23.

⁵⁷ NEs (1 February 2018) p 20 ln 2–24.

Witness: So two witnesses, my younger brother. I didn't think he would take their side. So I cried.

...

Q: So because this will needed correction, do you remember what was the next step you took?

A: I don't remember. I was crying very frequently, so I don't know.

Q: ... You mentioned in [paragraph 18 of your affidavit] that [your Second Son] told you that he will arrange for you to go to Ah Sam's office. Is this correct?

A: No.

...

A: Sam's office, why would I go to his office?

Court: Are you saying you did not go to Mr Sam's office?

Witness: Yes. Why would I go to his office?

82 The second defendant went on to explain that she could not remember going to a lawyer's office in 2016 and could not remember making a will then.⁵⁸ Although she recognised her signature on the 2016 Will when she was presented with it, she could not recall what its contents were, beyond the fact that it was about "money given to [her] son". When asked for details about her instructions in the Will, she repeated that "everything must go according to [her] will". She could not remember what her Will was otherwise supposed to say.⁵⁹

83 I recognised that it would not have been entirely safe to find that the second defendant lacked mental capacity in July 2016 simply on the basis of her statements in court in 2018. But I first noted that the defendants did not lead any evidence beyond the second defendant's own evidence as to the fact that she

⁵⁸ NEs (1 February 2018) at p 21 ln 4–11.

⁵⁹ NEs (1 February 2018) at p 22 ln 2–30.

had been independently advised as to the 2016 Will. Neither Mr Koh nor the witnesses to the signing of the Will gave evidence as to the circumstances surrounding its preparation and execution.⁶⁰

84 Second, Prof Kua gave expert evidence that the second defendant might not have had the testamentary capacity to execute the 2016 Will, and would have had difficulty understanding and grasping the full implications of the Will and retaining a full recollection of the document for the purpose of executing it. Based on two interviews in June 2017, he assessed that she could not remember what assets and properties she wished to include in her Will and could not remember that her Second Son was an executor. She also stated her intention to bequeath money to each of her grandchildren, but was unable to remember that only nine of her 16 grandchildren would each inherit \$1,250 under the 2016 Will. She also could not remember that her Youngest Daughter was a beneficiary. Most significantly, she could not recall that the residuary clause bequeathed all remaining moneys to the first defendant.⁶¹

85 While Dr Tang was of the view that the second defendant had capacity to execute the 2016 Will, I preferred Prof Kua's evidence for the reasons set out above at [72]. Furthermore, as argued by the plaintiff,⁶² Dr Tang's conclusions were premised on the second defendant being given full information and assistance at the time of execution of the 2016 Will, and he did not have information as to whether this was the case.⁶³

⁶⁰ Plaintiff's reply submissions at para 34.

⁶¹ NEs (21 August 2017) at p 37 ln 16 – p 40 ln 3; Prof Kua's Report at pp 10–12.

⁶² PCS at para 184(a).

⁶³ NEs (4 September 2017) at p 45 ln 29 – p 46 ln 7.

The testimony of the lawyers

86 Mr Peh, who prepared the 2016 LPA and Declaration of Intention, did not flag any issues at the time of signing and execution. But it is clear from his evidence that he did not solely rely on the second defendant for instructions; the first defendant and the second defendant's brothers, who witnessed the signing of the 2016 Declaration of Intention, were also involved in explaining the proceedings to the second defendant.⁶⁴ In any case, I could not give his evidence much weight as he was not trained to assess capacity and did not know of the second defendant's dementia at the time: see above at [79].

87 As for Mr Koh, who prepared the 2016 Will, he did not in the end testify as to his interaction with the second defendant. Any assertion he would have had on this point was not in evidence and not tested. Unlike the earlier application in SUM 5468/2016 under s 18 of the SCJA, where I accepted his position on record that he had taken instructions from the second defendant and that a medical examination of the second defendant should not be ordered, I could not in the present MCA application give his assertion *prima facie* weight.

The possibility of legal advice

88 For completeness, Dr Tang pointed to the possibility that the second defendant might have had no difficulty in executing the 2016 LPA and Will if assistance had been made available to her at the time.⁶⁵ While it is true that s 3(3) of the MCA does allow for the possibility of mental capacity being exercised with some assistance, I did not understand this to mean that any impairment

⁶⁴ NEs (31 January 2018) at p 37 ln 9–30.

⁶⁵ NEs (4 September 2017) at p 46 ln 3–7.

could be sufficiently mitigated by assistance. There would have to be a base level of capacity for the subject to recognise the shortcomings he may have. What the second defendant had fell far short of this.

89 In addition, I would understand s 3(3) as being concerned with ensuring that impairment is not found simply because the subject required some assistance in making a decision; it is meant to ensure that impairment is not too readily found. Again, the aid which the second defendant required went beyond this prescribed level of assistance. It would not be appropriate to lay down a detailed test for the level of assistance that would go beyond the pale as regards impairment.

Undue influence

90 The plaintiff relied on the doctrine of undue influence to support his case that the second defendant was incapable of making decisions for herself⁶⁶ and to argue that the 2016 LPA and Will should be revoked and set aside respectively. Undue influence was made out as the two elements were present:

- (a) First, there was presumed undue influence in the relationship between the defendants. The second defendant reposed trust and confidence in the first defendant, whom she had lived with from June 2016 onwards. The medical evidence further showed that there was dependency and vulnerability on her part. The first defendant also exercised dominion and control over her: he was her primary caregiver

⁶⁶ PCS at para 30.

and would direct her as to what to do (eg, to affix her signature on documents she was asked to sign).⁶⁷

(b) The second limb was made out by the actions undertaken by the second defendant which were made in circumstances that called for an explanation. These included the creation of documents which gave the first defendant benefits and control over the second defendant's personal welfare and her property and affairs, and instructions to lawyers to make demands of her younger sons.⁶⁸

The plaintiff also argued that the second defendant's hostility on the stand towards her children and Daughter-in-Law showed that she had had been influenced by the first defendant.⁶⁹ Nothing was raised which rebutted the presumption of undue influence.⁷⁰ Undue influence was relevant as the second defendant's mental impairment operated together with the fact that she could not realistically hope to obtain assistance in making decisions.⁷¹

91 The defendants argued that there was no undue influence. The second defendant was able to recount the circumstances in which the transactions were carried out. While her relationship with the plaintiff was strained, it was her decision to cut him and other members of the family off. She had made her choice of caregiver (the first defendant) and had executed the 2016 legal documents with independent advice. If anything, it was the plaintiff and the

⁶⁷ PCS at paras 42–55.

⁶⁸ PCS at paras 56–86.

⁶⁹ PCS at paras 87–90.

⁷⁰ PCS at paras 91–97.

⁷¹ PCS at para 155.

second defendant's Third Son who exerted undue influence on her, and the plaintiff and his witnesses who conspired against her and the first defendant.⁷²

92 I was satisfied that the presumption of undue influence was made out and unrebutted. This was a situation where Class 2B undue influence was potentially at play. In *Oversea-Chinese Banking Corp Ltd v Tan Teck Khong and another (committee of the estate of Pang Jong Wan, mentally disordered) and others* [2005] 2 SLR(R) 694 ("*Tan Teck Khong*") at [39] to [44], Kan Ting Chiu J observed that a Class 2B situation arose in the context of a mother-son relationship. On the facts, the parent-child relationship had been reversed as the mother was illiterate and feeble through old age and ill health; she placed much trust and reliance on the second defendant, who was the only son close to her. The transaction in question (a mortgage) was manifestly one-sided and not readily explicable by the mother-son relationship. In executing the mortgage, the mother placed her main asset to secure loans granted to the second defendant alone. There was no agreement on the use and repayment of the loans, and she had no say in these matters. The mortgage was clearly beneficial to him and disadvantageous to her.

93 The facts in the present case were similar to those in *Tan Teck Khong*. The evidence showed that the second defendant reposed a great deal of trust and confidence in the first defendant, and that she was dependent and vulnerable beyond a normal degree. By the first defendant's evidence, the second defendant was unable to look after herself because of her age and medical conditions.⁷³

⁷² DCS at paras 12, 17–20, 22 and 23(vi); DRS at paras 2–21.

⁷³ NEs (2 February 2018) at p 41 ln 7–32.

94 I also found that the execution of the legal documents in 2016 called for explanations which were not forthcoming. I accept that the second defendant was entitled to form her views as to her children, and as to which of them was to manage her assets and the inheritance they would each receive. However, the evidence did not indicate that she was brought to Mr Peh's and Mr Koh's offices in June and July 2016 to execute the various legal documents of her own volition.

95 I first consider the second defendant's meeting with Mr Peh on 21 June 2016. The second defendant appeared to have just complied with what was asked of her, in terms of her attendance and her execution of the documents.⁷⁴ The meeting was attended by the second defendant, her two brothers, the first defendant and his daughter.⁷⁵ Notably, it was the first defendant who had contacted the second defendant's brothers to attend the meeting to witness the signing of the 2016 LPA,⁷⁶ and the second defendant's Second Son's wife who had arranged the meeting.⁷⁷ There was nothing raised in the second defendant's evidence about weighing the information and considering what had to be done. It was of concern that when asked if she knew that the 2016 Declaration of Intention was prepared by her lawyer for her to sign, she said:⁷⁸

Witness: They told me to sign and said that, 'Since my son said it, you just sign', I don't know what they were saying.

⁷⁴ NEs (1 February 2018) at p 10 ln 8–21; p 18 ln 6–17; p 20 ln 26 – p 21 ln 7.

⁷⁵ DBA, Mr Peh's affidavit at para 2.

⁷⁶ DBA, first defendant's affidavit at paras 142 and 143.

⁷⁷ NEs (31 January 2018) at p 26 ln 3–9.

⁷⁸ NEs (1 February 2018) at p 10 ln 20–21.

Although the second defendant indicated under cross-examination that it was the plaintiff and her Third Son who told her to sign the 2016 Declaration of Intention, this did not square with Mr Peh’s evidence that the first defendant had been the only son present at meeting.⁷⁹ Mr Peh also explained that he was instructed to prepare the 2016 LPA after the second defendant had a discussion with her brothers and the first defendant.⁸⁰

96 Regarding the 2016 Will, the second defendant testified that it reflected her wishes, but was unable to give specifics as to its contents.⁸¹ To my mind, this raised the inference that she did not know what was in the Will and put in doubt the proper exercise of her own mind in these matters. This was buttressed by Prof Kua’s expert opinion that she was vulnerable and susceptible to undue influence and manipulation given her low education, mental impairment and increasing physical frailty.⁸² Furthermore, while the lawyers involved expressed that the second defendant had been properly advised, I could not rely on their accounts, as explained above at [86] and [87].

97 Finally, I considered the other occasions on 28 June and 11 July 2016 when the second defendant met Mr Peh. On both dates, the second defendant instructed Mr Peh to send legal letters on her behalf; she was accompanied by the first defendant each time.⁸³ As with the 2016 Declaration of Intention and LPA, the second defendant was unable to recognise the letters sent, even though

⁷⁹ NEs (1 February 2018) at p 10 ln 22–30; DBA, Mr Peh’s affidavit at para 2.

⁸⁰ DBA, Mr Peh’s affidavit at para 6.

⁸¹ NEs (1 February 2018) at p 22 ln 2–30.

⁸² Prof Kua’s Report at p 12 at para 6(X).

⁸³ DBA, Mr Peh’s affidavit at paras 8–11.

she was able to recall the disputes which the letters referred to.⁸⁴ Her lack of familiarity with these letters echoed her inability to recall letters sent on her behalf in July 2017⁸⁵ and the signing of her affidavits (see above at [46]). Indeed, the second defendant's affidavit dealt with complex legal issues, *eg*, explaining in detail how her lawyer had explained s 3 of the MCA to her and the various principles under the Code of Practice published pursuant to s 41(1)(a) of the MCA.⁸⁶ I took the view that it was extremely unlikely that the second defendant would have been aware of or familiar with these legal concepts, especially given that she could not even recall the contents of her affidavit or the circumstances she made it in. Given these facts in their totality, I found that a rebuttable presumption of undue influence arose, with the first defendant appearing to have had a hand in many of these events.

98 This presumption was not rebutted by the arguments and evidence relied upon by the defendants. The defendants could only point to the fact that the second defendant favoured the first defendant and approved of his actions. Such evidence did not counteract any presumption of undue influence that might have arisen through their relationship, nor did it demonstrate that the second defendant was able to exercise independent judgment, which was at issue here.

99 I would further note that much of the evidence relied upon by the defendants were assertions that the effect of the 2016 legal documents cohered with the second defendant's intentions, and that it was in fact the plaintiff and the second defendant's Third Son who had exerted undue influence on her by

⁸⁴ NEs (1 February 2018) at p 6 ln 29 – p 8 ln 28.

⁸⁵ NEs (1 February 2018) at p 48 ln 22 – p 49 ln 1.

⁸⁶ DBA, second defendant's affidavit at paras 8–10.

frightening her into moving her moneys into the Bank Account.⁸⁷ Again, these were not relevant to the rebuttal of the presumption or the issue of undue influence.

Other considerations

The second defendant's relationship with her family members

100 The plaintiff submitted that the second defendant's hostility towards him and some other family members evidenced an inability to use and weigh information. For instance, she immediately made negative associations when reference was made to the plaintiff, her Third Son and her Daughter-in-Law. The plaintiff cast these as false beliefs which stood in contrast to her positive views of the first defendant and her Second Son's intentions.⁸⁸ The defendants did not submit specifically on this marked difference in treatment between the two sets of children, but presumably would have been content to state that the second defendant was entitled to form her own views of her children.

101 In my judgment, the dim view held by the second defendant against some family members was immaterial in determining her mental capacity. Whatever her feelings might be, these did not have sufficient connection or impact on the question of whether she was indeed suffering from any mental impairment. Her hostility could have been triggered by other factors and for other reasons, *eg*, influence from others or her own perception of events. Unravelling these different possible causes would not have been productive, and was not possible to do on the evidence before me. I would have had to consider

⁸⁷ DCS at para 19(i); DRS at para 4.

⁸⁸ PCS at paras 144 and 150.

much more evidence about the family’s relationships and interactions, which would have taken me far from the purpose of the current proceedings.

Dr Yeo’s psychological assessment of the second defendant

102 Dr Yeo conducted a psychological assessment of the second defendant at her home. Prof Kua had made arrangements for him to assess her memory and executive function through a battery of cognitive tests, with the hope that the second defendant would be more comfortable at home than in a clinical setting. Dr Yeo eventually dispensed with a formal neuropsychological assessment. He instead provided Prof Kua with a report on the informal cognitive testing that he carried out, which Prof Kua elected not to include in his final report as it was inadmissible.⁸⁹

103 Dr Yeo’s report covered his behavioural observations of the second defendant and his assessment of her mental capacity. In his clinical opinion, the second defendant had sufficient intellectual and cognitive resources to independently make informed decisions, though she would require memory supports (*eg*, cues or prompts) to recall detailed factual information.⁹⁰

104 I allowed counsel to cross-examine Dr Yeo on his report. The plaintiff argued that his evidence was inadmissible as it was not medical opinion as to mental capacity which was admissible under the MCA. Dr Yeo himself acknowledged that his psychological report was not meant to be a medical report. Rather, his assessment of the second defendant’s cognitive abilities was

⁸⁹ NEs (21 August 2017) at pp 5–6.

⁹⁰ Dr Yeo’s Psychological Assessment Report exhibited at YHH-1 Tab A to his affidavit at p 7.

meant to be one of several areas considered by a medical expert making a final medical diagnosis.⁹¹ The defendants, however, referred to his report to buttress their case that the second defendant was not suffering from any impairment.⁹²

105 I was of the view that Dr Yeo’s evidence could not be given much weight. I agreed with the plaintiff that it was the opinion of medical experts that was relevant to the court’s inquiry under the MCA. Psychologists are not medical professionals, even if their psychological assessments may feed into a medical practitioner’s assessments.

The evidence from the second defendant’s family members

106 While some of the second defendant’s family members, namely, one of her brothers (“Younger Brother”), her Third Son and her Daughter-in-Law, gave evidence about her mental capacity, I did not attach much weight to their testimony. The testimony from her family members varied considerably and was largely subjective. No objective evidence, such as in the form of videos or other recordings, were adduced that could have shed light on her behaviour and capacity in an out-of-court setting. Given the strong feelings that both sides of the family had as regards the present proceedings, I found that it was safer to reach a conclusion on what I perceived in the courtroom and what was observed by the medical experts.

Conclusion on mental capacity

107 For the reasons above, I gave primary consideration to the second defendant’s performance in court and the medical experts’ opinions, and

⁹¹ PCS at paras 119–121; NEs (4 September 2017) at p 23 ln 1–21.

⁹² DCS at paras 11(iv)(c) and 23(vi).

Prof Kua's expert evidence in particular. Both factors established that she suffered from a mental impairment that manifested in a deterioration of memory and an inability to understand and use information. But a different conclusion could have been reached, if, for instance, her cross-examination was taken on its own and against strongly favourable expert opinion, and if it was shown that her performance on the stand did not accurately reflect her abilities.

108 Relatedly, I found that the second defendant lacked the capacity to execute the 2016 legal documents. I did note that Prof Kua found that her capacity to make the 2016 LPA was not affected as he considered the LPA to be a simpler document than the 2016 Will. However, considering her performance on the stand, I was of the view that the second defendant's ability was generally compromised. Adding to this substratum, the presumption of undue influence was unrebutted. This was relevant as regards the issue of mental capacity in the three ways identified in *Re BKR* at [125] and [126]. The second defendant's mental impairment affected her ability to discern whether undue influence was being exerted upon her; made her more susceptible to undue influence; and resulted in her inability to receive assistance, given that the party exerting the influence was also her primary caregiver. Taken together, the evidence pointed to a clear lack of capacity at the material times. The fact that these documents were nonetheless executed raised a distinct probability that the transactions in question were at least tainted by undue influence.

109 Considering the evidence as a whole, I was satisfied that the second defendant's mental abilities fell short of what was stipulated in ss 5(1)(a) to 5(1)(c) of the MCA. Section 5(1)(d) of the MCA, which concerned the second defendant's ability to communicate decisions, was not at issue here. But this was not determinative; as noted in *Re BKR (HC)* at [71], the requirements in ss 5(1)(a) to 5(1)(c) are usually considered together.

110 The nature of the second defendant's difficulties also put into doubt the possibility that assistance of the sort contemplated under s 3(3) of the MCA would have made a difference. Section 3(3) states that a person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been unsuccessful. I read this stipulation as geared towards facilitative assistance, *ie*, that which enables a person to make a decision. This could entail the use of simplifying language, memory aides, and the like: see also s 5(2) of the MCA. In other words, the assistance conceived of in ss 3(3) and 5(2) of the MCA is aimed at helping a person retain her existing decision-making ability. Given the second defendant's performance in court, I had grave doubts that such facilitative assistance would be helpful to her. What was of concern here was that the second defendant's ability was compromised to begin with: her inability to understand and retain information and to remember what was said minutes or hours before would prevent her from benefiting from any level of assistance that fell short of a substitution of judgment on her behalf. What she needed was not assistance under s 3(3) of the MCA, but a deputy to make decisions concerning her property and affairs on her behalf.

111 For completeness, the defendants highlighted the fact that the second defendant is not educated and is illiterate.⁹³ While it is perhaps true that her lack of education may hamper her at any age or at any level of dementia, sufficient judicial notice may be taken of the ability of many less educated persons who are able to get by and prosper even without formal schooling, by sheer dint of natural intelligence or experience.

⁹³ DCS at para 19(i).

112 Finally, the possibility of the medical experts sitting in court and giving further opinions based on the second defendant's performance on the stand was raised but not pursued, given the disposition of the case. On hindsight, that may have been a better way of disposing the matter, albeit at greater cost to the parties, who would have had to pay for the attendance of the experts in court. The other possibility would have been to have other doctors assess the second defendant's mental capacity, but this was not pursued in these proceedings.

Consequential orders to be made

113 As permitted under s 19(1) of the MCA, I declared that that the second defendant lacked capacity to make decisions for herself in relation to matters concerning her personal welfare and her property and affairs because of an impairment of or a disturbance in the functioning of her mind or brain. In particular, she lacked capacity to make decisions in respect of the Bank Account and to commence and continue proceedings in OS 1096/2016. The following orders were consequential upon my declaration.

Revocation of the 2016 LPA and Will

The 2016 LPA

114 Section 17(4)(b) read with s 17(3)(a)(ii) of the MCA provides that the court may revoke an LPA if the donor lacks the capacity to do so, where undue pressure induced the donor to create the LPA. Given that I found that the 2016 LPA had been created in circumstances where the second defendant was under undue influence by the first defendant, I granted the plaintiff's prayer in OSM 1/2017 seeking the revocation of the 2016 LPA.

The 2016 Will

115 The Court of Appeal has clarified that the definitions of capacity under ss 4 and 5 of the MCA are consistent with the common law principles regarding testamentary capacity: *Chee Mu Lin Muriel v Chee Ka Lin Caroline (Chee Ping Chian Alexander and another, interveners)* [2010] 4 SLR 373 (“*Muriel Chee*”) at [45]. For a will to be found valid, the testator must (a) have the mental capacity to make a will; (b) have knowledge and approval of the contents of the will; and (c) be free from undue influence or the effects of fraud: at [37]. The burden of proving that the testator possessed testamentary capacity falls on the propounder of the will: at [40]. Testamentary capacity will generally be presumed when the testator is not suffering from any kind of mental disability and the will was duly executed in “ordinary circumstances”: *UAM v UAN and another* [2018] 4 SLR 1086 at [57], citing *Muriel Chee* at [46]. This presumption does not arise where there are suspicious circumstances surrounding the execution of the will which would raise a well-grounded suspicion that the will did not express the mind of the testator; in these circumstances, the propounder must prove affirmatively that the testator knew and approved the contents of the will: *UAM* at [57] citing *Muriel Chee* at [48].

116 This was not strictly a case that involved a propounder of a will seeking to prove its validity. But it followed from my findings above as to the second defendant’s lack of capacity at the material time and the presence of undue influence that she did not have testamentary capacity in relation to the 2016 Will. I therefore granted the plaintiff’s prayer in OSM 1/2017 for the 2016 Will to be set aside.

Appointment of deputies

117 I was empowered by s 20(2)(b) read with s 20(1) of the MCA to appoint a deputy to make decisions on the second defendant's behalf in relation to her property and affairs. My preferred option was to appoint as deputy a family member who was generally acceptable to the second defendant and her family members. Unfortunately, but not unexpectedly, this was not possible: the only real candidate was the second defendant's Younger Brother, who declined to be appointed. I did not press this alternative further as he was fairly elderly himself, and his appointment would no doubt have added an additional burden to him.

118 The other option I considered was the appointment of a professional deputy, as permitted under s 24(1)(a)(iii) of the MCA. The statutory mechanism for doing so was not in effect at the time of my decision, but in any case, such appointment would not have been appropriate as it would have eaten into the second defendant's funds, which were not really that large to begin with.

119 As it was, I considered that the best option was to appoint two joint deputies, namely, the second defendant's Youngest Daughter and Daughter-in-Law.

120 To date, I recognise that the two deputies are trying to execute their duties to the best of their abilities and their understanding of their roles. I do not know how long this may continue. An option that may have to be triggered would be the appointment of a single deputy, namely, the second defendant's Daughter-in-Law, although the second defendant may not be on good terms with her and may not wish to deal with her. It may also come to pass that fairly intrusive orders need to be made, eg, to remove the second defendant from her current care arrangements. It is hoped that these measures will be avoided.

Decision on the civil application

121 Based on the above evidence before me on her mental capacity, I was of the view that the second defendant did not have capacity to manage her moneys. A person lacking capacity may not bring a claim in any proceedings, except by his litigation representative: O 76, r 2 of the Rules of Court (Cap 322, R5, 2014 Rev Ed). Accordingly, I made no order in respect of the civil application in OS 1096/2016 by the second defendant for the return of the moneys in the Bank Account to her. In any case, I note that the second defendant has since closed the Bank Account and transferred the moneys that were in it to a new account at the same Bank.⁹⁴ These moneys would fall to be managed by the deputies appointed by the court.

Conclusion

122 For the foregoing reasons, I declared that the second defendant lacked capacity to make decisions as to her personal welfare and her property and affairs, and appointed deputies to make decisions on her behalf in relation to her property and affairs. The 2016 LPA and Will were also accordingly revoked and set aside respectively. The first defendant has appealed against my decision.

Aedit Abdullah
Judge

⁹⁴ DBA, second defendant's affidavit at para 12 and pp 125–133.

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