

The Legal Aspects of Dementia

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BAMP/UWI Medical Conference, LESC
November 19th, 2016

The Mental Health Act (1989)

- ▶ Referred to hereafter as 'The Act'
- ▶ Chapter 45 of the Laws of Barbados
- ▶ Governs the legal management of a 'patient':
"a person who is suffering or appears to be suffering from a mental disorder"
- ▶ While the Act does not mention the word dementia, it makes provision for related matters.
- ▶ Dementia is a related matter

Part IV of the Act

- ▶ Addresses the management and affairs of patients.
 - ▶ Considers the body of medical evidence
 - ▶ The court must be satisfied that the person is incapable by reason of a mental disorder of managing and administering their affairs.
 - ▶ The referred medical evidence must be presented to this effect.
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Determination of Capacity

- ▶ Mental Capacity means a person's ability to make their own choices and decisions.
- ▶ Capacity is judged according to the specific decision to be made, so a person may have sufficient capacity to make simple decisions but not more complicated ones
- ▶ This is the key determinant in the court's exercise of its powers.
- ▶ The court is heavily dependent on the medical report or reports to determine whether the patient has the capacity to manage their own affairs

The Medical Report

- ▶ Provided by a registered medical practitioner
- ▶ Gives chronological changes in the patient's medical history
- ▶ Includes observations of diminished/diminishing capacity over time
- ▶ Details dates and times the patient was seen and any referrals made.
- ▶ Must contain a clear and definite medical diagnosis
- ▶ Must state that the patient is incapable of managing his/ her property and affairs
- ▶ Should give a prognosis of the person's future ability to manage their affairs

Medical and Legal Visitors

- ▶ Section 25 of the Act states that "the Court may appoint a medical practitioner who appears to have special knowledge and experience of cases of mental disorder to be a medical visitor"
 - ▶ This appointed medical visitor would be expected to give an expert assessment (e.g. psychiatrist or gerontologist)
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Major Legal Issues

Once a diagnosis of diminished capacity by reason of a mental disorder, such as dementia is made, the patient can no longer:

- ▶ Give Power of Attorney to another
 - ▶ Write or amend a Will
 - ▶ Enter into any contracts
 - ▶ Perform functions such as renewing a driver's license to continue driving
 - ▶ Make withdrawals from their bank
 - ▶ Give consent to marry
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Appointing a Receiver

- ▶ Section 22 of the Act provides for the Court to make an Order to appoint a Receiver.
- ▶ A Receiver "shall do all such in relation to the property and affairs of the patient"
- ▶ The Court may appoint joint Receivers.
- ▶ The Act is silent as to who may or may not be appointed as Receiver
- ▶ It does not state that the Receiver must be next of kin
- ▶ It does not state what happens when there are several children applying to be a Receiver.

The Court Order for Receivership

- ▶ The Court Order states that the Receiver is given legal power to act in lieu of the patient
- ▶ The Receiver can: manage finances; collect rents, make deposits and withdrawals, pay utilities; ensure that all the patient's health and medical needs are met and paid for
- ▶ The Receiver cannot: sell/transfer property; alter a Will; change legal provisions made by the patient while still capable without the consent of the Court
- ▶ The Receiver must appear in court biannually to give an account of the patient's affairs

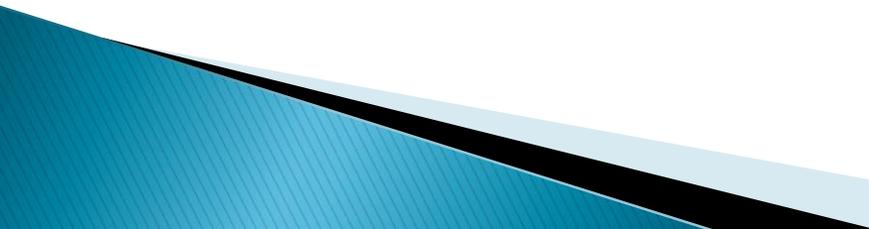
Case Studies

- ▶ Case 1: EC
 - ▶ 91 years old with 9 children
 - ▶ In institutional care for the last 3 years of her life up to the time of her death.
 - ▶ Diagnosis made by medical practitioner of dementia/ coupled with a stroke and paralysis
 - ▶ Contention among siblings
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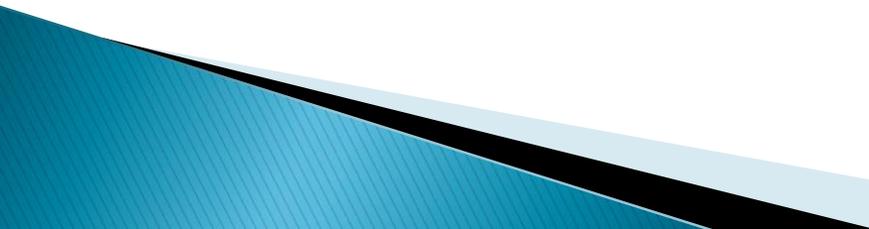
Case Studies (cont'd)

- ▶ Case 2. MB:
 - ▶ 89 year old Barbadian
 - ▶ Diagnosed as dementia in USA, in residential care there
 - ▶ No children or living siblings
 - ▶ Court in the U.S.A appointed joint Guardians
 - ▶ Court in Barbados appointed different joint Receivers
 - ▶ Contentious as step-children want to be appointed as Receivers
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Case Studies (cont'd)

- ▶ Case 3: RB
 - ▶ Late 70s male, divorcee, lives alone
 - ▶ Only son, in USA ,detects father's significantly increased pattern of spending,suspects dementia
 - ▶ Son requests medical report from father's GP of many years who is reluctant to write it
 - ▶ Son makes appointment for father to be seen by a medical expert
 - ▶ Dementia diagnosed
 - ▶ Son appointed as Receiver by the Court
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Common Grey Issues

- ▶ Who should be allowed to request a medical report of competency or capacity?
 - ▶ Should the GP/family physician/ other doctor, who is not a psychiatrist or gerontologist, provide the Court with an initial medical report on capacity?
 - ▶ Should Receiver or Next-of-Kin make medical decisions concerning the patient if they are not one and the same? E.g. A husband as NOK and daughter as Receiver
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The Way Forward

- ▶ The present Act needs amending
 - ▶ This should be done in conjunction with the Succession Act.
 - ▶ The practice of a Lasting Power or Enduring Power of Attorney , presently employed in other jurisdictions, should be examined.
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References

- ▶ The Mental Health Act, Chapter 45 of the Laws of Barbados
 - ▶ The Mental Health Rules
 - ▶ The Succession Act Chapter 249 of the Laws of Barbados
 - ▶ The Mental Health Act 1983, England and Wales
 - ▶ The Mental Capacity Act 2005
 - ▶ Canada's Traditional and Current Legal Capacity Laws
 - ▶ Cases and Court orders
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Definitions

- ▶ Enduring Power of Attorney:– an authority given by you to another person to look after your affairs and it continues to be valid even if you lose your capacity to make or communicate decisions.
 - ▶ Capacity is the legal term that means the ability to make and understand the consequences of decisions.
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Thank You

