A Need for Enduring Power of Attorney in Malaysia

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Abstract

Malaysia faces an ageing population that would have an impact on the socio-economic dynamics of the nation. This would require special consideration to enable the placement of effective mechanisms to deal with the special issues that accompany the impact. One of the issues being the subject of this paper is the ability of the elder to delegate a valid power of attorney that survives and endures the incapacity of the donor elder. Currently, the Malaysian Power of Attorney Act 1949 (Act 424) requires an ordinary power of attorney that does not survive the incapacity of the donor. The attorney would risk legal liabilities if they knowingly continue to operate under an invalid power of attorney. The need for enduring power of attorney is pressing given that the elder incapacity is the very situation the donor elder would seek to address and would want the delegate attorney to continue to act in the best interest of the donor elder's incapacity. It also prioritises the issue of caring for the aged elderly. Further, the scope of the current power of attorney is limited to financial matters. It needs also to be able to address non-financial aspects. In this regard, the lacunas or gaps in the existing legislation as stated above are examined by references to statute and cases. Lessons from other jurisdictions are drawn upon to highlight the way forward wherein change in the law is required in order to facilitate and protect the interest not only of the elder but the attorneys who deal and manage the elder's property and interest, financial or otherwise and third parties like banks or financial institutions who deal through the attorneys. The awareness and impetus for change needs to come not only from the elder but also the business and financial industry involved in dealings with the elder or the elder attorney, attorneys under a power of attorney and society in general.