

**THE LAW REFORM COMMISSION OF HONG KONG**

**CONSULTATION PAPER**

**ENDURING POWERS OF ATTORNEY:  
PERSONAL CARE**

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# THE LAW REFORM COMMISSION OF HONG KONG

## CONSULTATION PAPER

### ENDURING POWERS OF ATTORNEY: PERSONAL CARE

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# Preface

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1. A power of attorney is a legal instrument that enables a person (the donor) to delegate legal authority to another person (the attorney, or agent) or persons to make property, financial and other legal decisions on his behalf. A power of attorney can be general, so that the attorney can conduct any sort of business on behalf of the donor, or it may be limited to the specific transactions expressly provided for in the document.

2. A conventional power of attorney can only be made by a person who is mentally competent, and any such power of attorney will lapse if the donor subsequently becomes mentally incompetent. A special type of power of attorney called an “enduring power of attorney” (EPA) can be executed while the donor of the power is mentally capable but continues to have effect after the donor becomes incapable. As a result of concerns expressed that the execution requirements for an EPA were unduly onerous and might be acting as a hindrance to the wider use of EPAs, the Law Reform Commission was asked in November 2006 to review the requirements for the execution of an enduring power of attorney prescribed in section 5(2) of the Enduring Powers of Attorney Ordinance (Cap 501) (the EPA Ordinance). The Commission’s recommendations for reform in relation to this aspect of EPAs were presented in a report published in March 2008.<sup>1</sup>

3. At present, the powers which may be delegated under an EPA in Hong Kong extend only to decisions relating to the property and financial affairs of the donor.<sup>2</sup> The terms of reference of the Commission’s study which resulted in the March 2008 report were restricted to the execution requirements of an EPA. In the process of consulting on that review, however, the Commission also sought preliminary views on whether the powers delegated under an EPA should be extended to include decisions on the donor’s personal care, as is the case in a number of other jurisdictions. The Commission’s consultation paper posed a series of questions, including the following:

*“Do you think that the scope of the existing EPA should be reviewed and consideration given to including decisions as to the donor’s personal care (but not decisions as to giving or refusing medical treatment)?”<sup>3</sup>*

4. The majority of those who responded to this question were in favour of consideration of such an extension, including both the Bar and the Law Society. The Commission concluded that the completion of the review of the execution requirements for an EPA should not be delayed by expanding

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<sup>1</sup> Report on *Enduring Powers of Attorney*, HK LRC (March 2008).

<sup>2</sup> See section 8(1) of the Enduring Powers of Attorney Ordinance (Cap 501).

<sup>3</sup> Consultation paper on *Enduring Powers of Attorney*, HK LRC (April 2007), at page 39.

that study to include the question of personal care. Instead, the Commission agreed that this should be considered as a separate research project. The Commission's report on *Enduring Powers of Attorney* reflected this decision and confirmed that the Commission intended to consider as a separate research project the possible extension of EPAs to include personal care decisions.<sup>4</sup>

5. A supplementary issue was raised by a solicitor who responded to the Commission's April 2007 consultation paper on *Enduring Powers of Attorney*. He referred to the difficulty which can arise in some circumstances because the Hong Kong Registrar requires that the solicitor and medical practitioner who witness the execution of an EPA hold Hong Kong practising certificates. The solicitor cited the example of married clients who had drafted EPAs in Hong Kong but had moved to Scotland before executing them to enable the wife to undergo extended medical treatment. The wife subsequently died in Scotland. The husband executed his EPA before a Scottish solicitor and a Scottish doctor. Some years later, he returned to Hong Kong where the family wished to register the EPA at the onset of the husband's Alzheimer's disease. Registration was refused because the EPA had not been executed before a Hong Kong solicitor and doctor. The family were left without a remedy, as the husband was no longer competent to execute an EPA.

6. In the light of this practical difficulty with the existing provisions, the solicitor concerned suggested in his response to the Commission's consultation paper that consideration should be given to acceptance in Hong Kong of an EPA executed outside Hong Kong if the EPA were executed before a solicitor and a medical practitioner qualified in the place of execution.

7. In June 2008, the Secretary for Justice and the Chief Justice accordingly gave the following terms of reference to the Law Reform Commission:

*"To consider: (a) whether the scope of an enduring power of attorney should be extended beyond the donor's property and financial affairs to include matters relating to the donor's 'personal care' and, if so, what matters that term should encompass; and (b) whether provision should be made for the recognition in Hong Kong of enduring powers of attorney executed overseas."*

8. In considering those issues, questions arose as to what mechanism should be in place for supervision and discharge of an EPA attorney and the resolution of disputes. In December 2008 the original terms of reference were accordingly expanded to include this additional matter. The revised terms of reference now read:

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<sup>4</sup> Report on *Enduring Powers of Attorney*, HK LRC (March 2008), at page 38.

*“To consider: (a) whether the scope of an enduring power of attorney should be extended beyond the donor’s property and financial affairs to include matters relating to the donor’s ‘personal care’ and, if so, what matters that term should encompass; (b) whether provision should be made for the recognition in Hong Kong of enduring powers of attorney executed overseas; and (c) what provision should be made for the supervision of an attorney appointed under an enduring power of attorney and for the resolution of disputes.”*

9. This consultation paper sets out the Commission’s conclusions in respect of these questions. The Commission invites the public’s views on the issues raised and the proposals presented. A summary of the Commission’s recommendations is at page 57 and you will find a list of questions on which the public’s views are sought at page 55.

## **Terminology**

10. Different terms are used in different jurisdictions to describe the person who delegates his decision-making powers under an EPA, usually either the “donor” or the “principal”. For the sake of simplicity, we use the term “donor” throughout this paper. Similarly, we use the term “attorney” for the person to whom the donor delegates decision-making powers under an EPA. To avoid confusion, we should make clear that “attorney” in this sense does not mean a lawyer (though a donor may choose to appoint a lawyer as his EPA attorney), and a donor can, with certain restrictions, appoint anyone he wishes (whether professionally qualified or not) to be his attorney under an EPA.

11. It may also be useful at the outset to explain the distinction between an EPA and an “advance directive”. Like an EPA, an advance directive relates to decision-making for a person who no longer has mental capacity. Unlike an EPA, however, an advance directive is concerned with the future critical medical care of the donor. An advance directive is a written statement in which a person indicates when mentally competent the form of health care he would like to have at a future time when he is no longer competent. In particular, an advance directive enables a person to refuse certain types of life-sustaining medical treatment. Unlike an EPA, there is no statutory form of advance directive in Hong Kong. The Commission’s 2006 report on *Substitute Decision-making and Advance Directives in relation to Medical Treatment* put forward a model form of advance directive which could be used by those wishing to make decisions as to their future health care. In doing so, the Commission believed that the model form, if correctly completed, would offer an individual reasonable assurance that his wishes would be carried out. The model form would also assist medical practitioners in their consideration of consent to medical treatment and make it easier for them to be confident as to the patient’s wishes. The model form is available on the Commission’s website at Annex 1 to the 2006 report on advance directives and is available for anyone who chooses to use it ([www.hkreform.gov.hk/en/publications/rdecision.htm](http://www.hkreform.gov.hk/en/publications/rdecision.htm)).

# Chapter 1

## The existing law in Hong Kong and the case for change

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### The absence of “personal care” EPAs

1.1 Section 7 of the Powers of Attorney Ordinance (Cap 31) provides that a general power of attorney confers on the attorney “*authority to do on behalf of the donor anything which he can lawfully do by an attorney.*” A general power of attorney can only be made by a person who is mentally competent and will lapse if the donor subsequently becomes mentally incompetent. In contrast, an EPA continues to have effect after the donor becomes incapable.<sup>1</sup> Its scope is more limited than that of a conventional power of attorney, however, and section 8(1) of the EPA Ordinance provides that an EPA “*must not confer on the attorney any authority other than authority to act in relation to the property of the donor and his financial affairs.*” Matters excluded from the scope of an EPA would include decisions relating to the donor’s medical treatment and general welfare. There is, in other words, no scope under the existing Hong Kong provisions for what may for simplicity’s sake be termed a “*personal care*” EPA.

1.2 As explained in the preface to this paper, the consultation paper issued by the Commission in April 2007 on the execution requirements for an EPA included a question as to whether consideration should be given to extending the scope of an EPA to include decisions as to the donor’s personal care. The question specifically excluded decisions as to the giving or refusing of medical treatment, however. The consultation paper pointed out that:

*“Decisions as to giving or refusing of medical treatment are of a different character to those relating to personal care and it is possible that an attorney appointed to make decisions as to the one may not be the most appropriate person to make decisions as to the other.”<sup>2</sup>*

The possibility of extending the scope of EPAs to include decisions as to the giving or refusing of medical treatment was considered by the Commission in an earlier project on advance directives, but rejected on balance.<sup>3</sup> That discussion was, however, in the context of decisions involving life-sustaining treatment for the critically ill, rather than everyday health care decisions.

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<sup>1</sup> See section 4(1) of Cap 501, cited above.

<sup>2</sup> Consultation paper on *Enduring Powers of Attorney*, HK LRC (April 2007), at page 36.

<sup>3</sup> Report on *Substitute Decision-making and Advance Directives in relation to Medical Treatment*, HK LRC (August 2006), at page 155.

1.3 In a number of other jurisdictions the law allows an individual to delegate decisions as to his personal care to an attorney by way of an enduring form of attorney, whether this be an expanded EPA or a specific form of power of attorney which is limited to personal care decisions but which survives the onset of the donor's mental incapacity. We set out in the next chapter examples of provisions overseas which allow such personal care decisions to be delegated. What falls within the scope of a personal care EPA differs from one jurisdiction to another, but a typical example might be section 11 of the Powers of Attorney Act 2006 in the Australian Capital Territory. That section provides that for the purposes of the Act, the following are examples of "*personal care matters*":

- (a) where the donor lives;
- (b) who the donor lives with;
- (c) whether the donor works and, if he does so, where and how the donor works;
- (d) what education or training the donor gets;
- (e) whether the donor applies for a licence or permit;
- (f) the donor's daily dress and diet;
- (g) whether to consent to a forensic examination of the donor;
- (h) whether the donor will go on holiday and where; and
- (i) legal matters relating to the donor's personal care.

1.4 As the Commission's 2007 consultation paper on enduring powers of attorney observed, there may be circumstances in which it would be difficult to make decisions as to the donor's property and financial affairs which are in his best interests without also becoming involved in personal care matters such as these. The absence of provision for "personal care" EPAs in Hong Kong means that resort may have to be had to the more cumbersome guardianship procedure under the Mental Health Ordinance (Cap 136). There are clearly a number of issues which fall to be considered if personal care EPAs are introduced here (such as whether the same execution requirements should apply for all types of EPA and whether it should be possible to appoint separate attorneys for different EPAs) but we think that there would be distinct benefits in establishing a mechanism for "personal care" EPAs in Hong Kong.

**Recommendation 1**

**We recommend that the scope of an EPA in Hong Kong be extended to include decisions as to the donor's personal care.**

## **Supervision and discharge of EPA attorneys and the resolution of disputes**

1.5 Section 11(1) of the Enduring Powers of Attorney Ordinance (Cap 501) provides that the court may, on the application of an interested party: (a) require an EPA attorney to produce records and accounts and make an order for their auditing; (b) revoke or vary an EPA; or (c) remove the attorney if satisfied that the EPA donor's interests require it. There is no express power given to the court under Cap 501 to appoint a replacement attorney.

1.6 An EPA is revoked under section 13(1) of Cap 501, *inter alia*, on the death or bankruptcy of the attorney or on the appointment of a committee under Part II of the Mental Health Ordinance (Cap 136). Section 17(a) provides that, where the donor is mentally incapable, the attorney cannot revoke the EPA unless he applies to the court and the court confirms the revocation. The legislation does not specify the grounds on which the court may refuse to confirm the revocation but section 17(b) provides that the court "may confirm" the revocation where it is satisfied that the attorney has done whatever is necessary in law to effect a revocation.

1.7 Unlike some other jurisdictions, there is no provision in Cap 501 for the resolution of disputes between joint attorneys. Section 11(2), which provides that the attorney can apply to the court for directions on "*the meaning and scope of the authority of the power*", may offer some assistance but is more likely to be relevant where an attorney's actions have been questioned by a third party.

## **Recognition of EPAs executed outside Hong Kong**

1.8 As was pointed out in the preface, the Enduring Powers of Attorney Ordinance (Cap 501) makes no provision for recognition of EPAs (conventional or otherwise) executed outside Hong Kong, even if the execution requirements stipulated in the Ordinance have been met. As will be seen in the next chapter, this contrasts with the situation in a number of other jurisdictions, where specific legislative provision is made for recognition. A recent report by the Western Canada Law Reform Agencies argues in favour of recognition of EPAs made in another jurisdiction and points out that the non-recognition of EPAs from one jurisdiction to another impinges adversely on the mobility rights of persons who rely on EPAs. While the report's primary concern is with recognition between provinces within Canada, the points made in favour of recognition have equal relevance to Hong Kong, with its highly mobile population:

*"Because the formalities and content of EPAs are not uniform across provinces, an attorney may encounter difficulties dealing with the donor's affairs when the donor owns property in, or moves to, a province other than the province where the EPA was made. Persons or institutions with whom the attorney*

*needs to transact business may refuse to recognise the foreign EPA. Some donors may have the foresight to prepare two separate EPAs – one that complies with the formalities of the originating jurisdiction and one that complies with the formalities of the jurisdiction they will end up in. However, this precaution is unlikely to be carried out unless a lawyer has been involved in the preparation of the initial EPA and knows that the donor has property in another jurisdiction or anticipates that the donor is likely to move to another jurisdiction. Unlike the donor of a non-enduring power of attorney, a donor who is incapacitated cannot cure the defect by making a new EPA.”<sup>4</sup>*

This last point has particular resonance, given the specific Hong Kong example of hardship referred to at paragraph 5 of the preface.

1.9 We consider that provision should be made for the recognition of EPAs executed outside Hong Kong in specific circumstances. We refer in the next chapter to examples of such legislative provision elsewhere which might provide a model.

**Recommendation 2**

**We recommend that provision should be made for the recognition in Hong Kong of EPAs executed outside Hong Kong in specific circumstances.**

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<sup>4</sup> Final Report, *Enduring Powers of Attorney: Areas for Reform*, Western Canada Law Reform Agencies (2008), at page 11.

## Chapter 2

# Personal care EPAs, supervision and discharge of EPA attorneys and provision for recognition in other jurisdictions

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### Personal care EPAs

2.1 As explained in the previous chapter, a number of overseas jurisdictions have extended the scope of EPAs to include not only property and financial affairs but also matters relating to the donor's day-to-day well-being and care. This chapter looks at some of these provisions. The terminology used differs from jurisdiction to jurisdiction ("personal care", "personal affairs", "personal welfare", etc), but this paper uses the rubric "personal care" to include all of these.

2.2 For the sake of simplicity, "donor" is used throughout to mean the person executing an EPA (or principal) and "attorney" to mean the person to whom the EPA delegates authority (or donee).

### ***Australia: Australian Capital Territory***

2.3 An EPA made under the Powers of Attorney Act 2006 may cover "*property matters*", "*personal care matters*" or "*health care matters*". Section 11 gives the following examples of "*personal care matters*" which an EPA may cover:

- (a) where the donor lives;
- (b) who the donor lives with;
- (c) whether the donor works and, if he does so, where and how the donor works;
- (d) what education or training the donor gets;
- (e) whether the donor applies for a licence or permit;
- (f) the donor's daily dress and diet;
- (g) whether to consent to a forensic examination of the donor;
- (h) whether the donor will go on holiday and where; and
- (i) legal matters relating to the donor's personal care.

These examples are not exhaustive and may extend, but not limit, the meaning of the provision in which they appear.<sup>1</sup>

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<sup>1</sup> Sections 126 and 132 of the Legislation Act, referred to throughout the Powers of Attorney Act 2006.

- 2.4 The health care matters with which an EPA may deal include:
- (a) consenting to lawful medical treatment necessary for the donor's wellbeing;
  - (b) donations under the Transplantation and Anatomy Act 1978 by the donor or someone else;
  - (c) withholding or withdrawal of medical treatment for the donor; and
  - (d) legal matters relating to the donor's health care.<sup>2</sup>

2.5 Section 35 prohibits the donor from authorising the attorney to exercise power in relation to "*special personal matters*" or "*special health care matters*". The "*special personal matters*" are:

- (a) making or revoking the donor's will;
- (b) making or revoking a power of attorney or EPA for the donor;
- (c) exercising the donor's right to vote in an election or referendum;
- (d) consenting to the adoption of a child of the donor who is under 18: and
- (e) consenting to the marriage of the donor.<sup>3</sup>

The "*special health care matters*" are defined as:

- (a) removal of non-regenerative tissue from the donor while alive for donation to someone else;
- (b) sterilisation of the donor if the donor is, or is reasonably likely to be, fertile;
- (c) termination of the donor's pregnancy;
- (d) participation in medical research or experimental health care;
- (e) treatment for mental illness;
- (f) electroconvulsive therapy or psychiatric surgery; and
- (g) health care prescribed by regulation.<sup>4</sup>

### **Australia: New South Wales**

2.6 An EPA made under the Powers of Attorney Act 2003 in New South Wales only authorises an attorney to act in connection with financial matters such as bank accounts, shares or property. It cannot be used to make medical or lifestyle decisions. An individual wishing to appoint a person to make such decisions for him must instead appoint an enduring guardian under the Guardianship Act 1987. The New South Wales Guardianship Tribunal's explanatory pamphlet on enduring guardians explains:

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<sup>2</sup> Section 12 of the Powers of Attorney Act 2006.

<sup>3</sup> Section 36 of the Powers of Attorney Act 2006.

<sup>4</sup> Section 37 of the Powers of Attorney Act 2006.

*“You can give your enduring guardian as many or as few functions as you like. The appointment form has a list of functions and you can delete the functions you do not want your enduring guardian to have and add others if you wish. For example, you can give them the power to decide about your health care but not where you live.*

*You may give the enduring guardian directions about how to exercise the decision making functions you give them. For example, you can direct your enduring guardian to consult with a particular close friend before making a decision. If your enduring guardian has a health care function, they will be able to access your medical records to help make decisions for you.”<sup>5</sup>*

2.7 The form to appoint an enduring guardian lists the following functions which the donor may wish to authorise the enduring guardian to exercise on the donor’s behalf:

- (a) to decide where the donor lives;
- (b) to decide what health care the donor receives;
- (c) to decide what other kinds of personal services the donor receives;
- (d) to consent to the carrying out of medical or dental treatment on the donor (in accordance with Part 5 of the *Guardianship Act* 1987).

### ***Australia: Queensland***

2.8 An EPA in Queensland may cover both financial matters and “personal matters”.<sup>6</sup> A “personal matter” is defined in section 2 of Schedule 2 to the Powers of Attorney Act 1998 as a matter relating to the donor’s care (including his health care) or welfare and includes, for example:

- (a) where the donor lives;
- (b) with whom the donor lives;
- (c) whether the donor works and, if so, the kind of place and work and the employer;
- (d) what education or training the donor undertakes;
- (e) whether the donor applies for a licence or permit;
- (f) day-to-day issues, including, for example, diet and dress;
- (g) whether to consent to a forensic examination of the donor;
- (h) the donor’s health care;
- (i) a legal matter not relating to the donor’s financial or property matters.

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<sup>5</sup> “*Planning ahead ... enduring guardianship*”, The Guardianship Tribunal (2004), at [http://www.gt.nsw.gov.au/information/doc\\_124\\_end\\_guard.htm](http://www.gt.nsw.gov.au/information/doc_124_end_guard.htm) on 8 April 2008.

<sup>6</sup> Section 32(1) of the Powers of Attorney Act 1998.

2.9 An EPA cannot extend to “*special personal matters*” or “*special health matters*”. A “*special personal matter*” is a matter relating to:

- (a) making or revoking the donor’s will;
- (b) making or revoking a power of attorney, EPA or advance health directive of the donor;
- (c) voting for the donor in an election or referendum;
- (d) consenting to adoption of a child of the donor under 18;
- (e) consenting to the donor’s marriage.<sup>7</sup>

A “*special health matter*” is a matter relating to the “*special health care*” of the donor, and “*special health care*” means:

- (a) removal of tissue from the donor while alive for donation to someone else;
- (b) sterilisation of the donor;
- (c) termination of the donor’s pregnancy;
- (d) participation by the donor in special medical research or experimental health care;
- (e) electroconvulsive therapy or psychosurgery for the donor;
- (f) health care prescribed under the Guardianship and Administration Act 2000.<sup>8</sup>

2.10 There is separate provision made in the Powers of Attorney Act 1998 for advance health directives, which enable a donor to give directions about health matters and special health matters. In the light of the Commission’s previous reports on *Advance Directives* and *Enduring Powers of Attorney*, it is interesting to note that the Queensland legislation requires that an advance health directive must include a certificate by a doctor stating that, at the time of making the advance health directive, the donor appeared to the doctor to have the capacity necessary to make it.<sup>9</sup> There is no such requirement in respect of an EPA.

### ***Australia: Victoria***

2.11 In Victoria, there are separate provisions for EPAs dealing solely with financial matters and those dealing with medical treatment.<sup>10</sup> The latter is essentially an advance medical directive, extending to refusal of treatment, and does not deal with decisions on day-to-day care, such as where the donor should live. Those care decisions can be dealt with by a guardianship order made under the Instruments Act 1958. A key difference between guardianship and an EPA, however, is that a guardian is appointed by the Victorian Civil and Administrative Tribunal, while it is the donor himself who appoints his attorney under an EPA.

<sup>7</sup> Section 3 of Schedule 2 to the Powers of Attorney Act 1998.

<sup>8</sup> Sections 6, 7 and 17 of Schedule 2 to the Powers of Attorney Act 1998.

<sup>9</sup> Section 44(6) of the Powers of Attorney Act 1998.

<sup>10</sup> Under the Instruments Act 1958 (as amended by the Instruments (Enduring Powers of Attorney) Act 2003) and the Medical Treatment Act 1998 respectively.

### **Canada: Saskatchewan**

2.12 The Powers of Attorney Act 2002 allows a donor to appoint a personal attorney or a property attorney, or both. An attorney appointed under an EPA granted after the coming into force of the Act will be both a personal and property attorney unless the EPA states otherwise.<sup>11</sup> A personal attorney is defined by section 2(1) to mean a person who is appointed under an EPA to act for the donor with respect to the donor's "*personal affairs*". In contrast, a property attorney is appointed to act for the donor with respect to the donor's "*property and financial affairs*".

### **England and Wales**

2.13 Section 9(1) of the Mental Capacity Act 2005 provides that a Lasting Power of Attorney (LPA) gives the attorney authority to make decisions about the donor's "*personal welfare*" (or specified matters concerning his personal welfare) and his "*property and affairs*". Section 17 provides that the powers exercisable in respect of the donor's personal welfare extend in particular to:

- (a) deciding where the donor is to live;
- (b) deciding what contact, if any, the donor is to have with any specified persons;
- (c) making an order prohibiting a named person from having contact with the donor;
- (d) giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for the donor; and
- (e) giving a direction that a person responsible for the donor's health care allow a different person to take over that responsibility.

### **Ireland**

2.14 Section 6(6) of the Powers of Attorney Act 1996 allows the donor of an EPA to grant powers of decision to his attorney in relation to personal care. Section 4(1) defines a "*personal care decision*" as a decision on one or more of the following:

- (a) where the donor should live;
- (b) with whom the donor should live;
- (c) whom the donor should see and not see;
- (d) what training or rehabilitation the donor should get;
- (e) the donor's diet and dress;
- (f) inspection of the donor's personal papers; or
- (g) housing, social welfare and other benefits for the donor.

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<sup>11</sup> Section 4.1 of the Powers of Attorney Act 2002.

The Law Society of Ireland has pointed out in guidelines to its members that personal care decisions under an EPA do not extend to consents to medical treatment.<sup>12</sup>

2.15 Any personal care decision made by an attorney on behalf of a donor must be made in the donor's best interests.<sup>13</sup> Section 6(7)(b) provides that in deciding what is in a donor's best interests regard must be had to the following:

- (i) so far as ascertainable, the past and present wishes and feelings of the donor and the factors which he would consider if he were able to do so;
- (ii) the need to permit and encourage the donor to participate, or to improve the donor's ability to participate, as fully as possible in any decision affecting the donor;
- (iii) so far as it is practicable and appropriate to consult any of them, the views of the following persons as to the donor's wishes and feelings and as to what would be in the donor's best interests:
  - (a) any person named by the donor as someone to be consulted on these matters;
  - (b) anyone engaged in care for the donor or interested in the donor's welfare;
- (iv) whether the purpose for which any decision is required can be as effectively achieved in a manner less restrictive of the donor's freedom of action.

Section 6(7)(c) states that, in relation to a personal care decision, the attorney will have sufficiently complied with the "*best interests*" requirement in section 6(7)(a) if he "*reasonably believes that what he or she decides is in the best interests of the donor.*"

### ***New Zealand***

2.16 The Protection of Personal and Property Rights Act 1988 makes provision for EPAs in relation to property or personal care and welfare. So far as an EPA in relation to personal care and welfare is concerned, section 98 provides that the donor "*may authorise the attorney to act in relation to the donor's personal care and welfare, either generally or in relation to specific matters, and in either case such authorisation may be given subject to*

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<sup>12</sup> "*Enduring Powers of Attorney: Guidelines for Solicitors*", Law Society of Ireland (2004), at page 4.

<sup>13</sup> Section 6(7)(a) of the Powers of Attorney Act 1996.

*conditions and restrictions.*” The attorney may not act in relation to the donor’s personal care and welfare unless the donor is mentally incapable.<sup>14</sup>

### **Scotland**

2.17 The Adults with Incapacity (Scotland) Act 2000 makes provision for “*continuing powers of attorney*”, which relate to the donor’s property and financial affairs, and “*welfare powers of attorney*”, which relate to the donor’s personal welfare. What amounts to “*personal welfare*” is not defined, but section 16(6) provides that a welfare attorney may not:

- (a) place the donor in a hospital for the treatment of mental disorder against his will;
- (b) consent on behalf of the donor to certain specified types of medical treatment;
- (c) make, on behalf of the donor, a request under section 4(1) of the Anatomy Act 1984;
- (d) give, on behalf of the donor, an authorisation under certain specified provisions of the Human Tissue (Scotland) Act 2006; or
- (e) make, on behalf of the donor, a nomination under section 30(1) of the Human Tissue (Scotland) Act 2006.

### **Supervision and discharge of an EPA attorney and the resolution of disputes**

2.18 As was pointed out in the preface, in the course of considering whether or not to introduce some sort of personal care EPA to Hong Kong, the question arose as to how and to what extent an attorney should be supervised, in what circumstances he should be discharged and how disputes between attorneys should be resolved. Chapter 1 described the current provisions in the Enduring Powers of Attorney Ordinance (Cap 501) in relation to these issues. The approach adopted in the legislation of other jurisdictions is outlined below.

#### ***Australia: Australian Capital Territory***

##### *(a) Supervision*

2.19 Section 75 of the Powers of Attorney Act 2006 provides that where an EPA donor has impaired decision-making capacity, the guardianship tribunal may, on application or on its own initiative on hearing a matter under the Guardianship and Management of Property Act 1991:

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<sup>14</sup> Section 98(3) of the Protection of Personal and Property Rights Act 1988.

- (a) give a direction, not inconsistent with the 2006 Act or the EPA, that the attorney do or not do a stated act; or
- (b) direct the attorney to produce stated books, accounts or other records of transactions carried out by the attorney for the donor; or
- (c) revoke the EPA, or part of it; or
- (d) make a declaration about the interpretation or effect of the EPA.

An application under this section may be made by an interested person or, with leave of the guardianship tribunal, someone else. According to section 75(4), if the guardianship tribunal revokes an EPA, the tribunal may appoint a guardian or manager for the donor under the Guardianship and Management of Property Act 1991.

2.20 Under section 76(2), a “presidential member” of the guardianship tribunal may refer the matter, or part of the matter, to the Supreme Court.<sup>15</sup> Where an EPA donor has impaired decision-making capacity:

- (a) the public advocate may, by written notice given to a person who is or has been an attorney, require the person to give the public advocate stated books, accounts or other records of transactions carried out by the person for the donor under the EPA;<sup>16</sup>
- (b) the guardianship tribunal may, by order, remove an attorney under the EPA if satisfied that it is in the interests of the donor to remove the attorney;<sup>17</sup>
- (c) the public advocate is entitled to reasonable access to the donor;<sup>18</sup>
- (d) an “interested person” may apply to the guardianship tribunal for access to the donor;<sup>19</sup> and
- (e) the guardianship tribunal may, by order, grant the interested person access to the donor, whether with or without conditions, if satisfied that:

<sup>15</sup> Section 76(3) provides that in deciding whether to refer a matter to the Supreme Court, the presidential member of the guardianship tribunal must take into consideration whether the matter relates to the effect of the EPA on people other than the attorney or donor and whether the matter is likely to raise for consideration complex or novel legal issues. He may take into consideration anything else he considers relevant.

<sup>16</sup> Section 77 of the Powers of Attorney Act 2006.

<sup>17</sup> Section 79 of the Powers of Attorney Act 2006.

<sup>18</sup> Section 84(2) of the Powers of Attorney Act 2006.

<sup>19</sup> Section 84(3) of the Powers of Attorney Act 2006. Section 84(5) provides that an “interested person” includes:

- (a) *a relative of the [donor]; and*
- (b) *a person who is a carer of the [donor] or has been a carer of the [donor] in the last 12 months; and*
- (c) *a lawyer, or doctor, acting on behalf of a member of the [donor’s] family or relative of the [donor].”*

- (i) an attorney has denied the person access to the donor;  
and
- (ii) it is reasonable to allow the access.<sup>20</sup>

2.21 Where an attorney makes a decision in relation to the donor's health care and a relevant person believes, on reasonable grounds, that the decision is not in the donor's best interests, the relevant person may tell the public advocate about the decision and explain why the relevant person believes the decision is not in the donor's best interests.<sup>21</sup>

*(b) Discharge*

2.22 Section 53(2) of the Powers of Attorney Act 2006 provides that, if the donor has impaired decision-making capacity, an EPA attorney may only resign with the leave of the guardianship tribunal.

2.23 An EPA is revoked to the extent that it gives power to the attorney if an attorney dies,<sup>22</sup> A property EPA is also revoked where the attorney is an individual and he becomes bankrupt or executes a personal insolvency agreement.<sup>23</sup> Under section 63 of the 2006 Act, where an EPA attorney's decision-making capacity becomes impaired, the EPA is revoked in relation to the attorney.<sup>24</sup>

2.24 Where an attorney is a corporation; and either:

- (i) the attorney has been, or is being, wound up; or
- (ii) a liquidator is appointed for the attorney,

the EPA is revoked to the extent that it gives power to the attorney.<sup>25</sup>

*(c) Dispute resolution*

2.25 As far as the resolution of disputes between attorneys is concerned, section 25 of the Powers of Attorney Act 2006 provides that a donor of an EPA appointing two or more attorneys may:

- (a) authorise the attorneys to act together or separately, or in any combination;

<sup>20</sup> Section 84(4) of the Powers of Attorney Act 2006.

<sup>21</sup> Section 85(2) of the Powers of Attorney Act 2006. Section 85(1) defines a "relevant person" as:  
 "(a) a health professional who is treating, or has at any time treated, the [donor]; or  
 (b) a person in charge of a health care facility where the [donor] is being, or has at any time been, treated."

<sup>22</sup> Section 61 of the Powers of Attorney Act 2006.

<sup>23</sup> Section 62 of the Powers of Attorney Act 2006. For the extended meaning of "bankrupt" and "personal insolvency agreement", see the dictionary at the end of the Act, referred to in section 3.

<sup>24</sup> A person must not be taken to have impaired decision-making capacity only because of certain attributes or behaviours (see section 91).

<sup>25</sup> Section 64 of the Powers of Attorney Act 2006.

- (b) authorise different attorneys to act in different circumstances, on the happening of different events or in relation to different matters.<sup>26</sup>

2.26 Where two or more attorneys are authorised in relation to a matter, and the power of attorney does not state how they are to share a power given to them, the attorneys are authorised to exercise the power together but not separately.<sup>27</sup> Under section 27 of the 2006 Act, one or more of the attorneys, or another “interested person”<sup>28</sup> in relation to the power of attorney, may apply to the guardianship tribunal for directions or an order if:

- (a) two or more attorneys are authorised under an EPA by a donor in relation to a matter;
- (b) the EPA does not state how they are to share a power given to them;
- (c) the donor has impaired decision-making capacity; and
- (d) it is impracticable or impossible for the attorneys to exercise the power unanimously.

2.27 According to section 42, an attorney may enter into a “conflict transaction” only if the donor authorises the particular transaction or such transactions generally in the power of attorney. A conflict transaction is a transaction that results, or may result, in conflict between:

- (a) the duty of an attorney towards the donor; and
- (b) either:
  - (i) the interests of the attorney, or a relative, business associate or close friend of the attorney; or
  - (ii) another duty of the attorney.<sup>29</sup>

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<sup>26</sup> The following examples are included in the Act:  
“1 A power of attorney authorises Jo to act for the [donor] only if Wilhelm (another attorney) becomes a person with impaired decision-making capacity.  
2 A power of attorney authorises Frank to act for the [donor] until Melissa turns 18 and becomes the attorney.  
3 A power of attorney authorises Violet and Ian as attorneys act separately for the [donor], except in relation to health care matters when they must make decisions together.”

<sup>27</sup> Section 26 of the Powers of Attorney Act 2006.

<sup>28</sup> Section 74 defines “interested person” for these purposes as:

- (a) an attorney;
- (b) the donor;
- (c) a relative of the donor;
- (d) the public advocate;
- (e) the public trustee;
- (f) a guardian of the donor;
- (g) a manager of the donor.

<sup>29</sup> Section 42(1). Section 42(2) provides that a transaction is not a conflict transaction “only because, by the transaction, the attorney in the attorney’s own right and on behalf of the [donor]:

- (a) deals with an interest in property jointly held; or
- (b) acquires a joint interest in property; or
- (c) obtains a loan or gives a guarantee or indemnity in relation to a transaction mentioned in paragraph (a) or (b).”

## **Australia: New South Wales**

### **(a) Supervision**

2.28 Under section 36 of the Powers of Attorney Act 2003, a review tribunal may, on the application of an “interested person”, decide whether or not to review the making or the operation and effect of a “reviewable” power of attorney, and also to make an order under this section.<sup>30</sup> A review tribunal can be the Guardianship Tribunal or the Supreme Court.<sup>31</sup> Under section 33, a power of attorney is a “reviewable” power of attorney if the review tribunal to which the application is to be made has jurisdiction to deal with the application as provided by this section. Both the Guardianship Tribunal and the Supreme Court have jurisdiction to deal with an application in respect of an EPA.<sup>32</sup> Each of the following persons is an “interested person” in relation to the making of an application:

- (a) an attorney;
- (b) the donor;
- (c) any person who is:
  - (i) a guardian of the donor (whether under the Guardianship Act 1987 or any other Act or law), or
  - (ii) an enduring guardian of the donor under the Guardianship Act 1987;
- (d) any other person who, in the opinion of the review tribunal, has a proper interest in the proceedings or a genuine concern for the donor’s welfare.<sup>33</sup>

2.29 A review tribunal may, if satisfied that it would be in the donor’s best interests to do so or that it would better reflect the donor’s wishes, make any one or more of the following orders relating to the operation and effect of a power of attorney:

- (a) an order varying a term of, or a power conferred by, the power of attorney;
- (b) an order removing a person from office as an attorney;
- (c) an order appointing a substitute attorney to replace an attorney who has been removed from office by a review tribunal or who otherwise vacates the office;
- (d) an order reinstating a power of attorney that has lapsed by reason of any vacancy in the office of an attorney and appointing a substitute attorney to replace the attorney who vacated office;

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<sup>30</sup> Including orders relating to the making of a power of attorney (Section 36(3)); orders relating to the operation and effect of a power of attorney (Section 36(4)); orders relating to the mental capacity of the donor (Section 36(5)); and further orders relating to accounts and information (Section 36(8)).

<sup>31</sup> Section 26 of the Powers of Attorney Act 2003.

<sup>32</sup> Section 33(3): “*The Supreme Court (but not the Guardianship Tribunal) also has jurisdiction to deal with an application under this Division in respect of any other power of attorney given by a [donor] who is incommunicate for the time being.*”

<sup>33</sup> Section 35(1) of the Powers of Attorney Act 2003.

- (e) an order directing or requiring any one or more of the following:
  - (i) that an attorney furnish accounts and other information to the tribunal or to a person nominated by the tribunal;
  - (ii) that an attorney lodge with the tribunal a copy of all records and accounts kept by the attorney of dealings and transactions made by the attorney under the power;
  - (iii) that those records and accounts be audited by an auditor appointed by the tribunal and that a copy of the report of the auditor be furnished to the tribunal;
  - (iv) that the attorney submit a plan of financial management to the tribunal for approval;
- (f) an order revoking all or part of the power of attorney;
- (g) such other orders as the review tribunal thinks fit.<sup>34</sup>

Section 36(7) of the 2003 Act provides that an order under this section may be made subject to such terms and conditions as the review tribunal thinks fit.

2.30 Section 35(2) states that each of the following persons is a party to an application in respect of a reviewable power of attorney:

- (a) the applicant;
- (b) each attorney under the power (if the attorney is not the applicant);
- (c) the donor (if the donor is not the applicant);
- (d) any other person that the review tribunal concerned has joined as a party.

2.31 Under section 39, the Guardianship Tribunal in determining an application may, on its own initiative or at the request of a party, refer a question of law arising in the application to the Supreme Court for the opinion of the Court. The Supreme Court has jurisdiction to hear and determine any question of law referred to it under this section.

*(b) Discharge*

2.32 Section 5 of the Powers of Attorney Act 2003 provides that an attorney is discharged:

- (a) if the appointment of the attorney is revoked, or
- (b) if the attorney renounces the power,
- (c) if the attorney dies,
- (d) if the attorney becomes bankrupt,
- (e) where the attorney is a corporation, if the corporation is dissolved,
- (f) if the attorney, by reason of any physical or mental incapacity, ceases to have the capacity to continue to act as an attorney, or

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<sup>34</sup> Section 36(4) of the Powers of Attorney Act 2003.

- (g) in such other circumstances as may be prescribed by the regulations.

2.33 According to section 46, if two or more persons are appointed as joint attorneys, the power of attorney is terminated if the office of one or more of the attorneys becomes vacant. If a power of attorney appoints two or more persons as attorneys either severally or jointly and severally, a vacancy in the office of one or more attorneys does not operate to terminate the power of attorney in relation to the other attorneys.

### ***Australia: Queensland***

#### ***(a) Supervision***

2.34 Section 109A of the Powers of Attorney Act 1998 gives the Guardianship and Administration Tribunal the same jurisdiction and powers for EPAs as the Supreme Court, and this Act applies, with necessary changes, as if references to the Supreme Court were references to the tribunal. The following persons may apply to the court under section 110 for a declaration, order, direction, recommendation or advice in relation to an EPA or the exercise of an attorney's power:

- (a) the donor;
- (b) a member of the donor's family;
- (c) an attorney;
- (d) the adult guardian or public trustee;
- (e) if the document is an advance health directive or the application involves power for a health matter, the adult guardian or a health provider of the donor;
- (f) an interested person.<sup>35</sup>

2.35 Under section 110(4), the court may, by order:

- (a) remove an attorney and appoint a new attorney to replace the removed attorney;
- (b) remove a power from an attorney and give the removed power to another attorney or to a new attorney;
- (c) change the terms of an EPA; or
- (d) revoke all or part of an EPA.

#### ***(b) Discharge***

2.36 An EPA is revoked to the extent it gives power to an attorney for a matter if:

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<sup>35</sup> Section 110(3) of the Powers of Attorney Act 1998. Schedule 3: "interested person" means "a person who has a sufficient and continuing interest in the other person." See the *Guardianship and Administration Act 2000*, section 126 (Tribunal to decide who are interested persons).

- (a) the attorney resigns as attorney for the matter;<sup>36</sup>
- (b) the attorney for the matter becomes a person who has impaired capacity for the matter;<sup>37</sup>
- (c) the attorney dies;<sup>38</sup>
- (d) the attorney becomes a paid carer, or health provider, for the donor;<sup>39</sup>
- (e) the attorney becomes the service provider for a residential service where the donor is a resident.<sup>40</sup>

2.37 If an individual attorney of an EPA for a financial matter becomes bankrupt or insolvent or takes advantage of the laws of bankruptcy as a debtor under the Bankruptcy Act 1966 (Commonwealth) or a similar law of a foreign jurisdiction, the EPA is revoked to the extent it gives power for financial matters to the attorney.<sup>41</sup> If a corporate attorney is wound up or dissolved or a receiver (other than a receiver for a limited purpose) or administrator is appointed of the attorney, the EPA is revoked to the extent it gives power to the attorney.<sup>42</sup>

2.38 Under section 59A, if an attorney's power for a matter ends and the attorney was a joint attorney for the matter:

- (a) if there is one remaining joint attorney, the remaining attorney may exercise power for the matter; and
- (b) if there are two or more remaining joint attorneys, the remaining attorneys may exercise power for the matter and, if exercising power, must exercise power jointly.

(c) *Dispute resolution*

2.39 Section 78 of the Powers of Attorney Act 1998 states that two or more attorneys for a matter are appointed as joint attorneys for the matter if the EPA does not state how they are to share the power given to them. If there are two or more persons who are guardian, administrator or attorney for a donor, the persons must consult with one another on a regular basis to ensure the donor's interests are not prejudiced by a breakdown in communication between them.<sup>43</sup>

2.40 Under section 80, attorneys who may exercise power for a matter jointly must exercise the power unanimously unless the EPA provides otherwise. If it is impracticable or impossible to exercise the power

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<sup>36</sup> Section 55 of the Powers of Attorney Act 1998.  
<sup>37</sup> Section 56 of the Powers of Attorney Act 1998.  
<sup>38</sup> Section 58 of the Powers of Attorney Act 1998.  
<sup>39</sup> Section 59 of the Powers of Attorney Act 1998.  
<sup>40</sup> Section 59AA of the Powers of Attorney Act 1998.  
<sup>41</sup> Section 57(2) of the Powers of Attorney Act 1998.  
<sup>42</sup> Section 57(3) of the Powers of Attorney Act 1998.  
<sup>43</sup> Section 79 of the Powers of Attorney Act 1998. Section 79(2): "However, failure to comply with subsection (1) does not affect the validity of an exercise of power by a guardian, administrator or attorney."

unanimously, one or more of the attorneys, or another interested person<sup>44</sup> for the adult, may apply for directions to the court.

### **Australia: Victoria**

#### *(a) Supervision*

2.41 According to section 125G of the Instruments Act 1958, if the Victorian Civil and Administrative Tribunal (the “Tribunal”) makes an administration order under the Guardianship and Administration Act 1986 in respect of an EPA donor, the attorney may exercise power under the EPA only to the extent authorised by the Tribunal.

2.42 Under section 125V(1) of the 1958 Act, an application may be made to the Tribunal for a declaration, order, direction or recommendation about:

- (a) any matter or question relating to:
  - (i) the scope of an EPA attorney’s powers; or
  - (ii) the exercise of any power by an EPA; or
- (b) any other thing in or related to this Part.

An application may be made by:

- (a) the Public Advocate;
- (b) the EPA donor;
- (c) an EPA attorney; or
- (d) another person whom the Tribunal is satisfied has a special interest in the donor’s affairs.<sup>45</sup>

2.43 Under section 125X, the Victorian Civil and Administrative Tribunal may, on its own initiative or on an application under section 125V, revoke the appointment of an EPA attorney if the Tribunal is satisfied that it is in the donor’s best interests to do so, and the donor lacks the required capacity. The Tribunal may, on its own initiative or on an application under section 125V, declare an EPA to be invalid if it is satisfied that:

- (a) the donor lacked capacity at the time the EPA was made;
- (b) the EPA does not comply with the requirements of this Part; or
- (c) the EPA is invalid for another reason, for example, the donor was induced to make it by dishonesty or undue influence;

and if the Tribunal declares an EPA invalid, the power is void from the start.<sup>46</sup>

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<sup>44</sup> Schedule 3: “interested person” means “a person who has a sufficient and continuing interest in the other person.”

<sup>45</sup> Section 125V(2) of the Instruments Act 1958.

<sup>46</sup> Section 125Y of the Instruments Act 1958.

2.44 According to section 125Z, the Tribunal, on its own initiative or on an application under section 125V, may:

- (a) make a declaration or make recommendations or give any directions it considers necessary in relation to an EPA;
- (b) vary the effect of an EPA;
- (c) suspend for a specified period an EPA, either generally or in respect of a specific matter;
- (d) make any order it considers necessary in relation to an EPA;

and the Tribunal may, on its own initiative, give directions to an EPA attorney in respect of any matter.

2.45 Furthermore, the Tribunal may give an advisory opinion on any matter relating to an EPA that is referred to it.<sup>47</sup> The Tribunal may also make an order, on its own initiative or on the application of the donor or the Public Advocate or another interested person, that:

- (a) the attorney lodges with the Tribunal, accounts or other documents relating to the exercise of the power for a specified period; or
- (b) the accounts be examined or audited by a person appointed by the Tribunal and that a copy of the person's report be given to the Tribunal and the applicant.<sup>48</sup>

(b) *Discharge*

2.46 Under section 125M of the Instruments Act 1958, an attorney may resign as attorney by signed notice given to the donor. However, if a donor ceases to have legal capacity, an EPA attorney may only resign with the leave of a court or the Tribunal. If an EPA attorney resigns, the power of attorney is revoked to the extent that it confers power on the attorney. In addition, an EPA is also revoked to the extent that it confers power on the attorney if an attorney:

- (a) ceases to have legal capacity;<sup>49</sup>
- (b) becomes insolvent;<sup>50</sup> or
- (c) dies.<sup>51</sup>

(c) *Dispute resolution*

2.47 Section 125F(1) of the Instruments Act 1958 stipulates that an EPA does not authorise the attorney to make decisions about the donor's medical treatment. If a decision made by a guardian or enduring guardian

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<sup>47</sup> Section 125ZA of the Instruments Act 1958.

<sup>48</sup> Section 125ZB of the Instruments Act 1958.

<sup>49</sup> Section 125N of the Instruments Act 1958.

<sup>50</sup> Section 125O of the Instruments Act 1958.

<sup>51</sup> Section 125P of the Instruments Act 1958.

within the meaning of the Guardianship and Administration Act 1986 in the exercise of a power as guardian or enduring guardian conflicts with that made by an EPA attorney, the decision of the guardian or enduring guardian prevails.<sup>52</sup>

### **Canada: Saskatchewan**

#### *(a) Supervision*

2.48 Section 20 of the Powers of Attorney Act 2002 provides that the public guardian and trustee or any other interested person may apply to the court for advice or directions with respect to an EPA. Section 18(1) requires the attorney to provide an accounting to the donor upon the latter's request. If the donor lacks capacity, an accounting may be requested:

- (a) of a property attorney by a person named by the donor in the EPA, or if no such person is named, an adult family member of the donor; or a personal attorney, if any; and
- (b) of a personal attorney by a person named by the donor in the EPA; or if no such person is named, an adult family member of the donor; or a property attorney, if any.<sup>53</sup>

2.49 If the attorney fails to comply with a request for an accounting, the public guardian and trustee may be requested to direct the attorney to do so.<sup>54</sup> Under section 18(5) of the 2002 Act, the public guardian and trustee may direct the attorney to provide an accounting if the public guardian and trustee considers it appropriate or necessary and in the public interest to do so. If the public guardian and trustee do not direct the attorney to provide an accounting, or the attorney does not provide an accounting as directed by the public guardian and trustee, the court may, on application, direct the attorney to provide an accounting to the court or to the public guardian and trustee.<sup>55</sup>

#### *(b) Discharge*

2.50 Under section 19(1) of the 2002 Act, an EPA attorney's authority is terminated:<sup>56</sup>

- (a) on the death or lack of capacity of the attorney;
- (b) on the written resignation of the attorney;

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<sup>52</sup> Section 125F(2) of the Instruments Act 1958.

<sup>53</sup> Section 18(2) of the Powers of Attorney Act 2002.

<sup>54</sup> Section 18(3) and (4) of the Powers of Attorney Act 2002.

<sup>55</sup> Section 18(6) of the Powers of Attorney Act 2002.

<sup>56</sup> See also "6(1) *No person shall act as an attorney:*

(a) *in the case of an individual: ...*

(ii) *who is appointed to act as a property attorney, if the individual is an undischarged bankrupt; or ...*

(b) *if the person's occupation or business involves providing personal care or health care services to the [donor] for remuneration."*

- (c) in the case of a personal attorney, if a personal decision-maker is appointed for the donor or attorney pursuant to The Adult Guardianship and Co-decision-making Act; or if the public guardian and trustee is appointed as personal guardian for the donor or attorney pursuant to The Public Guardian and Trustee Act;
- (d) in the case of a property attorney, if a property decision-maker is appointed for the donor or attorney pursuant to The Adult Guardianship and Co-decision-making Act or if the public guardian and trustee is appointed, or executes an acknowledgement to act, as property guardian for the donor or attorney pursuant to The Public Guardian and Trustee Act.

If the court is satisfied on the application of any interested person<sup>57</sup> that an EPA attorney has abused his authority, the court may direct that the attorney's authority under the EPA be terminated.<sup>58</sup>

(c) *Dispute resolution*

2.51 Unless an EPA states otherwise, if two or more personal or property attorneys are appointed to act jointly:

- (a) a decision of the attorneys must be unanimous; and
- (b) the remaining attorneys may continue to act under the EPA if one or more of the attorneys:
  - (i) dies;
  - (ii) indicates in writing to the other attorneys that he is unwilling or unavailable to act; or
  - (iii) is found by a court to lack capacity.<sup>59</sup>

2.52 Where a donor has appointed a property attorney and another person as a personal attorney, the property attorney's decision is preferred to that of the personal attorney if:

- (a) it is unclear under the terms of the EPA whether a decision lies within the authority of the property attorney or the personal attorney;
- (b) the decision of the property attorney is inconsistent with the decision of the personal attorney; and
- (c) the expenditure of money is required as a result of the decision.<sup>60</sup>

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<sup>57</sup> The term "interested person" is not defined.  
<sup>58</sup> Section 19(2) of the Powers of Attorney Act 2002.  
<sup>59</sup> Section 7(4) of the Powers of Attorney Act 2002.  
<sup>60</sup> Section 19.1(2) of the Powers of Attorney Act 2002.

Nonetheless, if the decision of the property attorney is inconsistent with that of the personal attorney, an application may be made by the property attorney, the personal attorney or the public guardian and trustee to the court for direction respecting which decision is to be followed.<sup>61</sup>

## **England & Wales**

### *Supervision*

2.53 Section 45(1) of the Mental Capacity Act 2005 establishes a superior court of record known as the Court of Protection. The court<sup>62</sup> has the same powers, rights, privileges and authority as the High Court.<sup>63</sup> Under section 23(1), the court may determine any question as to the meaning or effect of a lasting power of attorney (LPA) or an instrument purporting to create one. The court may:

- (a) give directions with respect to decisions which an LPA attorney has authority to make, and which the donor lacks capacity to make;
- (b) give any consent or authorisation to act which the attorney would have to obtain from the donor if the donor had capacity to give it.<sup>64</sup>

2.54 If a donor lacks capacity to do so, the court may:

- (a) give directions to the attorney with respect to the rendering by him of reports or accounts and the production of records kept by him for that purpose;
- (b) require the attorney to supply information or produce documents or things in his possession as attorney;
- (c) give directions with respect to the remuneration or expenses of the attorney;
- (d) relieve the attorney wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as attorney.<sup>65</sup>

2.55 According to 50(1), no permission is required for an application to the court for the exercise of any of its powers under this Act:

- (a) by a person who lacks, or is alleged to lack, capacity,
- (b) if such a person has not reached 18, by anyone with parental

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<sup>61</sup> Section 19.1(3) of the Powers of Attorney Act 2002.

<sup>62</sup> Section 64(1) of the Mental Capacity Act 2005: "*In this Act, 'the court' means the Court of Protection established by section 45*".

<sup>63</sup> Section 47(1) of the Mental Capacity Act 2005.

<sup>64</sup> Section 23(2) of the Mental Capacity Act 2005.

<sup>65</sup> Section 23(3) of the Mental Capacity Act 2005.

- (c) responsibility<sup>66</sup> for him,
- (c) by the donor or attorney of an LPA to which the application relates,
- (d) by a deputy appointed by the court for a person to whom the application relates, or
- (e) by a person named in an existing order of the court, if the application relates to the order.

2.56 For the purposes of this Act, there is to be an officer, to be known as the Public Guardian who is to be appointed by the Lord Chancellor.<sup>67</sup> Section 58(1) lists the Public Guardian's functions as:

- (a) establishing and maintaining a register of LPAs;
- (b) establishing and maintaining a register of orders appointing deputies;
- (c) supervising deputies appointed by the court;
- (d) directing a Court of Protection Visitor to visit:
  - (i) an LPA attorney;
  - (ii) a deputy appointed by the court; or
  - (iii) the LPA donor or the person for whom the deputy is appointed
 and to make a report to the Public Guardian on such matters as he may direct;
- (e) receiving security which the court requires a person to give for the discharge of his functions;
- (f) receiving reports from LPA attorneys and deputies appointed by the court;
- (g) reporting to the court on such matters relating to proceedings under this Act as the court requires;
- (h) dealing with representations (including complaints) about the way in which an LPA attorney or a deputy appointed by the court is exercising his powers;
- (i) publishing, in any manner the Public Guardian thinks appropriate, any information he thinks appropriate about the discharge of his functions.

2.57 Under section 58(5), the Public Guardian may, at all reasonable times, examine and take copies of:

- (a) any health record,
- (b) any record of, or held by, a local authority and compiled in connection with a social services function, and
- (c) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c 14), so far as the record relates to the LPA donor.

The Public Guardian may also for that purpose interview the LPA donor in

<sup>66</sup> Section 50(4) of the Mental Capacity Act 2005: "*Parental responsibility*' has the same meaning as in the *Children Act 1989 (c 41)*".

<sup>67</sup> Section 57(1) of the Mental Capacity Act 2005.

private.<sup>68</sup>

## **Ireland**

### **(a) Supervision**

2.58 An EPA is invalidated or ceases to be in force, *inter alia*:

- (a) on the bankruptcy of the attorney;
- (b) if the attorney is a body corporate, on its winding up or dissolution; or
- (c) if the attorney is convicted of an offence involving fraud or dishonesty or an offence against the donor's person or property, or becomes a person in respect of whom a declaration has been made under section 150 of the Companies Act 1990 or subject to a disqualification order under Part VII of that Act.<sup>69</sup>

### **(b) Discharge**

2.59 Under section 14(1) of the Powers of Attorney Act 1996, an instrument which appoints more than one person to be an attorney may specify that the attorneys are appointed to act either jointly or jointly and severally. The default position is that the attorneys are deemed to have been appointed to act jointly. Where two or more persons are appointed (or are deemed to have been appointed) to act jointly, then, in the case of the death, incapacity or disqualification of any one or more of them, the remaining attorneys may continue to act, whether solely or jointly as the case may be, unless otherwise stated.<sup>70</sup>

## **New Zealand**

### **(a) Supervision**

2.60 Section 99A(1) of the Protection of Personal Property and Rights Act 1988 requires an EPA attorney to consult the donor, and any person specified in the EPA to be consulted, either generally or in respect of a particular matter. Generally speaking, an EPA attorney acting in relation to the donor's personal care and welfare may have regard to any advance directive given by the donor.<sup>71</sup> Under sections 99A(4) and 101 of the 1988 Act, an attorney may apply to a court for directions in respect of any advice given under section 99A(1) or any advance directive given by the donor and directions relating to the exercise of the attorney's powers.

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<sup>68</sup> Section 58(6) of the Mental Capacity Act 2005.

<sup>69</sup> Section 5(6) of the Powers of Attorney Act 1996.

<sup>70</sup> Section 14(3) of the Powers of Attorney Act 1996.

<sup>71</sup> Section 99A(2) of the Protection of Personal and Property Rights Act 1988.

2.61 Section 102 provides that, where the donor has become mentally incapable, a Court has jurisdiction to do any of the following in respect of an EPA:

- (a) determine any question as to the EPA's meaning or effect;
- (b) determine whether or not the EPA has ceased to have effect;
- (c) give directions with respect to:
  - (i) the management or disposal by the attorney of the donor's property and affairs; or
  - (ii) the rendering of accounts by the attorney and the production of the records kept by the attorney for the purpose; or
  - (iii) the remuneration or expenses of the attorney, whether or not in default of or in accordance with any provision made by the EPA, including directions for the repayment of excessive, or the payment of additional, remuneration; or
  - (iv) any matter relating to the donor's personal care and welfare;
  - (v) any other matter on which the directions of the Court are sought under section 101 of the Act;
- (d) modify the EPA's scope by including or excluding:
  - (i) part of the donor's affairs in relation to his property, or any powers relating to any such affairs; or
  - (ii) any specific matters in relation to the donor's personal care and welfare, or any powers relating to any such matters, not being a matter referred to in section 98(4) of the Act;
- (e) require the attorney to furnish information or produce documents or things in his possession as attorney;
- (f) give any consent or authorisation to act that the attorney would have to obtain from the donor if the donor were mentally capable.<sup>72</sup>

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<sup>72</sup> The Court also has power under section 102 to:

- "(g) authorise the attorney to act, otherwise than in accordance with section 107 of this Act, to the benefit of the attorney or persons other than the donor, but subject to any conditions or restrictions contained in the instrument;*
- (ga) authorise the attorney to make any loan or advance of the donor's property subject to—*
  - (i) any conditions that the Court considers appropriate; and*
  - (ii) any conditions or restrictions contained in the instrument;*
- (h) determine whether the donor of the power was induced by undue influence or fraud to create the power;*
- (i) determine whether, having regard to all the circumstances and, in particular, the attorney's relationship with the donor, the attorney is suitable to be the donor's attorney;*
- (j) authorise an attorney acting under an enduring power of attorney in relation to a donor's property to execute a will for and on behalf of the donor if the Court is satisfied that—*
  - (i) the donor lacks testamentary capacity; and*
  - (ii) there is no express provision to the contrary in the enduring power of attorney."*

2.62            Sections 102A and 103 allow any of the following persons to apply to a court to review any decision made by an EPA attorney while the donor is or was mentally incapable:

- (a) the EPA donor;
- (b) a relative or attorney of the donor (not being the attorney whose decision is sought to be reviewed);
- (c) a social worker;
- (d) a medical practitioner;
- (e) a trustee corporation;
- (f) if the donor is a patient or a resident in any place that provides hospital care, rest home care, or residential disability care within the meaning of the Health and Disability Services (Safety) Act 2001, the principal manager of that place;
- (g) any welfare guardian who has been appointed for the donor;
- (h) a person authorised by a body or organisation contracted by the Government to provide elder abuse and neglect prevention services;
- (i) any other person if the Court gives leave to do so.

An application for review may be made while the EPA is in force or after it is revoked.<sup>73</sup> The Court may, if it thinks it reasonable to do so in all the circumstances, review the decision and make any order it thinks fit.<sup>74</sup>

2.63 The Court may, in any proceeding commenced under sections 101, 102A or 103 revoke the appointment of an EPA attorney if it is satisfied that the attorney:

- (a) is not acting, or proposes not to act, in the donor's best interests; or
- (b) is failing, or has failed, to comply with any of the attorney's obligations under section 99A or 99B, or proposes not to comply with any of those obligations.<sup>75</sup>

Where a Court determines that the EPA donor was induced by undue influence or fraud to create the EPA or that the attorney is not suitable to be the donor's attorney, the Court will revoke the attorney's appointment.<sup>76</sup>

(b) *Dispute resolution*

2.64 Under section 99A(7) of the 1988 Act, where an EPA donor has appointed one attorney in relation to his property and another one in relation to his personal care and welfare, both attorneys must consult each other regularly to ensure that the donor's interests are not prejudiced through any breakdown in communication between them.

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<sup>73</sup> Section 103(3) of the Protection of Personal and Property Rights Act 1988.

<sup>74</sup> Section 103(4) of the Protection of Personal and Property Rights Act 1988.

<sup>75</sup> Section 105(1) of the Protection of Personal and Property Rights Act 1988. Section 105(1A): "In any proceedings commenced under section 101 or 102, the Court may revoke the appointment of an attorney under an enduring power of attorney only on the motion of the donor or a party to the proceeding other than the attorney."

<sup>76</sup> Section 105(2) of the Protection of Personal and Property Rights Act 1988.

## **Scotland**

### **(a) Supervision**

2.65 Section 6 of the Adults with Incapacity (Scotland) Act 2000 provides that the Public Guardian has the following general functions under the Act:

- (a) to supervise any guardian or any person who is authorised under an intervention order in the exercise of his functions relating to the property or financial affairs of the adult;
- (b) to establish, maintain and make available during normal office hours for inspection by members of the public, separate registers of:
  - (i) all documents relating to continuing powers of attorney (CPAs) governed by the law of Scotland;
  - (ii) all documents relating to welfare powers of attorney (WPAs) governed by the law of Scotland;
- (c) to receive and investigate any complaints regarding the exercise of functions relating to the property or financial affairs of an adult made, *inter alios*, in relation to CPA attorneys;
- (d) to investigate any circumstances made known to him in which the property or financial affairs of an adult seem to him to be at risk;
- (e) to provide, when requested to do so, a guardian, a CPA attorney, a withdrawer or a person authorised under an intervention order with information and advice about the performance of functions relating to property or financial affairs under this Act;
- (f) to consult the Mental Welfare Commission and any local authority on cases or matters relating to the exercise of functions under this Act in which there is, or appears to be, a common interest.

2.66 Section 13 requires the Scottish Ministers to prepare, and from time to time revise, codes of practice as to the exercise by CPA and WPA attorneys of their functions under this Act and as to such other matters arising as the Scottish Ministers consider appropriate.

2.67 Where, on an application, the sheriff is satisfied that a CPA or WPA donor is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare insofar as the power of attorney relates to them, and that it is necessary to safeguard or promote these interests, he may make an order:

- (a) ordaining that the continuing attorney shall be subject to the supervision of the Public Guardian to such extent as may be specified in the order;
- (b) ordaining the CPA attorney to submit accounts in respect of any period specified in the order for audit to the Public Guardian;

- (c) ordaining that the WPA attorney shall be subject to the supervision of the local authority to such extent as may be specified in the order;
- (d) ordaining the WPA attorney to give a report to him as to the manner in which the welfare attorney has exercised his powers during any period specified in the order;
- (e) revoking:
  - (i) any of the powers granted by the CPA or WPA; or
  - (ii) the appointment of an attorney.<sup>77</sup>

A decision of the sheriff under paras (a) to (d) is final.<sup>78</sup> An application for such an order may be made to the sheriff by any person claiming an interest in the property, financial affairs or personal welfare of the CPA or WPA donor.<sup>79</sup>

2.68 The sheriff may, on an application by any person claiming an interest in the property, financial affairs or personal welfare of an adult, if he is satisfied that the adult is incapable of taking the action, or is incapable in relation to the decision about his property, financial affairs or personal welfare to which the application relates, make an intervention order.<sup>80</sup>

2.69 An application to the sheriff may be made under section 57 by any person claiming an interest in the property, financial affairs or personal welfare of an adult for an order appointing an individual or office holder as guardian in relation to the adult's property, financial affairs or personal welfare.

*(b) Discharge*

2.70 Under section 23(1), a continuing or welfare attorney who wishes to resign may give notice in writing to:

- (a) the donor;
- (b) the Public Guardian;
- (c) any guardian or, where there is no guardian, the donor's primary carer;
- (d) the local authority, where they are supervising the welfare attorney.

2.71 If the donor and the continuing or welfare attorney are married to each other the power of attorney will, unless the document conferring it provides otherwise, come to an end upon the granting of:

- (a) a decree of separation to either party;
- (b) a decree of divorce to either party; or
- (c) declarator of nullity of the marriage.<sup>81</sup>

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<sup>77</sup> Section 20(2) of the Adults with Incapacity (Scotland) Act 2000.  
<sup>78</sup> Section 20(4) of the Adults with Incapacity (Scotland) Act 2000.  
<sup>79</sup> Section 20(1) of the Adults with Incapacity (Scotland) Act 2000.  
<sup>80</sup> Section 53 of the Adults with Incapacity (Scotland) Act 2000.  
<sup>81</sup> Section 24(1) of the Adults with Incapacity (Scotland) Act 2000. Section 24(1A) makes similar provision in respect of civil partnerships.

In addition, the authority of a continuing or welfare attorney in relation to any matter comes to an end on the appointment of a guardian with powers relating to that matter.<sup>82</sup>

## **Recognition of EPAs executed in another jurisdiction**

2.72 Neither the Enduring Powers of Attorney Ordinance (Cap 501) nor the Powers of Attorney Ordinance (Cap 31) currently make any specific provision for the recognition of EPAs executed outside Hong Kong. Two situations can be envisaged. One is where an overseas EPA has been executed in an overseas jurisdiction in compliance with the provisions governing EPAs in that jurisdiction and the attorney wishes to have the EPA recognised in Hong Kong. The second is where a Hong Kong EPA is executed in an overseas jurisdiction and witnessed by a solicitor and medical practitioner who are admitted in that jurisdiction but not in Hong Kong. A number of overseas jurisdictions have provisions which cover one or both of these situations, ensuring that an EPA executed outside the jurisdiction can be registered and recognised within the jurisdiction.

### ***Australia: Australian Capital Territory***

2.73 Specific recognition of EPAs made in other jurisdictions is confined to other States or Territories of Australia. Section 89(2) of the Powers of Attorney Act 2006 provides that an “interstate” EPA will be treated as an EPA made under and in compliance with the Act “*to the extent that the powers it gives could validly have been given by an [EPA] made under this Act.*” An interstate EPA is one “*made under the law of a State or another Territory*”.<sup>83</sup>

### ***Australia: New South Wales***

2.74 As with the legislation in the Australian Capital Territory, the New South Wales Powers of Attorney Act 2003 provides that an EPA made in another Australian state or territory will be automatically recognised in New South Wales, but this does not apply to EPAs which are made overseas.<sup>84</sup>

2.75 Section 19(2)(d) of the Powers of Attorney Act 2003 includes in the list of prescribed witnesses for the purposes of an EPA “*a legal practitioner duly qualified in a country other than Australia.*”

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<sup>82</sup> Section 24(2) of the Adults with Incapacity (Scotland) Act 2000.

<sup>83</sup> Section 89(1) of the Powers of Attorney Act 2006.

<sup>84</sup> Section 25 of the Powers of Attorney Act 2003.

### **Australia: Tasmania**

2.76 Section 43 of the Powers of Attorney Act 2000 provides that an EPA may be registered in Tasmania, whether or not it was executed in accordance with the law of Tasmania. If it was not executed in accordance with the law of Tasmania, it may only be registered if it was executed in accordance with the law of the place in which it was executed. This applies equally to jurisdictions inside and outside Australia. Section 44 provides that a certificate by a legal practitioner in the place of execution that an EPA was executed in accordance with the law of that place is evidence of that fact.

### **Australia: Victoria**

2.77 Section 116 of the Instruments Act 1958<sup>85</sup> provides that an EPA made in another State or Territory which complies with the laws of that State or Territory will be treated as valid in Victoria to the extent that the powers given could have been given by an EPA under the Instruments Act 1958. By virtue of section 125ZQ, section 116 applies to an EPA made before or after the 2003 amendments to the 1958 Act.

### **Canada: Alberta**

2.78 Section 2(5) of the Alberta Powers of Attorney Act 2002 states that, notwithstanding the specific formalities required by section 2(1) for the creation of an EPA:

*“... a power of attorney is an enduring power of attorney if, according to the law of the place where it is executed,*

- (a) it is a valid power of attorney, and*
- (b) the attorney’s authority under it is not terminated by the mental incapacity or infirmity of the donor that may occur after the execution of the power of attorney.”*

### **Canada: Manitoba**

2.79 Section 25 of the Powers of Attorney Act 1996 provides that an EPA executed in a jurisdiction outside the province is valid as an EPA in Manitoba if:

- (a) it is valid according the law of that jurisdiction; and
- (b) it provides that it is to continue despite the mental incompetence of the donor after the execution of the document.

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<sup>85</sup> As inserted by section 4 of the Instruments (Enduring Powers of Attorney) Act 2003.

### **Canada: Northwest Territories**

2.80 Section 25 of the Powers of Attorney Act 2001 recognises an EPA executed outside the Northwest Territories, provided it is valid according to the law of the place of execution and “*it provides the appropriate statement as to its commencement or continuation, as referred to in paragraph 13(1)(e).*” That statement is to the effect either that the EPA is to come into force at a specified future date or on the occurrence of a specified contingency or that the EPA is to continue in force notwithstanding any mental incapacity of the donor that occurs after its execution.

### **Canada: Saskatchewan**

2.81 Saskatchewan recognises EPAs, including contingent EPAs made outside the province, if the EPAs are valid according to the law of the place where they were made.<sup>86</sup>

### **Canada: Western Canada Law Reform Agencies’ proposals**

2.82 In its 2008 report on EPAs, the Western Canada Law Reform Agencies recommended that the four Canadian provinces concerned (Alberta, British Columbia, Manitoba and Saskatchewan) should enact a uniform recognition provision. This would require recognition to be given to an EPA that meets the formal requirements for an EPA in either:

- (a) the jurisdiction where recognition is sought;
- (b) the jurisdiction where the EPA was made: or
- (c) the jurisdiction where the donor was habitually resident at the time the EPA was made.<sup>87</sup>

2.83 The report explains that this approach was modelled on that followed by the Uniform Law Conference of Canada in relation to the recognition of advance health care directives made extra-territorially. Section 2 of the Uniform Law Conference of Canada’s proposed Uniform Advance Directives in Health Care Act reads:

“(1) *A health care directive, whether it is made in [enacting jurisdiction] or not, has the same effect as though it were made in accordance with this Act if,*

- (a) *it meets the formal requirements of this Act; or*
- (b) *it was made under and meets the formal requirements established by the legislation of,*

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<sup>86</sup> Section 13 of the Powers of Attorney Act 2002.

<sup>87</sup> Final Report, *Enduring Powers of Attorney: Areas for Reform*, cited above, at page 12.

- (i) *the jurisdiction where the directive was made, or*
  - (ii) *the jurisdiction where the person who made the directive was habitually resident at the time the directive was made.*
- (2) *For the purposes of subsection (1), the formal requirements are the requirements relating to the formalities of execution of health care directives.*
- (3) *A person implementing a health care directive may rely on a certification by a person purporting to be a lawyer [or notary - notaire] in a jurisdiction certifying that the directive meets the formal requirements of the jurisdiction.” [text square bracketed in original]*

**USA: National Conference of Commissioners on Uniform State Laws draft legislation**

2.84 The draft 2006 Uniform Power of Attorney Act produced by the National Conference of Commissioners on Uniform State Laws (NCCUSL) provides at section 106(c) of Article 2 that:

*“A power of attorney executed other than in this state is valid in this state if, when the power of attorney was executed, the execution complied with:*

- (1) *the law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to Section 107 ...”*

The “*meaning and effect*” of a power of attorney is, by virtue of section 107, determined by the law of the jurisdiction indicated in the power of attorney or, in the absence of any such indication, the law of the jurisdiction in which the power of attorney was executed. The commentary to section 106 makes clear that one of the purposes of the Uniform Power of Attorney Act was to promote the portability and use of powers of attorney. It adds that while the effect of section 106 is to recognise the validity of foreign powers of attorney, section 106 “*does not abrogate the traditional grounds for contesting the validity of execution such as forgery, fraud, or undue influence.*”

2.85 The 2006 draft replaced the NCCUSL’s Uniform Durable Power of Attorney Act, which was completed in 1979 and amended in 1987. While the earlier Act had been adopted by 45 US states, the 2006 Act was necessary “*because many states had incorporated numerous non-uniform provisions that, while helpful, caused great divergence and confusion in the states.*”<sup>88</sup> To date, the 2006 Act has been adopted in one state (New Mexico)

<sup>88</sup> Summary to the Uniform Power of Attorney Act 2006, at <[www.nccusl.org/Update/uniformact\\_summaries/uniformacts-s-upoaa.asp](http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-upoaa.asp)>, 13 August 2008.

and introduced in eight others. A key difference between the two draft statutes is the fact that the default position under the 2006 Act is that a power of attorney is an EPA (or “durable” power of attorney, to use the US terminology) unless it expressly states otherwise.<sup>89</sup> The commentary to section 104 of the 2006 Act explains that this default rule is “*based on the assumption that most principals prefer durability as a hedge against the need for guardianship.*”

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<sup>89</sup> Section 104, Uniform Power of Attorney Act 2006, NCCUSL.

## Chapter 3

### Options for change

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3.1 We indicated in chapter 1 our provisional conclusions that the scope of EPAs should be extended in Hong Kong to include decisions relating to the donor's "personal care" and that legislative provision should be made for the recognition in Hong Kong of EPAs executed in jurisdictions outside Hong Kong. Both reforms raise a number of issues which require consideration and this chapter sets those issues out and identifies the various options for change in respect of each of the two aspects of the current review. In addition, we consider the question of the supervision and discharge of EPA attorneys and the resolution of disputes arising from the execution of an EPA attorney's powers.

3.2 The following abbreviations are used in this chapter:

ACT	Powers of Attorney Act 2006, Australian Capital Territory
ALB	Powers of Attorney Act 2002, Alberta, Canada
ENG	Mental Capacity Act 2005, England & Wales, UK
IRE	Powers of Attorney Act 1996, Ireland
MAN	Powers of Attorney Act 1996, Manitoba, Canada
NSW	Guardianship Act 1987, New South Wales, Australia
NWT	Powers of Attorney Act 2001, Northwest Territory, Canada
NZ	Protection of Personal and Property Rights Act 1988, New Zealand
Q	Powers of Attorney Act 1998, Queensland, Australia
SAS	Powers of Attorney Act 2002, Saskatchewan, Canada
SCO	Adults with Incapacity (Scotland) Act 2000, Scotland, UK
TAS	Powers of Attorney Act 2000, Tasmania, Australia
USA	draft Uniform Power of Attorney Act 2006, US National Conference of Commissioners of Uniform State Laws
VIC	Instruments (Enduring Powers of Attorney) Act 2003, Victoria, Australia
WCLRA	Proposals by Western Canada Law Reform Agencies

### Personal care EPAs

#### ***What "personal care" decisions should be covered?***

3.3 Different aspects of "personal care" are specified in the legislation in other jurisdictions, and while some legislation is specific as to the decisions which may be made by the attorney on the donor's behalf, other legislation is more general in its terms. Specific aspects of "personal care"

which are covered under the legislation applicable in other jurisdictions include the following decisions:

- (a) where the donor lives (ACT, NSW, Q, ENG, IRE)
- (b) who the donor lives with (ACT, Q, IRE)
- (c) whether the donor works and, if he does so, where and how the donor works (ACT, Q)
- (d) what education or training the donor gets (ACT, Q, IRE)
- (e) whether the donor applies for a licence or permit (ACT, Q)
- (f) the donor's daily dress and diet (ACT, Q, IRE)
- (g) whether to consent to a forensic examination of the donor (ACT, Q)
- (h) whether the donor will go on holiday and where (ACT)
- (i) legal matters not relating to the donor's financial or property matters (Q)
- (j) the donor's health care (Q, NSW)
- (k) consent to medical treatment for the donor's wellbeing (ACT)
- (l) consent to medical or dental treatment on the donor (NSW, ENG)
- (m) what other kinds of personal services the donor receives (NSW)
- (n) deciding what contact, if any, the donor should have with any specified persons (ENG)
- (o) prohibiting a named person from contact with the donor (ENG, IRE)
- (p) directing that a person responsible for the donor's health care allow a different person to take over that responsibility (ENG)
- (q) inspection of the donor's personal papers (IRE)
- (r) housing, social welfare and other benefits for the donor (IRE)

3.4 A broad distinction can be made between those decisions which relate to the donor's everyday life (where he lives, who he lives with, his dress and diet, etc) and those touching on his health care (consent to medical treatment, etc). The scope of an EPA could be extended to cover both areas, or it could be restricted to matters other than health care. We pointed out in chapter 1 that our 2004 report on *Substitute Decision-making and Advance Directives in Relation to Medical Treatment* rejected an extension of the scope of EPAs to incorporate decisions as to the giving or refusing of medical treatment, not least because of the significance of such decisions and the need to have adequate safeguards and stringent execution requirements in place. That conclusion was reached, however, in the context of decisions involving life-sustaining treatment for the critically ill and not in relation to the everyday health care decisions which we envisage could be included in the scope of a "personal care" EPA.

3.5 In favour of restricting the scope of an EPA to non-health care matters it could be argued that decisions as to the donor's health care are of a particularly sensitive nature and an attorney charged with decisions on the donor's everyday life may not be the most appropriate person to deal with health care matters. The counter-argument is that health care is so intimately bound up with the way an individual orders his affairs that it would be artificial and impractical to exclude it from the scope of an expanded EPA. We accept

the force of this argument and take the view that if health care decisions were to be excluded the efficacy of personal care EPAs would be limited. At the same time, we acknowledge that an attorney appointed to manage a donor's financial affairs may not always be the most appropriate person to make decisions as to his health care. In our view, it should therefore be open to a donor, if he chooses, to delegate decisions as to his financial affairs and personal care to different attorneys under an EPA. We deal with this issue at Recommendation 6.

### **Recommendation 3**

**We recommend that, for the purposes of the proposed expanded EPA, “personal care” should include everyday decisions as to the donor’s health care, but not decisions involving the giving or refusing of life-sustaining treatment.**

3.6 The permissible range of decisions which may be delegated under an EPA could be defined either by reference to a statutory list of specific decisions or to a general power to make decisions, perhaps with certain proscribed decisions listed. Setting out in the legislation specific decisions which an attorney may make on the donor's behalf under an EPA has the advantage of providing certainty and clear guidance. A more general statement of the attorney's powers, however, would offer flexibility and enable decisions to be made for the donor's benefit in areas which a legislative list might have overlooked.

3.7 If a specific list of decisions is to be included in the legislation, it would appear from the models in other jurisdictions surveyed in chapter 2 that, while there is significant variation, certain decisions are generally included in the list. The most common appear to be: where the donor lives; who he lives with; his dress and diet; and the nature of any work, training or education. All may be said to be core elements of an individual's everyday life. The Australian Capital Territory's legislation (referred to in chapter 2) provides a typical example. Section 11 of the Powers of Attorney Act 2006 gives a non-exhaustive list of examples of “personal care matters” which an EPA may cover:

- (a) where the donor lives;
- (b) who the donor lives with;
- (c) whether the donor works and, if he does so, where and how the donor works;
- (d) what education or training the donor gets;
- (e) whether the donor applies for a licence or permit;
- (f) the donor's daily dress and diet;
- (g) whether to consent to a forensic examination of the donor;
- (h) whether the donor will go on holiday and where; and
- (i) legal matters relating to the donor's personal care.

3.8 We favour a similar approach, with the legislation providing a general power to delegate personal care decisions through an EPA and including a non-exhaustive list of such decisions. We consider the list of decision-making powers in the Australian Capital Territory's Powers of Attorney Act 2006 provides an appropriate model but we would welcome views on this.

#### **Recommendation 4**

**We recommend that legislative provision should be made to allow personal care decisions to be included in the scope of an EPA. The legislation should provide that such decisions may include:**

- (a) where the donor lives;**
- (b) who the donor lives with;**
- (c) whether the donor works and, if he does so, where and how the donor works;**
- (d) what education or training the donor gets;**
- (e) whether the donor applies for a licence or permit;**
- (f) the donor's daily dress and diet;**
- (g) whether to consent to a forensic examination of the donor;**
- (h) whether the donor will go on holiday and where; and**
- (i) legal matters relating to the donor's personal care.**

#### ***Should certain decisions be specifically excluded from the scope of a "personal care" EPA?***

3.9 While there is a case for extending the scope of the existing EPA in Hong Kong to cover decisions relating to the donor's personal care, there is obviously a need to ensure that the attorney's powers are properly circumscribed to prevent abuse. The legislation in a number of other jurisdictions has recognised this by specifically excluding certain decisions from the scope of an EPA. These decisions include:

- (a) making or revoking the donor's will (ACT, Q)
- (b) making or revoking a power of attorney or EPA for the donor (ACT, Q)
- (c) making or revoking an advance health directive for the donor (Q)
- (d) exercising the donor's right to vote in an election or referendum (ACT, Q)
- (e) consenting to the adoption of a child of the donor who is under 18 (ACT, Q)
- (f) consenting to the marriage of the donor (ACT, Q)

- (g) removal of non-regenerative tissue from the donor while alive for donation to someone else (ACT, Q, SCO)
- (h) sterilisation of the donor if the donor is, or is reasonably likely to be, fertile (ACT, Q)
- (i) termination of the donor's pregnancy (ACT, Q)
- (j) participation in medical research or experimental health care (ACT, Q)
- (k) treatment for mental illness (ACT)
- (l) place the donor in hospital for treatment of mental disorder against his will (SCO)
- (m) electroconvulsive therapy or psychiatric surgery (ACT, Q)
- (n) health care prescribed by regulation (ACT, Q)

3.10 If the amended legislation in Hong Kong were to include an exhaustive list of decisions which an attorney may make, there would clearly be no need to specify separately what decisions are precluded. Our recommendation, however, is that a broad decision-making power should be given, along with a non-exhaustive list of decisions. It is therefore necessary to specify in the legislation those decisions which an attorney may not make. The list of exclusions adopted elsewhere which is set out in the preceding paragraph provides a useful model and we consider that the following decisions should be statutorily excluded from the scope of an EPA in Hong Kong:

- (a) making, varying or revoking the donor's will (it is difficult to conceive of circumstances in which such actions could be said to be in the donor's best interests and there is obvious scope for abuse. We have added "varying" a will to the wording of item (a) of the legislative list in the preceding paragraph since the variation of a will offers as great an opportunity for abuse as making or revoking a will.)
- (b) making an EPA for the donor (once an EPA is registered all existing powers of attorney lapse. It is therefore unnecessary in Hong Kong to include revocation of a power of attorney as one of the excluded decisions and we have modified the wording of item (b) of the legislative list in the preceding paragraph accordingly.)
- (c) exercising the donor's right to vote in an election or referendum
- (d) consenting to the adoption of a child of the donor who is under 18
- (e) consenting to the marriage of the donor (as with item (a), it is difficult to conceive of circumstances in which consent to the donor's marriage could be said to be in the donor's best interests and there is obvious scope for abuse.)
- (f) removal of non-regenerative tissue from the donor while alive for donation to someone else
- (g) sterilisation of the donor if the donor is, or is reasonably likely to be, fertile.

We have not included in this proposed list of prohibited decisions the making or revoking of an advance directive (item (c) of the legislative list in the preceding paragraph.). In Recommendation 3 of this paper we specifically excluded from the scope of an EPA decisions involving the giving or refusing of life-sustaining treatment. In line with that recommendation, we do not therefore favour granting an attorney the power to make or revoke an advance directive on behalf of the donor under an EPA, which would effectively give the attorney the power to make decisions relating to the giving or refusing of life-sustaining treatment for the donor.

#### **Recommendation 5**

**We recommend that the following decisions should be statutorily excluded from the scope of an EPA:**

- (a) making, varying or revoking the donor's will**
- (b) making an EPA for the donor**
- (c) exercising the donor's right to vote in an election or referendum**
- (d) consenting to the adoption of a child of the donor who is under 18**
- (e) consenting to the marriage of the donor**
- (f) removal of non-regenerative tissue from the donor while alive for donation to someone else**
- (g) sterilisation of the donor if the donor is, or is reasonably likely to be, fertile.**

3.11 As regards items (i) to (n) of the legislative list at paragraph 3.9 above, we would welcome views as to whether any of these decisions (or any other decisions) should be specifically excluded from the scope of an attorney's powers under an EPA in Hong Kong.

***Should the existing EPA be able to include personal care decisions or should there be separate financial and personal care EPAs?***

3.12 Separate EPAs for financial matters and personal care are required in IRE, NZ and SCO. EPAs cover both in ACT, Q, SAS and ENG. One advantage of separate EPAs is that it allows donors to choose different attorneys according to the decisions they will be required to make: an attorney appointed to deal with financial matters might not be the donor's choice for decisions relating to personal care. On the other hand, it could be said in favour of providing for a single EPA that it offers a simpler mechanism and might therefore be expected to encourage more widespread use.

3.13 Our preference is to offer the maximum flexibility, so that a donor may choose either to appoint separate attorneys for financial matters

and personal care, or, if he prefers, to appoint a single attorney to make both categories of decisions for him. The use of separate attorneys may in some circumstances lead to difficulties where health care and finance matters overlap, as, for instance, where there is a dispute between the attorneys as to the appropriate level of health care having regard to the cost implications.

**Recommendation 6**

**We recommend that the donor of an EPA should be able to appoint a single attorney to make decisions on his behalf in relation to both financial matters and health care or to appoint separate attorneys to deal with each of these categories of decisions.**

***If personal care EPAs are to be executed separately should different rules apply to their execution and registration?***

3.14 A number of aspects of this issue arise. The first is whether the witness requirements for a personal care EPA should be more or less rigorous than the existing requirements for a financial and property EPA. There does not appear to be a difference in execution requirements in any other jurisdiction between property EPAs and personal care EPAs but it might be suggested nevertheless that a distinction was appropriate in Hong Kong. In our view, applying a different witness regime for a personal care EPA would needlessly complicate the EPA process, especially where the donor chose to appoint the same attorney for both financial matters and personal care decisions. The LRC recommended in its March 2008 EPA report that the execution requirements for a property EPA should be relaxed by removing the requirement for a medical witness. The aim of that proposal was to encourage the wider use of EPAs and we do not think there are compelling reasons why a similar approach should not also be adopted in relation to personal care EPAs. Our view is therefore that the revised witness requirements recommended in our March 2008 EPA report should apply to all EPAs, whether they cover personal care decisions or not.

3.15 A second issue is whether compliance with a statutory form should be necessary (as with the existing financial and property EPA), or not (as is the case for a conventional power of attorney). So far as can be ascertained, all jurisdictions require completion of a prescribed form. Given the fact that the existing property EPA currently requires compliance with a statutory form, it would seem difficult to argue that a personal care EPA should follow a more relaxed regime.

3.16 A third issue is whether notice should be necessary before registration and, if so, to whom must notice be given. There is currently no notice requirement stipulated in relation to property EPAs in Hong Kong, though the donor may, if he wishes, nominate himself and up to two other

persons to be notified before an application for registration is made. Failure to notify the nominated persons does not invalidate the EPA. In contrast, there is a requirement to give notice of the *execution* of an EPA in Ireland. In England and Wales, if the donor has not included in the EPA form the names of persons to be given notice of an application to register the EPA, then the EPA must be witnessed by two witnesses “*of a prescribed description*”, rather than one. The advantage of requiring some kind of pre-registration notification is that it offers a safeguard against possible abuse by the prospective attorney. We have reached no conclusion on this point and would welcome the public’s views.

**Recommendation 7**

**We recommend that the witness requirements proposed in our March 2008 report on Enduring Powers of Attorney for the execution of an EPA should apply to all EPAs, whether or not they extend to personal care decisions.**

**Recommendation 8**

**We recommend that the statutory EPA form should be revised so that it provides for an EPA which delegates decisions as to: (a) the donor’s financial and property affairs; or (b) the donor’s personal care; or (c) both (a) and (b).**

***What statutory guidelines should there be as to the standards to be applied by the attorney?***

3.17 Providing statutory guidelines as to the way in which an attorney must carry out his duties both protects the donor and assists the attorney. In Hong Kong, section 12(1) of the Enduring Powers of Attorney Ordinance (Cap 501) provides that an EPA attorney’s duties towards the donor are “of a fiduciary nature”. That essentially means that the attorney is placed in a position that requires loyalty to the donor and is under an obligation to act “with the utmost good faith” in his dealings under the EPA.

*“A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence”<sup>1</sup>*

3.18 A fiduciary duty can be defined as a duty “*to act with the highest degree of honesty and loyalty towards another person and in the best*

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<sup>1</sup> *Bristol & West Building Society v Mathew* [1998] Ch 1, at 18, per Lord Millett.

*interests of the other person*".<sup>2</sup> The difficulty of defining the attorney's responsibilities to the donor as "of a fiduciary nature" is that the meaning of that term may well be opaque to an attorney who has no legal background. Section 12(2) of the Enduring Powers of Attorney Ordinance (Cap 501) offers clearer guidance by providing that an EPA attorney has a duty:

- (a) *to exercise his powers honestly and with due diligence;*
- (b) *to keep proper accounts and records;*
- (c) *not to enter into any transaction where a conflict of interest would arise with the donor; and*
- (d) *not to mix the property of the donor with other property."*

3.19 A number of other jurisdictions have included in their legislation guidelines as to the standards which should be applied by EPA attorneys. In England and Wales, for instance, section 1 of ENG sets out the principles which apply for the purposes of the Act. One of these is that "*an act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.*"<sup>3</sup> Section 4(2) requires the attorney to "*consider all the relevant circumstances*" and to take a number of prescribed steps. So far as the present study is concerned, the relevant steps required of an attorney are that:

*"He must consider –*

- (a) *whether it is likely that the person will at some time have capacity in relation to the matter in question; and*
- (b) *if it appears likely that he will, when that is likely to be."*<sup>4</sup>

*"He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him."*<sup>5</sup>

*"He must consider, so far as is reasonably ascertainable –*

- (a) *the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity);*
- (b) *the beliefs and values that would be likely to influence him if he had capacity; and*
- (c) *the other factors that he would be likely to consider if he were able to do so."*<sup>6</sup>

*"He must take into account, if it is practicable and appropriate to consult them, the views of –*

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<sup>2</sup> See Black's Law Dictionary, 7<sup>th</sup> edition (1999), at 522.

<sup>3</sup> Section 1(5) Mental Capacity Act 2005.

<sup>4</sup> Section 4(3) Mental Capacity Act 2005.

<sup>5</sup> Section 4(4) Mental Capacity Act 2005.

<sup>6</sup> Section 4(6) Mental Capacity Act 2005.

- (a) *anyone named by the person as someone to be consulted on the matter in question or on matters of that kind;*
- (b) *anyone engaged in caring for the person or interested in his welfare;*
- (c) *any [attorney under an EPA] granted by the person; and*
- (d) *any deputy appointed for the person by the court,*

*as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6)."*<sup>7</sup>

3.20 The Code of Practice issued under ENG makes clear that certain duties apply automatically to an attorney under an LPA by virtue of the law of agency. These include a duty of care, of good faith and of confidentiality. An attorney is also under a duty not to delegate decisions unless authorised to do so, and not to take advantage of the position of attorney. Paragraph 7.59 of the Code of Practice imposes a specific obligation on solicitors who act as attorneys to "*display professional competence and abide by their own professional rules and standards.*" In addition, the same paragraph imposes a duty on an attorney under a property and affairs LPA to keep accounts and to keep the donor's money and property separate from his own.

3.21 Another example of statutory guidelines can be found in section 6(7) of IRE, which requires that any personal care decision made by an attorney be made "*in the donor's best interests*". Section 6(7)(b) stipulates that, in deciding what is in a donor's best interests, regard shall be had to:

- "(i) so far as ascertainable, the past and present wishes and feelings of the donor and the factors which the donor would consider if he or she were able to do so;*
- (ii) the need to permit and encourage the donor to participate, or to improve the donor's ability to participate, as fully as possible in any decision affecting the donor;*
- (iii) so far as it is practicable and appropriate to consult [any person named by the donor as someone to be consulted on those matters, or anyone engaged in caring for the donor or interested in the donor's welfare], their views as to the donor's wishes and feelings and as to what would be in the donor's best interests ... ;*
- (iv) whether the purpose for which any decision is required can be as effectively achieved in a manner less restrictive of the donor's freedom of action."*

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<sup>7</sup> Section 4(7) Mental Capacity Act 2005.

3.22 A rather different approach is adopted in section 114 of USA. This sets out in some detail the attorney's duties under an EPA. These include a duty to act in good faith and only within the scope of authority granted in the EPA.<sup>8</sup> Rather than a straight "best interests" requirement, however, section 114(a)(1) imposes a duty on the attorney to:

*"act in accordance with the [donor's] reasonable expectations to the extent actually known by the [attorney] and, otherwise, the [donor's] best interest."*

As the commentary to this section points out:

*"Establishing the [donor's] reasonable expectations as the primary guideline for [attorney] conduct is consistent with a policy preference for 'substituted judgment' over 'best interest' as the surrogate decision-making standard that better protects an incapacitated person's self-determination interests."*

3.23 In addition to these minimum mandatory duties imposed on an attorney under section 114(a), section 114(b) lists a number of what the commentary to the section describes as "default duties" which may be modified or omitted by the donor. These default duties are to:

- (1) "act loyally" for the donor's benefit;
- (2) act so as not to create a conflict of interest that impairs the attorney's ability to act impartially in the donor's best interest;
- (3) act with the care, competence and diligence ordinarily exercised by attorneys in similar circumstances;
- (4) keep a record of all receipts, disbursements and transactions made on the donor's behalf;
- (5) cooperate with a person who has authority to make health-care decisions for the donor to carry out the donor's reasonable expectations to the extent actually known by the attorney, or otherwise to act in the donor's best interest;
- (6) attempt to preserve the donor's estate plan to the extent actually known by the attorney, if preserving the plan is consistent with the donor's best interest based on all relevant factors, including:
  - (a) the value and nature of the donor's property;
  - (b) the donor's foreseeable obligations and need for maintenance;
  - (c) minimisation of taxes; and
  - (d) eligibility for a benefit, programme or assistance under a statute or regulation.

3.24 There are obvious advantages in providing clear statutory guidelines as to the standards which must be applied by EPA attorneys. Section 12 of the Enduring Powers of Attorney Ordinance (Cap 501) sets out

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<sup>8</sup> Section 114(a)(2) and (3), Uniform Power of Attorney Act 2006, NCCUSL.

an EPA attorney's duties but, unlike the provisions in some other jurisdictions, imposes no requirement on the attorney to take account of what the donor's own wishes would have been had he been competent, nor is the attorney placed under any obligation to consult others. We consider that an EPA attorney's paramount duty should be to act in the donor's best interests, but that in determining what those best interests are in relation to a particular decision the attorney should be required to take account of the donor's wishes to the extent that they are ascertainable and, where practicable and appropriate, to consult any person named by the donor or engaged in his care. Our provisional view is, in other words, that the existing obligations in section 12 of Cap 501 should be supplemented by provisions along the lines of the English and Irish legislation described above. We would welcome views on this.

#### **Recommendation 9**

**We recommend that an EPA attorney should be under a statutory duty to act in the donor's best interests. In determining the donor's best interests, the attorney should be required to have regard so far as practicable to the donor's wishes and feelings, to the extent that these are ascertainable. If it is practicable and appropriate, the attorney should be required to consult any person named by the donor as a person to be consulted on matters arising from the EPA and any person caring for the donor or interested in his welfare.**

### **Supervision and discharge of EPA attorneys and the resolution of disputes**

3.25 We outlined in Chapter 1 the existing provisions in the Enduring Powers of Attorney Ordinance (Cap 501) which relate to the supervision and discharge of EPA attorneys and in Chapter 2 examples of legislative provision on these matters in other jurisdictions. Powers given to the supervisory body (which is in some cases the court and in others a specialist tribunal) in other jurisdictions include the power to:

- (a) direct the attorney to do, or not do, a specified act (ACT, ENG)
- (b) revoke an EPA, or part of it (ACT, NSW, Q, NZ, SCO)
- (c) vary a term of an EPA (NSW, Q, VIC, NZ)
- (d) suspend for an EPA for a specified period, either generally or in respect of a specific matter (VIC)
- (e) make a declaration about the interpretation or effect of an EPA (ACT, VIC, NZ)
- (f) reinstate an EPA which has lapsed through a vacancy in the office of attorney (NSW)
- (g) remove an attorney (ACT, NSW, Q, SCO)

- (h) appoint a substitute attorney (NSW, Q)
- (i) remove a power from an attorney and give the removed power to another attorney or a new attorney (Q)
- (j) require an attorney to provide accounts and records of transactions carried out for the donor (ACT, NSW, VIC, SAS, ENG, NZ. SCO)
- (k) require an attorney to submit a plan of financial management for approval (NSW)
- (l) give directions as to the remuneration or expenses of the attorney (ENG, NZ)
- (m) make such orders as the supervisory body thinks fit (NSW, VIC, NZ)

3.26 The existing provisions in Cap 501 provide the court with supervisory powers along the lines of those at (b), (c), (e), (g) and (j) above. However, there are no explicit powers, *inter alia*, to direct an attorney to do (or not do) a specified act (see (a) above), to appoint a substitute attorney (see (h) above) or to give directions as to the remuneration or expenses of the attorney (item (l) above), nor is there a general discretionary power to make such orders as the supervisory body thinks fit (item (m) above). The question arises as to whether the existing powers of the court in Hong Kong in relation to EPAs should be extended. Related to that is the question of whether, and if so to what extent, the court's supervisory powers should be devolved to a body such as the Guardianship Board.

3.27 As regards the first question, it is in the donor's interests that there should be an appropriate level of supervision of the attorney to provide a means of protection against possible abuse. The requirement for supervision might be thought to be greater if the scope of EPAs were to be extended as proposed in this paper to include decisions as to the donor's personal care. While the existing supervisory powers are sufficient to meet some situations, we think that it would be desirable to supplement these with powers to:

- (i) direct an attorney to do, or not to do, a specific act;
- (ii) appoint a substitute attorney;
- (iii) give directions as to the remuneration and expenses of an attorney; and
- (iv) make such other orders as the supervisory body thinks are appropriate in the best interests of the donor.

3.28 The existing supervisory powers under Cap 501 are exercised by the court. In some other jurisdictions supervision is exercised by a specialist tribunal. That has the advantage of simplifying the process and reducing costs. One possibility would be to devolve responsibility for some or all supervision of EPAs in Hong Kong to the Guardianship Board. Our initial thinking on this is that it would be useful to adopt a two-tier approach, with more serious matters reserved to the court and day-to-day issues the preserve of the Board. The Board should be able to refer matters to the court, and the court should be able to refer matters back to the Board. An appeal should lie to the court from any decision by the Board.

3.29 Our provisional view is that the following matters should be referred to the court rather than the Board:

- (i) revocation of an EPA in whole or in part;
- (ii) discharge or dismissal of an attorney; and
- (iii) appointment of a substitute attorney.

These seem to us to be decisions of such a fundamental nature that they deserve determination by a judicial body. In addition, we believe that the court (but not the Guardianship Board) should be given an overall power to make such other orders as it thinks are appropriate in the best interests of the donor.

3.30 Taking cognisance of the powers available in other jurisdictions listed at paragraph 3.25 above, and of the existing supervisory powers under Cap 501, our provisional view is that the Board should be given power to:

- (i) direct an EPA attorney to do, or not do, a specified act ;
- (ii) vary a term of an EPA;
- (iii) make a declaration about the interpretation or effect of an EPA;
- (iv) remove a power from an attorney and give the removed power to another attorney or a new attorney;
- (v) require an attorney to provide accounts and records of transactions carried out for the donor;
- (vi) require an attorney to submit a plan of financial management for approval; and
- (vii) give directions as to the remuneration or expenses of the attorney.

We would particularly welcome views on this aspect of our proposals.

**Recommendation 10**

**(1) We recommend that the court's existing powers of supervision and discharge of an EPA attorney in the EPA Ordinance (Cap 501) should be supplemented by powers to:**

- (i) direct an attorney to do, or not to do, a specific act;**
- (ii) appoint a substitute attorney;**
- (iii) give directions as to the remuneration and expenses of an attorney; and**
- (iv) make such other orders as the court thinks are appropriate in the best interests of the donor.**

**(2) We further recommend that the Guardianship Board should be given power in relation to an EPA to:**

- (i) direct an EPA attorney to do, or not do, a specified act ;**
- (ii) vary a term of an EPA;**
- (iii) make a declaration about the interpretation or effect of an EPA;**
- (iv) remove a power from an attorney and give the removed power to another attorney or a new attorney;**
- (v) require an attorney to provide accounts and records of transactions carried out for the donor;**
- (vi) require an attorney to submit a plan of financial management for approval; and**
- (vii) give directions as to the remuneration or expenses of the attorney.**

**(3) The powers listed at (2) should also be exercisable by the court and the Board should be able to refer matters to the court, and *vice versa*. An appeal should lie to the court from any decision by the Board.**

## **Recognition of EPAs**

### ***Which EPAs executed outside Hong Kong should be recognised in Hong Kong?***

3.31 There are a number of alternative tests which have been adopted in jurisdictions elsewhere for the recognition of EPAs made outside the particular jurisdiction. One or more of the following alternatives could be adopted in Hong Kong:

- (a) EPA executed outside Hong Kong but complies with the Hong Kong execution requirements (though witnessed by a solicitor/doctor registered in the other jurisdiction, rather than Hong Kong) (WCLRA)**
- (b) EPA executed outside Hong Kong and complies with the EPA requirements of that jurisdiction (ACT, ALB, MAN, NWT, SAS, TAS, USA, VIC, WCLRA)**
- (c) EPA executed outside Hong Kong and complies with the EPA requirements of the jurisdiction indicated in the EPA (USA)**

- (d) EPA executed outside Hong Kong and complies with the EPA requirements of the jurisdiction where, at the time of execution, the donor:
  - (i) was habitually resident (WCLRA);
  - (ii) was ordinarily resident;
  - (iii) was domiciled; or
  - (iv) had a substantial connection.

3.32 Option (a) is the most conservative option and of limited scope. The advantage is that it avoids concerns which might otherwise be raised about execution requirements for foreign EPAs meeting a lesser standard than those of domestic EPAs. The disadvantage is that it is likely to assist in only a handful of cases and offers no solution, for instance, for an elderly relative who has executed an EPA in compliance with the requirements of his home jurisdiction and who joins his family in Hong Kong after the loss of mental capacity. In such circumstances, the donor would be unable to execute a new EPA in Hong Kong but his family could not rely on the overseas EPA.

3.33 Option (b) is the option which appears to have been most widely adopted in other jurisdictions. A disadvantage might be the practical difficulties for those faced with a foreign EPA of determining whether or not the requisite execution formalities had been met. Option (b) would, however, offer a solution where the circumstances described in the previous paragraph arise.

3.34 Option (c) does not seem to add much to options (a) and (b). The draft USA legislation from which it is taken provides that where the EPA does not itself indicate a jurisdiction, the EPA will be recognised if it complies with the requirements of the jurisdiction in which it was executed. The advantage of option (c) is that it offers the donor the ability to choose the jurisdiction which will govern his EPA, which may be relevant where the donor is at the time of execution temporarily resident in a jurisdiction other than that of his home. The disadvantage is that it may lead to artificiality and a donor choosing to execute an EPA in compliance with the requirements of a jurisdiction with which he has no real connection.

3.35 Option (d) refers to four grounds of jurisdiction (habitual residence, ordinary residence, domicile and substantial connection), of which one or more could be adopted. So far as (d)(i) and (ii) are concerned, it is not altogether clear from the case law as to what the distinction is between the terms “habitually resident” and “ordinarily resident”. It would seem that voluntary residence with a settled intention is required for both, but that while it may be possible to acquire ordinary residence immediately on entry to a jurisdiction, habitual residence requires a longer, undefined, period of residence.<sup>9</sup> Historically, habitual residence was associated with civil law

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<sup>9</sup> See *Nessa v Chief Adjudication Officer and Another* (House of Lords) 1999, at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991021/nessa.htm>, 26 August 2008.

jurisdictions while ordinary residence was the term preferred by common law jurisdictions.

3.36 All four terms shown in option (d) are used in Hong Kong's legislation. For instance, jurisdiction for divorce proceedings can be founded on habitual residence, domicile or substantial connection<sup>10</sup>, while permanent resident status is conferred on persons not of Chinese nationality who have "ordinarily resided" in Hong Kong for seven years.<sup>11</sup> The disadvantage of d(iii) and (iv) (domicile and substantial connection) is that assessing whether that ground has been satisfied may prove complicated. The advantage is that the inclusion of one or both of these grounds would offer greater flexibility in ensuring that a donor's wishes are recognised.

3.37 We favour the adoption in Hong Kong of options (a) and (b), which would appear to be the path followed in most of the jurisdictions surveyed in Chapter 2. It would offer a solution to the difficulties which arise where a donor executes an EPA outside Hong Kong and is no longer competent to execute an EPA on his return. Option (c) appears to be directed at circumstances relevant to the USA while option (d) raises additional complexities.

#### **Recommendation 11**

**We recommend that an EPA made in a jurisdiction other than Hong Kong should be recognised in Hong Kong if:**

- (a) it complies with the Hong Kong execution requirements (though witnessed by a solicitor/doctor registered in the other jurisdiction, rather than Hong Kong); or**
- (b) it complies with the EPA requirements of that jurisdiction.**

<sup>10</sup> See section 3 of the Matrimonial Causes Ordinance (Cap 179).

<sup>11</sup> See section 2 of Schedule 1 to the Immigration Ordinance (Cap 115).

## Invitation to comment

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This paper is issued by the Law Reform Commission to elicit views and comment from the public on the recommendations for change that it contains. The Commission would welcome responses in particular to the following questions:

- (1) Do you think that the scope of an EPA should be extended to include decisions about the donor's "personal care" (see Recommendation 1)?
- (2) If you have answered "no" to question 1, you should now go to question 3. If you have answered "yes" to question 1, please answer the following questions:
  - (a) Do you think that, for the purposes of an EPA, "personal care" should include decisions as to the donor's day-to-day health care (see Recommendation 3)?
  - (b) Do you agree that there should be a statutory list of decisions which may be included within the scope of an EPA (see Recommendation 4)?
  - (c) If you have answered "yes" to question 2(b) do you agree with the contents of the list of such decisions set out in Recommendation 4? If not, which decisions do you think should be deleted from the list? Are there other decisions which you think should be added to the list?
  - (d) Do you agree that there should be a statutory list of decisions which must be excluded from the scope of an EPA (see Recommendation 5)?
  - (e) If you have answered "yes" to question 2(d) do you agree with the contents of the list of such decisions set out in Recommendation 5? If not, which decisions do you think should be deleted from the list? Are there other decisions which you think should be added to the list?
  - (f) Do you agree that a donor should be allowed, if he wishes, to appoint separate attorneys for personal care decisions and for financial affairs decisions (see Recommendation 6)?
  - (g) Should there be a requirement to give notice of intended registration of a personal care EPA and, if so, to whom should that notice be given (see para 3.16)?

- (h) Do you agree that the same witness requirements should apply to all EPAs, whether they include personal care decisions or are restricted to financial and property affairs (see Recommendation 7)?
  - (i) Do you agree that there should be a statutory obligation on an attorney to act in the donor's best interests (see Recommendation 9)?
  - (j) Recommendation 9 proposes that, in determining the donor's best interests, the attorney should be required to have regard so far as practicable to the donor's wishes and feelings, to the extent that these are ascertainable. If it is practicable and appropriate, the attorney should be required to consult any person named by the donor as a person to be consulted on matters arising from the EPA and any person caring for the donor or interested in his welfare. Do you agree with this proposal?
  - (k) Do you agree that the court should be given the additional powers to supervise an EPA attorney set out at Recommendation 10(1)? If not, which, if any, additional powers should be given to the court?
  - (l) Do you agree that the Guardianship Board should be given the powers to supervise an EPA attorney set out at Recommendation 10(2)? If not, which, if any, powers do you think should be given to the Guardianship Board?
- (3) Do you agree that EPAs executed in a jurisdiction other than Hong Kong should be recognised in Hong Kong if they satisfy certain criteria (see Recommendation 11)?
- (4) If you have answered "yes" to question 3, do you agree with the proposal in Recommendation 11 that an EPA executed in a jurisdiction other than Hong Kong should be recognised in Hong Kong if:
- (i) it complies with the Hong Kong execution requirements (though witnessed by a solicitor/doctor registered in the other jurisdiction, rather than Hong Kong); or
  - (ii) it complies with the EPA requirements of that jurisdiction?

If you do not agree with this proposal, what criteria do you think an EPA should satisfy to be recognised in Hong Kong?

## Summary of recommendations

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### **Recommendation 1** (after para 1.4)

We recommend that the scope of an EPA in Hong Kong be extended to include decisions as to the donor's personal care.

### **Recommendation 2** (after para 1.9)

We recommend that provision should be made for the recognition in Hong Kong of EPAs executed outside Hong Kong in specific circumstances.

### **Recommendation 3** (after para 3.5)

We recommend that, for the purposes of the proposed expanded EPA, "personal care" should include everyday decisions as to the donor's health care, but not decisions involving the giving or refusing of life-sustaining treatment.

### **Recommendation 4** (after para 3.8)

We recommend that legislative provision should be made to allow personal care decisions to be included in the scope of an EPA. The legislation should provide that such decisions may include:

- (a) where the donor lives;
- (b) who the donor lives with;
- (c) whether the donor works and, if he does so, where and how the donor works;
- (d) what education or training the donor gets;
- (e) whether the donor applies for a licence or permit;
- (f) the donor's daily dress and diet;
- (g) whether to consent to a forensic examination of the donor;
- (h) whether the donor will go on holiday and where; and
- (i) legal matters relating to the donor's personal care.

### **Recommendation 5** (after para 3.10)

We recommend that the following decisions should be statutorily excluded from the scope of an EPA:

- (a) making, varying or revoking the donor's will
- (b) making an EPA for the donor

- (c) exercising the donor's right to vote in an election or referendum
- (d) consenting to the adoption of a child of the donor who is under 18
- (e) consenting to the marriage of the donor
- (f) removal of non-regenerative tissue from the donor while alive for donation to someone else
- (g) sterilisation of the donor if the donor is, or is reasonably likely to be, fertile.

**Recommendation 6** (after para 3.13)

We recommend that the donor of an EPA should be able to appoint a single attorney to make decisions on his behalf in relation to both financial matters and health care or to appoint separate attorneys to deal with each of these categories of decisions.

**Recommendation 7** (after para 3.16)

We recommend that the witness requirements proposed in our March 2008 report on *Enduring Powers of Attorney* for the execution of an EPA should apply to all EPAs, whether or not they extend to personal care decisions.

**Recommendation 8** (after para 3.16)

We recommend that the statutory EPA form should be revised so that it provides for an EPA which delegates decisions as to: (a) the donor's financial and property affairs; or (b) the donor's personal care; or (c) both (a) and (b).

**Recommendation 9** (after para 3.24)

We recommend that an EPA attorney should be under a statutory duty to act in the donor's best interests. In determining the donor's best interests, the attorney should be required to have regard so far as practicable to the donor's wishes and feelings, to the extent that these are ascertainable. If it is practicable and appropriate, the attorney should be required to consult any person named by the donor as a person to be consulted on matters arising from the EPA and any person caring for the donor or interested in his welfare.

**Recommendation 10** (after para 3.30)

(1) We recommend that the court's existing powers of supervision and discharge of an EPA attorney in the EPA Ordinance (Cap 501) should be supplemented by powers to:

- (i) direct an attorney to do, or not to do, a specific act;

- (ii) appoint a substitute attorney;
  - (iii) give directions as to the remuneration and expenses of an attorney; and
  - (iv) make such other orders as the court thinks are appropriate in the best interests of the donor.
- (2) We further recommend that the Guardianship Board should be given power in relation to an EPA to:
- (i) direct an EPA attorney to do, or not do, a specified act ;
  - (ii) vary a term of an EPA;
  - (iii) make a declaration about the interpretation or effect of an EPA;
  - (iv) remove a power from an attorney and give the removed power to another attorney or a new attorney;
  - (v) require an attorney to provide accounts and records of transactions carried out for the donor;
  - (vi) require an attorney to submit a plan of financial management for approval; and
  - (vii) give directions as to the remuneration or expenses of the attorney.
- (3) The powers listed at (2) should also be exercisable by the court and the Board should be able to refer matters to the court, and *vice versa*. An appeal should lie to the court from any decision by the Board.

**Recommendation 11** (after para 3.37).

We recommend that an EPA made in a jurisdiction other than Hong Kong should be recognised in Hong Kong if:

- (a) it complies with the Hong Kong execution requirements (though witnessed by a solicitor/doctor registered in the other jurisdiction, rather than Hong Kong); or
- (b) it complies with the EPA requirements of that jurisdiction.