

Law Reform Commission report

Enduring Powers of Attorney: Personal Care

Executive summary

Introduction

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. **[para 1, preface]**

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. **[para 2, preface]**

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.¹ **[para 3, preface]** In contrast, in a number of other jurisdictions the scope of an EPA can also include decisions as to the donor's personal care.

4. A further practical difficulty with the existing provisions is that EPAs executed in another jurisdiction cannot be registered in Hong Kong. This can result in hardship where the donor, resident in Hong Kong, is no longer competent to execute a Hong Kong EPA.

5. In June 2008, the Commission was asked to consider these issues, along with the mechanism which should be in place for supervision and discharge of an EPA attorney and the resolution of disputes. The Commission's terms of reference for this project were:

"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."

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See section 8(1) of the Enduring Powers of Attorney Ordinance (Cap 501).

6. In July 2009, the Commission issued a consultation paper, setting out the Commission's conclusions in respect of these questions. A total of 24 responses were received from individuals and organisations, with 20 making substantive comments on the proposals. **[para 9, preface]**

7. Subsequent to the conclusion of the consultation, a separate issue was brought to the Commission's attention. This concerned section 8(1)(b) of the EPA Ordinance (Cap 501) which provides that an enduring power "*must specify ... the particular matters, property or affairs in relation to which the attorney has authority to act.*" The donor of an EPA cannot therefore confer upon the attorney a general power to act on the donor's behalf, a fact highlighted in paragraph 2 of the explanatory information to the statutory EPA form at the Schedule to the EPA (Prescribed Form) Regulation.² In the light of the difficulties identified, the Commission decided to review this additional aspect of the law and to include their recommendations in Chapter 4 of this report, even though the issue had not been canvassed in the consultation paper. **[paras 10 & 11, preface]**

Chapter 1: The existing law in Hong Kong and the case for change

The absence of "personal care" EPAs

8. 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.³ 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. **[para 1.1]**

9. 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

² That paragraph reads: "To give a valid enduring power, you must not give your attorney(s) a general power in relation to all your property and financial affairs. You must either specify the matters in which he is given authority to act, with reference to the list set out in section 5(3) of the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap 501 sub leg A) or the particular property or financial affairs in respect of which he is given authority to act. Failure to do so would mean that the instrument you are about to execute would not take effect as an enduring power of attorney which continues even if you become mentally incapable."

³ See section 4(1) of Cap 501, cited above.

survives the onset of the donor's mental incapacity. 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. **[para 1.3]**

10. 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). **[para 1.4]** The report concludes that provision should be made to allow decisions as to the donor's personal care to be included within the scope of an EPA.

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

11. 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. **[para 1.6]**

12. 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. [para 1.7]

13. 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. [para 1.8]

Recognition of EPAs executed outside Hong Kong

14. 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. This contrasts with the situation in a number of other jurisdictions, where specific legislative provision is made for recognition. The consultation paper proposed that provision should be made for the recognition of EPAs executed outside Hong Kong in specific circumstances. All those who commented on this aspect of the paper supported that conclusion and the report confirms the original recommendation. [paras 1.9 & 1.10]

Recommendation 2: We recommend that provision should be made for the recognition in Hong Kong of EPAs executed outside Hong Kong in specific circumstances.

Chapter 2: Personal care EPAs, supervision and discharge of EPA attorneys and provision for recognition in other jurisdictions

Personal care EPAs

15. This chapter looks at the provisions in a number of overseas jurisdictions which 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. The terminology used differs from jurisdiction to jurisdiction ("personal care", "personal affairs", "personal welfare", etc), but the report uses the rubric "personal care" to include all of these. [para 2.1]

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

16. The legislative provisions in other jurisdictions dealing with the supervision and discharge of an EPA attorney and the resolution of disputes are outlined.

Recognition of EPAs executed in another jurisdiction

17. 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. The provisions of a number of overseas jurisdictions are examined which cover one or both of these situations, ensuring that an EPA executed outside the jurisdiction can be registered and recognised within the jurisdiction. **[para 2.72]**

Chapter 3: Options for change

Personal care EPAs

What "personal care" decisions should be covered?

18. 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. 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. **[paras 3.3 & 3.4]** The Commission concluded that the legislation should provide a general power to delegate personal care decisions through an EPA and include a non-exhaustive list of such decisions.

Recommendation 3: We recommend that, for the purposes of the proposed expanded EPA, "personal care" should include decisions as to the donor's health care, but not decisions involving the giving or refusing of life-sustaining treatment or the making or revoking of advance directives.

19. 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. **[para 3.10]**

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;**
- (i) legal matters relating to the donor's personal care;**
- (j) a power to refuse access to, or contact with, the donor by specific individuals; and**
- (k) decisions as to the donor's health care.**

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

20. 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. **[para 3.18]** 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. The report recommends, however, 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. **[para 3.19]**

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, varying or revoking an EPA for the donor;**
- (c) exercising the donor's right to vote in an election;**
- (d) consenting to the adoption of a child of the donor who is under 18;**
- (e) consenting to any change in the marital status 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**

- (h) reasonably likely to be, fertile;
- (h) participation in medical research or experimental health care;
- (i) placing the donor in hospital for treatment of mental disorder against his will;
- (j) consenting to electroconvulsive therapy or psychiatric surgery; and
- (k) consenting to health care prescribed by regulation

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

21. Some jurisdictions require separate EPAs for financial matters and personal care while others do not. 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. **[para 3.29]**

22. The report favours offering the maximum flexibility, so that a donor could choose either to appoint separate attorneys for financial matters and personal care, or, if he preferred, to appoint a single attorney to make both categories of decisions for him. The use of separate attorneys might in some circumstances lead to difficulties where health care and finance matters overlapped, as, for instance, where there was a dispute between the attorneys as to the appropriate level of health care having regard to the cost implications. **[para 3.30]**

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?

23. 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. 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 report therefore recommends 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. **[para 3.32]**

24. 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. **[para 3.34]**

25. 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. The advantage of requiring some kind of pre-registration notification is that it offers a safeguard against possible abuse by the prospective attorney. **[para 3.35]** The report concludes that there should be a requirement that the donor nominate in the EPA two persons other than himself to be given notice of an application to register the EPA.

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).

Recommendation 9: We recommend that an EPA donor should be required to nominate in the EPA two persons other than the donor who must be given notice of the attorney's intention to register the EPA.

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

26. 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. **[para 3.38]**

27. A number of other jurisdictions have included in their legislation guidelines as to the standards which should be applied by EPA attorneys. **[para 3.40]** There are obvious advantages in providing clear statutory guidelines as to the standards which must be applied by EPA attorneys. Section 12 of the EPA Ordinance (Cap 501) sets out 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. An EPA attorney's paramount duty should be to act in the donor's best interests, but 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. The report recommends that the existing obligations in section 12 of Cap 501 should be supplemented by provisions along the lines of those in the English and Irish legislation. **[para 3.45]**

Recommendation 10: 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

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. 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. **[para 3.50]**

Recommendation 11: (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 or 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 specific 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?

29. A number of alternative tests 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)
- (b) EPA executed outside Hong Kong and complies with the EPA requirements of that jurisdiction
- (c) EPA executed outside Hong Kong and complies with the EPA requirements of the jurisdiction indicated in the EPA

- (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
 - (ii) was ordinarily resident;
 - (iii) was domiciled; or
 - (iv) had a substantial connection. **[para 3.56]**

30. The report recommends the adoption in Hong Kong of options (a) and (b), which appears to be the path followed in most of the jurisdictions surveyed. **[para 3.62]**

Recommendation 12: 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.**

Chapter 4: Scope of an attorney's authority under section 8(1)(b) of the EPA Ordinance

31. Section 8(1)(b) of the EPA Ordinance (Cap 501) provides that an EPA "*must specify ... the particular matters, property or affairs in relation to which the attorney has authority to act.*" The donor of an EPA cannot therefore confer upon the attorney a general power to act on the donor's behalf, a fact highlighted in paragraph 2 of the explanatory information to the statutory EPA form at the Schedule to the EPA (Prescribed Form) Regulation.⁴ **[para 4.1]** This can result in practical problems. A review of the law in a number of other jurisdictions reveals none that adopt Hong Kong's position. Where there is specific provision on the point, it is to the effect that the donor may delegate authority to the attorney either generally or in respect of specified areas. **[para 4.5]**

32. The current provision has the potential to cause difficulty and uncertainty and it is hard to see any significant counterbalancing advantage. The report recommends that the restriction in section 8(1)(b) on the delegation of a general power to deal with the donor's property should be removed.

⁴ That paragraph reads: "To give a valid enduring power, you must not give your attorney(s) a general power in relation to all your property and financial affairs. You must either specify the matters in which he is given authority to act, with reference to the list set out in section 5(3) of the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap 501 sub leg A) or the particular property or financial affairs in respect of which he is given authority to act. Failure to do so would mean that the instrument you are about to execute would not take effect as an enduring power of attorney which continues even if you become mentally incapable."

Instead, a donor should be free to decide whether he wishes to delegate to his attorney general authority to deal with all his property or authority to deal only with specified parts of his property. A provision along the lines of those in, for instance, Ireland or New Zealand should be adopted in place of section 8(1)(b).
[para 4.16]

Recommendation 13: We recommend that section 8(1)(b) of the EPA Ordinance (Cap 501) be repealed and replaced with a provision to the effect that an EPA donor may authorise the attorney to act in relation to all of the donor's property and affairs or in relation to specified parts of the donor's property and affairs. In either case, the authorisation may be given subject to conditions and restrictions.

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