



CONSULTATION PAPER ON ENDURING POWERS OF ATTORNEY PERSONAL CARE – RECOMMENDATIONS

The Law Society has reviewed the Consultation Paper *Enduring powers of attorney: personal care* and submits the following response to the recommendations in the consultation:

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.

Although we note that culturally, the Chinese population regard the care of their elderly as one of filial and piety duty, and that Hong Kong has established a Guardianship Board, and the Social Welfare Department provides assistance to the elderly, Hong Kong might not have to automatically adopt legislation which has been introduced in comparable jurisdictions.

However, we agree with the recommendation that the scope of an EPA in Hong Kong be extended to include decisions as to the donor's personal care so that everyone has his/her own choice in making such pre-arrangements without having to rely on legislation and other assistance.

Recommendation 2

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

Please see our response to Recommendation 11.

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.

We agree with the recommendation.

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.

We agree with the proposals save for (e) "whether the donor applies for a licence or permit" as this requires further clarification.

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

We agree with recommendations save for (e) and (g):

(e) "*consenting to the marriage of the donor*"

We suggest amending this provision to "*consenting to any change to the marital status of the donor*"

(g) "*sterilisation of the donor if the donor is, or is reasonably likely to be, fertile*"

The proposal does not include certain exempted matters e.g. abortion/termination of pregnancy included in equivalent legislation in other jurisdictions. Such exempted matters may have to be *included* in an EPA.

If a donor becomes mentally incompetent, but remain sexually active, and is statutorily excluded from making provisions in respect of sterilization, a situation may arise where the donor becomes a parent of a child. The donor cannot play any part in the raising of the child. In addition, the child, as well as being deprived of his/her mother/ father will always know that the parent was not of sound mind.

We therefore recommend that (g) should not be statutorily excluded.

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.

We agree with the recommendation.

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.

We agree with the recommendation and support adoption of the revised form of the EPA per Annex D in the March 2008 Report.

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).

We agree with the recommendation.

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.

We agree with the recommendation.

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.

We agree with the recommendations as they facilitate the scope of the duty of the donee. This may encourage more people to take up EPAs

- (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.

We do not agree with provisions 2(i) to (viii). The Guardianship Board may in certain cases have to act slowly and the procedure is cumbersome. In contrast the Court is capable of acting swiftly upon urgent applications.

- (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.

We recommend the powers listed in (2) above be exercised only by the Court.

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.

We agree with the recommendation that an EPA made in a jurisdiction other than Hong Kong should be recognised in Hong Kong and note both Options (a) and (b) can be adopted.

The Law Society of Hong Kong
29 September 2009
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