



**Jockey Club End of Life Community Care Project
Faculty of Social Science, The University of HK**

Legal issues in End of Life Care Seminar

**Friday, 28 April 2017
[3:00 p.m. – 5:00 p.m.]**

***Presented by*
Mr Charles CHIU, Chairperson**

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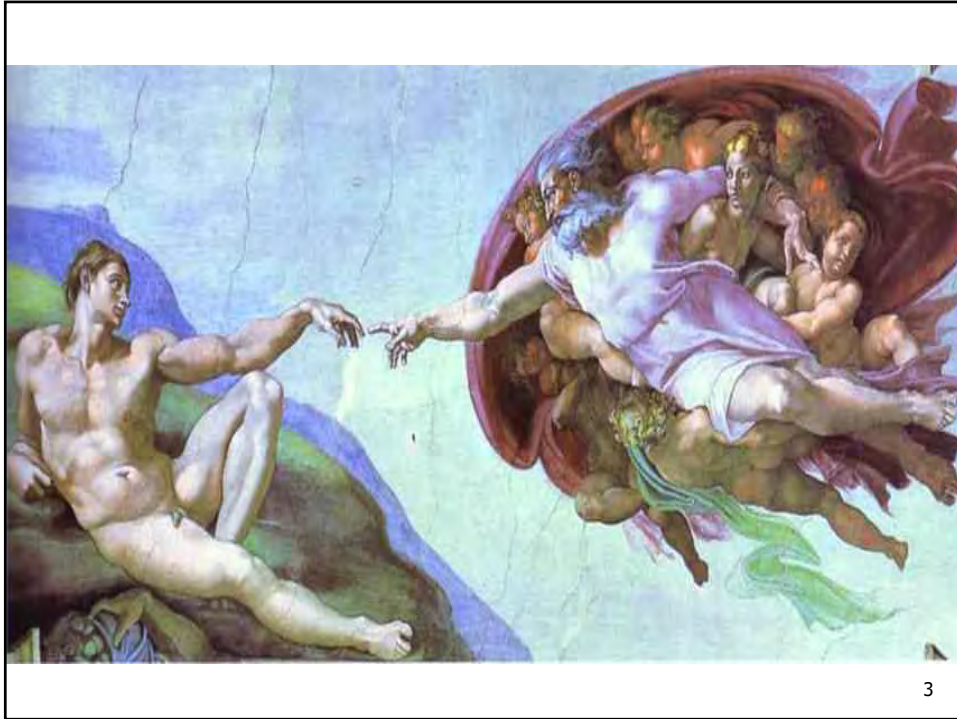
Outline

Part A Guardianship

**Part B Enduring Powers of
Attorney**

Part C Special Need Trust

2



 **Part A**

Guardianship

監護令



4

The slide features a green border and a central graphic of a stylized eye. The eye has a light blue iris and a yellow-orange pupil. The text 'Part A' is underlined and positioned above the eye. Below it, the word 'Guardianship' is written in a large, bold, green font. Underneath that, the Chinese characters '監護令' are written in a black font. A small number '4' is located in the bottom right corner of the slide.



Mission

- ◆ Empowerment (enablement)
- ◆ Protection

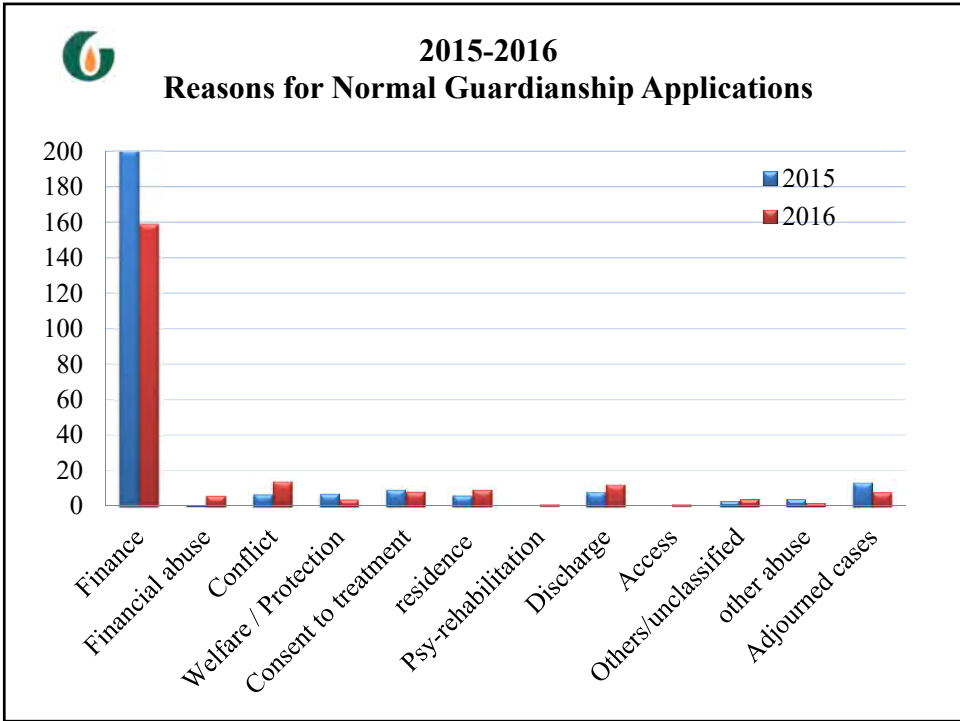
Model

- ◆ Best interests
- ◆ Substitute decision-making



Statistics

	<u>2016</u>	<u>2015</u>
New applications:	231	266
Review cases:	286	269
No. of hearings:	534	548



Mental Health
(1960 & 1962)
(1988 on 1983 MHA)
& old guardianship

VS

Mental Capacity
(1997 & February 1999)

= divergence & convergence



Ageing

2029 26%

2044 31%

[Source: HK Population Projections (2015-2064), CSD, HKSAR, 9/15]

2016: 16% population over 65 years old
 $7.3 \text{ M} \times 16\% = 1.168 \text{ M}$

10% over 65 years old suffer from dementia

$1.168 \text{ M} \times 10\% = 116,000$

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Mental Health Ordinance

Part IVB =

Mental Capacity Law
of Hong Kong
(1997)

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Guardianship Board

(established February 1999)

Introduction

- an independent quasi-judicial tribunal
- adults
- personal circumstances
- mental incapacity
- Panel A, Panel B & Panel C

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- Article 12 CRPD (The UN Convention on the Rights of Persons with Disabilities) (12/2006)

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons (人格) before the law.

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2. States Parties shall recognize that persons with disabilities enjoy **legal capacity** (“法律權利能力”) on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

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4. States Parties shall ensure that all measures that relate to the exercise of **legal capacity** (“法律權利能力”) provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

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5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal rights of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

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Characteristics/Conceptual Framework

- Flexibility/brokerage/watchdog/arbitral
- Social facilitation/humanistic
- Normalisation
- Citizen-based (to support and engage disadvantaged people)
- Test for need (chimed with social/functional competence)

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Application

MIP = either

- a. Mentally handicapped, or
- b. Mentally disordered (patient)

[a diagnostic threshold]

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The Legal Framework Mental disorder

- mental illness;
- state of arrested or incomplete development, associated with abnormally aggressive or seriously irresponsible conduct;
- psychopathic disorder;

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- Any other disorder (dementia, head injuries, stroke)

N.B.

Mental Capacity Act 2005 (UK) – no longer defining categories of patients or handicap (c.f. s.2 (2) & s.3 of Mental Health Act 1983 which sets out a list of disorders)

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Shall I make an application (1)?

Criteria: section 590(3)

- a nature or degree, which warrants his reception into guardianship;
- limits him in making reasonable decisions about all, or most of his personal circumstances;

[decisional capacity]

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- **need** may **only** be met by guardianship, no other less restrictive or intrusive means;
- in the interest of his welfare, or the protection of **others**.
(i.e. diagnostic & functional)
(never "outcome" approach)
- "Particular need" (time-specific & decision-specific)

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Shall I make an application (2)?

- **Guardian's powers (s.59R(3) (a)-(f))**
 - reside (old)
 - convey to specified place, reasonable force
 - attend as specified for treatment, occupation, education or training (old)

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- give **consent** to medical or dental treatment
- access to him: any doctor, approved social worker or other person specified in the Guardianship Order (old)

Positive vs Restrictive

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Financial power (s. 59R(3)(f))

- hold, receive or pay a monthly sum (currently a max. of HK\$15,000) (Q4, 2015) for patient's maintenance and benefit

[cash / savings at bank / compensations (e.g. insurance compensation or PCFB) to be received into subject's bank account / Pension]

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■ Guardian's financial power **NOT** for:

1. Debts overwhelm net equity
2. Stocks / real estate property (HK or Mainland)
3. CSSA / DA
4. Niche / shrine tablets / tomb lots
5. Fund / Unit investment
6. Litigations (over property or against banks or family members)
7. Estate papers / Grants application
8. Applying Committee orders
9. Choosing pension **options**
10. Insurance policies
11. MPF (cased since 25/3/2015)

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Leaflet 14

How to manage the finances of a mentally incapacitated person

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There are two usual ways to deal with the financial matters of a mentally incapacitated person:

- (i) *The financial power of a legal guardian* (by application to the Guardianship Board);
- (ii) *The appointment of a committee* (by application to the High Court).

However, the financial jurisdiction of the Guardianship Board is limited. It is mainly applicable to cases where the mentally incapacitated person has only savings at bank or cash. There are many situations that a Guardianship Order is not applicable, e.g. managing landed properties, stocks, securities, investments, applying for grant of probate or letters of administration of an estate, claiming personal injuries damages or employee's compensations, handling litigations over property or investment disputes, monetary claims or other legal proceedings. Further, the maximum monthly sum that could be authorized by the Guardianship Board is limited to HK\$1,000 (as at the third quarter of 2015). Also, such money can only be spent for that person's maintenance.

In the circumstances, a relative of the mentally incapacitated person can apply to retain a lawyer to apply to the High Court for an order of appointment of a financial manager under Part II of the Mental Health Ordinance (commonly known as a Part II Order). Such a financial manager, known as a "Committee", will have much wider financial powers to make valid decisions for the mentally incapacitated person, e.g. selling of the subject's landed properties, stocks or investments or starting litigation. There is no express law imposing a maximum limit on monthly expenses for the maintenance of the mentally incapacitated person or his family members.

Regarding an application for a Part II (Committee) order, more information is available at the following websites:

- (i) *Judiciary* - www.judiciary.gov.hk
 - (a) Guidance Note to Persons appointed as Committee of Estate of Mentally Incapacitated Person ("MIP")
 - (b) Practice Direction 30.1 (Applications under Part II of the Mental Health Ordinance (Cap. 136))
- (ii) *Law Society of Hong Kong* - www.lshk.org.hk; "Find Legal Service"
- (iii) *Official Solicitors Office* - www.oso.gov.hk

Regarding a guardianship application, you may like to contact the Secretariat of the Guardianship Board:

Address: Unit 807, 8/F, Hong Kong Pacific Centre
 23 Hia Wai Road, Tsimshatsui, Kowloon, Hong Kong
 Tel: 2367 1999
 Fax: 2735 7171
 Email: gsb@gsb.org.hk
 Website: www.gsbb.org.hk

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Leaflet 13 - Guide to doctors/dentists

- This Guide is to give more information to medical and dental professions
- S.59ZF (1) & (2)
- Encourage the use by doctors of Part IVC power to give **urgent** & **non-urgent** (elective) treatments

[**Transportation from *Re F* (1989)**: a mentally incapacitated person is incapable of understanding the general nature and effect of the treatment..... (s.59ZB(2))]

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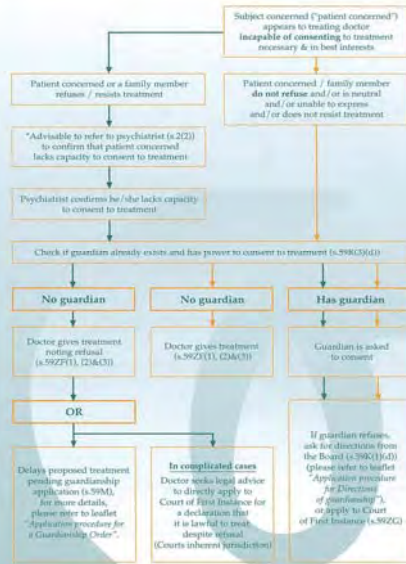
- "Medical treatment": includes any medical or surgical procedure, operation or examination carried out by, or under the supervision of, a registered medical practitioner and any care associated therewith; (s.59ZA)
- Best Interests: improving, preventing damage or deterioration of physical or mental health or overall well-being, and save life. (s. 59ZA)

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Leaflet 13

Consent to medical / dental treatment of mentally incapacitated person, Part IVC of Mental Health Ordinance [Cap. 136]



*This is not a legal requirement under Part IVC.

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Medical cases of 2016

Type of surgery / treatment	Number of case
1 excision biopsy of (2 x 1.5 cm) mass at right leg	1
2 trigger finger release	1
3 decompression of fixation of lumbar spine	1
4 Thyroidectomy	1
5 aldosteronism / aldosteronoma / adenoma (for investigation and surgery)	1
6 Cataract (bil)	1
7 General / critical treatment	1
8 Esophageal Polyp	1
TOTAL	8

Remarks: 3 applications withdrawn

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Case scenario

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Case 1

[Is there a third way out?]

Aug 2012

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- ◆ A very complicated and bitter case due to the conflict between the (caring) daughter of the subject and a well established subvented residential care home for elderly (“Home”). The subject’s stay there was long and got gradual and later step-wise deteriorations till total dependency and finally lost most of her sentience.



- ◆ Subject, late stage dementia, bilateral AKA, mute, on Ryles’ tube and insulin.
- ◆ On the issue of providing wrist restrainer to the subject who used to pull out the feeding Ryle’s tube in past recent 4.5 years totalling 153 times.



- ◆ Numerous lengthy reports from SWD and the Home
- ◆ To such use of a restraint, the daughter withdrew her consent early and refused to give further consent. According to the Handling Guideline issued by SWD, the Home could not therefore use the restraints.



- ◆ The daughter was very conscientious and attended the subject and kept close watch on the staff performance daily. Eventually she filed lots of written complaints to the management board and SWD.
- ◆ Finally, the staff installed a CCTV over the bed of the subject and started to apply for GO.



- ◆ 2 CGAT doctors certified use for wrist restrainers as part of medical treatment.
- ◆ SWD NOT recommend GO
- ◆ The hearing went through for hours and the result was remarkably well and parties shook hands with each other on leaving.



- ◆ The daughter signed the necessary consent before the Board and the matter stood adjourned sine die.
- ◆ Face preserved.
- ◆ Interests safeguarded.



- ◆ A direction was made to DSW to assign a local family service unit to follow up with the case.
- ◆ Though with a consent on hand, the Home has not applied the restrainer due to stable condition of the subject and the subject passed away peacefully in one year.



Case 2

[Snipe-clam grapple]



- ◆ **Subject, 77 year old – severe dementia & stroke with cognitive deficits, staying at private hospital.**
- ◆ **Application filed by daughter coming back from Canada.**

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- ◆ **Applicant learnt the granddaughter added her name as a joint account holder of subject's bank account.**
- ◆ **The granddaughter had not been residing with or taking care of the subject before.**

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- ◆ The granddaughter said subject intended to give her half of subject's money. (Board held that the alleged gifts were not established.)
- ◆ The granddaughter put \$1.3M, monies of subject into her solicitor's account for paying hospital and medical fees.

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- ◆ The applicant alleged that she was concealed from all expenditure accounts.
- ◆ Subject was "captivated" by son, his daughter ("granddaughter") and their appointed private GP doctor in a private hospital.

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- ◆ **GP repeatedly certified the subject not fit to remove from hospital and kept on minor medical tests all the time.**
- ◆ **At hearing, two doctors present.**

45



- ◆ **The private GP (“Dr Wrong”) produced by the granddaughter said subject was NOT a MIP.**
- ◆ **The applicant’s approved psychiatrist (“Dr Right”) said subject was a MIP.**

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- ◆ **MMSE 9/30 (The Chairperson interviewed the subject at ward before hearing. Subject could only say “How are you, how are you, sit down and have a cup of tea” repeatedly.)**

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- ◆ **Dr Wrong’s evidence was very much protracted and repetitive. He had his set of definitions. (Not under Mental Health Ordinance (“MHO”))**
- ◆ **On examination by the Board, he admitted he did not know anything about MHO. But he said he did not believe in psychiatry.**

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- ◆ **Dr Wrong suddenly, at the end of the hearing, admitted subject was suffering from moderate grade of dementia, after confronted by Dr Right.**
- ◆ **Board agreed with Dr Right that ¼ of the subject's brain did have infarction and those also covered critical areas of it.**

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- ◆ **Board adopted the evidence of Dr Right and rejected the evidence of Dr Wrong.**
- ◆ **No medical need to stay in hospital, the Board suggested to change to a quality C&A Home.**

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- ◆ **Board appointed Director of Social Welfare as guardian to protect the subject's welfare and interests.**
- ◆ **Public guardian took much longer time to effect the change to C&A Home.**

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- ◆ **Late news: -**
 1. **Dr Wrong made use family weakness in a similar subsequent case.**
 2. **After long preparation, the subject was finally discharged to a quality care home but predominant portion of her savings went to Dr Wrong and private hospital as medical fees.**

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3. One year later, Dr Wrong was suspended from medical practice for a duration by Medical Council as a result of complaint of the applicant.
4. Dr Wrong was involved in other (unrelated) criminal offences and sentenced.

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Part B

Enduring Powers of Attorney (EPA)

持久授權書

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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. It may be in just such circumstances, however, that the donor of the power would want his attorney to be able to act for him.

Drew v Nunn (1879) 4 QBD 661

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To meet that difficulty, the Enduring Powers of Attorney Ordinance (Cap 501) allows a special type of power of attorney, an “enduring power of attorney” (EPA), to be executed while the donor of the power is mentally capable but **which continues** to have effect after the donor becomes incapable.

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- An EPA can apply **only** to decisions about the donor's property and financial affairs and cannot be used to delegate decisions about the donor's health care.

- Prescribed Form

57



If the attorney has reason to believe the donor is, or is becoming, mentally incapable he must apply to the Registrar of the High Court as soon as is practicable to register the instrument creating the power of attorney.

58



In the event of the donor's mental incapacity, the attorney's power to act on his behalf will be suspended until the power of attorney is registered.

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The **advantages** of an EPA as being that:

- (a) it allows an individual to choose the person or persons who will look after the individual's affairs if he becomes incapable of doing so;

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- (b) it avoids expensive and potentially distressing court proceedings for the appointment of a trustee to look after the individual's affairs;

- (c) it provides an efficient and cost-effective way of administering the Individual's property.



The use of an EPA has benefits not only for the donor, but also for the **donor's family** who might otherwise be faced with considerable difficulties and distress in managing his affairs. From the **wider community's** point of view, an EPA can avoid the need to apply **scarce court resources** unnecessarily to the management of an individual's affairs.



Given these benefits, both general and individual, it is clearly **undesirable** that the existing provisions in the Enduring Powers of Attorney Ordinance (Cap 501) have so rarely been used.



Why need to change?

EPAs registration

1. Hong Kong 435
(Up to December 2016 in the 20 years since the Ordinance was enacted)
2. England and Wales

13/14	311,000
14/15	410,000
15/16	547,021



Why need to change?



LPAs Received (Annual)

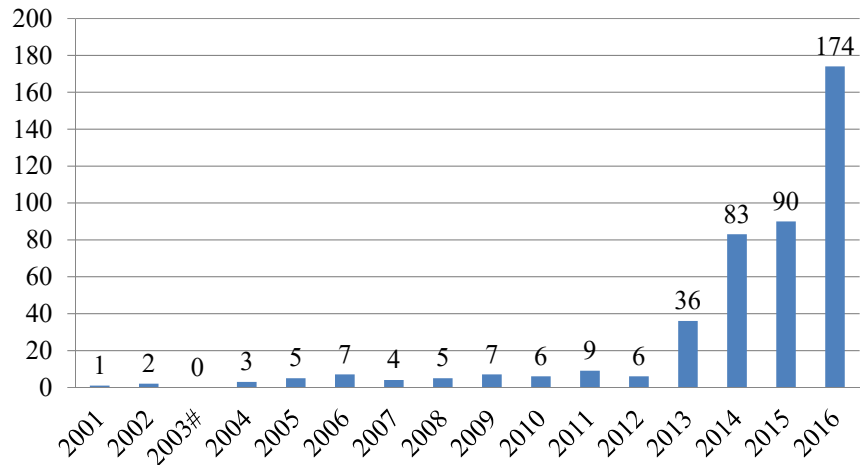
3. Singapore	
2010	476
2011	871
2012	1,763
2013	2,375
2014	5,134
2015	8,456
TOTAL	19,075

Source: Korean Conference (December 2015)

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EPAs registered



Remarks: # no record found

Total EPAs registered: 435

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A. The 1st change

**April 2007 to
March 2008**

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The old law in Hong Kong Cap. 501 (1997)

1.6 Section 5(2)(d) requires the **solicitor** to certify:

"(i) that the donor attended before him at the time of the execution of the enduring power of attorney.

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(ii) *that the donor appeared to be mentally capable (specifying in the certification that the donor appeared to be mentally capable in terms of section 2); and*"

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The **medical practitioner** must also certify in identical terms to paragraphs (i) and (iii), but instead of paragraph (ii) he must certify that he "*satisfied himself that the donor was mentally capable (specifying in the certification that he satisfied himself that the donor was mentally capable in terms of section 2)*".

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The 2007 Consultation

In April 2007, the Law Reform Commission issued a consultation paper which examined the existing provisions in the EPA Ordinance and made proposals for change.

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There may be **a variety of reasons for this exceptionally low take-up rate.** There may, for instance, be **cultural factors** which discourage the use of EPAs. A lack of **public awareness and education** as to the concept of EPAs and their **benefits** may also contribute.

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It seems reasonable to suppose, however, that one **factor discouraging use** is likely to be the requirement in **section 5(2)(a)** that the deed creating the enduring power of attorney must be signed by the donor before a solicitor **and** a registered medical practitioner, who must both be **present at the same time**.

73



Arranging for a solicitor and a doctor **to convene at the same time and place** would present a **costs** and **logistical problem** for most members of the community.

74



Report (March 2008)

■ Major recommendations:

1. An EPA be signed before a registered medical practitioner should be abolished.
2. The Government should identify a department or agency to plan, lead and co-ordinate publicity
3. Simplification & modern language

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"5. *The LRC published its Report on Enduring Powers of Attorney in March 2008 ("the Report") and recommended in the Report that the existing requirement in section 5(2) of the EPA Ordinance that an EPA be signed before a registered medical practitioner should be abolished and that the Law Society should be encouraged to issue practice directions to its members, making clear that where a solicitor has grounds for doubting the mental competence of his client to execute an EPA, the solicitor must obtain an assessment of his client's mental capacity from a medical practitioner before the EPA is executed ("Recommendation 1").*

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*The LRC added that if, contrary to the LRC's preferred approach, it was decided to retain the existing requirement in section 5(2) of the EPA Ordinance, this should be relaxed to allow a donor and a solicitor to sign an EPA within 28 days **after** it had been signed by a registered medical practitioner ("**Recommendation 2**"). The Report also recommended that the existing EPA form and its explanatory notes should be drafted in plain language and in a more user-friendly format. To that end, the Report recommended that the Schedule to the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501 sub. leg. A) ("the Regulation") be replaced with a form and explanatory notes along the lines of those set out at Annex C or D to the Report, depending on whether the reform proposed in Recommendation 1 is adopted or the existing law retained."*

77



Gazette on

29 December 2011

78



Commencement date:

3 July 2012

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Cap. 501

Section 5 – Formalities of execution

1. Donor signs *before*
 - a. doctor, and
 - b. solicitor(same time OR *before* a solicitor within 28 days)
= signing twice (see Form para 7)

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2. Solicitor certifies:
 - a. donor acknowledged voluntariness
 - b. appeared mentally capable

3. Doctor certifies:
 - a. the doctor satisfies mentally capable
 - b. donor acknowledged voluntariness

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Section 18 – Regulations

- Two Forms
- New explanatory information
“Information you must read”
(IYMR)
- User-friendly wording

N.B. IYMR is integral part of the prescribed form.

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Form 1

Chapter:	301A	Enduring Powers of Attorney (Prescribed Form) Regulation	Instrument Number:	Version Date:
		Empowering section		

(Cap 301 section 18)

(Enacting provision omitted—E.R. 2 of 2012)

[27 June 1997] L.N. 363 of 1997

(Originally L.N. 273 of 1997)

(*Finnish changes—E.R. 2 of 2012)

Note:
*The format of the Regulation has been updated to the current legislative styles.

Section:	1	(Unlimited as to trust—E.R. 2 of 2012)		
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Section:	1A	Interpretation		
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In this Regulation—
Form 1 (表 1) means the form set out in Schedule 1;
Form 2 (表 2) means the form set out in Schedule 2.

Section:	2	(Prescribed form)		
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- (1) An instrument creating an enduring power of attorney which appoints only one attorney must be in Form 1.
- (2) An instrument creating an enduring power of attorney which appoints more than one attorney must be in Form 2.
- (3) If an instrument which purports to create an enduring power of attorney does not contain the preliminary information given under the heading "Information you must read" in Form 1 or Form 2, it does not create an enduring power of attorney.
- (4) An enduring power of attorney may include any conditions or restrictions that the donor specifies in paragraph 3 of Part A of Form 1 or paragraph 4 of Part A of Form 2 (as the case requires).
- (5) The form of execution by an attorney may be adapted to provide for execution by a trust corporation.

Section:	3	(Execution)		
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- (1) An instrument creating an enduring power of attorney must be signed by both the donor and the attorney, although not necessarily at the same time, in accordance with this section and section 5 of the Ordinance.
- (2) The attorney must sign in the presence of a witness.
- (3) The witness must sign the instrument and provide his or her full name and address in the instrument.
- (4) The donor must not witness the signature of the attorney nor one attorney witness the signature of another attorney.
- (5) The solicitor and the registered medical practitioner who certify as to the matters specified in sections 5(3)(a) and 5(3)(b) of the Ordinance respectively must provide their full names and addresses in the instrument.
- (6) If, under section 5(7)(b) of the Ordinance, the instrument is signed in the presence, and under the direction, of the donor, paragraph 4 of Part A of Form 1 or paragraph 5 of Part A of Form 2 (as the case requires) must be completed.

Cap 301A - Enduring Powers of Attorney (Prescribed Form) Regulation 1



Section:	4	(Execution if more than one attorney is appointed)		
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- (1) If more than one attorney is appointed and they are to act jointly and severally, then at least one of the attorneys so appointed must sign the instrument for it to take effect as an enduring power of attorney.
- (2) Only an attorney who has signed the instrument has the functions of an attorney under an enduring power of attorney in the event of the registration of the instrument under section 9 of the Ordinance or the donor's mental incapacity, whichever first occurs.

Section:	5	(Donor to specify decisions attorney may make)		
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- (1) This section applies for the purposes of section 8(1) of the Ordinance.
- (2) The donor must:
 - (a) specify, with reference to the list set out in subsection (3), the matters in which the attorney is given authority to act; or
 - (b) specify the particular property or financial affairs in respect of which the attorney is given such authority.
- (2A) To avoid doubt, subsection (2) is not to be construed as preventing the donor from specifying under both paragraphs of that subsection. (25 of 2011 s. 11)
- (3) The list for the purposes of subsection (2)(a) is as follows—
 - (a) to collect any income due to the donor;
 - (b) to collect any capital due to the donor;
 - (c) to sell any of the donor's movable property;
 - (d) to sell, lease or surrender the donor's home or any of the donor's immovable property; (25 of 2011 s. 11)
 - (e) to spend any of the donor's income; or (13 of 2013 s. 58)
 - (f) to spend any of the donor's capital. (13 of 2013 s. 58)
 - (g) (Repealed 13 of 2013 s. 58)

Section:	6	(Nomination of persons to be notified)		
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- (1) The donor may, in the instrument, nominate all or any of the following persons to be notified by the attorney applying for the registration of the instrument under section 9 of the Ordinance before the application is made—
 - (a) the donor;
 - (b) any attorney who does not join in the application;
 - (c) a maximum of 2 other persons.
- (2) The donor must provide in the instrument the address of any person nominated under subsection (1).
- (3) If the donor's intention is not to make any nomination under subsection (1), the donor must indicate that intention by deleting paragraph 4 of Part A of Form 1 or paragraph 5 of Part A of Form 2 (as the case requires).

Schedule:	1	Form 1		
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[section 1A]

Information you must read

1. This form is a legal document that allows you to create an enduring power of attorney (EPA). An EPA enables you to authorize another person (*your attorney*) to act on your behalf in relation to your property and financial affairs. You must use this form if you intend to appoint only one attorney. If you become mentally incapable, your attorney will be able to make decisions for you after your attorney has registered this form with the Registrar of the High Court.
2. (Repealed 13 of 2013 s. 59)
3. You must complete Part A.

Cap 301A - Enduring Powers of Attorney (Prescribed Form) Regulation 2



4. Paragraph 1 of Part A: You must include the name and address of the person you wish to appoint as your attorney at paragraph 1 of Part A. The person you appoint as your attorney must be over 18 years of age and must not be bankrupt or mentally incapable. Your attorney does not have to be a solicitor. Your attorney must complete Part B and sign this form in the presence of a witness.

5. Paragraph 2 of Part A: You cannot give your attorney a general authority over all your property and financial affairs. If you do, your EPA will not be valid. Instead, you must specify at paragraph 2 of Part A what you authorize your attorney to do with your property and financial affairs, or the particular property or financial affairs for which you have given your attorney authority to act. For example, you may decide to give your attorney authority only for a particular bank account, or a particular piece of property.

6. Paragraph 3 of Part A: You may include any restrictions you like on the authority you give to your attorney. For example, you may include a restriction that your attorney must not act on your behalf until your attorney has reason to believe that you are becoming mentally incapable, or that your attorney must not enter into a contract without first seeking legal advice if its value exceeds a specified amount. You should set out these restrictions at paragraph 3 of Part A.

7. Unless you include a restriction preventing it, your attorney will be able to use any of your money or property to make any provision which you might be expected to make yourself for the needs of your attorney or the needs of other persons. Your attorney will be able to use your money to make gifts, but only for reasonable amounts in relation to the value of your money and property.

8. Your attorney may recover out-of-pocket expenses for acting as your attorney. If your attorney is a professional person, such as an accountant or a solicitor, your attorney may charge for any professional services provided when acting as your attorney.

9. If your attorney has reason to believe that you are, or are becoming, mentally incapable of managing your affairs, your attorney must apply to the Registrar of the High Court to register this EPA. Registration will allow your attorney to make decisions for you after you have become mentally incapable.

10. Paragraph 4 of Part A: If you would like to be notified before your attorney applies to the Registrar of the High Court to register this EPA, or if you would like other persons to be notified, you must include the names and addresses of the persons to be notified at paragraph 4 of Part A. You can include up to 2 persons to be notified in addition to yourself. If your attorney does not notify you or the persons you have nominated, that does not prevent the registration of your EPA or make it invalid. However, in any legal proceedings relating to the EPA the court may, if it considers it appropriate, draw an adverse inference from the failure to notify you or the nominated persons.

11. Paragraphs 7, 9 and 10 of Part A: You must sign this form at paragraph 7 of Part A and fill in the names and addresses of the registered medical practitioner and the solicitor who are present when you sign. If you do not sign in the presence of both the registered medical practitioner and the solicitor at the same time, you must sign the form in the presence of the solicitor no later than 28 days after the date on which you sign in the presence of the registered medical practitioner. The registered medical practitioner and the solicitor will need to complete the certificates at paragraphs 9 and 10 of Part A respectively to certify that you are mentally capable when you sign this form.

12. Paragraph 8 of Part A: If you are physically incapable of signing this form yourself, you can direct someone else to sign on your behalf. In this case, paragraph 8 of Part A must be completed and that person must sign at that paragraph in your presence and in the presence of the registered medical practitioner and the solicitor. The person signing on your behalf must not be your attorney, the spouse of your attorney, the registered medical practitioner or the solicitor before whom the instrument is signed or the spouse of the registered medical practitioner or the solicitor.

13. This form takes effect as an EPA in accordance with section 10 of the Enduring Powers of Attorney Ordinance (Cap 501) when it is signed by you or the person signing on your behalf and under your direction before the solicitor. You should note that unless and until this form is so signed, it has no effect either as an EPA or as an ordinary power of attorney. However, if you wish, you may choose a later date or later event, on which the EPA will take effect. In such



case you must specify this later date or event in paragraph 5 of Part A.

Form of enduring power of attorney (for appointment of only one attorney)

Part A

[This Part must be completed by the person appointing the attorney (the donor), except for paragraph 9 and 10, which must be completed by a registered medical practitioner and a solicitor respectively. You should read the explanatory information given under the heading "Information you must read" before you fill it in. Do not sign this form unless you understand what it means.]

1. Appointment of attorney by donor

I, *[your name here]*
holder of *[your identification document here]*
of *[your address here]*
appoint *[your attorney's name here]*
holder of *[identification document here]*
of *[your attorney's address here]*

to be my attorney under the Enduring Powers of Attorney Ordinance (Cap 501).

2. Attorney's authority

[You must specify what you authorize your attorney to do. You cannot give a general authority over all your property and financial affairs. If you do, your EPA will not be valid. You can either specify at subparagraph (1) what you authorize your attorney to do by ticking any or all of the appropriate boxes, or tick no box, in which case you must list at subparagraph (2) the particular property or financial affairs for which you have given your attorney authority to act. If you have ticked any or all the boxes at subparagraph (1), you may still list at subparagraph (2) any particular property or financial affairs in relation to which you have given your attorney authority to act. You must not make no ticks at subparagraph (1) and list no property at subparagraph (2).]

- (1) My attorney has authority to act on my behalf:
- (a) to collect any income due to me;
 - (b) to collect any capital due to me;
 - (c) to sell any of my movable property;
 - (d) to sell, lease or surrender my home or any of my immovable property;
 - (e) to spend any of my income;
 - (f) to spend any of my capital. (13 of 2013 s. 59)
 - (g) (Repealed 13 of 2013 s. 59)

(2) My attorney has authority to act on my behalf in respect of the following property or financial affairs: *[if you want your attorney to act for you only in relation to some of your property or financial affairs, you must list them here.]*

.....

.....

3. Restrictions on attorney



This enduring power of attorney is subject to the following conditions and restrictions: *[If you want to put conditions or restrictions on the way your attorney exercises any powers, you must list them here. For example, you may include a restriction that your attorney must not act on your behalf until your attorney has reason to believe that you are becoming mentally incapable. If you do not want to impose any conditions or restrictions, you must delete this paragraph.]*

4. Notification of named persons

[If you do not want anyone (including yourself) to be notified of the application for the registration of this EPA, you must delete subparagraphs (1) and (2).]

- (1) My attorney must notify me before applying for the registration of this enduring power of attorney. *[If you do not want to be notified, you must delete this subparagraph.]*
- (2) My attorney must notify the following persons before applying for the registration of this enduring power of attorney. *[Fill in the names and addresses of up to 2 persons (other than yourself) to be notified. If you do not want other persons to be notified, you must delete this subparagraph.]*

Name:
Address:
Address:

5. Commencement of EPA

[This EPA takes effect on the date it is signed before the solicitor in paragraph 7 or 8 below. If you want to specify a later date or later event on which this EPA will take effect, please fill in the gap in the sentence marked with an asterisk below. Delete that sentence if you wish this EPA to take effect on the date it is signed before the solicitor.]

*This EPA takes effect on (insert a later date or event).

6. Power to continue

I intend this enduring power of attorney to continue even if I become mentally incapable.

7. Signatures

Signed by me as a deed *[sign here]*
on *[date]*
in the presence of *[name and address of registered medical practitioner]*

Signed by me as a deed *[sign here]*
on *[date]*
in the presence of *[name and address of solicitor]*

8 *[If you are physically incapable of signing this form and you direct someone else to sign on your behalf, that person must sign here and paragraph 7 must be deleted.]*



This enduring power of attorney has been signed by *[name of person signing on your behalf]*
holder of *[identification document]*
of *[address of person signing on your behalf]*
under the direction and in the presence of the donor.

Signed as a deed *[signature of person signing on your behalf]*
on *[date]*
in the presence of the donor and *[name and address of registered medical practitioner]*

Signed as a deed *[signature of person signing on your behalf]*
on *[date]*
in the presence of the donor and *[name and address of solicitor]*

9. Certificate by registered medical practitioner

- I certify that:
- (a) I am satisfied that the donor is mentally capable in terms of section 2 of the Enduring Powers of Attorney Ordinance (Cap 501); and
 - (b) this form was signed by the donor in my presence and the donor acknowledged signing it voluntarily. *[If someone else signs this form on the donor's behalf, this statement must be deleted.]*
 - (c) this form was signed, in the presence of the donor and me, by *[name of person signing on donor's behalf]*
on behalf and under the direction of the donor. *[If the donor signs this form, this statement must be deleted.]*

Signed by registered medical practitioner
on *[date]*

10. Certificate by solicitor

- I certify that:
- (a) the donor appears to be mentally capable in terms of section 2 of the Enduring Powers of Attorney Ordinance (Cap 501); and
 - (b) this form was signed by the donor in my presence and the donor acknowledged signing it voluntarily. *[If someone else signs this form on the donor's behalf, this statement must be deleted.]*
 - (c) this form was signed, in the presence of the donor and me, by *[name of person signing on donor's behalf]*
on behalf and under the direction of the donor. *[If the donor signs this form, this statement must be deleted.]*

Signed by solicitor
on *[date]*



Part B

[This Part must be completed by the attorney.]

1. I understand that I have a duty to apply to the Registrar of the High Court to register this form under the Enduring Powers of Attorney Ordinance (Cap 503) where the donee is, or is becoming, mentally incapable.
2. I also understand my limited power to use the donor's property to benefit persons other than the donor as provided in section 8(3) and (4) of that Ordinance and also my duties and liabilities under section 12 of that Ordinance.
3. Signed by me as a deed *[signature of attorney]*
on *[date]*
in the presence of *[signature and name and address of witness, who must not be the donor]*

(Schedule 1 replaced 25 of 2011 s. 13)



B. The 2nd change

LRC – 2nd Consultation (July 2009)

Appoint your own guardian



Expanding scope

On 16 July 2009, the LRC published a consultation paper seeking the public's views on proposals to extend the scope of an EPA to include decisions as to the donor's personal care. At present, an EPA can apply only to decisions about the donor's property and financial affairs and cannot be used to delegate decisions about the donor's personal care.

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Personal care

"Personal care" for these purposes should include everyday decisions as to the **donor's health (medical) care**, but not decisions involving the giving or refusing of life-sustaining treatment.

The Commission recommends that the personal care decisions which an attorney may make under an EPA should include:

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Law Reform Commission Report dated 11 July 2011

Recommendation 3

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.

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Recommendation 4

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;

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- (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;

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- (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.

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Recommendation 11

(2) 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;

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- (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;

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- (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.

* also given to Court

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Recommendation 11

(1) 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;

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(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.

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Interdepartmental Working Group (IWG) under Department of Justice

Starts working since late 2011

Also considering: -



1. to stipulate absence of designation as "joint" attorney (s.15(1) EPAO);
2. to delete the requirement on specificity of property/power (s.8(1)(b), EPAO)

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Pre-legislation Consultation Paper
being prepared and will be circulated
with a draft Bill in mid-2017.

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Source of powerpoints no. 106-108

**Presentation of Mr Peter WONG, Deputy Solicitor
General (Policy Affairs), Department of Justice
Hong Kong SAR Government**

**at The 2nd Guardianship Conference of Hong
Kong on 18 February 2017**

Topic: The law of enduring powers – a new vista

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The proposed new Continuing Powers of Attorney regime

- The proposed changes would substantially alter the existing statutory regime - implementation by simply amending the EPA Ordinance would cause unnecessary confusion to the general public.
- The IWG's proposal :
 - introducing a new **Continuing Powers of Attorney Ordinance (CPA Ordinance)**, to govern all future EPAs which may cover decisions both in relation to a donor's (i) personal care; and (ii) property and financial affairs.
 - the existing EPA Ordinance, which will not be repealed, will govern EPAs executed prior to the commencement of the CPA Ordinance.

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EPAs vs CPAs

	EPAs	Proposed CPAs
Execution of instrument	<ul style="list-style-type: none"> In prescribed form under subsidiary legislation 	<ul style="list-style-type: none"> In prescribed form under subsidiary legislation The prescribed form will provide for a CPA which delegates decisions as to: (a) the donor's property and financial affairs; or (b) the donor's personal care; or (c) both (a) and (b).
Registration	<ul style="list-style-type: none"> Must be made to the Registrar of the High Court 	
Notification of registration	<ul style="list-style-type: none"> The donor Any attorney who does not join in the application A maximum of 2 other persons If the donor's intention is not to make any nomination, the donor must indicate that intention by deleting the relevant paragraph in the prescribed form. 	<ul style="list-style-type: none"> The donor may specify a maximum of 5 persons to be nominated for notification. If the donor does not wish to make such nomination, the donor must make a statement in the instrument to that effect.

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EPAs vs CPAs

	EPAs	Proposed CPAs
Forum of proceedings relating to a continuing power	<ul style="list-style-type: none"> The court 	<ul style="list-style-type: none"> The Guardianship Board and the court Application for proceedings – to be made to the Guardianship Board first The Guardianship Board must take into account a number of matters* in deciding whether to refer the application to the court
Practice Directions	<ul style="list-style-type: none"> n/a 	<ul style="list-style-type: none"> The court may issue Practice Directions governing the procedures on the transfer of proceedings between the court and the Guardianship Board

- *:
- (a) whether the application relates to the effect of a continuing power, or a revocation of the continuing power, on a third party;
 - (b) whether the application is likely to raise for consideration complex or novel legal issues that the court is better suited to determine; and
 - (c) any other matter that may be relevant in the circumstances.

Acknowledge:

Powerpoints 124-127: Source- Policy Affairs, Department of Justice, HKSAR.

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Part C

Special Need Trust

特殊需要信託

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Source of powerpoints no. 111-123

**Presentation of Professor Lusina HO, Faculty of
Law, The University of Hong Kong**

**at The 2nd Guardianship Conference of Hong
Kong on 18 February 2017**

**Topic: The special needs trust for individuals
with mental disability: a research perspective**

SNT initiative by the HK Government

- Policy Address of the Chief Executive of the Hong Kong Government, Feb 2016
“Paragraph 158 - Children with Special Needs
Some middle-income parents are concerned that after their passing, the care for their children with special needs, particularly those with intellectual disabilities, would be upset. The Labour and Welfare Bureau will establish a working group to explore the feasibility of setting up a public trust and review the related guardianship system, with a view to providing affordable services.”
- Task force on Feasibility Study

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What is a special needs trust (SNT)?

- Adaptation of the private family trust
- individuals with special needs that render them chronically unable to manage finances
- Typically, pooling of assets to reduce management cost / fees

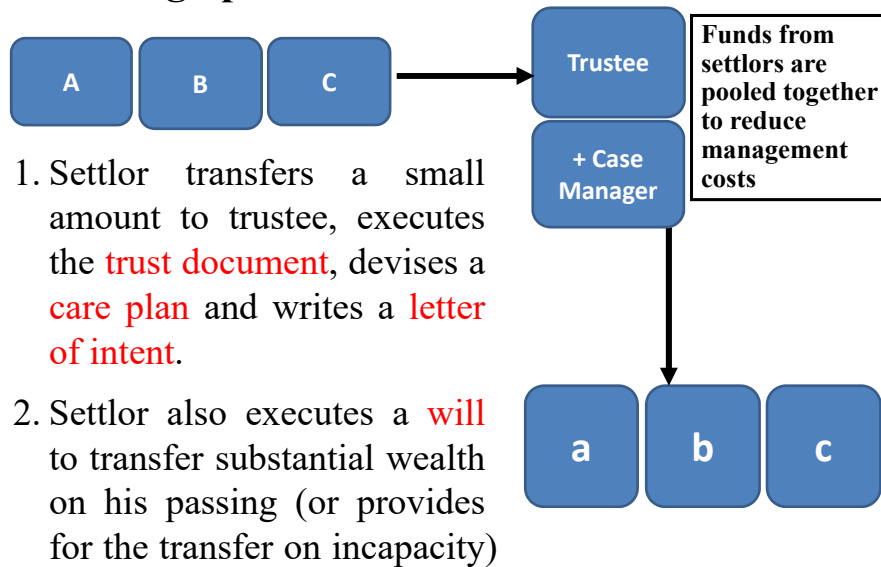
112

Benefits of an SNT

- Affordable trust service
- Reduces risk of financial abuses by caregivers
- Reduces burden of caregivers
- Reduces burden on social welfare

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1. Setting up an SNT account

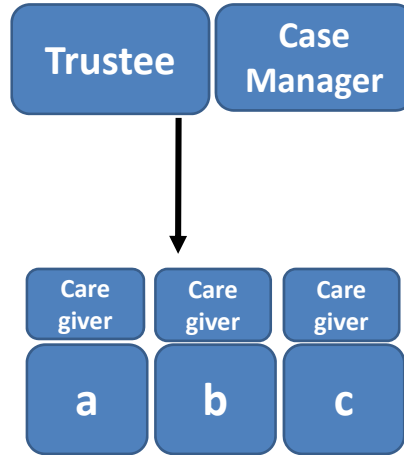


2. Activating the SNT

Trust activated upon settlor's death or incapacity.

Trustee disburses funds to the caregiver as per the care plan.

Case Manager makes periodic visit to the Beneficiary.



3. Terminating the SNT

When beneficiary passes, surplus goes to residuary beneficiary named by settlor.

Success stories overseas

- USA (Missouri; Washington)
- Singapore
 - NGO trustee with extensive govt support
 - 2009 - Jan 2017: 441 trusts, 19 activated, holding SGD16 million (HKD 113 million)
 - SNT for adults who have lost mental capacity

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Questionnaire Survey - SNT in HK

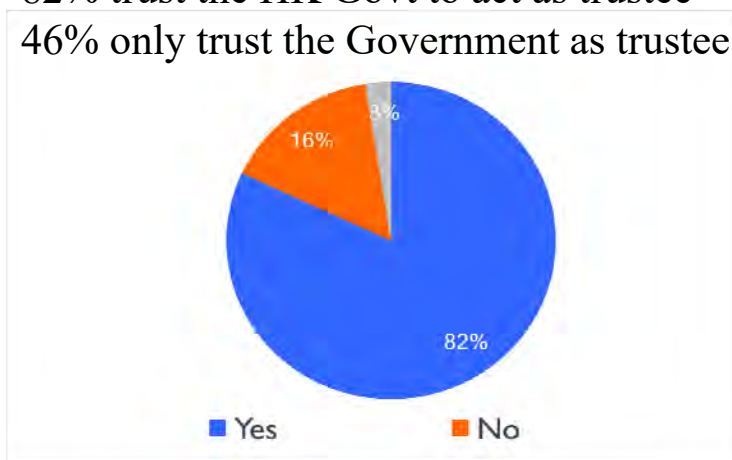
- 2,513 respondents; March to May 2016
- 5 main observations

1. Strong demand for SNT in HK

- Limited take up of existing mechanisms
 - Less than 10% executed a will or an enduring power of attorney
 - Over 50% could not find a suitable guardian
 - Only 5% able to set up a private trust
- Strong demand for SNT

2. Top priority for the Government to act as trustee

- 82% trust the HK Govt to act as trustee
- 46% only trust the Government as trustee



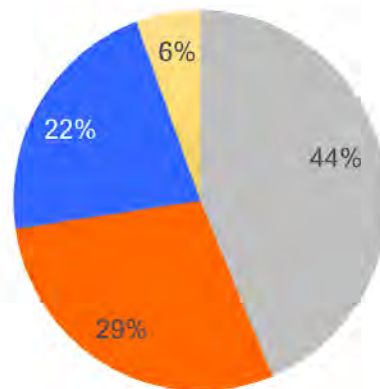
120

3. Fees must be very low

Not prepared to pay service fee	51%
Less than 1% p.a. of the managed assets	35%
More than 2% p.a. of the managed assets	3%

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4. How likely to join a Govt-run SNT?



■ Very likely / Likely ■ Not Sure ■ Very unlikely / Unlikely

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5. To whom is the SNT most appealing?

- Parents aged between 40-59;
- Currently living with dependents;
- Age of dependent is 39 or below; mild or moderate intellectual disability with a secondary disability; in receipt of disability allowance only or not in receipt of any social welfare benefits at all;
- 348 respondents meeting these conditions

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Way Forward

- 2 years?
- Cash only?
- Government as trustee?



THANK YOU

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